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THE

AMERICAN AND ENGLISH

ENCYCLOPÆDIA

OF

LAW

EDITED BY

DAVID S. GARLAND AND LUCIUS P. McGEHEE

UNDER THE SUPERVISION OF

JAMES COCKCROFT

SECOND EDITION

VOLUME VII.

H5562
22/6/99

NORTHPORT, LONG ISLAND, N. Y.

EDWARD THOMPSON COMPANY

LONDON: C. D. CAZENOVE AND SON, 2 HENRIETTA STREET

1898

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CONSTRAINT. — Compulsion ; restraint ; abridgment of liberty or hindrance of the will.[1]

CONSTRUCT. — "Construct" means to build or make.[2]

1. ***Constraint*** is synonymous with "compulsion" when used in reference to extrinsic force. The court said: "A voluntary act proceeds from one's own free will; done by choice or by one's own accord; unconstrained by external interference, force, or influence; not prompted or suggested by another. Worc. Dict.; Imp. Dict. 'Voluntarily' expresses by the use of one word all the force and meaning of the phrase, 'of her own free will and accord.' 'Compulsion' and ***constraint*** are synonyms, when used in reference to extrinsic power, force, or influence, as when exercised by one person on another. Mrs. Hester's acknowledgment that she signed the mortgage 'voluntarily, without any fear, compulsion, or threats of her said husband,' is of equivalent import and meaning with the expression 'of her own free will and accord, and without fear, ***constraints***, or threats on the part of her husband." Gates *v.* Hester, 81 Ala. 359.

Married Women. (See also the title ACKNOWLEDGMENTS, vol. 1, p. 546. And see RESTRAINT.) — On the question of the validity of a trust deed made by a married woman, wherein the certificate of privy examination, instead of following the words of the code that she "acknowledged the execution of the said deed to have been done by her freely, voluntarily, and understandingly, without compulsion or ***constraint*** from her said husband," substituted the word "restraint" for the word ***constraint***, the court, by Cooper, Ch., after showing that while the omission of one of the words included in the form is fatal, yet the substitution of a word of similar meaning is not matter of substance, and that a prior act on the same subject actually employed the word "restraint," said: "The question is consequently narrowed down to this: Is the word 'restraint' the same word in substance as ***constraint***, the word prescribed by the form? * * * One of the meanings which both Sheridan and Johnson give to the verb ***constrain*** is, to restrain. And all of our lexicographers give as one of the meanings of the noun 'restraint' an abridgment of liberty or hindrance of the will. It is in this sense that it was used in the form of certificate of 1833, and in that view is perhaps more appropriate than ***constraint***, which, except we give it the sense of 'restraint,' is identical in meaning with the word 'compulsion,' with which it is connected. The meaning of the two words, at one time identical, has been so differentiated by usage of the best writers as now to convey, when correctly used, distinct ideas. But as elements of the vulgar tongue they are still so nearly alike as to be applied without discrimination to the same purpose. To say that an act is done without ***constraint***, or without 'restraint,' would convey the same meaning, namely, without 'any abridgment of liberty or hindrance of the will,' which is one of the recognized definitions of 'restraint.' I am of opinion, therefore, that, while the words are different, the sense is one, and that the certificate is valid." Edmondson *v.* Harris, 2 Tenn. Ch. 427.

2. Seymour *v.* Tacoma, 6 Wash. 147, in which case it was held that the term as used in the title of an act authorizing a city or town to ***construct*** improvements had a wider meaning. The court said: "Ordinarily, the meaning of the word ***construct*** in the sense here meant would be to build or make; but to give the law any effect whatever, it must have been known to the legislature that more than the mere cost of ***construction*** involving the labor necessary would have to be implied. * * * If one should contract with another for the ***construction*** of a house, no one would suppose for a moment that the agreement to ***construct*** implied an agreement to furnish the land whereon the house must stand; but a gross contract to ***construct*** a system of water works for the city of Tacoma, with Green river as a source of supply, and turn it over ready for operation, would certainly imply that when the works were finished the perpetual right to have them remain where they were, with the waters of Green river flowing into them, should be secured to the city. Thus, under this power to ***construct***, all but the mere labor would be accomplished by purchase in most cases, and there would seem to be no good reason why water rights, land, pipes and machinery should not be purchased, although they be already in use for a like purpose."

Build, Erect, and Construct. — In La Crosse,

CONSTRUCTION. (See the titles DEEDS; INTERPRETATION AND CONSTRUCTION; MARITIME LIENS; MECHANICS' LIENS; STATUTES; WILLS.) — The erection or creation of anything.[1] The act of putting a meaning on, or of explaining in a certain way.[2]

etc., R. Co. *v.* Vanderpool, 11 Wis. 122, it is said: "In Crabb's Synonyms, 498, cited by the counsel for the plaintiff in error, the most precise and accurate distinction between the words 'build,' 'erect,' and ***construct***, seems to be stated. It says: 'What is built is employed for the purpose of receiving, retaining, or confining; what is erected is placed in an elevated position; what is ***constructed*** is put together with ingenuity.' And again: 'Houses are built, monuments erected, and machines ***constructed***.' Such nice distinctions and shades of meaning should never be observed in opposition to the ordinary and common understanding of men, unless the intent of the statute manifestly required it."

Constructing a Street. — An ordinance required that every person who should ***construct*** a new street should provide at one end, at least, of such street an entrance of a width equal to the width of such street. It was held that the ***construction*** of a new street within this provision included the building of the houses abutting on it, and consequently the landowner could not, until an adequate entrance had been provided, erect houses abutting on the proposed new street. Hendon Local Board *v.* Pounce, 42 Ch. Div. 602.

1. Construction and Erection — Mechanics' Liens. (See also the title MECHANICS' LIENS.) — In Burke *v.* Brown, 10 Tex. Civ. App. 298, it is said: "As used in the law, the words 'erection' and ***construction*** seem to be synonymous in their meaning; and in common acceptation, when applied to a house, they mean the building of it by putting together the necessary material and raising it; but it does not require a strained sense to bring the removal of a house from the place where it has been put together, and placing it in position or setting it up in another place, within the meaning of these words as used in the law."

Alteration — Mechanics' Liens. — In Donnell *v.* Starlight, 103 Mass. 227, it was held that labor and materials furnished in the alteration of a vessel fitted out for new uses are furnished in her ***construction*** and repairs.

As to whether ***construction*** includes alteration, see Montgomery *v.* Townsend, 84 Ala. 478, 22 Am. & Eng. Corp. Cas. 424, 425.

Construction of a Railroad. (See also the title RAILROADS.) — In McRae *v.* Toronto, etc., R. Co., 22 U. C. C. P. 1, the court said: "Where the ***construction*** of the road, or portion of road, had been already provided for, the government aid was not to be given. The fact that a company had succeeded in contracting for the grading and fencing of a portion of a road cannot in our judgment amount to a contract for the ***construction*** of such portion. A contract to ***construct*** ten or twenty miles of a railway must mean to put such portion in a state to be used as a railway, and such a contract could never be fulfilled merely by grading and fencing the line."

Construction of Railroad — Timber. — Under the *Iowa* Right of Way Act, the owner of the right of way might reserve timber and use it as his own unless necessary for the purpose of ***construction***. In Preston *v.* Dubuque, etc., R. Co., 11 Iowa 17, the court said: "Unless necessary for the purpose of ***construction*** or repairs, the proprietor may remove the timber and use it as his own; it being understood by the word ***construction*** as here used, more is meant than the mere making of the roadbed. The ***construction*** of the road implies its preparation and readiness for use; and not only so, but its use in a convenient and safe manner. Hence though such timber might not be necessary for the ***construction*** of the track, it might be necessary to remove it for the safe running of the locomotive and cars. The right to thus remove does not, however, carry with it the right to destroy, nor yet to appropriate it to the use of the company for the purpose of firewood or the like. Deaton *v.* Polk County, 9 Iowa 594; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288."

2. In State *v.* Smith, 35 Neb. 22, it is said: "***Construction***, as defined by Dr. Lieber, is the 'drawing of conclusions respecting subjects that lie beyond the direct expression of the text — conclusions that are within the spirit but not the letter of the text.'"

Construction Distinguished from Interpretation. — In Morris Aqueduct *v.* Jones, 36 N. J. L. 209, Beasley, C. J., says: "Upon looking into the cases referred to, and on an examination of others standing in the same line, I find they all rest upon the common principle that the legislative will is to be ascertained not from the meaning of the text of the statute alone, but from such words interpreted in view of the general object of the particular act. The adjudications are the results, not of acts of interpretation, which is the mere finding of the true sense of the special form of words used, but of acts of ***construction***, which Dr. Lieber, in his Hermeneutics, has properly defined as 'the drawing of conclusions respecting subjects that lie beyond the direct expression of the text — conclusions which are in the spirit though not within the letter of the text.' Lieber on Political Hermeneutics, c. 1."

In Bloomer *v.* Todd, 3 Wash. Ter. 612, it is said: "Interpretation differs from ***construction*** in this, that it is used for the purpose of ascertaining the true sense of any form of words; while ***construction*** involves the drawing of conclusions regarding subjects that are not always included in the direct expression."

As Applied to Powers. (See also the title POWERS.) — In Cutting *v.* Cutting, 86 N. Y. 535, it is said: "We now come to another question, that is, what is the ***construction*** that the Revised Statutes put upon this power? As we have seen, the ***construction*** of it is to be governed by the provisions of those statutes. By the term ***construction***, the revisers and the legislature meant not merely the meaning and force of the particular words used in creating the power. They had a wider notion in the use of the word, and intended by it what should be

CONSTRUCTIVE CONTEMPTS. (See the title CONTEMPT, *post.*) — "Constructive contempts" are those contempts of court which are not committed within the immediate presence of the court, but arise from matters occurring out of court, at a distance, of which it has no knowledge except as informed by others.[1]

CONSTRUCTIVE CONVERSION. (See the title TROVER AND CONVERSION.) — A "constructive conversion" takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion.[2]

CONSTRUCTIVE DELIVERY. (See the title SALES; and see DELIVERY, and references there given.) — "Constructive delivery" is a general term comprehending all those acts which, although not truly conferring a real possession of the thing sold on the vendee, have been held, *constructione juris*, equivalent to acts of real delivery. In this sense "constructive delivery" includes symbolical delivery and all those *traditiones fictæ* which have been admitted into the law as sufficient to vest the absolute property in the vendee, and bar the rights of lien and stoppage *in transitu*, such as marking and setting apart the goods as belonging to the vendee, charging him with warehouse rent, etc.[3]

CONSTRUCTIVE FORCE. — See the title ROBBERY.

CONSTRUCTIVE FRAUDS. (See the title FRAUD, and references there given.) — Constructive fraud consists in any act of omission or commission contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience, and operates to the injury of another.[4]

the effect in law of the creation and execution of the power upon the property which was the subject of it, and upon all persons interested therein, closely or remotely."

Construed in the Sense of Regarded or Considered. — The Civil Code of *California*, § 5, provides that sections of the code, so far as they are substantially the same as the common law, must be ***construed*** as the continuation thereof, and not as a new enactment. In Churchill *v.* Pacific Imp. Co., 96 Cal. 490, it is said: "Appellant's contention that the word ***construed***, as used in section 5, means simply to interpret, to explain, to translate, or to show the meaning of, cannot be sustained. As there used, the legislature clearly intended it to mean 'regarded' or 'considered.' It certainly was not intended to say that the provisions of the code, so far as they are substantially the same as the common law, should be ***construed*** the same as the common law. There is no such thing as construction of the common law. We do not interpret it; we declare it; we say what it is. Section 20 of the Civil Code adds no strength to the appellant's position."

1. State *v.* Ives, 60 Minn. 478.

Constructive contempts are contempts not offered to the court in its presence, but tending by their operation to obstruct and embarrass, or prevent, the due administration of justice. Whitten *v.* State, 36 Ind. 210.

2. Laverty *v.* Snethen, 68 N. Y. 524.

3. Bolin *v.* Huffnagle, 1 Rawle (Pa.) 9.

4. Clay Center *v.* Myers, 52 Kan. 365.

Other Definitions. — In People *v.* Kelly, 35 Barb. (N. Y.) 457, it is said: "Actual fraud implies deceit, artifice, trick, design; some direct, active operation of the mind. ***Constructive fraud*** is indirect, and may be implied from some other act, or omission to act, which may be, in moral contemplation, entirely innocent; but which, without the explanation, or actual proof of its innocence, is evidence of fraud."

In Durant *v.* Albany County, 26 Wend. (N. Y.) 85, it is said: "In [Judge Story's] explanation of ***constructive fraud***, he represents it as including 'such acts as, though not originating in any actual design to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or violate public or private confidence, or to impair or to injure the public interests, deemed equally reprehensible with positive fraud, and are prohibited by law as within the reason and mischief as much as contracts made *malo animo*.' 1 Story's Eq. 261."

In Price *v.* Masterson, 35 Ala. 495, it is said: "The phrase 'actual fraud' is usually employed as the antithesis of ***constructive fraud***. ***Constructive frauds*** are those transactions which the law pronounces fraudulent and invalid, in obedience to a sound public policy, irrespective of the intention of the parties. They are pronounced fraudulent although there does not appear any evidence of actual *mala fides*. Of this class are purchases by trustees at their own sales."

Constructive frauds are such as by their tendency to deceive or mislead other persons, or violate private or public confidence, or to impair or injure the public interests, are deemed equally reprehensible with positive frauds. Robson *v.* Harwell, 6 Ga. 589.

CONSTRUCTIVE MALICE. — See the title MALICE.

CONSTRUCTIVE MURDER. — See note 1.

CONSTRUCTIVE NOTICE. (See the titles NOTICE; RECORDING ACTS; and the references there given.) — By constructive notice is meant such notice as the law imputes from the circumstances of the case.[2] Constructive notice has been defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not allow even of its being contradicted.[3]

CONSTRUCTIVE POSSESSION. (See also the title ADVERSE POSSESSION, vol. 1, pp. 862, 864, 871.) — Actual possession exists where the thing is in the immediate occupancy of the party; "constructive possession" is that which exists in contemplation of law, without actual personal occupation.[4]

1. Constructive Murder. (See also the title HOMICIDE.) — In Darry *v.* People, 10 N. Y. 137, the court said: "It has been extensively applied to cases of ***constructive murder***, that is, to those cases where, although the want of any actual intent to take life is conceded, yet the law, in view of some other malicious or criminal intent, punishes the offense as murder; and to cases of death produced through an utter wantonness and recklessness as to life in general, as well as to cases where the life of an officer is unintentionally taken, when engaged in the performance of his duty."

2. Todd *v.* Troy, 61 N. Y. 509.

3. 1 Story's Eq., § 399; Plumb *v.* Fluitt, 2 Anstr. 432; Kennedy *v.* Green, 3 Myl. & K. 699; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 439; Townsend *v.* Little, 109 U. S. 511; Jordan *v.* Pollock, 14 Ga. 145; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Cambridge Valley Bank *v.* Delano, 48 N. Y. 339; Allegheny First Nat. Bank *v.* Farmers' Deposit Nat. Bank, (Pa. 1886) 5 Cent. Rep. 505; Garrard *v.* Pittsburgh, etc., R. Co., 29 Pa. St. 154; Nelson *v.* Allen, 1 Yerg. (Tenn.) 360; French *v.* Loyal Co., 5 Leigh (Va.) 627; Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 384.

In Simmons Creek Coal Co. *v.* Doran, 142 U. S. 439, it is said: "In later editions of that work [Story's Equity Jurisprudence], Judge Redfield (11th ed., § 410*a*) says that the term ***constructive notice*** 'is applied, indiscriminately, to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by the registry, and notice by *lis pendens*. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry, and some other similar matters, although often called ***constructive notice***, is rather implied notice, or presumptive notice, subject to be rebutted or explained. ***Constructive notice*** is thus a conclusive presumption or a presumption of law, while implied notice is a mere presumption of fact.'"

Constructive notice is a legal inference from established facts; and when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument and is matter of ocular inspection, the question is one for the court. Whether under a conceded state of facts the law will impute notice to the purchaser, is not a question for the jury. Birdsall *v.* Russell, 29 N. Y. 220.

Actual and Constructive Notice. — In Jordan *v.* Pollock, 14 Ga. 156, it is said: "The first broad elementary distinction, to which we call attention, is that notice is actual, when it is directly and personally given to the party to be notified; and ***constructive***, when the party, by circumstances, is put upon inquiry, and must be presumed to have had notice, or, by judgment of law, is held to have had notice. (Powell on Mortg. 561, 662; 16 Vin. Abr. 2; 4 Kent Com. 172.) Again, ***constructive notice*** is held to be, 'in its nature, no more than evidence of notice, the presumption of which is so violent that the court will not allow of its being controverted.' (Kennedy *v.* Green, 3 Myl. & K. 719; 3 Sugd. on Vend. 453.)"

In Chesapeake, etc., R. Co. *v.* Mullins, 94 Ky. 357, the court said: "Actual notice is such notice as is required to be given in some particular way to each owner. ***Constructive notice*** is such as results from some public act required to be done, and in a particular manner, and of which the owners of the property upon which the burdens are imposed are required to take notice."

In Williamson *v.* Brown, 15 N. Y. 359, it is said: "Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. ***Constructive notice***, on the other hand, is a legal inference from established facts; and like other legal presumptions, does not admit of dispute. ***Constructive notice***, says Judge Story, 'is in its nature no more than the evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted.'"

4. Constructive Possession. — Brown *v.* Volkening, 64 N. Y. 80.

In Thompson *v.* Burhans, 79 N. Y. 99, it is said: "***Constructive possession*** is based upon a written title, which may be valid or invalid. The person having the valid title is always in law in the ***constructive possession*** of the land, unless he has become disseized."

In Clements *v.* Yturria, 81 N. Y. 292, it is said: "A ***constructive possession*** is one that depends upon the contract that confers title. * * * Now a ***constructive possession*** is one made up of acts short of possession in fact, that by relation to the real legal title amount

CONSTRUCTIVE SEIZURE. — See the title ATTACHMENT, vol. 3, p. 181.

CONSTRUCTIVE TOTAL LOSS. — See the title ABANDONMENT AND TOTAL LOSS, vol. 1, p. 13.

CONSTRUCTIVE TRUST. (See also the titles TRUSTS AND TRUSTEES; IMPLIED TRUSTS.) — A "constructive trust" is one raised by operation of law, as distinguished from one created by the express words of some written instrument.[1]

CONSTUPRATE. (See the title RAPE.) — To "constuprate" is to violate, to debauch, to defile.[2]

CONSUETUDO. — A custom or usage. See the title USAGES AND CUSTOMS.

in law to a possession in fact. But they are nothing without they relate to and rest upon the legal title. And until the legal title is proven, they, though proven, show no right to take immediate actual possession."

In Sullivan *v.* Sullivan, 66 N. Y. 42, it is said: "***Constructive possession*** may exist without an actual *pedis possessio*, where there is a present right and the possession is either vacant or is consistent with the right of the owner to an immediate and actual possession by himself."

In Hodges *v.* Eddy, 38 Vt. 344, it is said: "We believe a correct definition of ***constructive possession*** is, 'a possession in law, without possession in fact.'"

1. Constructive Trusts. — Cutting *v.* Cutting, 86 N. Y. 535.

In Fulton *v.* Jansen, 99 Cal. 591, it is said: "***Constructive trusts*** arise in that class of cases where there is no intention of the parties to create a trust, and usually contrary to the intention of the party holding the legal title, and where there is no express or implied, written or verbal, declaration of a trust. 'They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership.' (Pomeroy's Equity Jurisprudence, § 1044.) In most cases of ***constructive trust***, pure and simple, an element of fraud, actual or constructive, is the basis upon which the trust is founded."

In Farmers', etc., Bank *v.* Kimball Milling Co., 1 S. Dak. 394, it is said: "Involuntary or ***constructive trusts*** embrace a much larger class of cases, and include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, when there is no intention of the parties to create a trust relation, and contrary to the intention of the one holding the legal title. This class of trusts may be usually referred to fraud, either actual or constructive, as an essential element."

Constructive Trust Distinguished from Resulting Trust. — In Love *v.* Watkins, 40 Cal. 568, Temple, J., says that a resulting trust, like an express trust, arises from a confidence reposed in the trustee. In that respect it differs widely from ***constructive trusts***, which are established by evidence and forced upon the conscience of the trustee against his will, and generally to prevent the consummation of a fraud.

Implied Trusts. — In Dunn *v.* Zwilling, 94 Iowa 233, it is said: "Trusts arising by implication of law are sometimes divided into two classes: (1) Those which are said to result by operation or presumption of law from certain acts or relations of parties from which an intention to create a trust is supposed to exist, and which are called 'resulting' or 'presumptive' trusts. (2) Those which exist by construction of law alone, without any actual or supposed intention that a trust should be created, but merely to assert the rights of parties or baffle fraud; they are called ***constructive trusts.***"

Classes of Constructive Trusts. — In Dunn *v.* Zwilling, 94 Iowa 233, it is said: "It is said in 10 AM. AND ENG. ENCYC. OF LAW [1st ed.] 60, that '***constructive trusts*** may be divided into three classes, to be determined according to the circumstances under which they arise: (1) trusts that arise from actual fraud; (2) trusts that arise from constructive fraud; (3) trusts that arise from some equitable principle, independent of the existence of fraud.'"

2. Harper *v.* Delp, 3 Ind. 230.

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For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ADMIRALTY JURISDICTION, vol. 1, p. 645; *ALIENS*, vol. 2, p. 64; *INTERNATIONAL LAW; MINISTERS AND AMBASSADORS; SEAMEN; SHIPS AND SHIPPING.*

I. DEFINITION. — A Consul is a commercial agent appointed by the government to reside in a seaport or other town of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him.[1]

II. ORIGIN AND HISTORY. — Consuls were appointed about the twelfth century in the opulent states of Italy, and since then have been multiplied and extended to every part of the world where navigation and commerce can

1. **Definitions.** — Bouvier's Law Dict. See Woolsey's Int. Law, § 95; Webster's Dict.; Wharton's Law Dict.; 1 Kent Com. 42. A consul is a mercantile agent of the sovereignty by which he is appointed to protect the commercial interests of its citizens or subjects in a foreign state. By virtue of his office, he is clothed only with authority for commercial purposes. He is not to be considered as a minister or diplomatic agent of his government, intrusted with authority to represent it in negotiations with foreign states, or to vindicate its prerogatives. 1 Kent Com. 43; The Anne, 3 Wheat. (U. S.) 445; Seidel *v.* Peschkaw, 27 N. J. L. 427.

A consul is a commercial agent of a country residing in a foreign seaport, whose duty it is to promote commercial intercourse of the state and especially of the individual citizen. Schunior *v.* Russell, 83 Tex. 88, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 764.

In Dainese *v.* U. S., 15 Ct. of Cl. 64, it was said that the word "consul" has two meanings. In its more limited sense it denotes an officer of a particular grade in consular service; but in its broader generic sense it denotes all consular officers of whatever grade.

Holder of Unrevoked Exequatur. — A person of a foreign nation, who holds the unrevoked *exequatur* issued by the President of the United States, by virtue of which he is in discharge of the duties of vice consul of his country, is still the accredited representative of the country, even though the government has been overthrown by a revolutionary government. U. S. *v.* Trumbull, 48 Fed. Rep. 94.

successfully penetrate. Their origin has been ascribed to the necessity for extraordinary assistance in those branches of commerce formerly carried on with barbarous and uncivilized nations.[1]

III. Classes of Consular Officers. — In the United States consular officers are consuls general, consuls, commercial agents, deputy consuls, vice consuls, vice commercial agents, consular agents, and none others.

The Principal permanent and full consular officers are consul general, consul, and commercial agent, and are to be distinguished from subordinates and substitutes.

The Subordinate consular officers are the deputy consul and consular agent, who exercise the powers and perform the duties within the limits of their consular or commercial agencies respectively, the former at the same ports and places and the latter at ports or places different from those at which such principals are located respectively.

The Substitute and temporary consular officers are vice consuls and vice commercial agents.[2]

IV. Appointment and Qualification — 1. In General. — The United States Constitution provides that the President shall nominate and, by and with the advice and consent of the senate, shall appoint consuls.[3] Consular clerks may, by statute, be appointed by the President.[4]

Appointment of Foreigners. — By the usage of many foreign powers, consular offices are frequently conferred upon the subjects of the country where the consular duties are to be performed,[5] and it has been held therefore by the United States Supreme Court that no presumption of alienage arises from the fact that a person is the consul of a foreign government.[6]

2. Bonds of Consular Officers. — Consular officers are required to give bonds faithfully to perform their duties and to keep safely and account for public property and moneys.[7]

1. History and Origin. — 1 Kent Com. 42; 1 Chitty Comm. Law 48, 49.

The consular system is said by Mr. Lorimer to have been developed chiefly in the Hanseatic League. 1 Lorimer's Law of Nations 290.

2. U. S. Rev. Stat. (1878), § 18, c. 1. See Schunior *v.* Russell, 83 Tex. 88.

A Consular Agent is a representative of the consul to whom he is subordinate. Gould *v.* Staples, 9 Fed. Rep. 159.

A Vice Consul is not a deputy, but an acting consul. *In re* Herres, 33 Fed. Rep. 167.

A Consul and a Commercial Agent are invested with the same powers and duties, though nominally different. The office of each is substantially the same as that of the other, and the name is determined by the relative importance of the port to which the officer is assigned. Schunior *v.* Russell, 83 Tex. 88.

3. U. S. Const., art. 2, § 2.

As to the appointment of vice consuls under the Consular Service Act, see Dainese *v.* U. S., 15 Ct. of Cl. 64.

4. U. S. Rev. Stat., § 1704.

5. 1 Kent Com. 44; Taney, C. J., in Gittings *v.* Crawford, Taney's Dec. (U. S.) 11.

In the United States, it is provided by statute (U. S. Rev. Stat., § 1744) that no compensation shall be paid to consuls who are not citizens of the United States. This statute, however, does not apply to deputy consuls, vice consuls, consular and vice commercial agents. Citizenship of Consuls, 12 Opp. Atty.-Gen. 124.

6. Börs *v.* Preston, 111 U. S. 252.

7. U. S. Rev. Stat., §§ 1697, 1698.

These bonds are to be approved by the secretary of state (U. S. Rev. Stat., *ut supra*) and take effect from such approval. 14 Opp. Atty.-Gen. 7.

Effect of Neglect to Give Bond. — Where a consul neglects to give bond he cannot recover the salary of his office. Dainese *v.* U. S., 15 Ct. of Cl. 64.

Bondsmen — Liability for Overpayment of Salary. — Where the undertaking of the bondsmen of a consul is that he "shall truly and faithfully discharge the duties of his office according to the law, and shall truly and faithfully pay over and deliver all the moneys which shall come into his hands," they are liable for money which the government overpays him for salary which he fails to return, and the negligence of the treasury department in suing for this money will not release him. U. S. *v.* Bee, 7 U. S. App. 459, 54 Fed. Rep. 112.

Bond of Vice Consul — Liability for Consul's Salary Paid to Him. — A vice consul who, as principal, signs a bond, the condition of which is that he shall account for and pay over all moneys received by him in his official capacity, is liable for the consul's salary paid to him where he fails to show that he paid over the salary to the consul. U. S. *v.* Mitchell, 26 Fed. Rep. 607.

Money Paid for Clerk Hire. — In U. S. *v.* Owen, 47 Fed. Rep. 797, an action of debt was brought upon the bond of the United States consul. The part of the condition in question was that he should truly and faithfully account for and deliver up all fees and moneys

3. Exequatur. — While a consul is appointed and commissioned by the government which he represents, he can exercise his functions within the territorial limits of the power to which he is sent, only by virtue of an *exequatur* from the latter — a formal recognition of the appointee as consul and permission to enter upon the discharge of his functions.[1] If the consul is guilty of illegal or improper conduct his *exequatur* may be revoked, and he may be punished or sent out of the country at the option of the offended government.[2]

V. Consular Powers and Consular Acts — 1. Consular Powers in General. — The powers and duties of consuls are generally limited and defined in treaties of commerce or by the statutory regulations of the country which they represent.[3]

Intercession in Behalf of Countrymen — Restitution of Property. — A consul, though a public agent, is clothed with authority only for commercial purposes; but he has an undoubted right to watch over the interests of his countrymen when they are not otherwise represented. He may interpose claims for the restitution of property belonging to them,[4] but he cannot receive the actual resti-

which should come to his hands. The books of the treasury department showed that he had paid besides other things eight hundred and ninety-five dollars for clerk hire under orders of the state department; and it was held that he was not liable for the money paid, even though the United States statute provided that the annual allowance of a consular agency for expenses should be an amount sufficient to pay for stationery and postage on official letters.

The Sureties on a Consul's Bond are not liable on account of moneys remitted to him for other objects and purposes, not comprehended within his consular duties, as prescribed by Act of Congress under which the bond is taken. U. S. *v.* Bell, Gilp. (U. S.) 41.

1. See Scanlan *v.* Wright, 13 Pick. (Mass.) 528, 25 Am. Dec. 344, *per* Shaw, C. J.; Manning's Law of Nations 113; Bouv. L. Dict., title *Exequatur*.

The powers conferred upon a consul by his sovereign are dependent upon the *exequatur* of the government of the country in which he is to exercise his functions; that is to say, before he can enter upon such exercise, he must be accepted in due form by the government of the state to which he is sent. His official quality begins only on the day when he obtains this *exequatur*. Leonard *v.* Premio-Real, 11 Quebec L. Rep. 128, *quoting* Foelix on International Law.

2. Coppell *v.* Hall, 7 Wall. (U. S.) 553.

3. 1 Kent Com. 42; Potter *v.* Ocean Ins. Co., 3 Sumn. (U. S.) 44.

Directing Survey. — If an American vessel seeks the port under necessity of repairs, the American consul may, it would appear, according to usage, direct a survey to ascertain the damages as part of his official duty. Potter *v.* Ocean Ins. Co., 3 Sumn. (U. S.) 44.

General Statement of Consular Duties. — Prof. Woolsey, in his International Law, par. 96, says: "Modern consuls generally legalize by their seal for use within their own country acts of judicial or other functionaries. They may authenticate marriages, births, and deaths among their countrymen; they may receive protest of masters of vessels, grant passports, and act as depositors of ship papers. They may reclaim deserters from vessels, provide for destitute sailors, and discharge them and send them home when they have been cruelly treated. They may act in behalf of the owners of stranded vessels, and administer on the personal property left within their consulate where no legal representative is left, and treaty stipulations permit."

Cannot Exempt Enemy's Ships from Capture. — A consul has no authority by virtue of his office to grant any license or permit which could have the legal effect of exempting the vessel of an enemy from capture or confiscation. Rogers *v.* The Mexican Schooner Amado, Newb. Adm. (U. S.) 400; The Hope, 1 Dods. 226. See also Coppell *v.* Hall, 7 Wall. (U. S.) 542.

4. Restitution of Property — Intercession for Countrymen. — The Anne, 3 Wheat. (U. S.) 435; The Elizabeth, Blatchf. P. C. 250; Gernon *v.* Cochran, Bee Adm. 209. See Robson *v.* Huntress, 2 Wall. Jr. (C. C.) 59.

The consul of a nation may claim on behalf of its subjects, in the absence of any authorized agent. The London Packet, 1 Mason (U. S.) 14.

In The Bello Corrunes, 6 Wheat. (U. S.) 167, Johnson, J., said: "To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the vice consul shall in any instance extend to the right to receive, in his national character, the proceeds of property libeled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed."

Petition to Pay Proceeds of Sale of Property

tution of the property in controversy without a specific authority from the particular individual who is entitled to it.[1]

Protest of Consul as Affecting Jurisdiction over Foreign Ships. — Courts of admiralty in determining whether to entertain jurisdiction in suits against foreign vessels, will give due consideration to the consent or protest of the consul representing the foreign country.[2]

Advice of Consul No Justification for Illegal Act. — The advice of an American consul in a foreign port gives to the master of a vessel no justification for an illegal act.[3]

No Diplomatic Functions. — A consul is not to be considered as a minister or diplomatic agent of his sovereign, intrusted by virtue of his office with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives.[4]

Libeled for Salvage. — In The Ship Adolph, 1 Curt. (U. S.) 87, it was held that a foreign consul had authority to petition the court to order the marshal to pay into the registry, proceeds of a sale of property libeled for salvage in which the citizens or subjects of the country were interested, they being absent and having no legal representative in the United States.

1. Authority from Citizen. — In The Bello Corrunes, 6 Wheat. (U. S.) 152, it was held that while a foreign consul has a right to claim or institute a proceeding *in rem*, where the rights of property of his fellow citizens are in question, without a special procuration from those for whose benefit he acts, yet he cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled to it.

Proof of Proprietary Interest. — And in The Antelope, 10 Wheat. (U. S.) 66, it was held that although a consul may claim for subjects unknown of his nation, yet restitution cannot be decreed without specific proof of the individual proprietary interest.

2. Jurisdiction over Foreign Vessel — Protest of Consul. — The Becherdass Ambaidass, 1 Lowell (U. S.) 569, where the court, by Lowell, J., said: "Besides these considerations, there is the protest of H. B. M. acting consul, which affirms the validity of the articles, and protests that the court ought not to take jurisdiction. Several of the authorities above cited refer to the consent or dissent of the representative of the foreign government as being an important fact, but precisely what weight should be given to it is not defined. Judge Sprague, in Hay *v.* Brig Bloomer, cited 2 Parsons on Shipping 229, note 2, says: 'The usual course in the case of a libel by a foreign seaman against his vessel, is to direct the clerk to inform the consul of the government of the pendency of the suit, that he may take such notice of it as he thinks proper; and unless there were strong circumstances in the case, the court would not proceed *in rem* against a foreign vessel, without the assent of the commercial representative here of the foreign government of the country where she belonged.' What circumstances would be strong enough to induce action, notwithstanding such a protest, is not stated. Judge Peters appears to have found such circumstances in Weiberg *v.* The Brig St. Oloff, 2 Pet. Adm. 428, where there had been both cruelty and deviation. So did Mr. Justice Curtis, in Patch *v.* Marshall, 1 Curt. (U. S.) 452, where the defendant appeared to be domiciled in Massachusetts, and the voyage was ended there. In a late case in England it has been decided, in conformity with the practice in both countries, that the protest of the foreign consul could not bar the jurisdiction; but that it ought to be respectfully considered and weighed together with the other facts and circumstances upon which the sound discretion of the court must be exercised. La Blache *v.* Rangel, L. R. 2 P. C. 38. See too The Golubchick, 1 W. Rob. 143; The Milford, Swab. Adm. 362; The Herzogin Marie, Lush. Adm. 292." Accordingly in this case it was held that in the absence of special circumstances warranting a disregard of the protest of the consul the court would not entertain jurisdiction of a suit against a foreign vessel by foreign sailors for their wages. See also The Octavie, 33 L. J. Adm. 115; Enos *v.* Sowle, 2 Hawaiian 332; Young *v.* Phillips, 2 Hawaiian 349.

3. Advice of Consul No Justification for Illegal Act. — Wilson *v.* The Brig Mary, Gilp. (U. S.) 31. In this case Hopkinson, J., said: "It is certainly a very prudent precaution to consult the consul in any difficulty, and if the case were fully and fairly stated to him and his advice faithfully pursued it would afford a strong protection on the question of malicious or wrongful intention; but it can give no justification or legal sanction to an illegal act, nor deprive those who have been injured of their legal rights and remedies."

4. No Diplomatic Character. — The Anne, 3 Wheat. (U. S.) 435; Robson *v.* Huntress, 2 Wall. Jr. (C. C.) 59.

By Treaty, Consuls to Non-Christian Countries are frequently vested with certain diplomatic functions. See Mahoney *v.* U. S., 10 Wall. (U. S.) 66, *per* Field, J.

"Consular privileges are much less extensive in Christian than in Mahometan countries. In the latter they cannot be imprisoned for any cause whatever, except by demanding justice against them of the Porte, and they partake very considerably of the character and importance of resident ministers. They are diplomatic agents under the name of consuls, and enjoy the rights and privileges which the Ottoman Porte recognizes in relation to the foreign ministers resident at Constantinople." 1 Kent Com. 45.

United States Statute — Diplomatic Functions of Consuls. — Consular officers are forbidden to

2. Certain Specific Powers under United States Statutes. — The United States Revised Statutes contain specific provision as to the powers of consuls in many matters.

Receiving Protests. — They are empowered to receive protests from masters of vessels, and others who are citizens of the United States, or from foreigners relative to the personal interest of a citizen of the United States.[1]

Lists of Seamen and Ships — Estates of Decedents — Consular Reports. — It is the duty of a consul to keep a list of all seamen shipped and discharged by him, and of the number of vessels arrived and departed, with particulars of tonnage, crews, and cargo;[2] where the laws of the country permit, to take charge of and administer upon the estates of citizens of the United States, other than seamen, dying within his consulate and leaving no legal representative, or trustee;[3] and to send reports to the state department containing commercial information as to the country where he is stationed, and to report to the secretary of the treasury the current prices of all articles usually exported to the United States.[4]

Other Duties. — Consuls are also required to perform many duties connected with commerce and shipping, such as receiving the deposit of ships' registers,[5] seeing to the return of destitute seamen to the United States,[6] taking measures for the purpose of saving vessels stranded within their consulates, and securing the effects and merchandise saved,[7] and the like. The details of the powers of consuls in these and numerous other matters must be sought in the statutes of the United States and the United States consular regulations.[8]

Marriages before Consuls, between persons who would be authorized to marry if residing in the District of Columbia, are declared to be valid as if solemnized in the United States.[9]

3. Notarial Functions. — By the United States Revised Statutes consuls are invested within their districts with the functions of notaries public, such as administering oaths, and taking depositions and acknowledgments.[10]

exercise any diplomatic function or to hold any diplomatic correspondence or relation on the part of the United States in, with, or to the government or country to which they are appointed, when there is in such country any officer of the United States authorized to perform diplomatic functions therein. The consul can only act by express authority from the President. U. S. Rev. Stat., § 1738.

It has been held under this provision that a retiring minister cannot install a consul in charge of the legation, nor can the consul receive the pay provided by law for a chargé d'affaires. Otterbourg's Case, 5 Ct. of Cl. 430.

Foreign Consul — Diplomatic Privileges when Citizen of the United States. — A consul general of a foreign country, who is a citizen of the United States and a resident of a state, is not entitled to the diplomatic privileges of a foreign minister. *In re* Baiz, 135 U. S. 403.

1. U. S. Rev. Stat., § 1707.

2. U. S. Rev. Stat., § 1708.

3. **Estates of Decedents.** — U. S. Rev. Stat., §§ 1709 *et seq.*

This statute does not authorize a consul to pay a claim not reduced to judgment for damages for a wrongful act committed by one deceased. Sturgis *v.* Slacum, 18 Pick. (Mass.) 36.

The duty of consuls in this respect is limited to cases where the laws of the country do not conflict. An American consul in England has been denied the right to administer upon the estate of a domiciled citizen of the United States. Aspinwall *v.* The Queen's Proctor, 2 Curteis 241.

So the right of a foreign consul to administer on the estate of a fellow subject dying in one of the United States has been disallowed as against the right of an administrator regularly appointed in the state. Lanfear *v.* Ritchie, 9 La. Ann. 96.

4. U. S. Rev. Stat., §§ 1712, 1713.

5. U. S. Rev. Stat., §§ 4309, 4310. See Toler *v.* White, Ware (U. S.) 280; Powers of American Consuls, 9 Opp. Atty.-Gen. 310.

6. U. S. Rev. Stat., §§ 4577–4578; Matthews *v.* Offley, 3 Sumn. (U. S.) 115; Luscom *v.* Osgood, 1 Sprague (U. S.) 82.

7. U. S. Rev. Stat., § 4238.

8. See also the titles SEAMEN; SHIPS AND SHIPPING.

9. U. S. Rev. Stat., § 4082.

10. U. S. Rev. Stat., § 1750. The statute provides also for the punishment of perjury committed in oaths or depositions taken before consuls, and for forgery of consular seals or signatures to such documents.

Certifying to the Official Character of a Foreign Notary is not a notarial act. Notarial Powers of Consuls, 12 Opp. Atty.-Gen. 1.

Acknowledgments Taken before Consuls are treated under the title ACKNOWLEDGMENTS, vol. 1, p. 506.

Agreement of Counsel as to Verifying Answer Given in Foreign Country. — An agreement of counsel that an answer to be given in France

English Statutes contain like provisions.[1]

4. Certificates as Evidence. — The certificate of a consul authenticated by his official seal is evidence only of those acts which are appropriate to his office,[2] and is not evidence of any fact as between third parties, unless expressly or impliedly made so by statute.[3]

Statutes. — The United States statutes contain provisions making various documents authenticated under a consul's hand and seal valid and admis-

may be taken and sworn to before any person by the laws of France authorized to administer oaths, is not complied with by an answer sworn to before an American consul. Herman *v.* Herman, 4 Wash. (U. S.) 555.

1. Stat. 18 & 19 Vict., c. 42; Taylor on Evidence (8th Eng. ed.), § 1567.

2. Stein *v.* Bowman, 13 Pet. (U. S.) 209.

Consul's Certificate — Not Authentication of Foreign Laws. — Thus such a certificate is not a sufficient authentication of a foreign law to go in evidence, it not being a consular function to grant such a certificate. Church *v.* Hubbart, 2 Cranch. (U. S.) 187.

Not Proof of Proceedings in Foreign Courts. — Nor is it a proper authentication of the proceedings of a foreign court, or of the proceedings of an officer authorized to take depositions. Stein *v.* Bowman, 13 Pet. (U. S.) 209; Catlett *v.* Pacific Ins. Co., 1 Paine (U. S.) 594.

Not Evidence of Facts Leading to Imprisonment of Seamen. — Nor of the facts inducing the summary imprisonment of a seaman in a foreign port. Johnson *v.* The Ship Coriolanus, Crabbe (U. S.) 239; Brown *v.* The Brig Independence, Crabbe (U. S.) 54.

Not Conclusive of Fact of Desertion under English Statute. — The certificate of a British consul to the fact of the desertion of a seaman under the Stat. 17 and 18 Vict., c. 104, § 107, is not conclusive evidence of the fact of desertion in a summary proceeding before justices in England by the seaman to recover his wages. Lewis *v.* Jewhurst, 15 L. T. N. S. 275.

Partial Loss under Policy — Consul's Certificate as to Sale of Damaged Goods. — In an action against insurers to recover for a partial loss sustained by reason of perils of the sea, it was held that the certificate of a British vice consul at the port of destination in Brazil, of the amount of the proceeds of a sale of the damaged goods, which by the law of Brazil were sold under his inspection, was not evidence to show the amount of loss. Waldron *v.* Coombe, 3 Taunt. 162. In this case Sir James Mansfield, C. J., said: "There is no rule in the English law which makes his certificate evidence. He has been supposed to be an agent, and he is to some purposes. So is an auctioneer in this country; nevertheless his certificate is not evidence in a court of justice, but what was done at the auction must be proved. The business of the vice consul is to see a fair sale. It is going much further to say that his certificate shall bind the parties. Anybody present might have proved the facts. The chirograph of fines here proves itself, but the indorsement of the proclamation of the fine must be proved by a compared copy of the record." See also Roberts *v.* Eddington, 4 Esp. N. P. 88.

Consul's Certificate of Refusal of Master to Receive Destitute Seamen. — Under the provision of the U. S. Rev. Stat., §§ 4577, 4578, providing for the recovery of a penalty from the master of vessels belonging to citizens of the United States for refusing to receive destitute seamen for return to the United States, the certificate of a consular officer under his hand and official seal is presumptive evidence of all the facts necessary to sustain a suit for the penalty. Matthews *v.* Offley, 3 Sumn. (U. S.) 115.

Ship's Papers Lodged with Consul. — In U. S. *v.* Mitchell, 2 Wash. (U. S.) 478, it was held that the certificate of the American consul at a foreign port, under his seal of office, that the ship's papers were lodged with him agreeably to the requisition of the embargo law, was good evidence of that fact, but not of other facts stated in it. See Levy *v.* Burley, 2 Sumn. (U. S.) 355.

Passport Given by Consul — Not Evidence of Being in Country. — A passport made out by a consul of the United States residing in a foreign country, permitting a person to return from that country to the United States, is not evidence that he has been in such foreign country. Facts of this character are completely susceptible of proof by witnesses. As a consul is not a judicial officer, there is no need of substituting a certificate in lieu of depositions of the proof of them. Foster *v.* Davis, 1 Litt. (Ky.) 71.

3. Evidence Only as Provided by Statute — Arrival of Ship at Foreign Port. — In Levy *v.* Burley, 2 Sumn. (U. S.) 355, it was held that the certificate of an American consul that the master of an American vessel arriving at the port where the consul was stationed failed to deposit the ship's register with the consul as required by law (U. S. Rev. Stat., §§ 4309, 4310), was not evidence of the arrival of the vessel at the port in an action brought to recover the penalty for failing to deposit the register. Mr. Justice Story said that while the consul's certificate that the register was deposited might be *prima facie* evidence of the arrival of the vessel, yet that his certificate of non-deposit was no evidence to the contrary, since it was quite consistent with the fact that the vessel had never arrived at the port. He declared that if it were shown to be a part of the consul's official duty to keep a memorandum of the arrival or departure of Amercian vessels (which was not shown), yet it would by no means follow that his certificate of the fact would be evidence in a court of justice; and he extracted from the case the principle that "a consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly so made by statute, for it is in derogation of the rules of evidence of the common law." See also The Alice, 12 Fed. Rep. 923.

sible as evidence within the United States.[1] Similar statutes exist in England.[2]

VI. Privileges and Immunities — 1. General Principles. — A consul is not entitled by the law of nations to the immunities and privileges of an ambassador or public minister.[3] He is to be considered merely as a commercial agent,[4] and in civil and criminal cases is subject to the local laws with other foreign residents owing a temporary allegiance to the state.[5] Some

1. See for instance U. S. Rev. Stat., §§ 1750, 896.

Genuineness of Seals. — In St. John *v.* Croel, 5 Hill (N. Y.) 573, it was held that the acknowledgment of a power of attorney purporting to have been taken before a consul of the United States, resident in a foreign country, certified by him in the proper form and authenticated by his official seal, is sufficient proof of the execution of the power, without any evidence *aliunde* of the genuineness of the signature or seal.

The impression of the consular seal should appear, so that identification and discrimination may be possible. The Atlantic, Abb. Adm. 451.

Where a deposition taken in the city of C., Mexico, by an officer who gave his official title as "Consular Agent of the United States at C., Mexico," was authenticated by a seal containing the words "United States Commercial Agency," it was held that the seal was properly affixed; the discrepancy between the seal and the official title being overcome by the presumption that the officer who took the deposition did his duty and affixed the proper seal in authentication of his acts. Schunior *v.* Russell, 83 Tex. 83.

2. Taylor on Evidence (8th Eng. ed.), § 1565 *et seq.*

3. Wheaton's International Law (Dana's ed.), § 249; 1 Kent Com. 44; *In re* Iasigi, 79 Fed. Rep. 751; Functions of Consuls, 7 Opp. Atty.-Gen. 342; Wilcox *v.* Luco, (Cal. 1897) 50 Pac. Rep. 758; Leonard *v.* Premio-Real, 11 Quebec L. Rep. 128.

A consul is not a public minister so as to make an offense against him punishable under the statute rendering penal any offer of "violence to the person of a public minister, in violation of the law of nations. (U. S. Rev. Stat., § 4062.)" Respect Due to Consuls, 1 Opp. Atty.-Gen. 41.

4. Commercial Agents Only. — A consul "is not the representative of his nation, nor is he employed in the management of national concerns. He is no more than a commercial agent attending to individual interests." Huger, J., in State *v.* De La Foret, 2 Nott & M. (S. Car.) 217.

"A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes." Story, J., in The Anne, 3 Wheat. (U. S.) 445.

A consul does not represent his sovereign. He is simply an agent of his government, intrusted with the duty of protecting the commercial interests of his fellow citizens in the country where he is stationed. Foelix on Int. Law, *quoted* in Leonard *v.* Premio-Real, 11 Quebec L. Rep. 128.

5. Subject to Local Laws. — Wheaton's Int. L. (Dana's ed.), § 249; 1 Kent Com. 44; *In re* Iasigi, 79 Fed. Rep. 751; Gittings *v.* Crawford, Taney's Dec. (U. S.) 11, *per* Taney, C. J.; Coppell *v.* Hall, 7 Wall. (U. S.) 553, *per* Swayne, J.; Consular Privileges, 1 Opp. Atty.-Gen. 77; Leonard *v.* Premio-Real, 11 Quebec L. Rep. 128; Wilcox *v.* Luco, (Cal. 1897) 50 Pac. Rep. 758. See also Barbuit's Case, Cas. *temp.* Talb. 280; Clarke *v.* Cretico, 1 Taunt. 106; Marshall *v.* Critico, 9 East 447; Valarino *v.* Thompson, 7 N. Y. 576; Caldwell *v.* Barclay, 1 Dall. (Pa.) 305, note.

In Viveash *v.* Becker, 3 M. & S. 284, it was held by Lord Ellenborough, after a full examination of the authorities, that a resident merchant of London, appointed and acting as consul for a foreign prince, is not exempt from arrest on mesne process.

In U. S. *v.* Ravara, 2 Dall. (U. S.) 297, the defendant, a consul from Genoa, was indicted in the U. S. Circuit Court for sending threatening letters, and upon his trial before Chief Justice Jay it was contended that he was privileged from prosecution by virtue of his official position. The court held otherwise, and the defendant was found guilty.

In Com. *v.* Kosloff, 5 S. & R. (Pa.) 545, it was held that the defendant, the consul-general of Russia, was not privileged by the law of nations from prosecution for the crime of rape.

In State *v.* De La Foret, 2 Nott & M. (S. Car.) 217, an indictment against a French consul for assault and battery was sustained.

Amenability to Subpœna. — By article 2 of the consular convention of 1853 between the United States and France (10 U. S. Stat. at Large 994), it was agreed that "they [consuls] shall never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes or deposition is to be received from them in the administration of justice they shall be invited, in writing, to appear in court, and if unable to do so, their testimony shall be requested in writing, or be taken orally at their dwellings."

In the case of *In re* Dillon, 7 Sawy. (U. S.) 561, it was held that these treaty provisions were not in conflict with the provisions of the United States Constitution that the accused in all criminal prosecutions shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

In U. S. *v.* Trumbull, 48 Fed. Rep. 94, the question arose whether the vice consul of Chili at San Francisco could be compelled to obey a subpœna to appear as a witness against a person charged with violating the neutrality laws of the United States by furnishing arms to assist a rebellion in Chili. The claim of the right to disregard the subpœna was based upon the fact that by treaty the consuls of Chili are on the footing of those of "the most favored of nations," thus entitling them to claim the privileges accorded to French consuls. The court decided the case upon another ground, and held that the party of the rebellion

expressions of Vattel, indeed, would appear to countenance a different

having established itself as the recognized government in Chili, the Chilian consul could not be compelled to attend as a witness. The court said: "To require the representative of that government [the newly recognized Chilian government], to appear and give testimony against those alleged to have aided its establishment, would not only be contrary to the principle upon which neutrality laws are based, but would strongly tend to give grave offense to the government now recognized by the United States, and with which this government, happily, is at peace." In the opinion, however, the court gave the following résumé of the case of *In re* Dillon, 7 Sawy. (U. S.) 561, distinguishing the principles there laid down from those applicable under the facts before them: "The subpœna served upon Mr. Dillon also required him to produce a certain document, said to be in his possession. Having failed to appear, an attachment was issued, and he was brought into court, from which, after a hearing of the matter, he was discharged. When the attachment was served, he hauled down his consular flag, and the case was taken up by the French minister at Washington as involving a gross disrespect to France. A long and animated controversy between Mr. Marcy, then secretary of state, and the French government ensued. The fact that an attachment had issued, under which Mr. Dillon was brought into court, was regarded by the French government as not merely a contravention of the treaty, but an offense by international law; and it was argued that the disrespect was not purged by the subsequent discharge of Mr. Dillon from arrest. It was urged also that the fact that the subpœna contained the clause *duces tecum* involved a violation of the consular archives. Mr. Marcy, in a letter of September 11, 1854, to Mr. Mason, then minister at Paris, discusses these questions at great length. He maintains that the provision in the Federal Constitution giving defendants opportunity to meet witnesses produced against them face to face overrides conflicting treaties unless in cases where such treaties embody exceptions to this right recognized as such when the constitution was framed. One of these exceptions relates to the case of diplomatic representatives. 'As the law of evidence stood when the constitution went into effect,' says Mr. Marcy, 'ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the constitution referred to did not give the defendant the right in criminal prosecutions to compel their attendance in court.' This privilege, however, Mr. Marcy maintained, did not extend to consuls; and consuls, therefore, could only procure the privilege when given to them by treaty, which, in criminal cases, was subject to the limitations of the Constitution of the United States. Mr. Marcy, however, finding that the French government continued to regard the attachment with the subpœna *duces tecum* as an attack on its honor, offered, in a letter to Mr. Mason, dated January 18, 1855, to compromise the matter by a salute to the French flag upon a French man-of-war, stopping at San Francisco. Count de Santiges, the French minister at Washington, asked, in addition, that when the consular flag at San Francisco was rehoisted it should receive a salute. This was declined by Mr. Marcy. In August, 1855, after a long and protracted controversy, the French government agreed to accept as a sufficient satisfaction an expression of regret by the government of the United States, coupled with the provision that "when a French national ship or squadron shall appear in the harbor of San Francisco the United States authorities there, military or naval, will salute the national flag borne by such ship or squadron with a national salute, at an hour to be specified and agreed on with the French naval commanding officer present, and the French ship or squadron whose flag is thus saluted will return the salute, gun for gun.' Whart. Int. Dig., p. 666. "It will therefore be seen that while the court held, in Dillon's Case, that the provision of the constitution securing to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in their favor does not authorize the issuing of such process to such consuls who, by express treaty, are not amenable to the process of the courts, the state department of the government contended that that provision overrides conflicting treaties, not embodying exceptions to the right guaranteed, recognized as such when the constitution was framed, within which exceptions consuls did not come. In the present case, however, the provision of the constitution referred to in Dillon's Case is not involved; for Mr. Catton has not been subpœnaed as a witness for the defendants, but on behalf of the prosecution. And if he is entitled, as in effect it is declared he is, by article 25 of the convention of 1832, and by the *exequatur* issued to him by the President, to the same privileges and immunities as are granted to the consuls of France, it would seem to follow that he is exempt from compulsory process to attend the court as a witness."

Mr. Dana (Dana's Wheat., p. 325, note), states that the controversy was settled by the French government instructing its consuls for the future to obey subpœnas.

Cases of this character are provided for by a special stipulation in the treaty between the United States and Italy. 20 U. S. Stat. at Large 727.

Invioliability of Consular Archives. — In the case of *In re* Dillon, 7 Sawy. (U. S.) 561, stated above in this note, the question of the inviolability of consular archives was raised but not settled. Under the treaty of 1853 with France (10 U. S. Stat. at Large 994), this right is thus stated: "The consular offices and dwellings shall be inviolable. The local authorities shall not invade them under any pretext. In no case shall they examine or seize the papers there deposited. In no case shall those offices or dwellings be used as places of asylum." It has been said that the privilege does not extend to the consul's personal papers, which must be kept strictly apart from the official archives. Rivier, Les Principes du Droit des Gens (Paris 1896), vol. 1, p. 549.

opinion,[1] but the contrary is too well settled to admit of doubt, although upon principle and according to international usage he is entitled to the liberty and safety necessary to the proper discharge of his functions.[2]

Liabilities — Contracts in an Official Capacity. — A consul general who makes a contract in his official capacity, and on account of his government, is exempt from personal liability.[3]

2. Engaging in Trade. — Though consuls, especially when stationed in Christian nations, are often allowed to engage in trade,[4] their official character affords no protection or immunity to them in their commercial concerns. In such matters the consul is liable in the same way as any other merchant or trader.[5]

1. Vattel, bk. 2, c. 2, § 34, says a consul's "functions seem to require that the consul should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the laws of nations by some enormous misdemeanor." But Lord Ellenborough, in Viveash *v.* Becker, 3 M. & S. 295, after examining this and other passages in Vattel remarks, "It was so positively averred in argument that Vattel was an authority to show that consuls were under the protection of the law of nations, that I was desirous of consulting him; and the passage to which I have referred shows that it is otherwise."

2. Consular Privileges — Safe Conduct, etc. — "Nobody," said Lord Ellenborough, "is disposed to deny that a consul is entitled to privileges to a certain extent; such as for safe conduct, and if that be violated the sovereign has a right to complain of such violation." Viveash *v.* Becker, 3 M. & S. 284. And Chancellor Kent observes, that a consul "is entitled to privileges to a certain extent, such as for safe conduct, but he is not entitled to the *jus gentium*." 1 Kent Com. 44.

In the treaty between the United States and Belgium, negotiated in 1845, it was provided that the consular officers of the two countries respectively "shall continue to enjoy all the privileges, protection, and assistance usually granted to them, and which may be necessary for the proper discharge of their functions." 8 U. S. Stat. at Large 612.

Statements of Consular Rights and Privileges in Treaties. — The treaty of 1788 between France and the United States undertook a more specific enumeration of consular privileges, which may be taken as representative of the usages of nations. The treaty provides for the immunity of consular archives; that the consuls shall be exempt from personal services, militia duty, the quartering of soldiers, etc., as well as all duties, taxes, and charges, except that they shall be subject to real estate and personal taxes as other individuals, "and in all other instances they shall be subject to the laws of the land as the natives are." They are entitled to place the national insignia over the doors of their houses, "but this mark of distinction shall not give to the said house any privilege of asylum for any person or property whatsoever." 8 U. S. Stat. at Large 106, 108.

The treaty of 1853 between the same countries, 10 U. S. Stat. at Large 993, 994, contains a very similar enumeration; the right to tax their real and personal property, however, being limited to such property as "they are or become owners of * * * there."

Like declarations of consular rights and privileges are to be found in United States consular conventions with other countries. See Convention with Austro-Hungary, 17 U. S. Stat. at Large 821; with Germany, 17 U. S. Stat. at Large 921; with Italy, 20 U. S. Stat. at Large 725.

Exemptions from Public Service are accorded, as a general rule, only to a consul who is a citizen or subject of the country he represents. Börs *v.* Preston, 111 U. S. 262, *per* Harlan, J. See also 8 Opp. Atty.-Gen. 169.

3. Contract — Bill of Exchange. — In Jones *v.* Le Tombe, 3 Dall. (U. S.) 384, an action was brought against the consul general of the French Republic, as drawer of a protested bill of exchange. The bill was signed by the consul general in his official capacity, and it was held that as the contract was made on account of the government, the credit was given to it as an official engagement; and that therefore there was no cause of action against the defendant.

4. Consuls Engaging in Business. — In Mahoney *v.* U. S., 10 Wall. (U. S.) 66, Mr. Justice Field said: "Whilst, therefore, in Christian countries consuls are little more than mere commercial agents, in Mohammedan countries they are clothed with diplomatic and even with judicial powers. Consuls to Christian countries are often allowed to engage in business; but consuls to Mohammedan countries are restricted to the duties of their offices, are paid a stated salary, and are prohibited from entering into commercial transactions." *Citing* Halleck on International Law, c. 10, §§ 21, 22; 7 Opp. Atty.-Gen. 346, 348.

In 1 Kent Com., p. 44, it is said: "The French consuls are forbidden to be concerned in commerce; and by the Act of Congress of Feb. 28, 1803, American consuls residing on the Barbary coast are forbidden also; but British and American consuls are generally at liberty to be concerned in trade."

The United States Revised Statutes (§§ 1699, 1700) prohibit consuls belonging to certain classifications of the service, and receiving certain salaries, to engage in business.

5. Consuls Entitled to No Immunities in Trade. — 1 Kent Com., p. 44.

"A trading consul," said Swayne, J., in Coppell *v.* Hall, 7 Wall. (U. S.) 553, "in all that concerns his trade, is liable in the same way as a native merchant. The character of consul does not give any protection to that of

Contract or Business Conflicting with Public Interests. — Consuls are precluded from undertaking any affairs or assuming any position in conflict with the interest or policy of the government whose representatives they are.[1]

Contract to Protect Property of Citizens of Belligerent State. — It has been held that a contract made by the consul of a neutral power with a citizen of a belligerent state, that the consul would, under his neutral name, protect from capture by the belligerent, transport to a market, and dispose of, the merchandise which the citizen had in the enemy's lines, was against public policy.[2]

VII. Federal and State Jurisdiction in Suits By or Against Consuls. — The Constitution of the United States invests the United States Supreme Court with original jurisdiction of all cases affecting consuls as well as ambassadors.[3] This grant of jurisdiction is not exclusive and does not affect the subordinate jurisdiction of other courts of the United States in suits in which consuls are parties.[4]

State Courts — Suits Against Consuls. — It has frequently been held that state courts under the Federal Judiciary Act of 1789 have no concurrent jurisdiction with the United States courts in suits against consuls,[5] and the privilege of a

merchant when they are united in the same person."

In Arnold *v.* United Ins. Co., 1 Johns. Cas. (N. Y.) 363, it is held that the American consul to the city of Havana, who there engaged in trade, became, in regard to his transactions as a merchant, and in reference to the enemies of Spain, a Spanish subject; and that his property was liable to be seized and condemned in the same way as that of other Spanish subjects. In this case Kent, J., afterwards Chancellor Kent, said: "As long as public ministers and consuls confine themselves to the business appertaining to their public characters their domicil is not changed, but remains in the country from which they are deputed, and they are not subjects of the country in which they reside. (Vattel 231; Martens 155, 229.) But if they engage in business inconsistent with or foreign to their public or diplomatic character, they are thenceforth to be considered as domiciliating themselves abroad, and becoming as subjects, amenable to the ordinary jurisdiction of the state. (Vattel 711–714.) As they contribute by their industry and property, when engaged in trade, to aid the government under which they reside, it is but reasonable that the enemies of that government should have a right to hold their property responsible as that of an enemy."

To the same effect is The Pioneer, Blatchf. P. C. 666, where the court said: "It is admitted that, in the case of a foreign consul who is carrying on trade as a merchant in the enemy's country, his consular residence and character will not protect that trade from interruption by the seizure and condemnation of his property as enemy property; and that, notwithstanding his consular character, he is to be considered, in all commercial transactions, as on the same footing with any other resident merchant."

These decisions agree with the adjudications of the English courts upon this subject. See The Indian Chief, 3 Rob. Adm. 22; Sorenson *v.* Reg, 11 Moo. P. C. 141; The Aina, 28 Eng. L. & Eq. 600.

1. Contract by Consul to Advance Private Interests with Government. — In Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, an action was brought by the consul general of the Ottoman government residing at the port of New York, to recover a sum alleged to be due to the consul upon contract with the defendant, as commissions on the sales of firearms to the Turkish government effected through his influence. Before the sale the consul general had agreed with the defendant, for a certain percentage, to use his influence with the agent of the Turkish government, sent to the United States for the purpose of purchasing arms, and thereby persuade him to purchase the arms from the defendant. It was held that this contract was void, being contrary to public policy, and that there could be no recovery on the contract in a court of the United States.

2. Coppell *v.* Hall, 7 Wall. (U. S.) 542.

3. "The judicial power shall extend * * * to all cases affecting ambassadors, other public ministers, and consuls. * * * In all cases affecting ambassadors, other public ministers, and consuls * * * the Supreme Court shall have original jurisdiction." U. S. Const., art. 3, § 2.

4. Subordinate Federal Courts Have Jurisdiction. — Gittings *v.* Crawford, Taney's Dec. (U. S.) 11, where U. S. *v.* Ravara, 2 Dall. (U. S.) 297, and Davis *v.* Packard, 7 Pet. (U. S.) 281, are *cited* and discussed. To the same effect see Börs *v.* Preston, 111 U. S. 252; St. Luke's Hospital *v.* Barclay, 3 Blatchf. (U. S.) 259; Graham *v.* Stucken, 4 Blatchf. (U. S.) 50.

Suit by Alien Against Consul. — The United States District Court has entertained jurisdiction against a consul, even in a case where the plaintiff was an alien; that is, the consular character of a party seems sufficient to give jurisdiction. It is to be noticed, however, that this action was taken in a case in admiralty. Lorway *v.* Lousada, 1 Lowell (U. S.) 77.

The consular character of a party is not sufficient to give jurisdiction in the United States Circuit Court. Pooley *v.* Luco, 72 Fed. Rep. 561.

5. State Courts Have No Jurisdiction in Cases Against Consuls. — Davis *v.* Packard, 7 Pet. (U. S.) 276; McKay *v.* Garcia, 6 Ben. (U. S.) 556; Miller *v.* Sels, 66 Cal. 341; Sartori *v.* Hamil-

consul to be sued in federal courts only is not one which he can waive. It is a privilege which belongs to the country whose agent the consul is, and not to the consul personally.[1] It has been doubted, however, whether under the provisions of the United States Revised Statutes of 1875, the jurisdiction of the United States courts is now exclusive of that of the state courts in suits against consuls,[2] and the courts of two states of the Union have held that

ton, 13 N. J. L. 107; Valarino *v.* Thompson, 7 N. Y. 576; Griffin *v.* Dominguez, 2 Duer (N. Y.) 656; Com. *v.* Kosloff, 5 S. & R. (Pa.) 545; Mannhardt *v.* Soderstrom, 1 Binn. (Pa.) 138.

A Contrary Decision was reached in State *v.* De La Foret, 2 Nott & M. (S. Car.) 217, which must be considered as *overruled* by Davis *v* Packard, 7 Pet. (U. S.) 281.

Commitment by Local Magistrate. — The United States statutes have no reference to proceedings out of court. They do not forbid the exercise of the police power of the state, nor the arrest by a policeman of a consular officer when committing a crime, nor his consequent detention for surrender to the proper tribunal for punishment. Therefore the commitment by a state magistrate of a consular offender who is a fugitive from justice in another state, merely for the purpose of transmitting him to the state where the crime was committed, is not prohibited. *In re* Iasigi, 79 Fed. Rep. 751, *affirmed* on other ground in Iasigi *v.* Van De Carr, 166 U. S. 391.

Revocation of Exequatur Pending Suit. — A state court has no jurisdiction over a defendant who at the time process is issued is a consul, although his *exequatur* is revoked pending the action; such revocation does not give validity to a process which was before invalid. Naylor *v.* Hoffman, 22 How. Pr. (N. Y. Supreme Ct.) 510.

Removal from Consular Office After Arrest but Before Hearing on Habeas Corpus. — Where a consul of Turkey was arrested upon a warrant issued by a city magistrate of the city of New York, and obtained a writ of habeas corpus from the United States District Court, and afterwards, but before the hearing on the writ in the District Court, he was removed from his consular office, it was held that he was not entitled to a discharge; the court saying that a writ of habeas corpus was not like an action to recover damages for an unlawful arrest or commitment, and that if sufficient ground for the prisoner's detention was shown he was not entitled to be discharged for defects in the original arrest or commitment. Iasigi *v.* Van De Carr, 166 U. S. 391, *affirming In re* Iasigi, 79 Fed. Rep. 751.

Several Defendants — Consul Not Liable — No Federal Jurisdiction. — In an action in the United States Circuit Court against a firm, one member of which is a foreign consul, if it is held that the consul is not liable, and the only ground of federal jurisdiction is the consular character of one of the defendants, the court's jurisdiction to give judgments against the other defendants fails. Bixby *v.* Janssen, 6 Blatchf. (U. S.) 316.

1. Privilege Cannot Be Waived. — Davis *v.* Packard, 7 Pet. (U. S.) 281, where the court said: "If the question was open for consideration here, whether the privilege claimed was not waived by omitting to plead it in the Supreme Court, we should incline to say it was not. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents." See also Durand *v.* Halbach, 1 Miles (Pa.) 46.

In Valarino *v.* Thompson, 7 N. Y. 581, the court, by Ruggles, C. J., said. "The defendant, therefore, is exempted, as a consul, from liability to be sued in the state courts. But this exemption is neither his personal privilege, nor the privilege of the state by which he was commissioned. It is not founded on the law of nations, nor on any treaty between his government and that of this country. If it can be regarded as a privilege belonging to him or to his office, it is only because it secures to him the protection of the national government, which is responsible to his own for any violation of his rights derived under the law of nations or from treaty. * * * The exemption of a consul from liability to be sued in a state court, if it can be called a privilege, is not the privilege of the consul nor of his sovereign, but of the United States government; and therefore it cannot be renounced by the consul."

Privilege May Be Claimed First on Appeal. — Consequently, although the privilege is not asserted in the trial court it is not waived, but may be claimed for the first time in the appellate tribunal. Miller *v.* Sels, 66 Cal. 341; Valarino *v.* Thompson, 7 N. Y. 576.

Privilege Ceases when Consular Character No Longer Exists. — The privilege, of course, does not belong to one who has ceased to be a consul. See Viveash *v.* Becker, 3 M. & S. 284; Marshall *v.* Critico, 9 East 447; Iasigi *v.* Van De Carr, 166 U. S. 391. And therefore it has been held that if a consul would avail himself of his immunity, he must make it appear in a suit against him in a state court that he is still a consul. Hall *v.* Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180. This, however, seems contrary to the later decisions cited *supra* in this note.

Consul Joined with Other Defendants. — The consul's privilege is not affected by the fact that he is joined with other defendants not entitled to the privilege. Valarino *v.* Thompson, 7 N. Y. 576; Durand *v.* Halbach, 1 Miles (Pa.) 46.

2. Suits Against Consuls — Doubt Whether Federal Jurisdiction Now Exclusive. — In Börs *v.* Preston, 111 U. S. 261, after reviewing federal legislation on this subject, Harlan, J., said: "By the existing law there is no statutory provision which, in terms, makes the jurisdiction of the courts of the United States exclusive of the state courts in suits against consuls or vice consuls." See also Froment *v.* Duclos, 30 Fed. Rep. 385; Pooley *v.* Luco, 72 Fed. Rep. 561.

under the present statutes they have jurisdiction.[1]

Suits by Consuls — State Jurisdiction. — It has been held that state courts have a concurrent jurisdiction with courts of the United States in actions brought by consuls.[2]

VIII. Consular Jurisdiction and Consular Courts — Consular Jurisdiction Dependent on Treaty. — In some places consuls have been authorized to exercise over their own countrymen a jurisdiction within the territory of the state where they reside; but no government can invest its consuls with judicial powers over its own subjects in a foreign country without the consent of the government of that country founded on treaty.[3]

But in the case of *In re* Iasigi, 79 Fed. Rep. 751, the court, after examining the changes wrought in the Federal Judiciary Act of 1789 by the passage of the United States Revised Statutes, intimates that although the exclusive jurisdiction of the federal courts in civil suits against consuls is probably abolished, yet the revision was not intended to have, and does not in fact have, any effect upon the exclusive jurisdiction of the United States courts in criminal prosecutions against consuls. But the court specifically declared that it did not intend to determine this question in the case before it.

1. State Courts Held to Have Concurrent Jurisdiction in Suits Against Consuls. — In De Give *v.* Grand Rapids Furniture Co., 94 Ga. 605, it was held that neither the constitution nor the statutes of the United States confer exclusive jurisdiction in civil cases against consuls upon the federal courts, and that since the repeal of the eighth clause of the 711th section of the Revised Statutes of the United States concurrent jurisdiction is not denied to the state courts.

In Wilcox *v.* Luco, (Cal. 1897) 50 Pac. Rep. 758, *reversing* upon a rehearing 45 Pac. Rep. 676, it was held that the exclusive jurisdiction of suits against consuls was done away with by the amendment to section 711 of the United States Revised Statutes; but the court declared that a consul could not be deprived of the benefits of the provision of the United States Constitution extending the judicial power of the United States to all cases in which he is affected, "and that, unless there is some law by which he may invoke this judicial power for the purpose either of removing the cause into the courts of the United States before judgment, or to review the judgment of the state court, a state court can have no jurisdiction to entertain an action in which he is a defendant." It was concluded, however, that under section 709 of the Revised Statutes the United States Supreme Court has jurisdiction to review a judgment given against a consul in a state court. The court proceeded: "It is thus seen that, if a consul is sued in a state court, he can, in addition to any defense he may have to the cause of action set up against him, claim his right under the Constitution to have the matter determined by the courts of the United States; and, if judgment is rendered against him in the state court, he can have that judgment reviewed by the Supreme Court of the United States, and the sufficiency of his defense determined by that tribunal, and thus fully enjoy the rights given him by the Constitution. This right, however, may be waived by him, since he has the same right to rest content with the judgment of the state court, either by merely pleading his defense to the cause of action without invoking this provision of the Constitution, or by suffering default, as he would have to invoke its jurisdiction as a plaintiff; and, if so waived, he cannot, after judgment has been rendered against him, claim the right to a review of this judgment under a writ of error by the Supreme Court of the United States."

In Reclamation Dist. No. 551 *v.* Runyon, 117 Cal. 164, in a proceeding under section 5493½ of the Cal. Polit. Code to test the validity of an assessment levied for the reclamation of public lands, it was held that a defendant who was a consul of a foreign country could not plead his consular privileges in bar of the proceeding. The court declared that this was not an action *in personam;* while not strictly a proceeding *in rem* it partook of that character. The court said: "It is a process of law forming one of the steps by which the lien of the tax is fixed upon property. We entertain no doubt that a foreign consul may be bound by all legal processes and proceedings in state courts having this end in view. No more responsibility attaches to the person of the consul in such a proceeding than arises in an action to enforce the assessment, or than is occasioned by his appearance before a county board for the equalization of his assessment for purposes of state and county taxation."

2. Consul May Sue in State Courts. — Sagory *v.* Wissman, 2 Ben. (U. S.) 240, where the court said: "It is unquestionable that, under section 9 of the Judiciary Act of September 24, 1789 (1 U. S. Stat. at Large 76), the courts of the states have no jurisdiction of a suit against a foreign consul. Davis *v.* Packard, 7 Pet. (U. S.) 276. There is no objection, however, to the bringing of a suit by a consul in a state court. Although, by the Constitution (art. 3, § 2), the judicial power of the United States extends to all cases affecting consuls, yet Congress has not seen proper to make the jurisdiction of suits brought by consuls exclusive in the courts of the United States."

It would seem that where a consul files a bill in equity in a state court the court has jurisdiction of a cross-bill. Sagory *v.* Wissman, 2 Ben. (U. S.) 240.

3. 1 Kent Com. 42; Wheat. Int. Law (Dana's ed.), § 110; Authority and Jurisdiction of Consuls, 2 Opp. Atty.-Gen. 378.

Origin and Basis of Consular Jurisdiction. — In Dainese *v.* Hale, 91 U. S. 15, Bradley, J., said: "It cannot be contended that every

Foreign Consuls in the United States. — Neither under international law nor under the statute law of the United States has a consular officer of a foreign government a right to sit as judge or arbitrator within the territory of the United States and render decrees or orders affecting personal liberty which the courts of the United States are authorized or required to enforce, unless the consent of the United States to such jurisdiction has been given either by express statute or treaty stipulation.[1]

consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant; for it is conceded that this is not the case in Christian countries. And whilst, on the other side, it is also conceded that in pagan and Mohammedan countries it is usual for the ministers and consuls of European states to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British Foreign Office to their consuls in the Levant in 1844, as quoted by Mr. Phillimore, do not claim anything more. They say: 'The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries come exclusively under the control of the local magistracy depends originally on the extent to which that right has been conceded by the sultans of Turkey to the British crown; and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the Queen, in the exercise of the power vested in her Majesty by Act of Parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects. Int. Law, vol. 2, p. 273, § 276.' Historically, it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden in his treatise on 'The Origin and Nature of Consular Establishments,' that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe, and the prevalence of civil order in the several Christian states, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the states which the consuls represent."

General Doctrine as to Consular Jurisdiction in Turkey. — In regard to the general doctrine as to consular jurisdiction in Turkey and the Levant, the same learned judge, in the opinion in the case just cited, quoted the following from the "Consuls' Manual" of the United States of 1862: "As to all civil affairs to which no subject of Turkey is a party, Americans are wholly exempt from the local jurisdiction; and in civil matters, as well as criminal, Americans in Turkey are entitled to the benefit of 'the usage observed towards other Franks.' * * * The phrase in the second article engages that citizens of the United States in Turkey shall not be 'treated in any way contrary to established usages.' The 'established usages' are the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

"The general doctrine thus in force in the Levant, of the exterritoriality of foreign Christians, has given rise to a complete system of peculiar municipal and legal administration, consisting of:

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians, at length substituted in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts, — an arrangement introduced first by the legations of Austria, Great Britain, France, and Rusisa, and then tacitly acceded to by the legations of other foreign Christian nations."

Among Christian Nations the jurisdiction of consuls is generally confined to the decision of controversies in civil cases arising between the merchants, seamen, and other subjects of the state, in foreign countries; to the registering of wills, contracts, and other instruments executed in presence of the consul; and to the administration of the estates of their fellow subjects deceased within the territorial limits of the consulate. Wheat. Int. Law (Dana's ed.), § 110.

Ordering Imprisonment of Seamen. — A consul of the United States has no authority to commit seamen to prison, and an order of commitment from him does not relieve the master from responsibility. The William Harris, Ware (U. S.) 373, where the court said: "They [consuls] cannot take cognizance of the offenses of seamen in foreign ports and sentence them to punishment. When the master of a vessel finds it necessary, for the purpose of preserving discipline on board his ship and maintaining his authority, to treat any of his crew with severity, as a matter of prudence it may be well for him to consult the consul and take his advice. This is usually done on his own representation of the case, but the interposition of the consul has never been supposed to exempt the master from his own responsibility." See Wilson *v.* The Brig Mary, Gilp. (U. S.) 31.

1. Jurisdiction of Foreign Consuls in United States. — *In re* Aubrey, 26 Fed. Rep. 848. In this case it was held that while a British consul had authority under British statutes to deal with an offense committed by a British

Special Treaty Stipulations Conferring Jurisdiction on Consuls. — Numerous special treaties, however, exist between the United States and nations of Europe giving exclusive jurisdiction over disputes between masters, officers, and crews of the vessels of the respective parties, including questions of wages, to the consuls of such contracting parties.[1]

subject on board a British ship in British domains, yet he had no authority to demand that his jurisdiction be effectuated by process from a United States court under section 728, U. S. Rev. Stat. That section only gives to the courts of the United States power to enforce the judgments and awards of foreign consuls where jurisdiction is vested in them by treaty stipulation.

No foreign power has a right to exercise admiralty jurisdiction within the United States through its consuls except in pursuance of treaty provisions. Glass *v.* The Sloop Betsey, 3 Dall. (U. S.) 6.

1. U. S. Consular Regulations 1888, p. 25. See also 7 Am. Law Rev. 417; and the title SEAMEN.

Consuls of Norway and Sweden. — By treaty between the United States and the kingdom of Norway and Sweden (8 U. S. Stat. at Large 352), all differences arising between the captains and crews of vessels belonging to that kingdom shall be settled by the consuls thereof without the intervention of the local authorities, and an American citizen who ships as a seaman of a foreign vessel is within the purview of this treaty. The Marie, 49 Fed. Rep. 286. See also The Welhaven, 55 Fed. Rep. 80; Norberg *v.* Hillgreu, 5 N. Y. Leg. Obs. 177, 7 Am. L. Rev. 418.

Consuls of Sweden have exclusive jurisdiction in questions between the masters and crews of Swedish vessels relating to wages. Tellefsen *v.* Fee, 168 Mass. 188.

Prussian Consuls were given similar powers under the treaty of 1828, and the decision of such a consul in a case between the captain and crew of a Prussian vessel is not subject to review or interference by the United States District Court. The Elwine Kreplin, 9 Blatchf. (U. S.) 438, *reversing* 4 Ben. (U. S.) 413.

Belgium Consuls — "Internal Order of Merchant Vessels." — The treaty between the United States and Belgium, which gives to the consuls of the latter "exclusive charge of the internal order of the merchant vessels of their nation," and declares that they alone shall "take cognizance of differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts," does not confer on said consuls authority to take cognizance of crimes and offenses committed against the local laws of the country. The treaty makes no provision for the creation and organization of a consular court, nor does it even authorize the consul to act as a committing magistrate. *In re* Wildenhus, 28 Fed. Rep. 924.

Libel for Wages — *Italian Consuls.* — Under the treaty between the United States and Italy by which the consular officers of the contracting parties are given exclusive jurisdiction in cases between masters and crews, especially "those relating to wages," a justice of the peace has no power, under §§ 4546, 4547 of the Revised Statutes of the United States, to compel the clerk of the United States District Court to issue admiralty process against an Italian ship for the wages of a seaman thereon. The Salomoni, 29 Fed. Rep. 534.

German Consuls. — In similar cases arising on German ships the German consul has by treaty exclusive jurisdiction. The Burchard, 42 Fed. Rep. 608.

See also the title SEAMEN.

Where There Is No Consular Representative Within the Jurisdiction. — In The Amalia, 3 Fed. Rep. 652, the United States District Court in Maine entertained a libel against a Swedish vessel on the ground that there was no consular representative of Sweden in the district of Maine.

False Imprisonment. — Where a constable arrested the captain of a Norwegian vessel acting under process issued from a state court in a controversy over which, by treaty between the United States and the kingdom of Norway and Sweden, the consul of the latter had exclusive jurisdiction, the constable at the time of making the arrest being fully informed of the provisions of the treaty, it was held that he was liable in an action of tort for false imprisonment. Tellefsen *v.* Fee, 168 Mass. 189.

Status of Consuls of "Most Favored Nation." — It seems that consuls to the United States of a foreign nation whose consuls are by treaty upon the footing of those of "the most favored nation" are not entitled to jurisdiction in cases of this kind, that for vesting such a jurisdiction a special convention is necessary, the terms of which have been specifically designated and not left to inferences or general construction. Weiberg *v.* The Brig St. Oloff, 2 Pet. Adm. 432.

Assault by Master upon Seaman — No Consular Jurisdiction. — Where the master of an Italian vessel in one of the ports of the United States is guilty of a barbarous and malicious assault on a seaman of such vessel he is not protected by the terms of the consular compact between the United States and the kingdom of Italy, and the United States District Court may, in its discretion, take jurisdiction of the case for the protection of the seaman and the redress of his wrongs. The Salomoni, 29 Fed. Rep. 534. See also Enos *v.* Sowle, 2 Hawaiian 332, interpreting the treaty between France and the Hawaiian Islands, and holding it not to give consuls exclusive jurisdiction over crimes on the high seas.

Treaty Provisions as to Consular Jurisdiction in Non-Christian Countries. — See for instance the treaties of the United States with Persia, 11 U. S. Stat. at Large 710; with Turkey, 8 U. S. Stat. at Large 409.

In the case of *In re* Ross, 140 U. S. 462, Field, J., said: "The practice of European governments to send officers to reside in for-

Treaties Investing Consuls in Non-Christian Countries with Judicial Powers. — The consuls of Christian nations in Turkey, China, Persia, and other Mohammedan and pagan countries are generally invested by treaty with judicial functions and the right to maintain consular courts.

United States Statutes Regulating Consular Courts. — The consular courts of the United States in several eastern countries are, so far as is consistent with treaty provisions, regulated by the statutes of the United States.[1] Rights are administered in accordance with the laws of the United States where possible, or according to the common law and the law of equity and admiralty. Where these fail to furnish an appropriate remedy, the ministers to the countries including the courts may issue decrees having the force of law.[2]

Appeals from the Judgments of Consular Courts are provided for to the United States minister to the country where the courts are situated, who also has original jurisdiction in certain grave felonies.[3] Further appeals from the judgments of the consular courts of China and Japan lie in certain cases to the United States Circuit Court for the district of California.[4]

eign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen, and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over eastern Asia, and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people. The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."

British Consular Courts in Turkey. — The Ottoman government allows Great Britain to have jurisdiction between British subjects and subjects of other Christian states within Ottoman territory, and this jurisdiction is exercised by consular courts. Papayanni *v.* Russian Steam Nav., etc., Co., 2 Moo. P. C. N. S. 162, 9 Jur. N. S. 1160. See also Bulkeley *v.* Schutz, L. R. 3 P. C. 764, 8 Moo. P. C. N. S. 170; Messina *v.* Petrococchino, L. R. 4 P. C. 144, 20 W. R. 451.

The British consular court at Constantinople has jurisdiction in cases of collision within Turkish waters, and can exercise such jurisdiction *in rem* and *in personam*. The Laconia, 33 L. J. Adm. 11, 7 L. T. N. S. 164, 12 W. R. 90.

While these consular courts have no compulsory power over any persons except British subjects, yet foreigners may of their own accord submit to the jurisdiction of such courts with the consent of their sovereign. Papayanni *v.* Russian Steam Nav., etc., Co., 2 Moo. P. C. N. S. 162, 9 Jur. N. S. 1160.

As to the procedure in these courts, see Pitts *v.* La Fontaine, L. R. 5 App. 564.

1. U. S. Rev. Stat., § 4083 *et seq.*; Supplement to U. S. Rev. Stat., 2d ed., vol. 1, pp. 6–180.

The procedure in these courts is not regulated by the guaranties of the United States Constitution. *In re* Ross, 140 U. S. 453.

By Act of Congress consular courts in China are given jurisdiction concurrent with the United States District Court in cases of traffic in opium by citizens of the United States. Supp. to U. S. Rev. Stat., 2d ed., vol. 1, p. 539.

2. U. S. Rev. Stat., § 4086.

3. U. S. Rev. Stat., §§ 4089–4092; The Ping-On *v.* Blethen, 11 Fed. Rep. 607, *sub nom.* The Ping-On, 7 Sawy. (U. S.) 483.

4. U. S. Rev. Stat., §§ 4093–4096.

As to such appeals, see Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713; Tazaymon *v.* Twombley, 5 Sawy. (U. S.) 79; The Ping-On *v.* Blethen, 11 Fed. Rep. 607, *sub nom.* The Ping-On, 7 Sawy. (U. S.) 483. See further, as to the consular courts of China, 7 Opp. Atty.-Gen. 495; of Japan, 11 Opp. Atty.-Gen. 474; of Honolulu, 11 Opp. Atty.-Gen. 508; of Turkey, 9 Opp. Atty.-Gen. 296; Dainese *v.* Hale, 1 MacArthur (D. C.) 86.

A Sentence of Imprisonment pronounced by a consular court cannot be executed beyond the territorial limits of such court.[1]

Effect of Judgment of Consular Court. — In *England* it has been held that a plea of judgment recovered in an action brought in a consular court in a foreign country, and payment by the defendant of the amount, is a bar to an action brought in England for the same case.[2] But a defendant relying on a judgment of a tribunal summoned by a foreign consular court, as a bar to a party proceeding in England, is required to establish that the tribunal had jurisdiction by treaty and usage or voluntary submission.[3]

IX. Statutory Regulation of Consular Conduct. — The United States Revised Statutes contain various provisions regulating the conduct of consuls, among others, provisions prohibiting such officers being absent from their ports for more than ten days;[4] from corresponding on the public affairs of foreign governments with private persons or newspapers, or asking or accepting presents or emoluments from such governments.[5] Regulations requiring consuls to perform certain duties and make reports have been referred to above in this title.[6] The President is vested with the general power to make consular regulations.[7]

X. Compensation. — The mode of compensation of consuls is fixed in the United States by statute. The consular service is classified, and compensation provided for in the form of salaries or fees, or both.[8]

Transfer of Consulate — Change of Salary. — The transfer by Congress of a consulate from the class in which it had previously stood, to a lower class, so changes the law in regard to salaries that a consul becomes entitled only to the salary attached to the latter class.[9]

Official and Non-Official Fees. — A consul is required to account to the United States for official fees;[10] but non-official fees are the personal emoluments of the consul himself.[11]

1. Imprisonment of Convicts of Consular Courts, 14 Opp. Atty.-Gen. 522.

2. **Effect of Judgment of Consular Court.** — The Griefswald. Swab. Adm. 430. See Tamvaco *v.* Simpson, 13 L. T. N. S. 160.

3. **Judgment as Bar to Party Proceeding — What Necessary to Establish.** — Barber *v.* Lamb, 8 C. B. N. S. 34, 98 E. C. L. 95, 6 Jur. N. S. 981, 29 L. J. C. P. 295, 8 W. R. 461.

4. U. S. Rev. Stat., § 1741.

5. U. S. Rev. Stat., § 1751.

6. See *supra*, this title, *Consular Powers and Consular Acts*.

7. U. S. Rev. Stat., § 1752.

8. See U. S. Rev. Stat., tit. 18, c. 2; c. 3, § 1744; Mahoney *v.* U. S., 10 Wall. (U. S.) 62.

An Absence from His Post of more than sixty days during one year works forfeiture of pay for such period. Absence of Consular Officers, 12 Opp. Atty.-Gen. 410.

9. **Transfer of Consulates — Change of Salaries — Tangier.** — In Mathews *v.* U. S., 123 U. S. 182, suit was brought by the appellant to recover from the United States the balance claimed to be due him on account of salary as consul of the United States at Tangier from July 1, 1882, to June 30, 1886. The United States appropriation acts up to 1883 gave a salary of $3,000 per annum to consuls at Tangier, but the acts making appropriations for the year ending June 30, 1883, placed the salary of the consul at Tangier at $2,000 a year; and it was held that as this act by implication repealed the former acts, the consul could not recover the difference between the salaries after the year 1883. See Francis *v.* U. S., 22 Ct. of Cl. 403; Sawyer *v.* U. S., 22 Ct. of Cl. 326.

10. **Official Fees to Be Accounted For.**—The following fees must be accounted for to the United States: Fees which a consul collects for certifying extra copies of quadruplicate invoices on goods shipped to the United States; fees for certifying invoices for free goods imported into the United States; and fees collected for certificates of shipment of extra invoices. U. S. *v.* Mosby, 133 U. S. 273.

Interest on Public Moneys. — Where a consul deposits public money in a bank, the interest on this money belongs to the government. U. S. *v.* Mosby, 133 U. S. 273.

11. **Non-Official Fees Not to Be Accounted For.**— The following fees are not moneys which a consul is required to account for to the United States: those collected by a consul for the examination of Chinese immigrants going to the United States on foreign vessels; for cattle-disease certificates; for shipping and discharging seamen on foreign vessels sailing on the Chinese coast under the United States flag; for settling private estates; for acknowledgments and authentications of instruments certifying the official character and signature of notaries public; for certifying shipments of merchandise in transit through the United States to other countries. U. S. *v.* Mosby, 133 U. S. 273.

And so a consul need not account for fees which are received for taking affidavits, acknowledgments, and authentications for individuals in transactions which have no relation directly or indirectly with the official

Question for Court. — And whether the fees were official or non-official is a question of law, where there is no conflict of evidence as to what the acts were for which the fees were received by the consul.[1]

Payment of Money by Mistake. — A consul who pays over money for fees supposed to belong to the government, but really belonging to himself, is entitled to be credited with the amount at any time before the accounts are settled.[2]

England — When Entitled to Fees. — In England it has been held that if a consul acts between party and party, though he acts as consul, he may receive fees; but if he acts for his government, he is not entitled to any.[3]

Claim for Salary — Jurisdiction. — The United States Court of Claims has jurisdiction of claims for consular salaries.[4]

CONSULT. — See note 5.

CONSUMERS. — See note 6.

CONSUMMATE DOWER. — See the title DOWER.

CONSUMMATION. (See also the titles DIVORCE; MARRIAGE.) — The word "consummation," whenever used as something different from the mere consent or formal solemnization of marriage, has always been held to mean simply sexual intercourse, copulation, nothing more nor less.[7]

CONTAGION. — See note 8.

CONTAGIOUS DISEASES. — See the titles ANIMALS, vol. 2, p. 380; BOARDS OF HEALTH, vol. 4, p. 596, and references there given; HEALTH; QUARANTINE; LIBEL AND SLANDER.

business of the government. U. S. *v.* Badeau, 31 Fed. Rep. 697.

1. U. S. *v.* Badeau, 31 Fed. Rep. 697.

No Commission for Witnessing Payment on Discharge. — Where a discharge of sailors takes place in a foreign port before the United States consul, the payment need not be made before him, but in case it is so made he is entitled to no commission for witnessing the paying. Hathaway *v.* Jones, 2 Sprague (U. S.) 56.

2. U. S. *v.* Owen, 47 Fed. Rep. 797; U. S. *v.* Badeau, 33 Fed. Rep. 572.

3. De Lama *v.* Haldimand, 1 C. & P. 183, 11 E. C. L. 360.

4. Dainese *v.* U. S., 15 Ct. of Cl. 64.

Statute of Limitation — Persons Beyond the Seas. — Under the provisions of the United States Revised Statutes that every claim against the United States cognizable by the Court of Claims shall be barred unless presented within six years after the claim has accrued to the secretary of the Senate or the clerk of the House of Representatives, except in certain specified cases including "persons beyond the seas at the time the claim accrued," it was held that a consul of the United States residing in Japan was a person beyond the seas, within the exception of the statute, and, therefore, that his claims were not barred by the six years' limitation, and that the exception provided in the statute was not affected by the Act of March 3, 1887, known as the Tucker Act. U. S. *v.* Greathouse, 166 U. S. 601.

5. **Consulting.** — In Union Pac. R. Co. *v.* Graddy, 25 Neb. 854, it is said: "Webster, in his Unabridged Dictionary, defines the word ***consulting***, as 'Imparting advice or information. ***Consulting*** physician (med.), a physician who ***consults*** with an attending practitioner required in cases of disease (Dunglison).'"

Consultation. — A statute provided that before making an appointment to a rectory the bishop should ***consult*** with the churchwardens of the parish. It was held that the ***consultation*** here referred to was not intended to be by correspondence, but in a personal interview with the churchwardens. Johnson *v.* Glen, 26 Grant's Ch. (U. C.) 162.

Consultation — Life Insurance. (See also the title LIFE INSURANCE.) — The assured was asked as to the medical men whom he had at any time ***consulted***, and in his answer omitted the names of those who attended him during the time when he was suffering from the effects of an accident, from which he fully recovered. It was held that this was not a misstatement or suppression of facts, such as would vitiate the policy. Miller *v.* Confederation L. Ins. Co., 14 Ont. App. 238.

6. **Consumer of Water.** — A ***consumer*** of water, for the purposes of a waterworks act, was held to be a person who either actually enjoys or is ***consuming*** water, or is entitled so to do and has intimated his intention so to do. Cooke *v.* New River Co., 57 L. J. Ch. 386, 38 Ch. Div. 56, 58 L. T. 830, *affirmed* L. R. 14 App. 698.

7. Sharon *v.* Sharon, 75 Cal. 15, 79 Cal. 633, 693.

8. **Contagion and Infection.** — In Wirth *v.* State, 63 Wis. 55, the court said: "The words 'infection' and ***contagion*** are nearly synonymous, the only difference being, not in the infectious or ***contagious*** matter, but in the manner of its communication. . Infection is communicated from the sick to the well by a morbid miasm or exhalation diffused in the air. ***Contagion*** is communicated by actual contact."

CONTAIN. — See note 1.

CONTANGO. — See the titles STOCK BROKERS; STOCK EXCHANGE.

CONTEMPLATION. — The act of purposing, designing, or looking forward to anything.[2]

1. Contain and State. — The fifth cause for demurrer to a complaint, under section 339, Rev. Stat. *Indiana* 1881, is: "That the complaint does not state facts sufficient to constitute a cause of action." It has been held that it is not necessary in demurring to a pleading to use the exact language of the statute; other words of equivalent meaning may be employed. The word ***contain***, though not synonymous, is as broad in its meaning, as used in the above connection, as the word "state;" for, if a complaint does not ***contain*** facts sufficient to constitute a cause of action, it certainly does not state such facts. State *v.* Younts, 89 Ind. 314.

Contained In — Fire Insurance. (See also the title FIRE INSURANCE.) — In a policy of insurance on a stock of goods, the term "***contained*** in" a particular building was held to limit the risk to the time the goods remained in the same building in which they were when the policy was issued. Maryland F. Ins. Co. *v.* Gusdorf, 43 Md. 506; Annapolis, etc., R. Co. *v.* Baltimore F. Ins. Co., 32 Md. 37. See also Lyons *v.* Providence Washington Ins. Co., 14 R. I. 109. But see Holbrook *v.* St. Paul F. & M. Ins. Co., 25 Minn. 229, where it was held that the words "***contained*** in" were merely matter of description for identification of the property insured, and not a warranty that the property should remain in the same building. See also Everett *v.* Continental Ins. Co., 21 Minn. 76.

So in Niagara F. Ins. Co. *v.* Elliott, 85 Va. 962, it was held that the words "***contained*** in" designate the usual place of deposit of the property described, and that where the vehicles insured had been removed to a repair shop they were still covered by the policy. In Haws *v.* Philadelphia F. Assoc., 114 Pa. St. 431, it was held that goods might be removed. See also Noyes *v.* Northwestern Nat. Ins. Co., 64 Wis. 419.

The description of a horse as "***contained*** in the assured's barn," in a policy of fire insurance with a lightning clause attached, insuring said horse, is not a promissory contract or warranty that the horse is to be kept all the time in the barn, and that the policy shall cease to cover it the moment it leaves the barn. Haws *v.* Philadelphia F. Assoc., 114 Pa. St. 431.

Contained by Estimation, or More or Less. — See the title DEEDS. And see MORE OR LESS; ESTIMATION.

Inclusive of. — The word ***containing*** may easily admit of being construed as meaning "inclusive of," and not as in diminution of a general bequest. *Per* Sir S. Lushington in delivering judgment of P. C. in Henfrey *v.* Henfrey, 6 Jur. 356, 2 Curt. 468, 4 Moo. P. C. 29.

2. Contemplation of Insolvency or Bankruptcy. (See BANKRUPTCY, vol. 3, p. 785. And see the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 1; FRAUDULENT SALES AND CONVEYANCES; INSOLVENCY AND BANKRUPTCY.) — In an action for damages for the unlawful conversion by the defendant of certain personal property claimed by the plaintiffs, which the plaintiffs had purchased from a plate-glass company, but which the defendants levied on while still in the possession of the company and sold by the sheriff, the defendants claimed that any sale or transfer made by the company was void (2 Rev. Stat., 5th ed., 600, § 4), as at the time of the sale the company was in "***contemplation*** of insolvency" — in fact was insolvent. But the court held that mere knowledge of the imminency of insolvency ought not to prejudice an honest customer where the insolvency has not actually occurred, or the affairs of the company remain in the hands of its officers in the usual course of business, without the interference of a court; Robertson, J., saying: "'***Contemplation*** of insolvency' must also mean something more than mere expectation of its occurrence; it must include provision against its results so far as the transferee is concerned, and that can only be applicable where he is already a creditor, and the object is to take his debt out of the equal ratable distribution of the assets of the company when insolvent." Heroy *v.* Kerr, 21 How. Pr. (N. Y. Super. Ct.) 409.

So where A and B being partners in trade and apprehending embarrassment in their business, conveyed all their stock and real estate and certain notes to certain of their creditors to secure them against certain debts and liabilities, as sureties and indorsers on the notes of A and B, and afterwards suits were commenced upon certain of the debts so secured, on which judgment was rendered and execution was levied, but before judgment was rendered A and B became bankrupts under the act; and the personal chattels so assigned were, previous to the bankruptcy, sold, and the proceeds applied to the payment of the said debts, — it was held that the assignment was an act in "***contemplation*** of bankruptcy" within the United States Bankrupt Act of 1841, c. 9, and in preference of certain creditors, and was therefore void; the court, by Story, J., saying: "'***Contemplation*** of bankruptcy,' in the sense of the Bankrupt Act, is not limited or confined to those cases only where the bankrupts contemplate and intend to be volunteers in bankruptcy, nor even where they contemplate future proceedings by their creditors against themselves *in invitum* under the act; but it extends also to cases where the bankrupts contemplate a complete and total stoppage of their business and trade, and mean, under such circumstances, to provide for preferences to particular creditors, injurious to the interests of their other general creditors, whether any proceedings are or shall be *in futuro* instituted by or against them under the Bankrupt Act or not. In short, '***contemplation*** of bankruptcy' means a ***contemplation*** of becoming a broken-up and ruined trader,

according to the original signification of the term; a person whose table or counter of business is broken up, *bancus ruptus*." Everett *v.* Stone, 3 Story (U. S.) 446.

The words "in ***contemplation*** of bankruptcy," as used in the bankrupt law, mean a ***contemplation*** of a state of bankruptcy merely, and not an intention to take the benefit of the bankrupt law. And this means more than an inability to pay debts promptly; it contemplates a thorough breaking up of business. M'Lean *v.* Lafayette Bank, 3 McLean (U. S.) 587. In that case the court said: "It is contended that the words 'in ***contemplation*** of bankruptcy,' must be construed to mean, an 'intention to take the benefit of the bankrupt law.' An individual may be reduced to a state of bankruptcy, and yet, from pride or other motives, not intend to take the benefit of the law. Now, if the construction contended for be correct, such an individual might, in ***contemplation*** of a state of bankruptcy, prefer certain creditors to others, without any violation of the act. This would defeat the great object of the law, which was, to secure to creditors a *pro rata* distribution of the estate of the bankrupt. A construction which leads to this, requires no further comment. The term 'bankrupt,' as used in the act, has no technical significancy which sustains this view. 'In ***contemplation*** of bankruptcy,' means, in ***contemplation*** of a state of bankruptcy. Had Congress meant more than this, they would have said so. Had an intention to take the benefit of the act been the thing ***contemplated***, it would have been expressed in appropriate terms. But such a provision would not have reached the evil to be remedied. A state of bankruptcy reaches the evil, and the above provisions of the act give a remedy. A state of bankruptcy, or insolvency, means more than a mere inability to pay debts promptly. Such are the vicissitudes of trade, that but few of our enterprising merchants have not, at different periods in their course of business, been in this predicament. They were, perhaps, unable to meet the demands against them under any reasonable indulgence, had they closed their concerns. But their credit was good; they met promptly the current demands against them, and soon retrieved their affairs. A bankruptcy within the law, not only presupposes an inability to pay debts, but to continue in business. The preference of one creditor over another implies an inability to pay both, and a determination to prefer one to the other."

If there be an actual state of insolvency, a payment is within the prohibition of the statute. Robinson *v.* Attica Bank, 21 N. Y. 406. In that case the court said: "It is contended by the counsel for the defendant, that the 4th section of title 2 does not apply to the present case: 1st, because the clause of that section relied upon by the plaintiff is applicable only to a general assignment, and not to the payment of any creditor; 2d, because associations formed under the general banking law are not subject to any provisions of the statutes applicable to corporations created by special charters; and, lastly, that the Hollister Bank having paid the two acceptances in question to the defendant (who was the *bona fide* holder of them for value), before the appointment of the receiver, the payment (the transfer in question) was valid, and should be permitted to stand. In regard to the first of these reasons, it is sufficient to say that the statute referred to forbids any transfer or assignment in ***contemplation*** of insolvency. The case is within the letter of the statute, and most clearly within its spirit and policy. In this connection, the case of Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13, is referred to by the defendant's counsel. In that case, the assignment in question was general of all the effects of the Greene County Bank, in trust for the benefit of the creditors of the bank, without preference. The court held the assignment valid, although that was unnecessary to produce the result which was arrived at by the court. I confess my inability to perceive how the case can be regarded an authority for the defendant in this particular connection. It is true, Judge Savage, who delivered the opinion of the court, makes some remarks, which, perhaps, bear on the question whether the transfer in this case was in ***contemplation*** of insolvency; but upon that question, there seems to have been no point made between these parties. The remarks of Judge Savage are to the effect that an act, to be in ***contemplation*** of insolvency, must be done in anticipation of insolvency, that is, in view of a future state of things expected or ***contemplated*** to take place after the act is done. To exclude from the operation of the 4th section of the 4th title, under consideration, transfers and assignments made in view or ***contemplation*** of present existing insolvency of the corporation, would be to deprive it of its most efficacious, practical and useful quality and character. Such, I am persuaded, is not the true construction of the section."

Contemplation of Marriage. (See the title MARRIAGE SETTLEMENTS.) — A settlement in ***contemplation*** of marriage is obviously an ante-nuptial settlement. *In re* Sampson, 53 L. J. Ch. 460, 25 Ch. Div. 482. See also *In re* Leigh, 58 L. J. Ch. 306, 40 Ch. Div. 290.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the following titles in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE: *CONTEMPT*, vol. 4, p. 764; *COSTS*, vol. 5, p. 100; *EXAMINATION OF WITNESSES*, vol. 8, p. 70; *SUPPLEMENTARY PROCEEDINGS.*

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ADVICE OF COUNSEL, vol. 1, p. 894; *ATTORNEY AND CLIENT*, vol. 3, p. 278; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS; INJUNCTIONS; JURY AND JURY TRIAL; JUSTICE OF THE PEACE; LIBEL AND SLANDER; NOTARY PUBLIC; PRIVILEGED COMMUNICATIONS; PRODUCTION OF DOCUMENTS; RECEIVERS; REFEREES AND REFERENCES; WITNESSES.*

I. DEFINITIONS — 1. In General. — In its broad sense a contempt is a disregard of, or disobedience to, the commands of a public authority, legislative or judicial, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb its proceedings or impair the respect due to its authority.[1]

2. Contempt of Court. — Contempts of court have been variously classified by courts and text-writers. There are four essential classes, viz., direct and indirect, criminal and civil. Under one or the other of these classes every contempt of court will fall.[2]

1. State *v.* Ralphsnyder, 34 W. Va. 361, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 777; *In re* Macknight, 11 Mont. 135, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 777. See *infra*, this section, *Contempt of Court;* and *infra*, this title, *Contempt of Legislature.*

2. Contempts Classified. — Blackstone says: "The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts, or the person of the judges who preside there; or else are consequential, which, without such gross insolence or direct opposition, plainly tend to create an universal disregard of their authority." 4 Black. Com. 283.

Contempts are defined to be: (1) direct, such as are offered in the presence of the court while sitting judicially; or (2) constructive, such as, though not in its presence, tend to obstruct and embarrass the due administration of justice.

a. DIRECT CONTEMPT. — A direct contempt, or a contempt *in facie curiæ*, is noisy or tumultuous conduct in the presence of the court,[1] or so near thereto as to interrupt its proceedings;[2] or an open defiance of its powers or authority;[3] or disrespectful behavior or language to the presiding judge;[4] or any improper conduct tending to defeat or impair the administration of justice.[5]

b. INDIRECT CONTEMPT. — An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends by its operation to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the due administration of justice. An indirect contempt may be either criminal or civil.[6]

c. CIVIL AND CRIMINAL CONTEMPTS. — Contempts of court are further classified as criminal and civil. The division between the two is not uniformly defined in all jurisdictions.

Criminal Contempt. — Generally, it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority.

An illustration of the latter class is a contemptuous publication in a newspaper in reference to a case then pending. People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528.

1. Improper Conduct in Presence of Court. — Holman *v.* State, 105 Ind. 513; *Ex p.* Wright, 65 Ind. 504.

It is a contempt to strike an attorney in the courtroom, although the court is in recess and the judge is not on the bench, and the circumstances show that there was no intention of any incivility to the court or judge, and the cause of the assault had no connection with the court or its proceedings. U. S. *v.* Patterson, 26 Fed. Rep. 509.

Contempt by disrespectful language spoken in court is not excused by the fact that the judge was ill-tempered and discourteous. Holman *v.* State, 105 Ind. 513.

To call another a liar in the presence of the court and in the hearing of its officers is a contempt. Violent language and an assault made in a hall adjoining the courtroom and within the hearing of the court, it then being in session, is a contempt which the court may punish, within the meaning of the Act of March 2, 1831. U. S. *v.* Emerson, 4 Cranch (C. C.) 188.

It seems that it is a contempt for a man to seize his own property by force in open court. Com. *v.* Wilson, 1 Phila. (Pa.) 83.

2. Improper Conduct Near the Court — Interruption of Proceedings. — Whittem *v.* State, 36 Ind. 196.

Persons fighting in the yard of a courthouse, before the courthouse door, are guilty of a contempt in the presence of the court. State *v.* Woodfin, 5 Ired. L. (N. Car.) 199, 42 Am. Dec. 161.

3. Open Defiance of Court's Authority. — Holman *v.* State, 105 Ind. 513. See Rex *v.* Davison, 4 B. & Ald. 329, 6 E. C. L. 505.

4. Disrespectful Behavior to Presiding Judge. — Russell *v.* French, 67 Iowa 102; Holman *v.* State, 105 Ind. 516; Baker *v.* State, 82 Ga. 776, 14 Am. St. Rep. 192; *Ex p.* Pater, 5 B. & S. 299, 117 E. C. L. 299.

Where a contention arose between counsel as to whether a witness had not already answered a certain question, and the court decided that she had, and one of the attorneys sprang to his feet and said to the court in loud tones and insulting manner, "She has not answered the question," the attorney was guilty of direct contempt. Russell *v.* French, 67 Iowa 102.

A Court Is Not Dissolved by a Mere Recess from one day to the next, and contemptuous behavior in the courtroom and in the immediate presence of the judge, while he is there to open court, is misbehavior in the presence of the court. Baker *v.* State, 82 Ga. 776, 14 Am. St. Rep. 192.

5. Improper Conduct Tending to Defeat Administration of Justice. — Savin, Petitioner, 131 U. S. 267; Cuddy, Petitioner, 131 U. S. 280; *In re* Brule, 71 Fed. Rep. 943; Matter of Choate, 24 Abb. N. Cas. (N. Y. Oyer & T. Ct.) 430.

Attempting, while a witness is in the witness room, to deter him from testifying by offering him money, is a contempt in the presence of the court and punishable by the court as a contempt. Savin, Petitioner, 131 U. S. 267.

And approaching a juror in the presence of the court with the view of improperly influencing his actions in the event he should be sworn as a juror in the case is a contempt in the presence of the court. Cuddy, Petitioner, 131 U. S. 280.

Where a newspaper reporter conceals himself in the jury room for the purpose of taking notes of the deliberations of the jury, the contempt is committed in the immediate view and presence of the court, and is punishable summarily. Matter of Choate, 24 Abb. N. Cas. (N. Y. Oyer & T. Ct.) 430.

6. Indirect Contempts. — Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392; Matter of Dill, 32 Kan. 668, 49 Am. Rep. 505.

An indirect or constructive contempt has been defined by Hurd, J., speaking for the court in Matter of Dill, 32 Kan. 668, 49 Am. Rep. 505, as follows: "To constitute constructive contempt of court some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or bring the court or judge or the administration of justice into disrespect."

Civil Contempt. — When a person fails or refuses to do something which he has been ordered to do for the benefit of the opposite party to the cause, the punishment, when by imprisonment, is for the purpose of coercing the performance of the act, or when by fine, it is usually for the purpose of having it go to the opposite party as an indemnity for the damage suffered by him on account of the failure of his adversary to comply with the order. In both of these cases the contempts are civil.

Doing a Forbidden Act. — If the contempt consists in doing a forbidden act, injurious to the opposite party, the contempt is considered criminal.[1]

Line of Demarkation. — The dividing line between the acts constituting criminal and those constituting civil contempts becomes indistinct in those cases where the two gradually merge into each other. In those cases they have been classified and punished by the courts in some jurisdictions as criminal contempts, and by those in others as civil contempts. This, however, is largely a matter of definition. In most cases where they rest thus on the boundary line they are both, and so far as the rights of the contemnor are concerned, may be punished as either. Their punishment as a civil contempt, in most instances, serves the double purpose of a private compensation to the opposite party and a public vindication of the power and dignity of the court.

The Mode of Procedure for the punishment of a civil contempt is necessarily different from that for the punishment of a criminal one. In the one case it is done on the relation of the aggrieved party and for his benefit, and in the other it partakes largely of the nature of a criminal prosecution.[2]

1. **Criminal and Civil Contempts.** — Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105; People *v.* Oyer & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691; People *v.* McKane, 78 Hun (N. Y.) 154; State *v.* Knight, 3 S. Dak. 509, 44 Am. St. Rep. 809; *Ex p.* Robertson, 27 Tex. App. 628.

Proceedings in contempt are of two classes, viz.: (1) those instituted solely for the purpose of vindicating the dignity of the court; these are criminal; and (2) those instituted by private individuals for the purpose of protecting or enforcing their rights; these are civil. Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105.

In People *v.* Oyer & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691, the court thus defines each: "The occasion and result of proceedings for contempt furnish a clear and well-defined line of division separating them into two classes which have become somewhat mingled and confused by the use of a fixed but ambiguous nomenclature. * * * There may prove to be rare and exceptional cases which do not easily fall within either class, or some which so commingle the characteristics of both as to make their location doubtful and difficult; but in the main the division is exhaustive and clear. In one class are grouped cases whose occasion is an injury or wrong done to a party who is a suitor before the court, and has established a claim upon its protection; and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety, and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled which are essential to his particular rights of person or of property."

In State *v.* Knight, 3 S. Dak. 509, 44 Am. St. Rep. 809, the court said: "If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed till he complies with the order. The order in such a case is not in the nature of a punishment, but is coercive, to compel him to act in accordance with the order of the court. If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal, and conviction is followed by fine, or imprisonment, or both, and this is by way of punishment. In one case the private party is interested in the enforcement of the order, and the moment he is satisfied the imprisonment ceases. On the other hand, the state alone is interested in the enforcement of the penalty; it being a punishment which operates *in terrorem*, and by that means has a tendency to prevent a repetition of the offense in other similar cases."

2. **In the Case of a Civil Contempt** the proceeding for its punishment is at the instance of the party interested, and is civil in its character; in the case of a criminal contempt the proceeding for its punishment should conform as nearly as possible to proceedings in criminal cases, and the proper course, where it does not occur in the presence of the court, is for an informing officer to bring it to the attention of the court. Welch *v.* Barber, 52 Conn. 148, 52 Am. Rep. 567.

For Matters of Procedure see 4 ENCYC. OF PL. AND PR., p. 764.

II. Right of Courts and Officers to Punish — 1. Superior Courts of Record — *a.* The Right Inherent. — The right of every superior court of record to punish for contempt of its authority or process is inherent from the very nature of its organization, and essential to its existence and protection and to the due administration of justice.[1]

1. Right to Punish Inherent in Superior Courts of Record — *United States.* — Anderson *v.* Dunn, 6 Wheat. (U. S.) 204; U. S. *v.* Hudson, 7 Cranch (U. S.) 32; *Ex p.* Kearney, 7 Wheat. (U. S.) 40; *Ex p.* Robinson, 19 Wall. (U. S.) 505; *Ex p.* Terry, 128 U. S. 289; U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 440.

Alabama. — Easton *v.* State, 39 Ala. 551, 87 Am. Dec. 49; Gates *v.* M'Daniel, 4 Stew. & P. (Ala.) 69.

Arkansas. — Neel *v.* State, 9 Ark. 263, 50 Am. Dec. 209; Cossart *v.* State, 14 Ark. 540; State *v.* Morrill, 16 Ark. 384.

California. — People *v.* Turner, 1 Cal. 152; People *v.* Durrant, 116 Cal. 209, *citing* 3 Am. and Eng. Encyc. of Law (1st ed.) 780.

Colorado. — Hughes *v.* People, 5 Colo. 436; Cooper *v.* People, 13 Colo. 352; People *v.* Stapleton, 18 Colo. 568.

Connecticut. — Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

Georgia. — State *v.* White, T. U. P. Charlt. (Ga.) 136.

Illinois. — People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; Stuart *v.* People, 4 Ill. 395.

Indiana. — State *v.* Tipton, 1 Blackf. (Ind.) 166; *Ex p.* Wright, 65 Ind. 508; Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224; Holman *v.* State, 105 Ind. 513; Cheadle *v.* State, 110 Ind. 301, 59 Am. Rep. 199; McKinney *v.* Frankfort, etc., R. Co., 140 Ind. 97, *citing* 3 Am. and Eng. Encyc. of Law (1st ed.) 799; Baldwin *v.* State, 126 Ind. 31, *citing* 3 Am. and Eng. Encyc. of Law (1st ed.) 780.

Kansas. — *In re* Millington, 24 Kan. 214.

Kentucky. — Johnston *v.* Com., 1 Bibb (Ky.) 598; Gorham *v.* Luckett, 6 B. Mon. (Ky.) 638; *In re* Woolley, 11 Bush (Ky.) 95; Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480.

Maine. — Mariner *v.* Dyer, 2 Me. 165; Morrison *v.* McDonald, 21 Me. 550.

Massachusetts. — Cartwright's Case, 114 Mass. 230.

Michigan. — Langdon *v.* Wayne Circuit Judges, 76 Mich. 358.

Mississippi. — *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234; Watson *v.* Williams, 36 Miss. 331.

Nebraska. — Kregel *v.* Bartling, 23 Neb. 852.

New Hampshire. — State *v.* Copp, 15 N. H. 212; State *v.* Matthews, 37 N. H. 451.

New York. — Yates' Case, 4 Johns. (N. Y.) 318; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; Yates *v.* Lansing, 5 Johns. (N. Y.) 282.

North Carolina. — State *v.* Woodfin, 5 Ired. L. (N. Car.) 199 42 Am. Dec. 161.

Ohio. — Hale *v.* State, 55 Ohio St. 210.

Oklahoma. — Burke *v.* Territory, 2 Okla. 499.

Pennsylvania. — Respublica *v.* Oswald, 1 Dall. (Pa.) 319, 1 Am. Dec. 246; Williamson's Case, 26 Pa. St. 9, 67 Am. Dec. 376.

South Dakota. — State *v.* Knight, 3 S. Dak. 509, 44 Am. St. Rep. 809.

Tennessee. — Sanders *v.* Metcalf, 1 Tenn. Ch. 419.

Vermont. — *In re* Cooper, 32 Vt. 253.

Virginia. — Johns *v.* Davis, 2 Rob. (Va.) 729.

West Virginia. — State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

Statements of the Rule — Reasons Therefor. — In *Ex p.* Robinson, 19 Wall. (U. S.) 505, the court said: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

Blackstone, commenting on the possession of this power by every superior court of record, says: "Laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend." 4 Black. Com. 286.

In Cartwright's Case, 114 Mass. 238, Gray, C. J., said: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights."

In Watson *v.* Williams, 36 Miss. 341, Harris, J., said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it."

In State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257, Snyder, J., in a concurring opinion, forcibly observes: "It may be stated as a proposition of law unquestioned and unquestionable, that by the common law of England, as well as by the uniform decisions of the courts of this country, courts have

b. WHAT ARE SUPERIOR COURTS OF RECORD. — It is unnecessary to say that a superior court of record does not necessarily mean one that possesses appellate rather than original jurisdiction, or one that has general jurisdiction in the sense that it may try any cause, whether of legal or equitable, civil or criminal cognizance. The existence of any such court would be impossible under the prevailing judicial systems in this country; and such too has always been the case in England.[1] The terms "superior courts" and "inferior courts" had their origin in England. An inferior court is one whose jurisdiction is very limited, and subordinated to that of other courts. Generally it is a court not of record, and one whose proceedings may, if disputed, be determined by another tribunal. On the other hand, a court of record is a tribunal whose proceedings, when recorded, are entitled to full verity in all other courts, and cannot be called in question except by a writ of error from a higher court.[2] A court designated as a superior court is always one of record. The term "inferior court" is variously used, without meaning except as afforded by the context. Resort must be had to the act creating it, to ascertain whether it be, in the legal sense, a court of record and not an inferior one.

2. Inferior Courts — *a.* RULE AT COMMON LAW. — An inferior court could not, at common law, punish for a contempt of court.[3]

b. UNDER STATUTES. — In most of the *United States*, however, and in *England* and *Canada*, the power to punish certain acts as contempts has been conferred by statute on some inferior courts.[4] The power thus conferred will not be extended in any degree beyond the terms of the statute conferring it;[5]

the inherent power to punish for contempts in a summary manner, and that this power is an essential element and part of the court itself, which cannot be taken away without impairing the usefulness of the court, because it is a power necessary to the exercise of all others."

1. In the United States a superior court is usually a name prescribed by the constitution or statute for a court superior in jurisdiction to the inferior courts existing in the particular city, county, or district in which it may have jurisdiction. In some states the highest court of original jurisdiction is termed the Superior Court, as is the case in *Connecticut* and *Georgia*.

In England "superior courts" is the general designation given to the Courts of Chancery, Queens or King's Bench, and the former Courts of Common Pleas and Exchequer, which are now divisions of the Supreme Court.

2. See the title COURTS.

3. Reg. *v.* Lefroy, L. R. 8 Q. B. 134; Matter of Kerrigan, 33 N. J. L. 344; State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

As to what are inferior courts, whether of record or not, see generally *supra*, this title, *Superior Courts of Record;* and see the title COURTS.

4. Inferior Courts — Statutes — *England.* — Reg. *v.* Lefroy, L. R. 8 Q. B. 134; Reg. *v.* Rogers, 7 Mod. 28; Rex *v.* Revel, 1 Stra. 421; *Ex p.* Pater, 5 B. & S. 299, 117 E. C. L. 299.

Canada. — *In re* Pacquette, 11 Ont. Pr. Rep. 463; Armstrong *v.* McCaffrey, 12 New Bruns. 525.

Alabama. — Coleman *v.* Roberts, (Ala. 1896) 21 So. Rep. 449.

California. — *Ex p.* Rowe, 7 Cal. 181.

Indiana. — Murphy *v.* Wilson, 46 Ind. 537.

New Hampshire. — State *v.* Copp, 15 N. H. 212.

New York. — Rutherford *v.* Holmes, 5 Hun (N. Y.) 317; Matter of Watson, 3 Lans. (N. Y.) 408, *affirmed* in 5 Lans. (N. Y.) 466.

South Carolina. — Lining *v.* Bentham, 2 Bay (S. Car.) 1; State *v.* Johnson, 2 Bay (S. Car.) 385.

Tennessee. — State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

Texas. — *Ex p.* Robertson, 27 Tex. App. 628.

Vermont. — *In re* Cooper, 32 Vt. 253.

The power of an inferior court to punish for contempt does not extend to contempt out of court. Reg. *v.* Lefroy, L. R. 8 Q. B. 134.

5. Construction of Statutes Giving the Power. — Inferior courts have no power to punish as contempts the acts or omissions of parties or persons other than such acts or omissions as were prescribed by the code, § 4106, and subsections 1, 2, 3, 4, and 5, or by other statutory enactments. Contempts at common law which do not fall within the five clauses prescribed by the code, or by other enactments, are not punishable by the inferior courts. State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

The power to punish for contempt cannot be extended in the least degree beyond the limit which has been imposed by statute; hence it was held in Rutherford *v.* Holmes, 66 N. Y. 368, *affirming* 5 Hun (N. Y.) 317, that under the *New York* statute a justice had no power to commit a witness for refusal to answer a question until the party at whose instance the witness attended had first made affidavit as required by statute.

A Surrogate's Power to enforce "all lawful orders, process," etc., by attachment against the person (2 Rev. Stat. 221, § 6, subs. 4), does not authorize him to inflict a fine and then commit upon the fine. Matter of Watson, 5 Lans. (N. Y.) 466.

and, where conferred, the exercise of such power is sometimes made subject to the supervision of a superior court.[1] Generally the power of an inferior court to punish is limited to contempts committed *in facie curiæ*.[2]

c. JUSTICES OF THE PEACE. — The power to punish for a contempt *in facie curiæ* is frequently conferred on justices of the peace. Such power would seem to be necessary in order that decorum may be maintained while court is in session.[3] A general power to punish for contempt has in some jurisdictions been conferred on them.[4]

3. Non-judicial Bodies and Officers. — The question of the constitutionality of statutes attempting to delegate the power to punish for contempt, to such bodies and officers as city councils, tax commissioners, court commissioners, referees, notaries public, and the like, has been exhaustively treated elsewhere in this work, to which reference is here made.[5]

III. EFFECT OF STATUTORY DECLARATIONS — 1. In General. — Statutes conferring on courts of justice the right to punish for contempt are regarded as merely declaratory of the necessarily inherent powers possessed by them at common law.[6]

2. Abridgment of Right to Punish — *a.* COURTS CREATED BY LEGISLATURE. — When the court may be created by the legislature its powers and duties are dependent upon the act calling it into existence, and by that act, or by subsequent acts of the legislature, its right to punish for contempt may be abridged.[7]

1. *Ex p.* Rowe, 7 Cal. 181; Com. *v.* Newton, 1 Grant's Cas. (Pa.) 453.

Usurpation of Jurisdiction. — Every court of record has attached to its jurisdiction, as inherent in it, the power to punish for contempt; but if the court is one of inferior jurisdiction the Court of Queen's Bench has authority to intervene and prevent any usurpation of jurisdiction by it, and if it treats conduct as a contempt which there is no reasonable ground for so treating, may interfere to protect the party upon whom the power to commit or fine for contempt has been improperly exercised. *Ex p.* Pater, 5 B. & S. 299, 117 E. C. L. 299.

2. Reg. *v.* Lefroy, L. R. 8 Q. B. 134; *In re* Pacquette, 11 Ont. Pr. Rep. 463; Armstrong *v.* McCaffrey, 12 New Bruns. 527; State *v.* Copp, 15 N. H. 212; Matter of Watson, 3 Lans. (N. Y.) 408, *affirmed* 5 Lans. (N. Y.) 466; State *v.* Appelgate, 2 McCord L. (S. Car.) 110; State *v.* Johnson, 2 Bay (S. Car.) 385; State *v.* Johnson, 1 Brev. (S. Car.) 155; *In re* Cooper, 32 Vt. 253.

3. Justices of the Peace. — Coleman *v.* Roberts, (Ala. 1896) 21 So. Rep. 449; Newton *v.* Locklin, 77 Ill. 103; State *v.* Copp, 15 N. H. 212; Lining *v.* Bentham, 2 Bay (S. Car.) 1; *In re* Cooper, 32 Vt. 253; Armstrong *v.* McCaffrey, 12 New Bruns. 525.

A justice of the peace can punish for contempt a bystander who, when the justice intimated that he would find a person being tried before him guilty of assault, interrupted that he knew two persons who saw the affair, and refused to disclose their names. Coleman *v.* Roberts, (Ala. 1896) 21 So. Rep. 449.

A person is guilty of contempt who, in the presence of the court of a justice of the peace, assails his judgment with sneers, sarcasm, and irony. *In re* Cooper, 32 Vt. 253.

Justices of the peace, acting judicially, have power to commit to prison for a contempt committed in the face of the court. Armstrong *v.* McCaffrey, 12 New Bruns. 525.

Under the Illinois Statute, c. 79, art. 17, § 3, a justice of the peace has no power to commit for contempt *in facie curiæ*. Newton *v.* Locklin, 77 Ill. 103. He may, however, commit for failure to pay a fine which the statute authorizes. Newton *v.* Locklin, 77 Ill. 103; Hill *v.* Crandall, 52 Ill. 70.

4. *Ex p.* Robertson, 27 Tex. App. 628; Murphy *v.* Wilson, 46 Ind. 537.

Under art. 4539 of the Revised Statutes of *Texas*, justices of the peace may punish generally for contempts. *Ex p.* Robertson, 27 Tex. App. 628.

A justice of the peace has power to attach, and punish as for a contempt, jurors who, after being sent out to consult, escape and go home. Murphy *v.* Wilson, 46 Ind. 537.

5. See the title CONSTITUTIONAL LAW, vol. 6, p. 882.

6. U. S. *v.* Hudson, 7 Cranch (U. S.) 32; State *v.* Morrill, 16 Ark. 384; Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650; People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; Whittem *v.* State, 36 Ind. 196; *Ex p.* Smith, 28 Ind. 47; Langdon *v.* Wayne Circuit Judges, 76 Mich. 358.

7. Courts Created by Legislature — Abridgment of Right to Punish. — *Ex p.* Robinson, 19 Wall. (U. S.) 505.

United States Statutes. — Section 724, U. S. Rev. Stat., limits the power of the federal courts to punish for contempts, and defines contempts to be either: (1) contempts committed in the presence of the court; (2) the misbehavior of an officer of the court in his official transactions; or (3) the disobedience or the resistance by any officer, party, juror, or other person, to any lawful writ, process, order, rule, decree, or command of the court.

State Statutes. — Statutes defining contempts, both civil and criminal, have been enacted in many of the states, limiting the right of the court to punish as a contempt to the acts or defaults so defined, and also limiting the ex-

b. COURTS CREATED BY CONSTITUTION. — When, however, the court is a creature of the constitution, the better opinion seems to be that it cannot, by legislative enactment, be shorn of its inherent right to punish for contempts; nor can the legislature abridge that right,[1] although it may regulate its exercise.[2] The constitution may confer on the legislature the power to abridge the right of courts created by the constitution to punish for contempts, but in only a very few states of the Union has that been done.[3]

IV. TRIAL COURT EXCLUSIVE JUDGE OF CONTEMPTS — 1. General Rule. — At

tent of the punishment which may be imposed. See the various statutes.

1. Constitutional Courts. — State *v.* Morrill, 16 Ark. 385; Matter of Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78; People *v.* Stapleton, 18 Colo. 568; Holman *v.* State, 105 Ind. 513; Cheadle *v.* State, 110 Ind. 301, 59 Am. Rep. 199; Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480; *In re* Chadwick, (Mich. 1896) 67 N. W. Rep. 1071; Hawes *v.* State, 46 Neb. 150; Hale *v.* State, 55 Ohio St. 210.

A statutory enumeration of acts which shall constitute contempts does not deprive the Supreme Court of jurisdiction over other contempts. The court is governed in that respect by the rules of the common law. People *v.* Stapleton, 18 Colo. 568.

The power to punish for a contempt, as well as to determine whether a contempt has been committed, is inherent in all courts of superior jurisdiction; the legislature cannot prevent the one nor abridge the other. Cheadle *v.* State, 110 Ind. 301, 59 Am. Rep. 199.

A number of cases have arisen in this country relating to the power to punish under legislative limitation. In the few cases where the limitations were sought to be applied to courts created by the constitution, the courts have, doubtless through feelings of delicacy, generally found a way to avoid directly passing on their own jurisdiction to punish for a contempt committed to it, in this regard. Thus in *In re* Woolley, 11 Bush (Ky.) 95, where the contempt was to the Court of Appeals, the creation of the constitution, and it was claimed that the court had no power to punish a contempt except by an imprisonment not exceeding thirty hours, and by a fine not exceeding thirty dollars, unless the person was tried by a jury, the court in part said: "We will not in this case determine whether, under the constitution, the legislative department, under the guise of regulating proceedings in cases of contempts, can take from the judiciary the power to preserve its independence and equality by protecting itself against insults and indignities. * * * It remains an open question in this state, and we intend in this case to so leave it."

Invalidity of Act of Territory Abridging Right of Court Created by Congress. — The territorial District Courts being created by Act of Congress, and being endowed with those inherent powers of punishing contempts which courts of record possess at common law, those powers cannot be abridged by a power inferior to their creator, and the acts of territorial legislatures seeking to abolish or abridge such powers are invalid. Zimmerman *v.* Zimmerman, 7 Mont. 114; Burke *v.* Territory, 2 Okla. 499.

The Supreme Court of the United States, in an opinion by Justice Field, intimates that an Act of Congress limiting the power to punish for contempt, which in terms applied to all federal courts, could not limit the authority of the Supreme Court. The question before the court then related solely to the effect of the Act on a District Court created by Congress. *Exp.* Robinson, 19 Wall. (U. S.) 505.

North Carolina. — But see Matter of Oldham, 89 N. Car. 23, 45 Am. Rep. 673. In that case the court was not a creature of the constitution, but the constitution of the state provides that the legislature cannot deprive the judicial department of any power which rightly pertains to it. It was held that such provision was not infringed by the legislature in specifying what acts shall constitute contempts, and if a person is guilty of an act which is a contempt at common law, but not enumerated in the act, he cannot be punished for a contempt.

2. Regulation of Exercise of Power. — State *v.* Morrill, 16 Ark. 384; Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650; Wyatt *v.* People, 17 Colo. 261; People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; Worland *v.* State, 82 Ind. 49; Cheadle *v.* State, 110 Ind. 301, 59 Am. Rep. 199; Holman *v.* State, 105 Ind. 513; Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480.

In Wyatt *v.* People, 17 Colo. 261, the court said: "Though the legislature cannot take away from courts created by the constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded as binding."

3. Constitutional Limitations — Georgia and Louisiana. — The constitutions of Georgia and Louisiana provide that the power of the court to punish for contempts may be limited by the legislature. Ga. Const. art. 1, § 1, par. 20; La. Const. 166.

Where a person who was not a party to a judgment under which land was sold by a sheriff purchased the same at public outcry, and the sheriff made him a deed and put him in possession, such sale cannot be set aside and the deed canceled, by a motion or rule to show cause, on the ground that the purchaser and the sheriff fraudulently colluded at the sale, so that the land sold for an insignificant sum compared with its value. Under the constitution and laws of *Georgia* contempt of court in such case relates only to the officer in his official transactions, and to the disobedience or resistance by any person of any lawful writ, process, order, rule, decree, or command of court. Under §§ 5009 and 4711 of the code the court may summarily punish the sheriff for contempt, but not the purchaser by annulling the deed. Harrell *v.* Word, 54 Ga. 650.

Common Law every court of competent jurisdiction was the exclusive judge of contempts committed in its presence or against its process, and the exercise of its power to punish therefor could neither be raised on error [1] nor assailed collaterally by a resort to the writ of habeas corpus.[2]

When Appeal Lies. — This, in the absence of a statute granting the right of appeal, is still the prevailing rule, though in a few states the appellate courts will entertain an appeal from a judgment of conviction of contempt, whether civil or criminal.[3] In other states an appeal lies only when the contempt is

1. Trial Court the Exclusive Judge — Common-law Rule — *United States.* — King *v.* Wooten, 51 Fed. Rep. 612; *In re* Chetwood, 165 U. S. 443; *Ex p.* Kearney, 7 Wheat. (U. S.) 40; *In re* Debs, 158 U. S. 564; *In re* McDonald, 1 Lowell (U. S.) 100.

Alabama. — Hogan *v.* Alston, 9 Ala. 627; Gates *v.* M'Daniel, 4 Stew. & P. (Ala.) 69; Easton *v.* State, 39 Ala. 551, 87 Am. Dec. 49; Wyatt *v.* Magee, 3 Ala. 94; *Ex p.* Hardy, 68 Ala. 305.

California. — *Ex p.* Smith, 53 Cal. 204; Tyler *v.* Connolly, 65 Cal. 28; Larrabee *v.* Selby, 52 Cal. 506; *Ex p.* Clancy, 90 Cal. 553.

Colorado. — Bloom *v.* People, 23 Colo. 416; Teller *v.* People, 7 Colo. 451.

Florida. — *Ex p.* Edwards, 11 Fla. 174.

Illinois. — Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177.

Iowa. — Bloomington First Congregational Church *v.* Muscatine, 2 Iowa 69.

Kentucky. — Johnston *v.* Com., 1 Bibb (Ky.) 598.

Louisiana. — State *v.* Judge, 31 La. Ann. 116.

Mississippi. — Watson *v.* Williams, 36 Miss. 331; Shattuck *v.* State, 51 Miss. 50, 24 Am. Rep. 624.

Nevada. — Phillips *v.* Welch, 11 Nev. 187, 12 Nev. 158.

New Hampshire. — State *v.* Towle, 42 N. H. 540.

Tennessee. — *Ex p.* Martin, 5 Yerg. (Tenn.) 456, 26 Am. Dec. 276; State *v.* Galloway 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

Texas. — Craw *v.* State, 24 Tex. 12.

Utah. — People *v.* Owens, 8 Utah 20.

Vermont. — Vilas *v.* Burton, 27 Vt. 56.

Canadian Rule. — While a power resides in any court or judge, whether it be inherent, or by statute conferred on an inferior court, to punish contempts in its presence, it is the power or privilege of such court or judge to determine the facts, and the truth of those facts will not be reviewed by a higher tribunal. *In re* Clarke, 7 U. C. Q. B. 223.

In the Case of an Inferior Court, the superior court will intervene only for the purpose of preventing an usurpation of jurisdiction. *Ex p.* Lees, 24 U. C. C. P. 214; *In re* Clarke, 7 U. C. Q. B. 223.

2. *United States.* — *Ex p.* Watkins, 3 Pet. (U. S.) 193; *Ex p.* Yarbrough, 110 U. S. 651; *Ex p.* Terry, 128 U. S. 289; U. S. *v.* Pridgeon, 153 U. S. 48; *In re* Swan, 150 U. S. 637.

Alabama. — *Ex p.* Hardy, 68 Ala. 305.

California. — *Ex p.* Acock, 84 Cal. 51; Matter of Cohen, 5 Cal. 494; *Ex p.* Perkins, 18 Cal. 60; *Ex p.* Cottrell, 59 Cal. 417; *Ex p.* Smith, 53 Cal. 204.

Florida. — *Ex p.* Edwards, 11 Fla. 174.

Illinois. — *Ex p.* Smith, 117 Ill. 63.

Indiana. — State *v.* Tipton, 1 Blackf. (Ind.) 166.

Iowa. — Platt *v.* Harrison, 6 Iowa 79, 71 Am. Dec. 389; State *v.* Dunham, 6 Iowa 252; *Ex p.* Holman, 28 Iowa 88, 4 Am. Rep. 159; Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211.

Kansas. — Matter of Gunn, 50 Kan. 155.

Louisiana. — State *v.* Judge, 28 La. Ann. 882.

Maryland. — *Ex p.* Maulsby, 13 Md. 625.

Michigan. — Matter of Bissell, 40 Mich. 63; Matter of Morton, 10 Mich. 208.

Mississippi. — *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234; Shattuck *v.* State, 51 Miss. 50, 24 Am. Rep. 624.

Missouri. — *Ex p.* Goodin, 67 Mo. 637; *Ex p.* McKee, 18 Mo. 599.

New Hampshire. — State *v.* Towle, 42 N. H. 540.

New York. — People *v.* Spalding, 10 Paige (N. Y.) 284, *affirmed* 7 Hill (N. Y.) 301; People *v.* New York, 29 Barb. (N. Y.) 622; People *v.* Cassels, 5 Hill (N. Y.) 164; Kahn's Case, 11 Abb. Pr. (N. Y. Super. Ct.) 147; People *v.* Fancher, 2 Hun (N. Y.) 226; Matter of Percy, 2 Daly (N. Y.) 530; Kearney's Case, 13 Abb. Pr. (N. Y. Supreme Ct.) 459; Wicker *v.* Dresser, 13 How. Pr. (N. Y. Supreme Ct.) 331.

Texas. — Jordan *v.* State, 14 Tex. 436.

Utah. — Matter of Whetstone, 9 Utah 156; *In re* Harris, 4 Utah 5.

Vermont. — *In re* Cooper, 32 Vt. 253.

Wisconsin. — *In re* Perry, 30 Wis. 268; Matter of Blair, 4 Wis. 522; *In re* Milburn, 59 Wis. 24; *In re* Rosenberg, 90 Wis. 581.

Jurisdiction of Committing Court. — The court, however, must have jurisdiction not only over the person and the matter, and the organic power to render the judgment, but the act or default charged must in law constitute a contempt, else the judgment of the committing court will be a nullity. Being such it is usually so treated. See *infra, Jurisdiction of Court and Authority to Make Order.* Where the court lacks jurisdiction, its judgment may in *California* be reviewed by certiorari, or by appeal, as well as on habeas corpus. *Ex p.* Hollis, 59 Cal. 405.

Where the court lacks jurisdiction appeals are also entertained in *New York.* People *v.* Over & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691

3. No Statute — States Allowing Appeals — *Minnesota.* — Where the penalty is imposed for the benefit of a party to the suit the order is brought to the Supreme Court by appeal; where imposed as a punishment for a criminal contempt, by certiorari. State *v.* Leftwich, 41 Minn. 42.

Nebraska. — Hawes *v.* State, 46 Neb. 149;

not *in facie curiæ*.[1] and in others the test seems to be whether the punishment be for a criminal or civil contempt. In the latter case it may be reviewed in the appellate court.[2]

2. Statutes Authorizing Appeals. — In most states where there has been an abrogation or modification of the common-law rule in this regard, it has been brought about through legislative action. The circumstances under which judgments in contempt cases may be reviewed by appeal will be found in the notes.[3]

Beckett *v.* State, 49 Neb. 210; Boyd *v.* State, 19 Neb. 128; Johnson *v.* Bouton, 35 Neb. 903; Percival *v.* State, 45 Neb. 741.

Pennsylvania. — The Supreme Court has jurisdiction to review a proceeding for contempt from the Common Pleas. Com. *v.* Newton, 1 Grant's Cas. (Pa.) 453.

South Carolina. — See *In re* Stokes, 5 S. Car. 71, which seems to lay down the law in these broad terms.

1. When Contempt Not In Facie Curiæ — *Connecticut.* — Welch *v.* Barber, 52 Conn. 147, 52 Am. Rep. 567.

Illinois. — Contempts are of two kinds. When the proceedings are instituted for the purpose of punishing for misconduct in the presence of the court, or in disrespect of its authority or dignity, the proceeding is criminal; when for the purpose of affording relief between the parties to a cause in chancery, it is civil, and in such case an appeal will lie from an order of the court, either in imposing a fine or in discharging the defendant. People *v.* Diedrich, 141 Ill. 665. Where the contempt is criminal and not in the presence of the court, an appeal lies. Stuart *v.* People, 4 Ill. 396. But not where it is in the presence of the court, even where the court is one of inferior jurisdiction, as that of a magistrate. Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177.

Maine. — In this state exceptions to an order finding a person guilty of contempt in conveying real estate while a bill was pending in relation to the title thereto, were allowed by the judge presiding at the term and passed on subsequently by the full bench. See Snowman *v.* Harford, 57 Me. 398.

North Carolina. — Matter of Daves, 81 N. Car. 72; Matter of Walker, 82 N. Car. 95; *In re* Deaton, 105 N. Car. 59. See also State *v.* Woodfin, 5 Ired. L. (N. Car.) 199, 42 Am. Dec. 161, in which the court held that there could be no revision by appeal or certiorari of the judgment of a court of record imposing a punishment for a contempt committed *in facie curiæ*. The court expressed no opinion as to whether an appeal would be entertained when the contempt was not *in facie curiæ*.

Tennessee. — Hundhausen *v.* U. S. Marine F. Ins. Co., 5 Heisk. (Tenn.) 702, which *overrules*, though not in terms, State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404, where the court would not entertain an appeal from a judgment of conviction for contempt in publishing testimony in a newspaper.

2. *United States.* — The Supreme Court of the United States, on January 17, 1895, refused a writ of error to review the judgment of contempt pronounced by the trial court in the case of U. S. *v.* Debs, 64 Fed. Rep. 724. In that case the petitioners for a writ of error contended that they had done no act which came within the prohibition of the injunction. These questions, so far as they related to one of the petitioners, the Supreme Court afterwards held, on two hearings of a writ of habeas corpus, were not open to review. See *In re* Debs, 158 U. S. 565.

Connecticut. — Baldwin *v.* Miles, 58 Conn. 496.

Georgia. — Howard *v.* Durand, 36 Ga. 346, 91 Am. Dec. 767.

Kentucky. — Newport *v.* Newport Light Co., 92 Ky. 445, limiting the general doctrine as laid down in Johnston *v.* Com., 1 Bibb (Ky.) 598.

Michigan. — An order adjudging a party guilty of contempt for the nonpayment of alimony, and ordering him to stand committed, is an appealable final order. Matter of Bissell, 40 Mich. 63; Ross *v.* Ross, 47 Mich. 185; Haines *v.* Haines, 35 Mich. 138.

3. *Indiana.* — Worland *v.* State, 82 Ind. 49; Whittem *v.* State, 36 Ind. 196; Rev. Stat. 1881, §§ 1005–1013. In this state all cases of indirect contempts may be reviewed by appeal.

New Jersey. — In this state commitments for contempt in all inferior courts may be reviewed by appeal. P. L. 1884, p. 219.

New York. — An order adjudging a person guilty of the violation of an injunction is held to be a special civil proceeding, and therefore appealable under §§ 1356 and 1357 of the Code of Civil Procedure. People *v.* Dwyer, 90 N. Y. 402; *In re* De Long, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 363.

And an appeal is allowable from an order finding a defendant guilty of a contempt of court in supplementary proceedings. The right of the party affected by such order to appeal is governed by the provisions of the code authorizing supplementary proceedings, and not by the provisions relating to proceedings for the punishment of contempt. Forbes *v.* Willard, 37 How. Pr. (N. Y. Supreme Ct.) 193.

South Dakota. — Convictions for criminal contempts are appealable under Comp. Laws, § 7499 *et seq.* State *v.* Knight, 3 S. Dak. 509, 44 Am. St. Rep. 809.

Utah. — Where the contempt is civil, and the punishment is by fine to make good to his antagonist damages which have resulted to him from the contemnor's noncompliance, such order is appealable under the statute relating to appeals in special proceedings. *Ex p.* Whitmore, 9 Utah 441.

Virginia. — In Virginia the judgment of a court committing for contempt may, by statute, be reviewed by writ of error unless it be a proceeding "to compel the performance of any decree or judgment, or to enforce obedience

V. Jurisdiction of Court and Authority to Make Order — 1. In General. — The jurisdiction of the court is, of course, essential to the validity of the judgment of conviction. In the absence of jurisdiction the judgment is a nullity; and if the punishment be by imprisonment, the contemnor will be released on the hearing of a writ of habeas corpus.[1]

2. What Constitutes Jurisdiction. — There has been some conflict of authority as to the scope to be attached to the word "jurisdiction." Some of the older authorities regarded jurisdiction of the matter and the person sufficient to give the court jurisdiction to pronounce a judgment which could not be successfully assailed by this writ.[2] The rule now supported by high and abundant authority and excellent reason is, that the court must not only have jurisdiction over the person and the matter, but authority to render the particular judgment. The judgment is not conclusive upon the question of the authority of the court to render it. That, as well as any other matter which would render the proceedings void, is open to inquiry.[3]

thereto." Code of 1887, § 4053. See Wells *v.* Com., 21 Gratt. (Va.) 500; Stokeley *v.* Com., 1 Va. Cas. 330; Com. *v.* Dandridge, 2 Va. Cas. 408.

West Virginia. — In this state a judgment committing for a contempt, whether in or out of the presence of the court, may be reviewed by writ of error. Acts of 1882, c. 128, § 4; State *v.* Miller, 23 W. Va. 801.

Wisconsin. — All commitments for criminal contempts are appealable under § 115 of Statutes of 1858. State *v.* Giles, 10 Wis. 101.

1. Want of Jurisdiction — *United States.* — *Ex p.* Fisk, 113 U. S. 713; *Ex p.* Rowland, 104 U. S. 604.

Alabama. — *Ex p.* Hardy, 68 Ala. 303.

California. — *Ex p.* Hollis, 59 Cal. 406.

Colorado. — *In re* Brown, 4 Colo. 438; Wyatt *v.* People, 17 Colo. 252.

Illinois. — People *v.* Pirfenbrink, 96 Ill. 68.

Massachusetts. — Com. *v.* Sumner, 5 Pick. (Mass.) 360.

Michigan. — Matter of Morton, 10 Mich. 208; Matter of Hall, 10 Mich. 210.

Missouri. — *Ex p.* Crenshaw, 80 Mo. 447.

New York. — People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Shanks' Case, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 38; People *v.* Over & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691; Matter of Watson, 3 Lans. (N. Y.) 408, *affirmed* in 5 Lans. (N. Y.) 466, where a court not of record attempted to punish a contempt not *in facie curiæ*.

Pennsylvania. — Com. *v.* Perkins, 124 Pa. St. 36.

Rhode Island. — Matter of Hammel, 9 R. I. 248.

South Carolina. — James *v.* Smith, 2 S. Car. 183.

Vermont. — *In re* Leach, 51 Vt. 630.

Wisconsin. — Matter of Blair, 4 Wis. 522.

2. Former View — Jurisdiction of Person and Subject-Matter Sufficient. — The leading case in this country laying down this doctrine is the case of *Ex p.* Kearney, 7 Wheat. (U. S.) 40, in which the opinion was delivered by Mr. Justice Story. In that case the petitioner had been committed for contempt for refusing to answer a question which tended to criminate him. Irrespective of whether the refusal of the witness to answer the question constituted contempt of court, it was held that on application for a writ of habeas corpus, or on appeal, the only question which could be considered was the jurisdiction of the court over the party and the subject-matter, and that the jurisdiction to render the judgment in question could not be inquired into. See also Williamson's Case, 26 Pa. St. 9, 67 Am. Dec. 374; *Ex p.* Kellogg, 6 Vt. 509; State *v.* Towle, 42 N. H. 541, for general expressions of this old doctrine.

3. Jurisdiction to Render Particular Judgment. — People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; People *v.* Over & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691; *Ex p.* Degener, 30 Tex. App. 566; Holman *v.* Austin, 34 Tex. 668; *Ex p.* Fisk, 113 U. S. 713.

Jurisdiction of the person and of the subject-matter are not alone conclusive, but the jurisdiction of the court to render the particular judgment is a proper subject of inquiry; and if upon the whole record it appears that the judgment was unwarranted by law, the contemnor will be released on the hearing of a writ of habeas corpus. People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

Jurisdiction is of two kinds: (1) The power to hear and determine the particular matter; (2) the power to render the particular judgment which was rendered. If the commitment be against law, as for a matter for which by law no man ought to be punished, the court will discharge the contemnor on the hearing of a writ of habeas corpus. Again, if the court had no power to render the judgment, the writ of habeas corpus will lie. The party is entitled to the writ, not merely where the court is without jurisdiction of the cause, but where it has no authority or power to condemn the prisoner. Where, therefore, a grand jury of one court, acting in good faith under their supposed authority conferred by law, issued an attachment for the judge of another court, without any direction as to the manner or time of serving the same, and the bailiff of the grand jury served it while the judge was upon the bench holding court, but in a quiet, respectful manner and without interrupting the business of the court, it was held that this did not constitute contempt on the part of the grand jury, and a judgment so holding was unauthorized and void. *Ex p.* Degener, 30 Tex. App. 566.

3. Instances of Jurisdictional Defects. — Such want of jurisdiction to render the particular judgment may arise either from a constitutional prohibition against the infliction of such punishment in such case,[1] or from the infliction of a punishment in excess of that allowed by law,[2] or the commitment may be for an indefinite time,[3] or it may arise from the punishment as a contempt of an act

In a late work on jurisdiction the author, in discussing the three essential elements necessary to render a conviction valid, says: "These are, that the court must have jurisdiction over the subject-matter, the person of the defendant, and authority to render the particular judgment. If either of these elements is lacking the judgment is fatally defective." Brown on Jurisdiction, § 110.

1. See *infra*, *Imprisonment to Enforce Payment of Money Demands—Constitutional Prohibitions against Imprisonment for Debt;* and *Contempt by Witnesses — Self Crimination.*

Punishment Cruel and Unusual. — Where a person is confined in jail for the purpose of coercing the payment of a fine for contempt of court, he cannot be put at hard labor on the streets, as is provided may be done with persons who may be imprisoned for a punishment. Such punishment is cruel and unusual, and therefore unconstitutional. *In re* Fil Ki, 80 Cal. 201.

2. Imposition of Punishment Not Allowed by Law. — *Ex p.* Edwards, 11 Fla. 174; Haines *v.* Haines, 35 Mich. 138; People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Matter of Patterson, 99 N. Car. 407; Matter of Walker, 82 N. Car. 95; Com. *v.* Newton, 1 Grant's Cas. (Pa.) 453; *In re* Pierce, 44 Wis. 411.

A statute providing expressly that when the court, in contempt proceedings, orders the payment of money to the injured party, this shall stand instead of a fine, the imposition of a criminal fine, in addition to the requirement of payment to the party, is erroneous and unwarranted. Haines *v.* Haines, 35 Mich. 138.

Under the *Wisconsin* statute the utmost punishment for contempt is six months' imprisonment, and where the court imposed a fine and committed the contemnor until paid, it was held that such imprisonment was illegal, and that the contemnor was entitled to be released on application for a writ of habeas corpus. *In re* Pierce, 44 Wis. 411.

Under the *Pennsylvania* statute a witness in contempt for not obeying a subpœna could only be punished by fine. The punishment of a witness by suspending him from his professional functions as a lawyer was held to be illegal. Com. *v.* Newton, 1 Grant's Cas. (Pa.) 453.

Judgment of Lower Court Corrected and Prisoner Remanded. — Where a statute provided that when there was a committal for the nonpayment of a fine for contempt, such imprisonment should not exceed one day for every three and one-third dollars of the fine, and where there was a committal for an indefinite time, the Supreme Court modified the judgment so as to conform to the law, and remanded the prisoner. State *v.* Myers, 44 Iowa 580.

3. Order of Commitment for Indefinite Period. — Yoxley's Case, 1 Salk. 351; Rex *v.* James, 5 B. & Ald. 894, 7 E. C. L. 292; Cromartie *v.* Bladen, 85 N. Car. 211; Matter of Hammel, 9 R. I. 248; *In re* Leach, 51 Vt. 630; People *v.* Pirfenbrink, 96 Ill. 68; State *v.* Myers, 44 Iowa 580; Bickley *v.* Com., 2 J. J. Marsh. (Ky.) 575; *Ex p.* Alexander, 2 Am. L. Reg. 44; Matter of Watson, 3 Lans. (N. Y.) 408; Com. *v.* Roberts, 4 Pa. L. J. 126.

Thus where an order and mittimus for the imprisonment of a person was not for any definite period, it was held that the order and process was void, and the prisoner was discharged on habeas corpus. People *v.* Pirfenbrink, 96 Ill. 68.

A person who is summoned before a commissioner appointed by a court of record to take testimony, or before a town council authorized by law to take testimony, may be committed to prison for contempt in refusing to testify, but if the commitment be indefinite as to time the prisoner is entitled to be discharged under a writ of habeas corpus. Com. *v.* Roberts, 4 Pa. L. J. 126; Matter of Hammel, 9 R. I. 248.

A court cannot punish for contempt by fine as for criminal offense, and then commit until the fine is paid or until the further orders of the court. Persons so committed will be discharged on application for a writ of habeas corpus. Matter of Watson, 3 Lans. (N. Y.) 408, *affirmed* in 5 Lans. (N. Y.) 466.

In *Ex p.* Alexander, 2 Am. L. Reg. 44, a commitment for a criminal contempt "until the further order of the court" was held void.

Where Mittimus and Order Fail to Show Nature of Contempt. — It was held in *In re* Leach, 51 Vt. 630, where a person was committed to jail for contempt of court in failing to pay money by order of the court, that if it was imprisonment as punishment for a criminal contempt, it was void as being without limit, and if it was imprisonment until the contemnor purged himself by payment of the money, he was held in a matter in which he had had no opportunity to be heard.

Where Not Void. — If the order of commitment be for the purpose of coercing the payment of money, or the performance of some act adjudged to be within the power of the contemnor, the commitment need not limit the duration of the imprisonment. Matter of Allen, 13 Blatchf. (U. S.) 271; *Ex p.* Crittenden, 62 Cal. 534; State *v.* Tipton, 1 Blackf. (Ind.) 166; Kernodle *v.* Cason, 25 Ind. 362; Chapel *v.* Hull, 60 Mich. 167; Jernee *v.* Jernee, 54 N. J. Eq. 657; Forrest *v.* Price, 52 N. J. Eq. 16; People *v.* Tamsen, 17 Misc. Rep. (N. Y. Supreme Ct.) 212; Cromartie *v.* Bladen, 85 N. Car. 211; State *v.* Irwin, 30 W. Va. 405.

It must, however, specify the amount to be paid or the act to be performed, so that the contemnor may purge himself without further application for instructions. Thus where a party is committed by an order in equity for the nonpayment of alimony, a fine, and costs, the amounts must be specified in the commitment. Jernee *v.* Jernee, 54 N. J. Eq. 657.

or default which in law is not contempt.[1]

VI. Imprisonment to Enforce Payment of Money Demands — 1. In General. — **In the Earlier Days of the Court of Chancery** its decrees operated only *in personam*, and the sole method of enforcing a decree for the payment of money due on a contract was by process of contempt.

Other Methods Have Been Provided by Statute both in the *United States* and in *England*,[2] and most of our state constitutions, containing various limitations, forbid imprisonment for debt. In some states where the constitutional prohibition against imprisonment for debt is identical there is conflict of judicial opinion as to when a commitment for failure to pay money ordered to be paid into court constitutes imprisonment for debt.[3]

Act Once Adjudged to Be in Contemnor's Power Not Res Adjudicata. — When an act commanded is adjudged to be within the power of the contemnor and he is imprisoned for not performing it, the doctrine of *res adjudicata* cannot be invoked to deprive him of another examination. If a mistake were made in the judgment, his imprisonment would be perpetual if he could never obtain another investigation. In *Georgia*, where contempt proceedings are reviewed by the Supreme Court, a defendant was committed by the court for contempt in having failed to pay money, of which he was adjudged to be possessed, to a receiver, until he had purged himself by making such payment. After several months confinement he filed a petition praying to be allowed to purge himself by showing his inability to comply with the order. A demurrer was sustained to the petition, on the ground that it showed no fact transpiring since the making of the order. On appeal the Supreme Court remanded the cause with directions that the court refer the matter for reinvestigation to a register, notwithstanding the legal conclusiveness of the judgment in the first instance. Ryan *v.* Kingsbery, 89 Ga. 228.

1. Where Act Charged Is No Contempt. — *Ex p.* Fisk, 113 U. S. 713; *Ex p.* Hollis, 59 Cal. 406; People *v.* Oyer & T. Ct., 101 N. Y. 245.

The courts of the United States sitting in New York have no power to compel a party to submit to an examination by his adversary at a time previous to the trial, as provided by the New York statute, and where a person is punished by imprisonment for a refusal to do so he will be released on the hearing of a writ of habeas corpus. *Ex p.* Fisk, 113 U. S. 713.

In *New York* all criminal contempts are enumerated by the Code Civ. Proc., § 8, and it is held that an act which is not so enumerated and which in law is not a civil or private contempt, cannot be punished by the court as a contempt. People *v.* Oyer & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691.

A superior court has no jurisdiction to find a party guilty of contempt and imprison him for not turning over to a receiver in insolvency money held by him adversely to the insolvent debtor. Such a power cannot be exercised unless he holds the money as trustee for the estate of the insolvent debtor, and where such is not the case he will be released on a writ of habeas corpus. *Ex p.* Hollis, 59 Cal. 406.

2. Enforcement of Payment of Money Decrees. — Irrespective of constitutional prohibitions against imprisonment for debt, when another adequate method for enforcing a decree in chancery for the payment of money is enacted, it is not cumulative but supersedes imprisonment for contempt to enforce collection. Thus it has been held in Esdaile *v.* Visser, 13 Ch. Div. 421, that since the adoption of the Debtors' Act (32 and 33 Victoria, c. 62) a person who makes default in the payment of money which he has been ordered by the court to pay, cannot be attached for contempt in failing to obey the order, but must be proceeded against under the Debtors' Act. See Fassett *v.* Tallmadge, 14 Abb. Pr. (N. Y. Supreme Ct.) 188; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; People *v.* Riley, 25 Hun (N. Y.) 587; People *v.* Conner, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430.

3. Inability to Pay. — It may be said, that irrespective of constitutional prohibitions against imprisonment for debt, and irrespective of the fact that statutory methods for enforcing decrees for the payment of money have been provided, a failure to pay through absolute inability lacks the essential element of a contempt. Matter of Ockershausen, 59 Hun (N. Y.) 200.

In a recent case in the Court of Chancery of New Jersey, the chancellor, after referring to a condition in which the one against whom a money decree was rendered, might find himself, forcibly says: "Such a condition, when fairly proven to be actually existing when the decree was made, is to be considered as a showing of cause why the supposed offense was not committed. If it be true that the defendant could not, at any time since the making of the decree for payment, perform it, he certainly could not be in contempt of it; for the existence of a contempt of this character presupposes that, being able to perform the decree, the defendant wilfully omits or refuses to obey." Walton *v.* Walton, 54 N. J. Eq. 607. A prayer for an attachment for contempt was refused.

Trial Court Judge of Party's Inability. — Where the obligation, for the failure to pay which, a person may be committed, is not a debt, and the order of commitment is not therefore unconstitutional, the trial court is, in those states which do not permit an appeal from an order adjudging a person guilty of contempt, the exclusive judge of the person's ability to pay. See *infra*, *Nonpayment of Alimony*.

In a state where an order committing for a contempt is appealable it was held that where it appeared from the testimony that the failure of a person to pay over money, constituting a

2. Constitutional Prohibitions Against Imprisonment for Debt — *a.* IN GENERAL. — In order that the seeming irreconcilability of some of the decisions in this regard, as shown by cases hereafter cited, may be explained, it is deemed necessary to make a synopsis of the various constitutional prohibitions, especially as in the majority of instances the opinion of the court fails to quote the section in the constitution, and in several cases does not declare whether or not the constitution contains any prohibition.[1]

b. OBLIGATIONS IN TORT — (1) *Generally.* — Though many of our state constitutions expressly except from the operation of the section prohibiting imprisonment for debt, those obligations arising in tort or *ex delicto*, such obligations are not "debts," and accordingly an imprisonment for contempt of court, in failing to obey a decree ordering the payment of money in such a case, in states where the constitution contains no limitation as to the nature of the obligation, is held not to be an imprisonment for debt.[2] There has

trust fund, on the order of the court, resulted from absolute inability to obey the order, he was not guilty of a contempt of court, and the order was reversed and the defendant discharged from custody. Register *v.* State, 8 Minn. 214.

1. The Federal Constitution contains no provision abolishing imprisonment for debt.

The United States Revised Statutes, § 990, provides, however, that there shall be no imprisonment for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been, or shall be, abolished.

State Constitutions. — The constitutions of the states of *Maine*, *New Hampshire*, *Vermont*, *Rhode Island*, *Connecticut*, *New York*, *Massachusetts*, *Delaware*, *Maryland*, *Virginia*, and *West Virginia* do not forbid imprisonment for debt in any case, but the statute law of each of these states forbids, with various limitations, such imprisonment.

The constitutions of the states of *Alabama*, *Minnesota*, *Missouri*, *Georgia*, *Tennessee*, *Texas*, and *Mississippi* prohibit without limitation imprisonment for debt.

The constitutions of *Arkansas*, *Florida*, *Indiana*, *Kansas*, *Nebraska*, *Iowa*, *North Carolina*, and *South Carolina* prohibit the imprisonment of any person for debt except in cases of fraud.

The *California* constitution expressly declares that civil actions founded on torts are within the prohibition, except in cases of wilful injury to person or property, or in cases of fraud.

The *New Jersey*, *Michigan*, and *Wisconsin* constitutions limit the prohibition to actions or judgments founded on contract, and to cases of fraud.

The *Michigan* constitution provides that no person shall be imprisoned for debt arising out of, or founded on a contract, expressed or implied, except in cases of fraud, or breach of trust, or of moneys collected by public officers, or by some one in professional employment.

The constitutions of *Pennsylvania*, *Kentucky*, *Illinois*, *Colorado*, *Montana*, and *North Dakota* prohibit imprisonment for debt unless upon refusal of the debtor to deliver up his estate to his debtors; or in cases of fraud.

The *Oregon* and *Washington* constitutions prohibit imprisonment for debt except in cases of absconding debtors.

The Oregon constitution contains the further limitation of cases arising in fraud.

The *Nevada* constitution adds to the cases of fraud, as exceptions, those of libel and slander.

2. Obligations Ex Delicto. — *Ex p.* Hardy, 68 Ala. 303; Harris *v.* Bridges, 57 Ga. 407, 24 Am. Rep. 495; Smith *v.* McLendon, 59 Ga. 523; People *v.* Cotton, 14 Ill. 414. See also Howland *v.* Needham, 10 Wis. 498; Scheunert *v.* Kaehler, 23 Wis. 523; Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774, to the same effect.

Under the Constitution of Alabama of 1875 which provides that "no person shall be imprisoned for debt," such provision is not to be construed to prohibit the general assembly from enacting laws authorizing imprisonment for liabilities originating in tort or *ex delicto*; it has reference only to obligations *ex contractu*. *Ex p.* Hardy, 68 Ala. 303.

Deprivation of Possession of Personalty Held Tort. — The owner of personalty is entitled to the possession thereof, and any deprivation of such possession is a tort. Proof of the contemnor's inability to produce the property on a return of a writ of habeas corpus, issued at his instance, would not authorize his discharge. Harris *v.* Bridges, 57 Ga. 407, 24 Am. Rep. 495.

The Illinois Constitution, like the Georgia and Alabama Constitutions, contains no express limitation as to obligations founded in tort, and it was held that the constitutional prohibition against imprisonment for debt relates only to obligations founded on contract, and that it did not extend to actions for tort. People *v.* Cotton, 14 Ill. 414.

North Carolina Constitution. — The same construction has been given to the North Carolina constitution, which contains no expressed limitation as to the nature of the obligation. See generally Kinney *v.* Laughenour, 97 N. Car. 325; Long *v.* McLean, 88 N. Car. 3; Hoover *v.* Palmer, 80 N. Car. 313; Moore *v.* Mullen, 77 N. Car. 327; Moore *v.* Green, 73 N. Car. 394, 21 Am. Rep. 470.

Under Canadian Statute. — And the same construction has been given to the Canadian statute abolishing process of contempt for the nonpayment of money as between "debtor and creditor." Thus, where the defendant was by judgment directed to procure the discharge of an incumbrance wrongfully placed

been some conflict of authority in judging the nature of the obligation for the failure to pay which the contemnor may be committed, but it may be regarded as well settled that when it does not arise from contract, either expressed or implied, it is not a debt within the meaning of the constitutional prohibitions.

(2) *Conversion of Money by Attorney.* — The constitutions of several states, prohibiting imprisonment for debt, contain an exception excluding persons acting in a fiduciary capacity.[1] In other states, whose constitutions do not contain such exception, it has been held that money belonging to a client, which has been collected and appropriated to his own use by a faithless attorney, creates not merely a debt, but renders the attorney liable to an action in tort, and, therefore, that imprisonment for failing to pay over money so collected is not imprisonment for debt.[2]

(3) *Money Fraudulently Withheld.* — Although a committing court of competent jurisdiction is usually the exclusive judge of the fraudulent conduct of the contemnor, as to the matter in which the judgment of contempt of court is made,[3] in those states where such judgments are examined on appeal or by

by him on the plaintiff's land, the court held that he could be attached for a failure to comply with the judgment, although the payment of money might become necessary to effect what was required. Male *v.* Bouchier, 1 Ch. Chamb. (Ont.) 359.

1. Fiduciaries. — The constitutions of *Michigan*, *Arkansas*, *Florida*, *Indiana*, *Kansas*, *Nebraska*, *Iowa*, *North Carolina*, *South Carolina*, *California*, *New Jersey*, *Wisconsin*, *Pennsylvania*, *Kentucky*, *Illinois*, *Colorado*, *Montana*, *North Dakota*, *Oregon*, and *Nevada*, except cases of fraud. The *Michigan* constitution expressly excludes from the operation of the section prohibiting imprisonment for debt, those cases in which money may have been collected by any one in professional employment.

2. Attorney and Client. — Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774; Smith *v.* McLendon, 59 Ga. 523. The same conclusion was arrived at by the courts in both of these cases. In the first case an attorney who had recovered a judgment for his client, bid off the land of the judgment debtor, sold under execution, in his own name, and afterwards sold it and, instead of accounting with his client, converted the proceeds to his own use. The lower court had decided that by reason of the relation between attorney and client the claim was founded upon a contract, and the attorney was not liable to arrest. In an exhaustive and able opinion, and after a careful review of authorities, the court concludes, first, that the claim was of such a nature that either an action *ex contractu* or one *ex delicto* might be maintained; and, secondly, that the complaint claimed damages for conversion, and simply set out the contract by way of inducement and as a measure of damages.

The case of Smith *v.* McLendon, 59 Ga. 523, was an appeal from the order of the trial court refusing to discharge on hearing of habeas corpus an attorney who had collected and converted his client's money. In affirming the order the court said in part: "Imprisonment under an attachment for contempt, to compel obedience by an officer of court to a lawful order to pay over money which he has collected in the course of his official or professional duty, is not imprisonment for debt. It is sound disciplinary dealing with an unruly member of the forensic household. One who lives and moves within the precincts of the court misbehaves, to the injury of a person who has trusted him, and whose confidence he has abused, and the court orders him to make redress. He refuses, and the court, as the minister of law, chastens him by imprisonment, and endeavors to coerce obedience. It is true, he is a debtor; but he is more than a debtor — he is an assistant in the affairs of justice, and as such bears a peculiar and special relation to the law. Through that relation the court acts upon him, treating him, not as a mere debtor who will not pay, but as a domestic of the law who refuses to obey his master."

It will be observed that the decision of the Georgia court is based on the relation existing between the court and the attorney as its officer, and not on the nature of the obligation owing to the client.

Where Attorney Absolutely Unable to Comply with Order. — Where the facts showed that it was absolutely impossible for an attorney to comply with an order to pay money collected for a client into court, he being utterly insolvent, having no means with which to support himself and family and being unable to obtain aid from friends or relatives, these facts were sufficient to entitle him to be relieved from imprisonment; for a court will not require an impossibility, or imprison a man perpetually for a money obligation, he having purged himself of the contempt. Kane *v.* Haywood, 66 N. Car. 1.

Embezzlement. — As to when an attorney is guilty of embezzlement of his client's money, see the title EMBEZZLEMENT.

3. Money Fraudulently Withheld. — The *Iowa* statute conferring upon an examining officer the power to order any property of a judgment debtor, in the hands of himself or others, to be delivered up and applied in satisfaction of the judgment, and the power to punish for contempt the disobedience of the order made by the acting officer, is repugnant to the constitution and therefore void; but the judgment of a court of competent jurisdiction finding the

certiorari, the appellate court will determine whether or not fraud in fact existed, and if it did not will release a prisoner who may have been committed.[1]

c. NONPAYMENT OF ALIMONY. — Alimony allowed by decree of court is not founded on contract, and hence imprisonment for its nonpayment is not imprisonment for debt.[2]

When Unable to Pay. — The decrees for the payment of alimony should be confined to those cases where the husband is able to pay. It is not a contempt to fail to pay, if, without fault, the husband is unable to pay.[3]

Necessity of Personal Demand for Payment. — A proper demand for the payment of alimony is ordinarily a prerequisite for a commitment for contempt in not

conduct of the debtor fraudulent will not be reviewed by an appellate court on appeal, certiorari, or habeas corpus. *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

1. Where Money Not Fraudulently Withheld. — The plaintiff brought suit against the defendant for money claimed to be due him as commissions and attorney's fees, and after answer the defendant filed a motion that the plaintiff be required to pay into court money which he claimed the plaintiff's own pleadings showed to belong to the defendant. The court granted the motion, and committed the plaintiff to jail for failing to obey the order. The order of the trial court was held to be erroneous, as on fraud was shown. Cunningham *v.* Colonial, etc., Mortg. Co., 57 Kan. 678.

In a proceeding against a clerk of a circuit court, for contempt of an order made by that court, the complaint alleged that, in a proceeding by the relator against a distributor of the estate of a certain decedent, the court had adjudged that the relator was entitled to certain moneys theretofore paid to the clerk for the distributee, and ordered that the clerk should pay the same to the affiant; and that a demand had been made on the clerk prior to the order, which he, in contempt of the court, had refused to obey. The clerk was found guilty of contempt and committed to prison. The Supreme Court held on demurrer that the complaint was insufficient in having failed to state facts which would constitute the defendant a fraudulent debtor, even had the demand been alleged to have been made after the order, and the judgment was reversed with instructions to discharge the defendant and dismiss the proceedings. Swift *v.* State, 63 Ind. 81.

2. Alimony — *Alabama.* — Murray *v.* Murray, 84 Ala. 363.

California. — *Ex p.* Perkins, 18 Cal. 60; *Ex p.* Cottrell, 59 Cal. 417; *Ex p.* Hart, 94 Cal. 254.

Connecticut. — Lyon *v.* Lyon, 21 Conn. 185.

Georgia. — Goss *v.* Goss, 29 Ga. 109; Carlton *v.* Carlton, 44 Ga. 700; Lewis *v.* Lewis, 80 Ga. 706, 12 Am. St. Rep. 281.

Illinois. — Wightman *v.* Wightman, 45 Ill. 167; Blake *v.* People, 80 Ill. 11; Andrews *v.* Andrews, 69 Ill. 609; O'Callaghan *v.* O'Callaghan, 69 Ill. 552.

Michigan. — Matter of Bissell, 40 Mich. 63; Potts *v.* Potts, 68 Mich. 492; Haines *v.* Haines, 35 Mich. 138.

New York. — Allen *v.* Allen, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 175.

North Carolina. — Pain *v.* Pain, 80 N. Car. 322; Wood *v.* Wood, Phil. L. (N. Car.) 538; Zimmerman *v.* Zimmerman, 113 N. Car. 432.

Pennsylvania. — Groves's Appeal, 68 Pa. St. 143.

Wisconsin. — Staples *v.* Staples, 87 Wis. 592.

In Iowa the refusal of a defendant in a divorce proceeding to pay a judgment for temporary alimony is not considered contempt of court, and does not affect his right to defend. Baily *v.* Baily, 69 Iowa 77; Allen *v.* Allen, 72 Iowa 502. See also Peel *v.* Peel, 50 Iowa 521.

In Missouri imprisonment for contempt of court in failing to pay alimony awarded is held to be imprisonment for debt, and the contemnor will be released on habeas corpus. Coughlin *v.* Ehlert, 39 Mo. 285.

3. Inability to Pay — *California.* — Galland *v.* Galland, 44 Cal. 475; Matter of Wilson, 75 Cal. 580.

Georgia. — Carlton *v.* Carlton, 44 Ga. 216.

Illinois. — Wightman *v.* Wightman, 45 Ill. 167; Blake *v.* People, 80 Ill. 11; Schuele *v.* Schuele, 57 Ill. App. 189; Kadlowsky *v.* Kadlowsky, 63 Ill. App. 292.

Iowa. — Peel *v.* Peel, 50 Iowa 521; Allen *v.* Allen, 72 Iowa 502.

Kansas. — State *v.* Dent, 29 Kan. 416.

Kentucky. — Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52.

Minnesota. — Hurd *v.* Hurd, 63 Minn. 443.

North Carolina. — Wood *v.* Wood, Phil. L. (N. Car.) 538; Pain *v.* Pain, 80 N. Car. 322.

Oregon. — Newhouse *v.* Newhouse, 14 Oregon 290.

Pennsylvania. — Ormsby *v.* Ormsby, 1 Phila. (Pa.) 578.

Wisconsin. — Wright *v.* Wright, 74 Wis. 439.

Where Party Disables Himself to Pay. — But where the inability to pay is brought about by the party himself, his failure to obey the order is contumacious and may be punished as a contempt. Haines *v.* Haines, 35 Mich. 138; Staples *v.* Staples, 87 Wis. 592. As where he conveys property to his mother to avoid the payment of alimony. McClung *v.* McClung, 33 N. J. Eq. 462.

In Massachusetts a transfer by a husband of his property to his son-in-law in anticipation of an action for divorce and alimony does not constitute a contempt of court, but is competent evidence to show whether the husband has the property under his control. Stuart *v.* Stuart, 123 Mass. 370.

Purging by Proof of Inability. — A husband neglecting or refusing to pay alimony may purge himself from such contempt by proof of inability to comply with the order. Russell *v.* Russell, 69 Me. 336. See *infra*, *Purging Contempts*.

paying it.[1] Where, however, the husband declines to pay the alimony awarded by the court, before demand, a demand is unnecessary to lay the foundation for contempt proceedings.[2]

d. COURT COSTS. — There were no costs at common law, but they were always entered on the roll as increase of damages by the court, and were in that manner recoverable.[3] There can be no question that when the obligation sued on is a "debt" within constitutional prohibitions, an imprisonment for contempt for the nonpayment of the costs of the suit, or the fees of the officers of the court, would be imprisonment for debt. In *New York*, where there is no constitutional provision against imprisonment for debt, the statute prohibiting it is not in conflict with other statutes providing that there may, in some cases, be a committal for contempt in failing to pay costs, interlocutory or otherwise.[4]

e. SUPPLEMENTARY PROCEEDINGS — (1) *Refusal to Disclose Property.* — Imprisonment for contempt in refusing to answer questions in supplementary proceedings as to the whereabouts of property liable in execution is not imprisonment for debt. There is a broad distinction between the constitutionality of a statute authorizing a court to make an order on a person to pay money, and a statute authorizing an examination as to property liable for the payment of debts.[5]

(2) *Refusal to Attend or to Answer Questions.* — Hence the refusal to attend[6] or to answer proper questions in such a case is punishable as a contempt.[7]

(3) *Refusal to Deliver Property.* — When there is a judgment of a court upon proceedings supplementary to execution, that the judgment debtor owns certain property or is possessed of certain money, which might have been

1. **Demand Necessary.** — Edison *v.* Edison, 56 Mich. 185; Potts *v.* Potts, 68 Mich. 492; Park *v.* Park, 80 N. Y. 156.

2. Potts *v.* Potts, 68 Mich. 492.

3. **Costs.** — Bacon's Abr., tit. Costs, p. 484; 3 Bl. Com. 399; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75; Lorton *v.* Seaman, 9 Paige (N. Y.) 609.

4. See Patrick *v.* Warner, 4 Paige (N. Y.) 398; Lorton *v.* Seaman, 9 Paige (N. Y.) 609; Fulton *v.* Brunk, 18 Wend. (N. Y.) 509; Worden *v.* Orange County Bank, 1 Wend. (N. Y.) 309; Brockway *v.* Copp, 2 Paige (N. Y.) 579. And see the titles CONTEMPT, 4 ENCYC. OF PL. AND PR. 764; COSTS, 5 ENCYC. OF PL. AND PR. 100.

Where the clerk of a court, or the marshal, lent credit to a party to a suit, he could compel the payment of his fees by attachment. Caldwell *v.* Jackson, 7 Cranch (U. S.) 276; Anonymous, 2 Gall. (U. S.) 101.

These decisions were rendered before the enactment of section 990, Rev. Stat., and in the states of Maryland and New York, neither of which states has constitutional prohibitions against imprisonment for debt.

Under the *New York* statute, where a collected judgment for costs is set aside and a new trial had, which results in a verdict in favor of the party paying the judgment, the mode of enforcing an order for restitution of the costs previously paid is by execution as upon a money judgment, and not by proceedings to punish for contempt. O'Gara *v.* Kearney, 57 How. Pr. (N. Y. Ct. App.) 439.

The New York Code of Civil Procedure, § 2007, providing that a person who has been ordered to pay costs may, for his failure to obey the order, be punished for a contempt of the court awarding the costs, is directory merely, and the court will inflict such punishment only when in its judgment it is proper to do so. People *v.* Masonic Guild, etc., 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 74.

5. **Supplementary Proceedings — Refusal to Disclose Property.** — State *v.* Barclay, 86 Mo. 55.

6. **Refusal to Attend.** — Shults *v.* Andrews, 54 How. Pr. (N. Y. Supreme Ct.) 378; Coursen *v.* Dearborn, 7 Robt. (N. Y.) 143; Parker *v.* Hunt, 15 Abb. Pr. (N. Y. Supreme Ct.) 410, note; Rugg *v.* Spencer, 59 Barb. (N. Y.) 383. See the title SUPPLEMENTARY PROCEEDINGS, ENCYC. OF PL. AND PR.

A person is not guilty of contempt in not obeying an order for him to attend, at a time when a second order requiring his attendance has already been issued, as the latter supersedes the first. Gaylord *v.* Jones, 7 Hun (N. Y.) 480.

7. **Refusal to Answer Proper Questions.** — Page *v.* Randall, 6 Cal. 32; State *v.* Barclay, 86 Mo. 55; People *v.* Marston, 18 Abb. Pr. (N. Y. Supreme Ct.) 257; *In re* Rosenberg, 90 Wis. 581. See the title SUPPLEMENTARY PROCEEDINGS, ENCYC. OF PL. AND PR.

Where Discovery Untruthful or Evasive. — In an action against a judgment debtor to compel the discovery of his property, the court may require him to produce a written statement of his assets. The court is the sole judge of the truthfulness of the statement, and if in its opinion it is either untruthful, evasive, or prevaricating, so as in effect to amount to a refusal to make the discovery required of him, he may be punished by imprisonment for contempt in failing to make such discovery. *In re* Rosenberg, 90 Wis. 581.

levied on in satisfaction of the execution, the disobedience of or the failure to comply with an order based on such judgment to deliver the property or money to the court or to a receiver appointed by the court, that it may be applied on the judgment, is a contempt of court and may be punished by imprisonment,[1] even though the judgment was for a debt founded on a contract.[2] These proceedings, however, are in effect a substitute for a creditor's bill, and statutes authorizing them should be strictly construed.[3]

Necessity of Demand. — Where the order is for the payment of money or for the delivery of property, a proper demand by the officer or party to whom the money is to be paid or the property is to be delivered, must be made before the person ordered to make such payment or delivery can be adjudged to be in contempt.[4]

1. Refusal to Deliver Property. — *Ex p.* Kellogg, 64 Cal. 343; Eikenberry *v.* Edwards, 67 Iowa 619, 56 Am. Rep. 360; State *v.* Burrows, 33 Kan. 10; State *v.* Becht, 23 Minn. 411; Bond *v.* Bond, 69 N. Car. 97; Kennesaw Mills Co. *v.* Walker, 19 S. Car. 104; *In re* Milburn, 59 Wis. 24. See the title SUPPLEMENTARY PROCEEDINGS, ENCYC. OF PL. AND PR.

Control Without Actual Possession of Property Sufficient. — In supplementary proceedings the defendant was ordered to turn over certain notes to be sold in satisfaction of the execution. He was held to have been guilty of contempt for disobedience of the order, notwithstanding the notes were not in his hands, but in the hands of a resident of a distant state, but were shown to be under his control. Eikenberry *v.* Edwards, 67 Iowa 619, 56 Am. Rep. 360.

When Violation of Order Not Excused by Informalities in Affidavit. — After a person has appeared and been examined in supplementary proceedings, without objection, he is not in a position to justify himself when proceeded against for contempt in violating an order restraining him from transferring his property, by allegations of informalities in the affidavit upon which the proceedngs were based. Lehmaier *v.* Griswold, 46 N. Y. Super. Ct. 11.

Inability to Comply with Order. — The inability of the judgment creditor to comply with an order to turn over property or money, is a good defense to a prosecution for contempt irrespective of constitutional prohibitions against imprisonment for debt. McCartan *v.* Van Syckel, 10 Bosw. (N. Y.) 694.

And a contempt may be purged by showing that the failure to comply with the order was due to actual inability. Myers *v.* Trimble, 3 E. D. Smith (N. Y.) 607.

Where the Inability Is Created by the Contemnor. — But where the contemnor creates the inability in anticipation of the order of court commanding the delivery of property or the payment of money, the rule is different. In such case the creation of the inability is itself properly punishable as a contempt. *Ex p.* Kellogg, 64 Cal. 343; McCartan *v.* Van Syckel, 10 Bosw. (N. Y.) 694; Myers *v.* Trimble, 3 E. D. Smith (N. Y.) 607.

Counsel Fees in Proceedings. — Under the *New York* statute, the aggrieved party at whose instance the attachment is issued is entitled to reasonable attorney's fees. He cannot, however, have compensation for his attorney for services in the supplementary proceedings previous to the issue of the attachment for contempt. Van Valkenburgh *v.* Doolittle, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 72.

2. Judgment for Debt Founded upon Contract. — State *v.* Becht, 23 Minn. 411; *In re* Milburn, 59 Wis. 24.

Each of these cases was heard on application for a writ of habeas corpus, and in each case the prisoner was remanded. In the latter case the subject of the order consisted of certain promissory notes and certain cash found to be owned by the judgment debtor; in the former it consisted of some personal property. In delivering the opinion in the former case the court, in part, says: "In the case at bar the imprisonment is for contempt in refusing to obey an order of the court. It is true that the order relates to the debt evidenced by the judgment against the relator, but this in no way alters the fact that the imprisonment is for the contempt, not for the debt. And the contempt does not consist in the relator's neglect or refusal to pay the debt, but in his disobedience of the order directing him to hand over certain property to the receiver. The fact that the property in question is to be handed over, for the purpose of being applied to the payment of the judgment, is in no way important. The commitment is, nevertheless, in no proper sense imprisonment for debt."

3. Statutes Strictly Construed. — The statute authorizing punishment as for a contempt, of a person disobeying an order made in supplementary proceedings, should be strictly construed. Where the writ of attachment recited that it appeared to the commissioner making the order, that the judgment debtor "has property which he unjustly refuses to apply to the satisfaction of the judgment," but did not state that there was proof "by affidavit to the satisfaction of" a commissioner, although it did subsequently recite that the order was made "upon sufficient affidavit," the court held that the commitment was unlawful and the writ was no protection to the officer making the arrest. Smith *v.* Weeks, 60 Wis. 94. See the title SUPPLEMENTARY PROCEEDINGS, ENCYC. OF PL. AND PR.

Where the order appointing a receiver in supplementary proceedings had not been filed with the county clerk as required by the code, the court will not punish the judgment debtor for disobedience of instructions contained in the order. Bareither *v.* Brosche, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 446.

4. Necessity for Demand. — Haines *v.* People'

VII. CONTEMPT BY OFFICERS OF COURT — 1. In General. — A frequent exercise of the power to punish for a contempt by a court of competent jurisdiction is applied to its own officers. Attorneys, solicitors, jurors, marshals, sheriffs, bailiffs, and all officers or persons whose general or special duties are to execute the orders or decrees of the court, such as receivers appointed by it, are officers of the court. The contempt may be by disrespect to the person of the judge presiding over the court, or by a failure to obey orders emanating from the court, or by dishonest, illegal, or oppressive conduct, whereby injury is sustained by a suitor in the court.[1]

2. By Attorneys — *a.* DISOBEDIENCE OF ORDER REQUIRING PAYMENT OF MONEY. — Where an attorney collects money for his client, on the former's failure to pay it the court will issue an order for its payment, and on a refusal to comply with such order, an attachment for contempt.[2] His failure to pay money into court, which has been collected by him for a client, but which subsequently by a decree of the court is awarded to another suitor, will be punished as a contempt.[3]

b. ADVICE TO CLIENT TO VIOLATE ORDER OF COURT. — Where an attorney advises and procures his client to disobey an order of court, such unworthy practice will be regarded and punished as a contempt.[4]

c. FILING FICTITIOUS SUIT. — It is a contempt of court for an attorney, without the permission of the court, to file a suit for the purpose of getting the court's decision on a feigned issue, where there is no real controversy existing between the parties.[5]

d. OTHER ILLUSTRATIONS. — Many other instances of acts adjudged to be contempts are found in the notes.[6]

97 Ill. 162; McComb *v.* Weaver, 11 Hun (N. Y.) 271; Lorton *v.* Seaman, 9 Paige (N. Y.) 609; Union Trust Co. *v.* Gage, 6 Dem. (N. Y.) 358; Gray *v.* Cook, 24 How. Pr. (N. Y. Super. Ct.) 432; Matter of Ockershausen, 59 Hun (N. Y.) 200. See *supra*, this section, *Nonpayment of Alimony*. And see the title SUPPLEMENTARY PROCEEDINGS, ENCYC. OF PL. AND PR.

Under an order for the delivery of certain property to a receiver, the party ordered to make the same cannot be punished for contempt in failing to comply with such order until the receiver has made a personal demand for the property. Panton *v.* Zebley, 19 How. Pr. (N. Y. Super. Ct.) 394.

1. Disbarment of Attorney. — Under some circumstances the proper punishment for an attorney who has been guilty of a contempt, is by disbarment. See *infra*, *By Attorneys — Disbarment or Suspension*.

2. Order to Attorney to Pay Over Money — Disobedience. — Smith *v.* McLendon, 59 Ga. 523; Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774; Wilmerdings *v.* Fowler, 14 Abb. Pr. N. S. (N. Y. Ct. App.) 249; People *v.* Wilson, 5 Johns. (N. Y.) 368. See generally the title ATTORNEY AND CLIENT, vol. 3, p. 278.

3. Matter of McBride, 6 N. Y. App. Div. 376.

4. Advising Client to Violate Order of Court. — Territory *v.* Clancy, 7 N. Mex. 584; King *v.* Barnes, 113 N. Y. 476, *affirmed* 113 N. Y. 655; Watson *v.* Citizens' Sav. Bank, 5 S. Car. 159. See the title ADVICE OF COUNSEL, vol. 1, p. 894.

5. Fictitious Suits. — Matter of Elsam, 3 B. & C. 597, 10 E. C. L. 193; Hoskins *v.* Berkeley, 4 T. R. 402; Smith *v.* Junction R. Co., 29 Ind. 546; Smith *v.* Brown, 3 Tex. 360, 49 Am. Dec. 748.

6. Charging Judge with Prejudice on Motion for New Trial. — The insertion by an attorney, in a motion for a new trial, that the judge before whom it was tried was "so prejudiced against the defendant that he did not give him a fair and impartial trial," and the filing of an affidavit reaffirming the same charge, were held to constitute a contempt. Harrison *v.* State, 35 Ark. 458.

Abstracting Records of Court. — It is a contempt of court for an attorney to be guilty of abstracting a part of the records of the court in the interest of his client, although this is by statute a criminal offense. *In re* Gates, 17 W. N. C. (Pa.) 142.

Contemptuous Language. — In State *v.* Root, 5 N. Dak. 487, the defendant used language of an abusive and defamatory nature in reference to a judge of the district court in which the defendant was licensed to practice, and the language reflected in severe terms upon the official action of the judge with respect to cases then pending in the said court, and also reflected upon the private character of the judge; but the language was not uttered in the courthouse nor in the immediate view and presence of the court or any of its branches, nor within the sight or hearing of the judge, but was spoken in the stores, streets, and public places of the city in which the court was being held. Such language, under the circumstances, was held not to constitute the offense of contempt of court.

Upon an Application for a Change of Venue. based upon the prejudice of the judge, while facts are to be stated they are not to be set out beyond what is necessary where they involve the judicial acts and character of the judge, and they may be set out in such a manner as

c. DISBARMENT OR SUSPENSION. — As a general rule an attorney may be disbarred only when his character or habits are such as to unfit him for the practice of his profession;[1] but it is well settled by the rules and practice at common law, that if an attorney so conducts himself in his intercourse with the court that his appearance before it and his recognition by it tends to bring it into public contempt, the court may disbar him. Such power is a necessary incident to the power to admit him to the bar.[2] But one court has no

to constitute a contempt. Hughes *v.* People, 5 Colo. 436.

Filing Indecent Petition. — An attorney at law who filed a petition for a divorce which was unnecessarily gross and indelicate, and who deported himself improperly in reading it, was held to have been guilty of a contempt of court. Brown *v.* Brown, 4 Ind. 627, 58 Am. Dec. 641.

Abuse of Process of Court. — To sue out an attachment for a witness in a civil cause, who has not been regularly served with a subpœna, is a contempt of court on the part of the attorney applying for it. Butler *v.* People, 2 Colo. 295.

If an Attorney Opens a Deposition in a Suit without an order of court he is guilty of a contempt. Sturtevant *v.* Sullivan, 69 Ill. App. 47.

Withholding Papers from Client — Publications Derogatory to Court. — So also the malpractice of attorneys, as in withholding papers or money from clients. Matter of Pitman, 1 Curt. (U. S.) 186; The Bark Laurens, Abb. Adm. 302. And publications by attorneys derogatory to the court. *Ex p.* Biggs, 64 N. Car. 202; Matter of Moore, 64 N. Car. 398.

When the Attorney Undertakes to Procure the Bail Himself, he assumes, in addition to his ordinary duty, the responsibility of knowing whom he presents to the court. *In re* Lucas Hirst, 9 Phila. (Pa.) 216; *Ex p.* O'Grady, 4 W. N. C. (Pa.) 199.

Disregarding Order of Bankrupt Court. — While an attorney was arguing a motion in a state court for the appointment of a receiver of an insolvent corporation, proceedings against which had already been taken in the bankrupt court, of which fact the attorney had knowledge, he was served with an injunction from the bankrupt court. He informed the justice of the fact, ceased his argument, and handed up his papers, one of which was a draft of an order for the appointment of a receiver. It was held that he had deliberately disregarded the order of the bankrupt court, and was guilty of contempt. Matter of South Side R. Co., 7 Ben. (U. S.) 391, 10 Nat. Bank Reg. 274.

Illustrations of What Are Not Contempts. — To advise a client that if a continuance could not be procured "he then could escape and forfeit his recognizance, which would work a continuance of said cause until the next term at a trifling cost," was held not to be a contempt. Ingle *v.* State, 8 Blackf. (Ind.) 574.

The statute requiring an attorney at law in a case of a prosecution of a poor person to defend upon his appointment by the court without fee, is in conflict with § 21, art. 1, of the Constitution of 1851, and void. Hence a refusal to defend in such case is not a contempt. Blythe *v.* State, 4 Ind. 525.

1. Disbarment — General Rule. — *Ex p.* Robinson, 19 Wall. (U. S.) 513; Fletcher *v.* Daingerfield, 20 Cal. 427; *In re* Woolley, 11 Bush. (Ky.) 95; Dickens's Case, 67 Pa. St. 169, 5 Am. Rep. 420; *In re* Henderson, 88 Tenn. 531; State *v.* McClaugherty, 33 W. Va. 250. See the title ATTORNEY AND CLIENT, vol. 3, p. 278.

An act highly discreditable but not infamous and not connected with an attorney's duties, will not give the court jurisdiction to strike him from the roll. Dickens's Case, 67 Pa. St. 169, 5 Am. Rep. 420.

An attempt to make an opposing attorney drunk to obtain an advantage of him in the trial of a cause, is good ground for striking an attorney from the roll. Dickens's Case, 67 Pa. St. 169, 5 Am. Rep. 420.

An order to suspend or remove an attorney for contempt should not be made where the offense is not so gross as to render him unworthy of the office. Where in an action by a creditor to wind up a banking corporation, an order is made restraining it, its officers and agents, from paying out money and disposing of its effects, it is a contempt by the attorney of the bank to advise its officers and stockholders to file a petition in bankruptcy with a view of removing its property beyond the jurisdiction of the court, but it is not a contempt of such nature as to merit the suspension or disbarment of the attorney. Watson *v.* Citizens' Sav. Bank, 5 S. Car. 159.

2. *In re* Woolley, 11 Bush (Ky.) 95; *In re* Gates, 17 W. N. C. (Pa.), 142; *In re* Serfass, 19 W. N. C. (Pa.) 476; *In re* Davies, 93 Pa. St. 116, 39 Am. Rep. 729; Darby's Case, 3 N. Y. Wheel. Cr. Cas. (Tennessee Supreme Ct.) 1; State *v.* Root, 5 N. Dak. 505, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 785.

A court of common pleas has authority without a trial by jury to suspend from practice an attorney who has been guilty of abstracting a part of the records of the court in the interest of his client. *In re* Gates, 17 W. N. C. (Pa.) 142.

If an attorney write and publish strictures on an opinion delivered in court, with a view to prejudice a cause pending in such court, or the court to which it may be remanded for trial, such publishing is a contempt for which he may be stricken from the roll of attorneys. Darby's Case, 3 N. Y. Wheel. Cr. Cas. (Tennessee Supreme Ct.) 1.

Indiana Statute. — Proceedings to disbar an attorney are regulated by the statute (2 G. & H., § 780, p. 330), and though an attorney may have been guilty of a contempt which would have justified the imposition of a fine or imprisonment, the court cannot disbar him for such offense by a summary order. *Ex p.* Smith, 28 Ind. 47.

North Carolina Statute. — The Act of April 4, 1871, declaring that no attorney who has been duly licensed to practice law shall be disbarred or deprived of his license and right to practice, except upon conviction for a crimi-

authority to disbar an attorney for a contempt committed before another court.[1]

Right to Be Heard. — In no event can a court, as a punishment for contempt, suspend or disbar from practice before it an attorney at law, without first giving to him an opportunity to be heard in his own defense.[2]

3. By Jurymen. — Instances of contempts committed by jurymen will be found in the notes.[3]

4. By Receivers. — The refusal of a receiver to obey a proper order of the court of which he is an officer is a contempt.[4]

VIII. CONTEMPT BY WITNESSES — 1. Failure or Refusal to Attend. — If a person without legal excuse fails or refuses to obey a subpœna requiring his presence at court, he is guilty of a contempt, and it is a common practice of trial courts to issue an attachment against him.[5] It must, however, always appear

nal offense, or after confession in open court, is constitutional. The aforesaid Act does not take away any of the inherent rights which are absolutely essential in the administration of justice. Therefore, in a case where a judge attempted to debar an attorney from practicing his profession in his judicial district, who had not been convicted of any criminal offense, or who had not confessed himself guilty thereof in open court, it was held that such action was unauthorized, and in violation of law. *Ex p.* Schenck, 65 N. Car. 353.

North Dakota Statute. — Certain contempts of court, when committed by an attorney, will furnish grounds for his suspension or disbarment, but he cannot be lawfully suspended or disbarred as a punishment inflicted in a summary and quasi-criminal proceeding instituted and conducted in accordance with the statute governing prosecutions for the offense of contempt of court. State *v.* Root, 5 N. Dak. 487.

1. *Ex p.* Bradley, 7 Wall. (U. S.) 364. See the title ATTORNEY AND CLIENT, vol. 3, p. 278.

2. Right to Be Heard. — *Ex p.* Bradley, 7 Wall. (U. S.) 364; *Ex p.* Robinson, 19 Wall. (U. S.) 506; Fletcher *v.* Daingerfield, 20 Cal. 427; *Ex p.* Hayfron, 7 How. (Miss.) 127.

3. Instances of Contempt by Jurors. — Jurors who, after having retired to consult as to their verdict, escape and go home are guilty of a contempt. Murphy *v.* Wilson, 46 Ind. 537.

For a juror to corruptly confer with a party to a cause on trial, about the cause and the verdict to be rendered, is a contempt under U. S. Rev. Stat., § 725. *In re* May, 1 Fed. Rep. 737.

During the progress of the trial of an indictment for an assault, a juror, without permission, viewed the locality where it was committed. This was held not to be a contempt. People *v.* Oyer & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691.

One exempt from jury service by reason of his membership in a military company is not guilty of contempt if, having been summoned, he does not attend to make excuses. Miller *v.* Com., 80 Va. 33 (Lewis, P. J., dissenting).

If a juror, charged with a cause, leaves his associates and mingles with the community, or holds communication with persons outside, he commits a contempt of court. State *v.* Helvenston, R. M. Charlt. (Ga.) 48. See 2 Hawk. P. C. (Curw. ed.) p. 212.

It has been held to be a contempt for a juror to leave his seat for a short time, without the knowledge of the court or the parties, although no testimony is given during his absence, and he holds communication with no one on the subject of the cause. *Ex p.* Hill, 3 Cow. (N. Y.) 355.

It is a contempt for a juror voluntarily to express an opinion as to the guilt of a prisoner for the purpose of disqualifying himself. U. S. *v.* Devaughan, 3 Cranch (C. C.) 84. See the titles JURY AND JURY TRIAL; VERDICT.

4. A Receiver who disobeys an order of the court to pay over funds in his hands is guilty of a contempt of court. Clark *v.* Bininger, 75 N. Y. 344; *Ex p.* Haley, 37 Mo. App. 562; Cartwright's Case, 114 Mass. 230. See the titles RECEIVERS.

5. Compelling Attendance of Witness. — *Ex p.* Humphrey, 2 Blatchf. (U. S.) 220; Goodrich *v.* U. S., 42 Fed. Rep. 392; *Ex parte* Pearce, 111 Ala. 102, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 783; Wilson *v.* State, 57 Ind. 71; Com. *v.* Carter, 11 Pick. (Mass.) 277; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; Hale *v.* State, 55 Ohio St. 210; Respublica *v.* Duane, 4 Yeates (Pa.) 347; Meloney *v.* Morrison, 6 New Bruns. 240; Gilbert *v.* Campbell, 12 New Bruns. 258. See the title WITNESSES.

Criminal Proceeding. — An attachment against a witness for not obeying a subpœna is a criminal proceeding. Goodrich *v.* U. S., 42 Fed. Rep. 392, *following* Erwin *v.* U. S., 37 Fed. Rep. 470.

Interpreters — Experts. — The court will not compel the attendance of an interpreter by attachment for contempt, unless in case of necessity. In the Matter of Roelker, 1 Sprague (U. S.) 276, the court said: "When a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend as a witness. In this, all stand upon equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved. Thus, the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise. This is so unreasonable that nothing but necessity can justify it. The case of an interpreter is analogous to that of an expert."

that he has been personally served with the subpœna, to render him liable in contempt for a disobedience thereof.[1]

2. Refusal to Be Sworn — *a.* IN GENERAL. — The generally recognized rule is that a witness is guilty of contempt when he refuses to be sworn,[2] even though such refusal results from conscientious scruples, unless there is a statutory exception which permits persons belonging to his class to testify upon affirmation.[3]

That Criminating Evidence May Be Sought, is no excuse for a witness to refuse to be sworn. He cannot assert that privilege until such question may be asked.[4]

b. STATUTORY REGULATIONS AS TO AFFIRMATION.— In some states any person is permitted by statute to testify upon solemn affirmation, instead of being compelled to take an oath;[5] in others only those having conscientious scruples against taking an oath are allowed that privilege.[6] In the former case the order of commitment must show that the person refused to be affirmed as well as sworn, otherwise the commitment will not show that he is held for a contempt.[7] In the latter case a witness who has no conscientious scruples against taking an oath cannot insist upon the privilege of testifying upon affirmation.[8]

3. Refusal to Answer Questions — *a.* IN GENERAL. — The refusal of a witness to answer a proper question about a matter over which the court has jurisdiction, is a flagrant contempt.[9] And a refusal to testify before, or answer a

1. Marshall *v.* York, etc., R. Co., 18 Eng. L. & Eq. 500; State *v.* Trumbull, 4 N. J. L. 157.

2. **Refusal of Witness to Be Sworn.** — *Ex p.* Judson, 3 Blatchf. (U. S.) 89; *Ex p.* Walker, 25 Ala. 81; *Ex p.* Stice, 70 Cal. 51; Lockwood *v.* State, 1 Ind. 161; *Ex p.* Langdon, 25 Vt. 680; Uhrig *v.* Uhrig, 15 Ont. Pr. Rep. 53.

3. **Affirmation.** — A person being called as a witness refused to be sworn, on the ground of conscientious scruples, and was committed for contempt. It was held that the laws of *Massachusetts* confined the liberty of being affirmed to Quakers, and that the witness, not being a Quaker, could not claim the privilege. U. S. *v.* Coolidge, 2 Gall. (U. S.) 364. See *infra*, the next subdivision.

Refusal of Jew to Be Sworn on Saturday. — Where a Jew was offered as a witness on Saturday, but he refused to be sworn, because he had conscientious scruples against taking an oath on his Sabbath, he was fined for contempt. Stansbury *v.* Marks, 2 Dall. (Pa.) 213. See *infra*, the next subdivision.

4. *Ex p.* Stice, 70 Cal. 51.

5. Wilcox *v.* State, 46 Neb. 402.

6. It was held that under the *New Jersey* statute, *prima facie*, every witness is to be sworn, and all evidence is to be given under oath. The privilege substituting an affirmation is to be extended only to such as "shall allege" themselves conscientiously scrupulous of taking an oath. Williamson *v.* Carroll, 16 N. J. L. 217.

7. Wilcox *v.* State, 46 Neb. 402.

8. Williamson *v.* Carroll, 16 N. J. L. 217.

9. **Refusal of Witness to Answer Proper Question** — *United States.* — Matter of Allen, 13 Blatchf. (U. S.) 271.

California. — *Ex p.* Perkins, 18 Cal. 60; Matter of Gannon, 69 Cal. 541.

Illinois. — Wright *v.* People, 112 Ill. 540; Dixon *v.* People, 63 Ill. App. 585.

Massachusetts. — Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502.

Michigan. — Barnes *v.* Reilly, 81 Mich. 374.

Mississippi. — *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234.

Nebraska. — Wilcox *v.* State, 46 Neb. 402.

New Hampshire. — State *v.* Towle, 42 N. H. 540.

New York. — People *v.* Kelly, 24 N. Y. 74; People *v.* New York, 7 Abb. Pr. (N. Y. Supreme Ct.) 96; People *v.* Rice, 57 Hun (N. Y.) 62; Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493; People *v.* Hicks, 15 Barb. (N. Y.) 153.

North Carolina. — La Fontaine *v.* Southern Underwriters' Assoc., 83 N. Car. 132.

Ohio. — Hale *v.* State, 55 Ohio St. 210.

Wisconsin. — State *v.* Lonsdale, 48 Wis. 348; Stuart *v.* Allen, 45 Wis. 158.

Canada. — Clark *v.* Campbell, 15 Ont. Pr. Rep. 338.

See also the title WITNESSES.

In Michigan — Power of Board of Supervisors. — A board of supervisors has power under the Michigan statute to subpœna witnesses, but it cannot commit a witness for contempt in refusing to testify, and where such a commitment has been made the witness will be released on habeas corpus. Matter of Blue, 46 Mich. 268.

Power of Justice to Obtain Affidavit. — Under the *Iowa* statute a justice of the peace has power, upon the application of a person desirous of obtaining the affidavit of another, to require the presence of the latter before him by a subpœna issued for that purpose; and a refusal either to obey the subpœna, or to make affidavit when brought before him, is a contempt of court for which the contemnor may be committed by the justice. Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211; State *v.* Seaton, 61 Iowa 563.

Power of Notary Under Ohio Statutes. — The power conferred on a notary in taking depositions, to commit a witness to jail for refusing to answer a question, is not judicial in the sense of the constitution conferring all judicial

proper question propounded by, a grand jury, is a contempt committed in the presence of the court on which the grand jury is attending.[1]

b. EXPERT WITNESSES. — Under the laws of some states, where the witness is called as an expert, he is entitled to compensation before being required to testify.[2] The better opinion, however, is that he may be required to testify without compensation other than his witness fees, and his refusal to answer questions is a contempt.[3] Where he voluntarily submits himself to an examination as an expert, he can in no case refuse to answer one particular question after having, without objection, answered others.[4]

c. SELF CRIMINATION — (1) *Construction of Constitutional Guaranties.* — The common-law maxim that no one shall be compelled to accuse or furnish evidence against himself has been embodied in the constitutions of the several states, and is held to mean not merely that he shall not be required to furnish such evidence on his own trial, but that he shall be exempt from having to furnish such evidence on the trial of any case or before any grand jury or investigating committee.[5]

(2) *Where Answer Would Incriminate* — (a) **In General.** — The adjudication, therefore, of the court in which the alleged contempt occurs, while conclusive that the party committed the act of which he was convicted, and of its character when that might, according to the circumstances, be meritorious or criminal, cannot establish as a contempt that which the law allowed the alleged contemnor to do; hence in case of a refusal to answer a question which would tend to criminate the witness, and when such refusal is based on that ground, it is the duty of the court to excuse him from making answer. If the court should fail to do so a commitment for contempt is merely a punishment for the assertion of a right guaranteed to the witness by his State as well as by the Federal Constitution, and is illegal.[6]

power upon the courts of the state, and on the refusal of a witness to answer questions propounded to him he may be committed as a contumacious witness. De Camp *v.* Archibald, 50 Ohio St. 618, 40 Am. St. Rep. 692.

1. Refusal to Testify Before Grand Jury. — U. S. *v.* Caton, 1 Cranch (C. C.) 150; Newsum *v.* State, 78 Ala. 407; Smith *v.* People, 20 Ill. App. 591; Lockwood *v.* State, 1 Ind. 161; Com. *v.* Bannon, 97 Mass. 214; Heard *v.* Pierce, 8 Cush. (Mass.) 341, 54 Am. Dec. 757; Ward *v.* State, 2 Mo. 120, 22 Am. Dec. 449; Matter of Taylor, 8 Misc. Rep. (N. Y. Supreme Ct.) 159.

2. Experts. — Dills *v.* State, 59 Ind. 15; Buchman *v.* State, 59 Ind. 1, 26 Am. Rep. 75; People *v.* Montgomery, 13 Abb. Pr. N. S. (Monroe Oyer & T. Ct.) 207.

3. *Ex p.* Dement, 53 Ala. 389, 25 Am. Rep. 611; Summers *v.* State, 5 Tex. App. 374, 32 Am. Rep. 573; Dixon *v.* People, (Ill. 1897) 48 N. E. Rep. 108, *affirming* 63 Ill. App. 585.

A Physician who has been subpœnaed and is interrogated as an expert witness only, may be punished as for a contempt for refusing to testify, when no compensation greater than that allowed an ordinary witness has been paid or promised him. The fact that the case in which he is subpœnaed is a civil one is immaterial. Dixon *v.* People, (Ill. 1897) 48 N. E. Rep. 108.

4. Where Expert Voluntarily Submits to Examination. — In an action for assault and battery, a physician was called as a witness to testify in behalf of the plaintiff. He testified that he was called to see the plaintiff professionally, and described the condition in which he found him. He was then shown a policeman's "billy" and asked if a blow struck with it on the head would not be likely to produce a condition similar to that in which the plaintiff was found. Without answering the question he inquired of the court whether the question called for a professional opinion, and upon being told that it did, refused to answer until a fee was paid or secured. It was held that the opinion sought to be elicited was pertinent to the subject about which he had voluntarily testified, and he was properly punished for contempt of court. Wright *v.* People, 112 Ill. 540.

5. Constitutional Guaranties. — Counselman *v.* Hitchcock, 142 U. S. 547; State *v.* Quarles, 13 Ark. 307; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; State *v.* Nowell, 58 N. H. 314; People *v.* Seaman, 8 Misc. Rep. (N. Y. Supreme Ct.) 152; Cullen *v.* Com., 24 Gratt. (Va.) 625. See U. S. *v.* Burr, 25 Fed. Cas. No. 14692*e*, where the opinion was delivered before the Fifth Amendment to the Constitution. See generally the titles CRIMINAL LAW; WITNESSES.

6. Where Answer Would Incriminate. — U. S. *v.* Burr, 25 Fed. Cas. No. 14692*e*; Counselman *v.* Hitchcock, 142 U. S. 547; *Ex p.* Rowe, 7 Cal. 175; *Ex p.* Cohen, 104 Cal. 524, 43 Am. St. Rep. 127; Richman *v.* State, 2 Greene (Iowa) 532; Matter of Nickell, 47 Kan. 734, 27 Am. St. Rep. 315; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; People *v.* Seaman, 8 Misc. Rep. (N. Y. Supreme Ct.) 152; People *v.* Kelly, 24 N. Y. 75; Cullen *v.* Com., 24 Gratt. (Va.) 624. See generally the title WITNESSES.

Rule for Ascertaining Whether Answer Would Incriminate. — The correct rule for ascertain-

(b) **Where Court Is Exclusive Judge.** — Unless from the very nature of the question itself an answer would tend to incriminate, the court must be the exclusive judge of whether such an answer is possible, and the refusal of a witness to answer a question, after the court has decided in the negative, is a flagrant contempt for which the witness is punishable.[1]

(c) **Where Witness Is Exclusive Judge.** — Where, from the nature of the question, the answer would inevitably incriminate the witness, he is the sole judge, and may answer or refuse to answer the question.[2]

(d) **Statutory Safeguards.** — The only occasion on which a difference of opinion is likely to arise between the court and the witness, is where safeguards as to the effect of the testimony of the witness are provided by legislative enactment.

Grant of Immunity Must Be Co-extensive with Constitutional Guaranty. — The constitutional provisions of the United States and of the various states that no one shall be compelled to accuse or furnish evidence against himself are substantially identical. Many states have passed statutes providing that testimony so given by a witness shall not thereafter be used in the prosecution of any offense so disclosed by him;[3] or that he shall not be prosecuted for any offense with reference to which the testimony is used.[4] The former class of statutes do not offer to the witness that protection granted to him by the various constitutions, and if he be imprisoned for contempt for refusing to

ing the right of a witness to refuse to testify on the ground that his testimony might tend to criminate him, was laid down by Chief Justice Marshall in the famous case of U. S. *v.* Burr, 25 Fed. Cas. No. 14692*e*, and has since been uniformly followed. The court thus concludes: "The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer."

Witness Before Grand Jury — Evasive Answer as to Crimination. — Where a witness summoned before a grand jury, upon being told that he was not bound to criminate himself, was asked: "Do you know of your own knowledge of any person or persons having played for money or other valuable thing with cards? * * * If so state who, for what and with what did they play." The witness replied: "I cannot answer that question without criminating myself, or divulging the names of witnesses who would criminate me, and of which witnesses the people have no knowledge, as I believe, other than would be derived from my testimony in answering the question." After having been told by the foreman that the question referred to no game in which he participated, he repeated the answer. The court held that the proper answer for the witness to have made if he could not testify without incriminating himself, would have been "No;" and that a refusal to answer was a contempt. Smith *v.* People, 20 Ill. App. 591.

Statutory Regulation as to Who Shall Judge. — Under the *Pennsylvania* statute the witness is never the final arbiter as to whether an interrogatory propounded to him has such tendency, but it is always the province of the judge to decide. Com. *v.* Bell, 145 Pa. St. 375.

1. Where Court the Exclusive Judge. — U. S. *v.* McCarthy, 18 Fed. Rep. 87; U. S. *v.* Miller, 2 Cranch (C. C.) 247; Sanderson's Case, 3 Cranch (C. C.) 638; Richman *v.* State, 2 Greene (Iowa) 532; Janvrin *v.* Scammon, 29 N. H. 280; Matter of Taylor, 8 Misc. Rep. (N. Y. Supreme Ct.) 159; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122. See the title WITNESSES.

2. Where Witness the Exclusive Judge. — Richman *v.* State, 2 Greene (Iowa) 532. In this case the court quoted and followed the doctrine laid down in U. S. *v.* Burr, 25 Fed. Cas. No. 14692*e*. The court said: "We understand from this and other decisions on this subject that in relation to the privilege of witnesses it is necessary to avoid these two extremes: 1st, That of permitting the witness to protect himself by his privilege by refusing to answer questions which cannot, from the nature of the answers sought, criminate him; 2d, That of *compelling* him to answer, when, from the nature of the question, the answer would inevitably criminate him. In the first, the court must be judge and compel the answer. In the second, the witness is sole judge and may answer or refuse as he sees proper." See the title WITNESSES.

3. Statutory Enactments. — Counselman *v.* Hitchcock, 142 U. S. 547; Emery's Case, 107 Mass. 172, 9 Am. Rep 22; Cullen *v.* Com., 24 Gratt. (Va.) 624; People *v.* Kelly, 24 N. Y. 74. See the title WITNESSES.

4. Newsum *v.* State, 78 Ala. 407; *Ex p.* Cohen, 104 Cal. 524, 43 Am. St. Rep. 127; State *v.* Nowell, 58 N. H. 314; Brown *v.* Walker, 161 U. S. 591; People *v.* Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851; Kendrick *v.* Com., 78 Va. 490. See the title WITNESSES.

give the testimony called for, such imprisonment is illegal.[1]

Absolute Immunity from Prosecution. — Where the law offers an absolute guaranty to the witness that he shall not be liable to indictment or prosecution for the offense with reference to which his testimony is given, such immunity is sufficient to authorize the court to compel him, by attachment for contempt, to testify.[2]

1. Under a Statute of Massachusetts, which provided that no one should be excused from testifying to any corrupt practice of the state police, on the ground that his answers might tend to criminate him, and also provided that the testimony of no such witness should be used against him, it was held that the statute did not offer full immunity to the witness, because he still remained liable for matters in respect to which his testimony might relate, and that his commitment for contempt in refusing to answer such questions was illegal, and he was discharged on the hearing of a writ of habeas corpus. Emery's Case, 107 Mass. 172, 9 Am. Rep. 22.

Where a Witness Refused to Answer Questions Before a Grand Jury in relation to a duel, on the ground that he would incriminate himself by so doing, and was fined by the court for contempt, on appeal it was held that a state statute which provided that any one who fought, aided, or abetted in a duel could be required to testify, but that any "statement" made by him as such witness could not be used against him in any prosecution, was unconstitutional, and that the witness had the right to refuse to answer. Cullen *v.* Com., 24 Gratt. (Va.) 624.

California Statute. — The immunity given to the witness must include not only the offense with reference to which the defendant is charged, and in which the witness was a participant with the defendant, but also any other offense with which the witness may be charged, and to which the testimony may have reference, or which it may tend to establish. The California statute in granting immunity to the witness is sufficiently broad to accomplish this. *Ex p.* Cohen, 104 Cal. 524, 43 Am. St. Rep. 127.

The United States Revised Statutes, § 860, provides that no evidence given by a witness before a grand jury, with reference to a certain matter, shall in any manner be used against him, in any court in the United States, in any criminal proceeding. The witness, on his refusal to answer certain questions propounded to him, was committed for contempt. The cause was remanded by the court with instruction to discharge the witness from custody on the writ of habeas corpus. Counselman *v.* Hitchcock, 142 U. S. 547. Mr. Justice Blatchford, delivering the opinion of the court in this case, said: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of § 860 of the Revised Statutes that it does not undertake to compel self-criminating evidence from a party or a witness. In several of the state statutes above referred to, the testimony of the party or witness is made compulsory, and in some, either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

Contra. — In the case of the People *v.* Kelly, 24 N. Y. 74, it was held that a statute which merely prevented the use of such testimony on the prosecution of the witness of a crime was a sufficient safeguard to his incrimination; that the information elicited facilitates the discovery of other evidence by which the witness may be subsequently indicted and convicted, is an incidental consequence against which the constitution does not guard. See Bedgood *v.* State, 115 Ind. 275, and State *v.* Quarles, 13 Ark. 307, where it was held that, though the statutes did not grant absolute immunity from punishment, under the constitutions of those states, they afforded sufficient protection to the witness to justify the court in compelling him to answer.

2. Where Absolute Indemnity Afforded. — Brown *v.* Walker, 161 U. S. 591, *affirming* 70 Fed. Rep. 46; Newsum *v.* State, 78 Ala. 407; *Ex p.* Cohen, 104 Cal. 524, 43 Am. St. Rep. 127; Frazee *v.* State, 58 Ind. 8; State *v.* Nowell, 58 N. H. 314; People *v.* Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851; Floyd *v.* State, 7 Tex. 215; Kendrick *v.* Com., 78 Va. 490. See the title WITNESSES. See also Hirsch *v.* State, 8 Baxt. (Tenn.) 89; Warner *v.* State, 13 Lea (Tenn.) 52.

Illustrations. — And, of course, the refusal of a witness to answer questions before a legislative committee, on the ground that the answer would incriminate, was, in a case where immunity from prosecution was granted by a statute, a contempt of the legislature. *In re* Falvey, 7 Wis. 630.

On the trial of a person for knowingly allowing one not entitled to vote to register, the person who registered was called as a witness, but refused to testify lest he incriminate himself. A statute provided that the witness should not thereafter be liable to indictment, information, or prosecution for the offense with reference to which his testimony was given. It was held that the witness was rightfully committed for contempt in refusing to testify. *Ex p.* Cohen, 104 Cal. 524, 43 Am. St. Rep. 127.

(e) **Where Offense Barred by Statute of Limitations.** — Where the offense in relation to which the witness refuses to answer questions is barred by the statute of limitations, he cannot claim the privilege, because he cannot be punished for the offense.[1]

(3) *Exposure to Disgrace.* — **The General Rule** seems to be that a witness is not privileged from answering a question concerning a matter which is material to the issue on the ground that his answer would tend to disgrace him.[2]

Irrelevant Questions. — But as to questions irrelevant and impertinent to the issues, the better view is that the witness is privileged, and that a refusal to answer is not contempt.[3]

(4) *Where Court Has No Jurisdiction.* — And where the court has no jurisdiction to inquire as to the particular matter,[4] or where it adopts an illegal method of making such inquiry,[5] the judgment of commitment is void, and the alleged contemnor will be released on the hearing of a writ of habeas corpus.

A statute providing that a clerk, servant, or agent shall not be excused from testifying against his principal, but that he shall not thereafter be prosecuted for any offense disclosed by him, does not deprive the witness of the protection afforded by the constitution, and a motion for an attachment will be granted to compel his testimony. State *v.* Nowell, 58 N. H. 314.

A *New York* statute declared that any person offending against the section thereof relating to bribery "is a competent witness against another person so offending and may be compelled to testify," etc. The same section further provided that the persons testifying "shall not thereafter be liable to indictment, prosecution, or punishment for that bribery." The court held that the statute was not violative of the constitution, and that the court could compel the witness to testify. People *v.* Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851.

Under the *Indiana* statute against gaming, any person called as a witness to prove the offense, although he may have been concerned as a party, may be compelled to testify. Another section of the same statute provides that he shall not be liable to indictment or punishment in any such case. The statute is constitutional, and the court may compel the witness to testify. Frazee *v.* State, 58 Ind. 8.

Where a witness was summoned before a grand jury to testify as to unlawful gaming, and where, on his refusal to answer a question on the ground of self-crimination, he was brought before the court and informed of the existence of a statute granting him immunity from prosecution as to any offense with reference to which his testimony should be given, and where he persisted in his refusal to testify, he was guilty of a contempt. Newsum *v.* State, 78 Ala. 407.

Where a statute secured to a witness called to testify concerning unlawful gaming, immunity against prosecution for any offense committed by him at that time and place, it was held that he could not claim the privilege of refusing to testify on the ground of self-crimination. Kendrick *v.* Com., 78 Va. 490. In this case there was a dissenting opinion by two members of the court. They expressed the opinion that the constitutional guaranties of both the state and federal constitutions are such that the legislature cannot compel a person to give evidence against himself even by providing absolute immunity from prosecution.

1. Where Offense Barred by Statute of Limitations. — U. S. *v.* Smith, 4 Day (Conn.) 121; Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Weldon *v.* Burch, 12 Ill. 374; Mahanke *v.* Cleland, 76 Iowa 401; Close *v.* Olney, 1 Den. (N. Y.) 319; Floyd *v.* State, 7 Tex. 215. See the title WITNESSES.

2. Exposure to Disgrace. — *Ex p.* Rowe, 7 Cal. 184; Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340; Com. *v.* Roberts, Bright. (Pa.) 109; Weldon *v.* Burch, 12 Ill. 374; Cundell *v.* Pratt, M. & M. 108; Rex *v.* Edwards, 4 T. R. 440; Harris *v.* Tippett, 2 Campb. 638; 1 Greenl. on Ev., §§ 454, 455, 456.

But there are cases which hold that when a direct answer to the question will disgrace a witness and affix a stain of infamy upon his character, he is not bound to answer it whether the question be material or not to the cause in which he is being examined. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Respublica *v.* Gibbs, 3 Yeates (Pa.) 429; Galbreath *v.* Eichelberger, 3 Yeates (Pa.) 515.

For a Full Discussion of this question, see the title WITNESSES.

3. *Ex p.* Zeehandelaar, 71 Cal. 238. See also *Ex p.* Henshaw, 73 Cal. 510; and the cases in the preceding note. See generally the title WITNESSES.

4. Where Court Has Not Jurisdiction. — People *v.* Cassels, 5 Hill (N. Y.) 164; Ellison *v.* State, 125 Ind. 492. See Holman *v.* Austin, 34 Tex. 668.

And the court may go back of the commitment, although it may allege jurisdictional facts, and judge whether the committing court had in fact jurisdiction to inquire as to the particular matter. People *v.* Cassels, 5 Hill (N. Y.) 164.

5. Illegal Method Employed in Making Inquiry. — A statute of *New York* permitted a party to a suit to be examined by his adversary as a witness at any time previous to the trial in an action at law. The *United States* statute provides that the mode of proof in the trial of actions at law shall be by oral testimony in open court. Where a person was committed for contempt by the Circuit Court of the United States for refusing to submit to such examina-

IX. Interference with Property in Custodia Legis — 1. In General. — Any unauthorized interference with property in the custody of the court is punishable as a flagrant contempt.[1]

2. In Custody of Sheriff or Other Like Officer — *a.* At Common Law. — Property taken by a sheriff or other officer of the court, under proper process, is *in custodia legis*, and at common law it was a contempt to disturb that possession by the execution of a writ of replevin from another court.[2] The failure of an officer of one court to deliver property, which is properly in his possession as such officer, to an officer of another in execution of a writ from that court, cannot render him liable for contempt.[3]

b. Statutory Enactments. — In many states the common-law rule has been changed by statute, or modified by the courts, and in those states an action of replevin may be maintained by some person other than the defendant in the case in which the property has been taken, unless the seizure has been made for taxes.[4]

3. In the Hands of Receiver — *a.* In General. — Property in the hands of a receiver is in the custody of the court of which the receiver is an officer,[5] and any person disturbing the possession of such receiver is guilty of a contempt of court.[6]

tion, it was held that the court exceeded its authority in the judgment of the commitment, and the contemnor was released on hearing of a writ of habeas corpus. *Ex p.* Fisk, 113 U. S. 713.

1. Interfering with Property in Custodia Legis — General Rule — *United States.* — De Visser *v.* Blackstone, 6 Blatchf. (U. S.) 235; King *v.* Ohio, etc., R. Co., 7 Biss. (U. S.) 529; Secor *v.* Toledo, etc., R. Co., 7 Biss. (U. S.) 513; Sabin *v.* Fogarty, 70 Fed. Rep. 482.

Alabama. — *Ex p.* Stickney, 40 Ala. 160.

California. — *Ex p.* Kellogg, 64 Cal. 343; Matter of Lowenthal, 74 Cal. 109.

Connecticut. — Huntington *v.* McMahon, 48 Conn. 174.

Illinois. — Richards *v.* People, 81 Ill. 551.

New York. — Noe *v.* Gibson, 7 Paige (N. Y.) 513.

Pennsylvania. — Com. *v.* Young, 11 Phila. (Pa.) 606.

2. Property in Custody of Sheriff or Other Officer. — Matter of Lowenthal, 74 Cal. 109; Huntington *v.* McMahon, 48 Conn. 174; Cromwell *v.* Owings, 7 Har. & J. (Md.) 55; Fries *v.* Porch, 49 Iowa 351; Sabin *v.* Fogarty, 70 Fed. Rep. 482.

It is a contempt of court for either the defendant in an execution, or for a stranger, to bring a replevin suit and seize under a writ property which has been levied on under execution. Cromwell *v.* Owings, 7 Har. & J. (Md.) 55.

A Person Who Takes from an Officer, by Means of Legal Process, certain personal property taken by such officer under a search warrant issued by a judge of the superior court, is guilty of a contempt of court. Matter of Lowenthal, 74 Cal. 109.

Seizure of Property by Sheriff in Possession of Marshal. — A United States marshal sold certain personal property under process of a federal court, and after accepting a bid and before delivery, while in custody of a deputy, the goods were seized by a sheriff. The sheriff was guilty of a contempt of court. Sabin *v.* Fogarty, 70 Fed. Rep. 482.

3. Failure to Obey Writ of Another Court. — Where a constable has levied upon property under an execution, and a party, other than the defendant, sues out a writ of replevin, the constable is not guilty of a contempt of court in refusing to deliver the property to the sheriff who holds such writ. It is proper that he should have the sheriff execute the writ at his peril, without any affirmative action on his part which might make him liable to the plaintiff in execution. Williams *v.* Galt, 95 Ill. 172.

4. Statutes. — See Richards *v.* Kirkpatrick, 53 Cal. 433; Samuel *v.* Agnew, 80 Ill. 553; Ralston *v.* Black, 15 Iowa 47; Musgrave *v.* Hall, 40 Me. 498; Ilsley *v.* Stubbs, 5 Mass. 283; Hanselman *v.* Kegel, 60 Mich. 540; Thompson *v.* Button, 14 Johns. (N. Y.) 84; Crittenden *v.* Lingle, 14 Ohio St. 182, 84 Am. Dec. 370.

5. Receiver's Possession That of the Court. — Booth *v.* Clark, 17 How. (U. S.) 331; Davis *v.* Gray, 16 Wall. (U. S.) 218; *In re* Merchants' Ins. Co., 3 Biss. (U. S.) 165; Hooper *v.* Winston, 24 Ill. 354; Richards *v.* People, 81 Ill. 551; Cartwright's Case, 114 Mass. 230; Elliott *v.* Warford, 4 Md. 80; Skinner *v.* Maxwell, 66 N. Car. 48; Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160.

6. *England.* — Angel *v.* Smith, 9 Ves. Jr. 335; *Ex p.* Cochrane, L. R. 20 Eq. 282; Skip *v.* Harwood, 3 Atk. 564; Langford *v.* Langford, 5 L. J. Ch. N. S. 60; Helmore *v.* Smith, 35 Ch. Div. 449; Russell *v.* East Anglian R. Co., 3 Macn. & G. 104; Fripp *v.* Bridgewater, etc., Canal Co., 3 W. R. 356; Randfield *v.* Randfield, 1 Drew. & Sm. 310; *Ex p.* Howard, 45 L. T. 320.

United States. — Secor *v.* Toledo, etc., R. Co., 7 Biss. (U. S.) 513; King *v.* Ohio, etc., R. Co., 7 Biss. (U. S.) 529; Visser *v.* Blackstone, 6 Blatchf. (U. S.) 235.

Illinois. — Richards *v.* People, 81 Ill. 551; Sercomb *v.* Catlin, 128 Ill. 556, 15 Am. St. Rep. 147.

Kentucky. — Hazelrigg *v.* Bronaugh, 78 Ky. 62.

Railroad in Hands of Receiver — Ordering Strike of Employees. — It has been held that the issue of notices during a strike, organized to resist a reduction of wages of the employees of a railroad which was then in the hands of a receiver, requesting them to stop work, was a contempt of court.[1] Though there is some slight difference in the mode of expressing the doctrine, it seems to be settled law by the federal courts that it is unlawful and a contempt to "order a strike" on any railroad in the hands of a receiver.[2]

The Courts Have Granted Injunctions restraining certain named defendants and all other persons from in any manner interfering with the operation of railroads in the hands of receivers, by threatening, intimidating, or persuading their employees to stop work, and the violation of such injunctions by any person is held to be a contempt.[3]

When There Was No Injunction — United States Statutes. — It has been held that it is immaterial whether or not the "ordering of a strike" on a railroad in the hands of a receiver may have been previously forbidden by an injunctional order; that to order a strike under such circumstances is a contempt of court under the United States Revised Statutes which provide that "the disobedience or resistance of any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts," is a contempt of the order of the court appointing the receiver.[4]

b. SUITS AGAINST RECEIVER. — Though there is some conflict, the weight of authority is to the effect that a person who brings an action in one court against a receiver appointed by another, without having first obtained the permission of the latter, is guilty of a contempt of that court.[5]

New York. — Noe *v.* Gibson, 7 Paige (N. Y.) 513; Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236.

Pennsylvania. — Com. *v.* Young, 11 Phila. (Pa.) 606.

Vermont. — Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

The possession of a receiver is the possession of the court itself, and any interference therewith, whether by forcibly taking possession of property committed to his charge or by legal proceedings for that purpose, without the sanction of the court, is a direct and flagrant contempt. Richards *v.* People, 81 Ill. 551.

It is a contempt of court for a sheriff to seize property in the hands of a receiver, with notice of the latter's appointment and without leave of the court appointing him, even though the title of the person whose writ the sheriff executes is paramount to that of the receiver. Com. *v.* Young, 11 Phila. (Pa.) 606.

Actual Notice of Appointment of Receiver Sufficient. — An order for an injunction and receiver was granted, and the parties against whom the order went had actual notice of it, although there was no formal service of the order on them. The court held that they were guilty of contempt in disposing of the notes which were the subject of the injunction and receivership. Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236. See also Skip *v.* Harwood, 3 Atk. 564.

Preferred Rights of Resident Creditors. — A plaintiff, resident in Illinois, instituted attachment suits in the courts of other states, and garnished debtors of a foreign corporation, for which a receiver of the accounts and notes and all choses in action had been appointed by a superior court of Illinois. It was held that in prosecuting said suits the plaintiff was not guilty of contempt of the superior court appointing the receiver. Ford *v.* Holbrook, 50 Ill. App. 547, *affirmed* 153 Ill. 633.

1. Ordering Strike on Railroad in Hands of Receiver. — The following notice was sent to the foremen of the various shops of a railway company during a strike organized to resist a reduction of wages, the railroad being at that time in the hands of a receiver appointed by the court: "———, Foreman: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employees. But in no case are you to consider this an intimidation." It was held that this was an unlawful interference with the management of the road by the receiver, and a contempt of court, for which the writer should be punished. *In re* Wabash R. Co., 24 Fed. Rep. 217.

2. *In re* Wabash R. Co., 24 Fed. Rep. 217; *In re* Higgins, 27 Fed. Rep. 443; U. S. *v.* Kane, 23 Fed. Rep. 748; *In re* Doolittle, 23 Fed. Rep. 544; U. S. *v.* Debs, 64 Fed. Rep. 724.

In the latter case the Supreme Court affirmed the doctrine announced by the Circuit Court. See *In re* Debs, 158 U. S. 564.

3. Injunction. — U. S. *v.* Debs, 64 Fed. Rep. 724, 158 U. S. 564.

4. *In re* Acker, 66 Fed. Rep. 295. See also the second note preceding.

5. Suing Receiver Without Permission of Appointing Court. — Angel *v.* Smith, 9 Ves. Jr. 335; Wiswall *v.* Sampson, 14 How. (U. S.) 65; Thompson *v.* Scott, 4 Dill. (U. S.) 508 [*denying* Allen *v.* Central R. Co., 42 Iowa 683; and Kinney *v.* Crocker, 18 Wis. 75, which lays down the contrary doctrine]; Tremper *v.* Brooks, 40 Mich. 335; Smith *v.* Circuit Judge

X. Causing Arrest of Party or Witness in Attendance on Trial. — The parties to a cause [1] and their witnesses,[2] while in attendance upon a trial, and while going to or returning from the place of trial, or a witness in attendance upon a committee of the legislature,[3] being exempt from arrest, a person who procures the arrest of such person is guilty of a contempt to the body or court on which he is in attendance.[4]

XI. Violation of Injunctions and Orders — **1. In General.** — One of the chief remedies afforded by courts of equity is that of a writ of injunction, which restrains a party from the exercise of designated acts, or commands the performance of others. It may operate only during the pendency of the cause before the tribunal, or perpetually thereafter, according to the decree. Violations of these writs constitute probably the most familiar instances of contempts.[5] It may be laid down as a general rule, that when the court has jurisdiction of the parties and of the subject-matter, and the organic power to grant the particular injunction, its violation is a flagrant contempt of the court which issued it.[6]

4. Necessity of Service of Order — *a.* GENERALLY ESSENTIAL. — A person

84 Mich. 564; Com. *v.* Young, 11 Phila. (Pa.) 606. See the title RECEIVERS.

Interference by Attachment. — An attachment of the property of a corporation debtor for which a receiver has been appointed, by a foreign corporation, with knowledge of such appointment, is an interference with property *in custodia legis* and punishable as a contempt. Holbrook *v.* Ford, 153 Ill. 633, 46 Am. St. Rep. 917.

Contempt of Officer Executing Process. — Where one institutes an action without leave of the court, for property in the hands of a receiver, both he and the officer who may seize the goods under his process are guilty of a contempt of court. Com. *v.* Young, 11 Phila. (Pa.) 606. *Contra*, see Kinney *v.* Crocker, 18 Wis. 80.

1. Causing Arrest of Party in Attendance on Trial. — *Ex p.* M'Neil, 6 Mass. 245; Wood *v.* Neale, 5 Gray (Mass.) 538. See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

2. Causing Arrest of Witness Attending Trial. — State *v.* Buck, 62 N. H. 670; May *v.* Shumway, 16 Gray (Mass.) 86, 77 Am. Dec. 401; Rex *v.* Wigley, 7 C. & P. 4, 32 E. C. L. 415. See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

3. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.

4. State *v.* Buck, 62 N. H. 670; Rex *v.* Wigley, 7 C. & P. 4, 32 E. C. L. 415; Garibaldo *v.* Cagnoni, 6 Mod. 90.

5. For the Scope of the Writ's Operation, and as to what acts may constitute its violation, see generally the title INJUNCTIONS.

6. General Rule as to Violation of Injunction — *United States.* — *In re* Debs, 158 U. S. 564; Monroe *v.* Harkness, 1 Cranch (C. C.) 157; Fischer *v.* Hayes, 6 Fed. Rep. 63; Monroe *v.* Harkness, 1 Cranch (C. C.) 157.

California. — Johnson *v.* Superior Ct., 65 Cal. 567.

Illinois. — Welch *v.* People, 38 Ill. 20; Kerfoot *v.* People, 51 Ill. App. 410.

Indiana. — Mowrer *v.* State, 107 Ind. 539; Hawkins *v.* State, 126 Ind. 294.

Iowa. — State *v.* Baldwin, 57 Iowa 266.

Michigan. — Wilcox Silver Plate Co. *v.* Schimmel, 59 Mich. 524.

Mississippi. — Commercial Bank *v.* Waters, 10 Smed. & M. (Miss.) 559.

New Jersey. — West Jersey Traction Co. *v.* Board of Public Works, 58 N. J. L. 536.

New York. — People *v.* Van Buren, 136 N. Y. 252; People *v.* Spalding, 2 Paige (N. Y.) 326; Deposit Nat. Bank *v.* Wickham, 44 How. Pr. (N. Y. Supreme Ct.) 421; Sullivan *v.* Judah, 4 Paige (N. Y.) 444; New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; Purchase *v.* New York Exch. Bank, 3 Robt. (N. Y.) 168; People *v.* Compton, 1 Duer (N. Y.) 512.

North Carolina. — Baker *v.* Cordon, 86 N. Car. 116, 41 Am. Rep. 448.

Ohio. — Forsythe *v.* Winans, 44 Ohio St. 277.

Vermont. — Vilas *v.* Burton, 27 Vt. 56.

Wisconsin. — Mead *v.* Norris, 21 Wis. 310; *In re* Perry, 30 Wis. 268; Ramstock *v.* Roth, 18 Wis. 522; Poertner *v.* Russel, 33 Wis. 193.

See also the title INJUNCTIONS.

Refusal of Writ by One Judge Does Not Invalidate Action by Another. — Where one circuit judge refused an application for a writ by indorsing the refusal on the bill, it is a question of courtesy only with another circuit judge, as to whether, on application to him, he will allow the writ. If he allows the writ, disobedience of it is a contempt. Welch *v.* People, 38 Ill. 20.

The Jurisdiction of a Court Granting a Preliminary Injunction against the diversion of water from a stream is not exceeded because the order also commands the removal of the means by which the water is diverted. A disobedience of such order is a contempt. Johnson *v.* Superior Ct., 65 Cal. 567.

Professing to Act Under Different Authority — No Excuse. — Pending an appeal to test the validity of a city ordinance purporting to grant to a street railroad company power to use electricity as the propelling power of its cars, the company proceeded, in evasion of the restraining force of the writ, to lay down its tracks under and by virtue of a "resolution" of the board of public works which had preceded the ordinance. The court held that the company, by reason of thus proceeding, was guilty of a contempt. West Jersey Traction Co. *v.* Board of Public Works, 58 N. J. L. 536.

cannot be in contempt of an order, injunctional or otherwise, unless he is shown to have been served with such order,[1] or to have had actual notice of its issuance.[2] If there is doubt as to whether the writ has been actually served a motion to attach for contempt for a disobedience of it will not be granted by the court.[3]

b. PERSONAL KNOWLEDGE OF ORDER. — Where a party against whom an injunction is granted has personal knowledge of its issuance, his disobedience of it before service is a contempt.[4]

Actual Presence in Court. — When a person is actually present in court when the order is made, he has personal knowledge of its issuance and no formal service is necessary to render its disobedience by him a contempt.[5]

3. Injunction After Appeal. — The allowance of an appeal from a decree granting an injunction does not dissolve the same, and its disobedience after appeal is a contempt of court.[6]

1. Service of Order Generally Necessary. — Whipple *v.* Hutchinson, 4 Blatchf. (U. S.) 190; Johnson *v.* Superior Ct., 63 Cal. 578; Hennessy *v.* Nicol, 105 Cal. 138; Perrine *v.* Broadway Bank, 53 N. J. Eq. 221; Pierce *v.* Post, 6 Phila. (Pa.) 494; Greenleaf *v.* Leach, 20 Vt. 281; Witter *v.* Lyon, 34 Wis. 564.

A party to a suit will not be adjudged in contempt therein for any act or omission which occurred before the service of the particular process alleged to have been disregarded. Witter *v.* Lyon, 34 Wis. 564.

When Service Presumed. — Where a person after being duly notified to show cause why he should not be punished for disobedience of an order of court, fails to appear and make any defense, the service of the original order will be presumed. *In re* Milburn, 59 Wis. 24.

2. See *infra*, the next subdivision.

3. Where There Is Doubt as to Service. — Where an injunction had been issued restraining parties to a suit from constructing certain iron bridges according to letters patent, and where the injunction had been violated, on a motion for an attachment for contempt the court held that as there was doubt as to the service of the writ the motion would be denied. Whipple *v.* Hutchinson, 4 Blatchf. (U. S.) 190.

4. Personal Knowledge by Contemnor of Issuance of Writ. — *England.* — Skip *v.* Harwood, 3 Atk. 564; Osborne *v.* Tennant, 14 Ves. Jr. 136; Vansandau *v.* Rose, 2 Jac. & W. 264.

United States. — Hatch *v.* Chicago, etc., R. Co., 6 Blatchf. (U. S.) 115.

Florida. — Thebaut *v.* Canova, 11 Fla. 143.

New Jersey. — Haring *v.* Kauffman, 13 N. J. Eq. 397, 78 Am. Dec. 102.

New Mexico. — Territory *v.* Clancy, 7 N. Mex. 580.

New York. — New York *v.* Conover, 5 Abb. Pr. (N. Y. C. Pl.) 251; People *v.* Kearney, 21 How. Pr. (N. Y. Supreme Ct.) 75; Livingston *v.* Swift, 23 How. Pr. (N. Y. Supreme Ct.) 1; Davis *v.* Davis, 83 Hun (N. Y.) 500; New York *v.* New York, etc., Ferry Co., 40 N. Y. Super. Ct. 315; People *v.* Marston, 18 Abb. Pr. (N. Y. Supreme Ct.) 257; Wilcox *v.* Harris, 59 How. Pr. (Monroe County Ct.) 262; People *v.* Brower, 4 Paige (N. Y.) 405; Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236.

Vermont. — Howe *v.* Willard, 40 Vt. 654.

Wisconsin. — Mead *v.* Norris, 21 Wis. 315; Poertner *v.* Russel 33 Wis. 193; Ramstock *v.* Roth, 18 Wis. 522.

And Where He Has Actual Notice of an Order for Its Immediate Issuance, and disobeys the terms of it, as ordered, he is guilty of a contempt though it has not been formally drawn up and served on him. Winslow *v.* Nayson, 113 Mass. 411.

Where the Writ of Injunction Contained a Slight Misdescription of a Suit, the prosecution of which was enjoined, and where such misdescription could not have misled the contemnor, a violation of the injunction was held to be a contempt. Endicott *v.* Mathis, 9 N. J. Eq. 110. But see Kennedy *v.* Weed, 10 Abb. Pr. (N. Y. C. Pl.) 62, where an order of court was based on an affidavit showing a judgment in favor of the plaintiff against "Ira Weed and Mary Weed," while the transcript docketed was of a judgment against "Ira Weed and Mrs. Weed." Such misdescription was held to be sufficient to relieve the defendant of a charge of contempt in disobeying the order.

5. Actual Presence in Court When Order Made. — McDonnell *v.* Henderson, 74 Iowa 619; Koehler *v.* Farmers', etc., Nat. Bank, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 307.

6. Disobedience After Appeal — *California.* — Heinlen *v.* Cross, 63 Cal. 44; Ortman *v.* Dixon, 9 Cal. 23.

Indiana. — Central Union Telephone Co. *v.* State, 110 Ind. 203; Hawkins *v.* State, 126 Ind. 294.

Iowa. — Lindsay *v.* Clayton Dist. Ct., 75 Iowa 509.

Missouri. — State *v.* Dillon, 96 Mo. 56.

New Jersey. — Hunt *v.* Lambertville, 46 N. J. L. 59.

New York. — Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 71 N. Y. 430; People *v.* Bergen, 53 N. Y. 404; People *v.* Rice, 80 Hun (N. Y.) 437; Graves *v.* Maguire, 6 Paige (N. Y.) 379.

After Appeal from Order Awarding Mandamus. — Whether the order appealed from be one granting an injunction or awarding a mandamus, the rule is necessarily the same. Thus where the officers of a street railroad company caused a portion of the tracks to be torn up, pending an appeal from an order awarding a mandamus to compel them to continue operating that portion of their line, they were guilty of a contempt of court. San Antonio St. R. Co. *v.* State, (Tex. Civ. App. 1896) 38 S. W. Rep. 54.

4. Order or Injunction Erroneously Granted. — Though an order of court or an injunction may be improperly or improvidently granted, it must be obeyed until vacated or dissolved. No matter how unreasonable in its terms or unjust in its operation it may prove, disobedience of it is a contempt.[1]

5. Irregularity in Exercise of Power. — Though a party cannot be guilty of contempt for disobeying an order which the court had no authority to make, such want of power must not be confused with mere irregularity in its exercise. Where the court has jurisdiction of the parties and of the subject-matter, and authority to make the order, a refusal to obey it is a contempt, however irregularly, improvidently, or erroneously made. Mere irregularity or error in the procedure, or in the order itself, will not justify a disobedience of the writ.[2]

6. Want of Jurisdiction to Make the Order. — A refusal to obey an injunction

1. Order or Injunction Improperly Granted — *England.* — Woodward *v.* Lincoln, 3 Swanst. 626; Netherwood *v.* Wilkinson, 33 Eng. L. & Eq. 297.

Connecticut. — William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121.

Illinois. — Kerfoot *v.* People, 51 Ill. App. 410; Clark *v.* Burke, 163 Ill. 334; Leopold *v.* People, 140 Ill. 552.

Iowa. — State *v.* Baldwin, 57 Iowa 266.

Kansas. — Billard *v.* Erhart, 35 Kan. 616.

New Jersey. — Una *v.* Dodd, 39 N. J. Eq. 173; Forrest *v.* Price, 52 N. J. Eq. 16; Richards *v.* West, 3 N. J. Eq. 456.

New York. — Moat *v.* Holbein, 2 Edw. Ch. (N. Y.) 188; People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Sullivan *v.* Judah, 4 Paige (N. Y.) 444; People *v.* McKane, 78 Hun (N. Y.) 161; Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Schell *v.* Erie R. Co., 51 Barb. (N. Y.) 377; People *v.* Bergen, 53 N. Y. 404.

South Carolina. — State *v.* Nathans, (S. Car. 1897) 27 S. E. Rep. 52; James *v.* Smith, 2 S. Car. 183.

Tennessee. — Rutherford *v.* Metcalf, 5 Hayw. (Tenn.) 58.

Vermont. — Howe *v.* Willard, 40 Vt. 662; Stimpson *v.* Putnam, 41 Vt. 238.

West Virginia. — State *v.* Harper's Ferry Bridge Co., 16 W. Va. 877.

Wisconsin. — Kaehler *v.* Halpin, 59 Wis. 40.

Where the Court Had Jurisdiction of the Parties and of the Subject-matter, the fact that an order of injunction has been erroneously granted affords no justification for its violation, which is properly punished as a contempt. Billard *v.* Erhart, 35 Kan. 616.

On an appeal from an order of the court committing a defendant to the county jail for refusing to obey a prior order requiring him to assign and hand over certain property to a receiver, no error in such prior order can be considered. The only question that can be considered is whether the court had jurisdiction to make it. Tolman *v.* Jones, 114 Ill. 147.

An attachment for contempt is the proper mode of enforcing obedience to an order of injunction, even though erroneous. State *v.* Baldwin, 57 Iowa 266.

An injunction, however erroneously issued, must be respected; the fact that it has been erroneously granted affords no justification for its violation. Kerfoot *v.* People, 51 Ill. App. 410.

While an injunction is in operation the failure of a party to respect it is a flagrant contempt of court, even though improperly issued. Moat *v.* Holbein, 2 Edw. Ch. (N. Y.) 188.

In an attachment for contempt in failing to obey an order of the court, the respondent may question the order which he is charged with refusing to obey, only in so far as he can show it to be absolutely void for want of jurisdiction either of the party, the subject-matter, or the authority to pronounce the particular judgment. Clark *v.* Burke, 163 Ill. 334.

No Indemnity Awarded to Adverse Party. — A person may be punished for the violation of an injunctional order, although such order was improperly granted; but he cannot, in such case, be compelled to pay any sum as indemnity to the opposite party. Kaehler *v.* Halpin, 59 Wis. 40.

Facts Subsequently Occurring No Excuse for a Violation. — If an order within the jurisdiction of the court is erroneously granted, the remedy of the party aggrieved is by an application to vacate it; it cannot be reviewed upon an application to punish for disobedience of it. If facts occur subsequently, they will not avail as an excuse for disobeying the order. Such disobedience is a contempt. People *v.* *v.* Bergen, 53 N. Y. 405.

2. Irregularity Merely — *United States.* — Elliott *v.* Peirsal, 1 Pet. (U. S.) 340; *Ex p.* Watkins, 3 Pet. (U. S.) 193.

Alabama. — *Ex p.* Stickney, 40 Ala. 160.

Illinois. — Leopold *v.* People, 140 Ill. 552.

Indiana. — Hawkins *v.* State, 126 Ind. 294.

New Jersey. — Wandling *v* Thompson, 41 N. J. L. 142.

New York. — New York *v.* New York, etc., Ferry Co., 64 N. Y. 623; People *v.* Bergen, 53 N. Y. 404; Myers *v.* Janes, 3 Abb. Pr. (N. Y. Supreme Ct.) 301; Higbie *v.* Edgarton, 3 Paige (N. Y.) 253; Matter of McLean, 62 Hun (N. Y.) 1.

North Dakota. — State *v.* Markuson, (N. Dak. 1897) 73 N. W. Rep. 82.

South Carolina. — Earle *v.* Stokes, 5 S. Car. 336.

Tennessee. — Rutherford *v.* Metcalf, 5 Hayw. (Tenn.) 58.

Wisconsin. — *In re* Perry, 30 Wis. 268.

The Rule in Canada is that the contemnor may always defend himself by objections to the regularity of the process. Matter of Allen, 31 U. C. Q. B. 458.

or order of court, granted without jurisdiction, does not render the person so refusing, liable for contempt. Courts cannot usurp authority and then punish for a disobedience of such usurpation.[1]

1. Jurisdictional Defects — *United States.* — *In re* Sawyer, 124 U. S. 200; *In re* Ayers, 123 U. S. 443; *Ex p.* Rowland, 104 U. S. 604.

California. — *Ex p.* Hollis, 59 Cal. 406; *Ex p.* Jaynes, 70 Cal. 638; *Ex p.* Brown, 97 Cal. 83; Brown *v.* Moore, 61 Cal. 432; People *v.* O'Neil, 47 Cal. 109; Foster *v.* Superior Ct., 115 Cal. 279.

Illinois. — Walton *v.* Develing, 61 Ill. 201; Weigley *v.* People, 51 Ill. App. 51; Dickey *v.* Reed, 78 Ill. 261; Andrews *v.* Knox County, 70 Ill. 65; Darst *v.* People, 62 Ill. 306; Lester *v.* People, 150 Ill. 408, 41 Am. St. Rep. 375.

Kansas. — State *v.* Smithers, 14 Kan. 629. *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 396.

Louisiana. — State *v.* Voorhies, 37 La. Ann. 605.

Michigan. — Brewer *v.* Kidd, 23 Mich. 440; People *v.* Simonson, 10 Mich. 335.

Mississippi. — *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234.

Missouri. — *Ex p.* Crenshaw, 80 Mo. 447; St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230.

Nevada. — *Ex p.* Gardner, 22 Nev. 280.

New Jersey. — Dodd *v.* Una, 40 N. J. Eq. 672; Forrest *v.* Price, 52 N. J. Eq. 16.

New York. — People *v.* Edson, 52 N. Y. Super. Ct. 53; Dawley *v.* Brown, 43 How. Pr. (N. Y. Supreme Ct.) 17; Bacon *v.* Wilber, 1 Cow. (N. Y.) 117; Quimbo Appo *v.* People, 20 N. Y. 531; People *v.* Donovan, 135 N. Y. 79, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 788.

North Carolina. — Bear *v.* Cohen, 65 N. Car. 511.

Pennsylvania. — Com. *v.* Perkins, 124 Pa. St. 36.

South Carolina. — Gilliam *v.* McJunkin, 2 S. Car. 442.

West Virginia. — State *v.* Blair, 39 W. Va. 704.

Wisconsin. — Matter of Blair, 4 Wis. 522; *In re* Pierce, 44 Wis. 411.

The Disregard of a Supersedeas improvidently issued, and annulled and vacated for want of jurisdiction, will not be punished as a contempt. State *v.* Blair, 39 W. Va. 704.

The Circuit Court of the United States has no jurisdiction to entertain a bill to restrain the mayor of a city from removing an officer upon charges filed against him for malfeasance in office; and an injunction issued upon such bill, and an order committing the defendant for contempt in disregarding the injunction, are absolutely void, and he is entitled to be discharged on habeas corpus. *In re* Sawyer, 124 U. S. 201.

Where Proceedings Are Ex Parte. — Where a complainant, claiming to be in actual possession of certain premises, obtained a preliminary injunction enjoining the respondents from trespassing, and the writ also enjoined them from interfering with the possession, and where it appeared that respondents were actually in possession at the time the injunction was issued, it was held that they could not be punished for contempt in maintaining that possession by force. People *v.* Simonson, 10 Mich. 335.

Where Judge Out of His District. — The judge of one district when in another district has no jurisdiction while the judge of the latter district is holding his own court, to make an order in relation to a matter pending in the court of the latter district; and a party cannot be punished for a contempt in violating an order which the court had no jurisdiction to make. People *v.* O'Neil, 47 Cal. 109.

Enjoining an Election for Which the Law Provides. — Where the law authorized an election to be called in a township to determine whether a majority were in favor of subscribing to the stock of a railroad company, and the election was called in pursuance of the requirements of the law, a court of equity had no jurisdiction to restrain the officers from holding, or the people from voting, at such election. An injunction issued in such case is void, and the disobedience of it is no contempt. Walton *v.* Develing, 61 Ill. 201, *followed* in Darst *v.* People, 62 Ill. 306.

Where a Court Had No Jurisdiction Over a Cause Ratione Materiæ it exceeds the bounds of its authority when it issues therein an injunction; and a disobedience of such injunction is not a contempt. State *v.* Voorhies, 37 La. Ann. 605.

Order of Judge that Cause Pending in One District Be Transferred to His. — The district court of one county lacks power to make an order that an action pending in the court of another county be transferred to the first-named court. Such order is without jurisdiction, and disobedience to it cannot be punished as a contempt. *Ex p.* Gardner, 22 Nev. 280.

Where Judge Without Jurisdiction to Render Money Decree. — On the petition of a surety of an administrator to be relieved from his liability as surety, the judge of probate having cited the administrator before him, took an account of his administration, and, finding a balance due by him to the estate, made an order that such balance be paid into court, and that the letters of administration be revoked. On failing to comply with the order to pay the money he was arrested and imprisoned for contempt. It was held that the judge was without jurisdiction to render the decree, and that the imprisonment for contempt was unlawful. Gilliam *v.* McJunkin, 2 S. Car. 442.

Suit Against State. — Where a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make (the original order being void for want of jurisdiction), the order punishing for contempt is equally void. The constitutional exemption, guaranteed by the Eleventh Amendment, covers not only suits brought against a state by name, but those against its officers, where the state, though not named, is the real party against which the relief was asked. *In re* Ayers, 123 U. S. 443. See the title STATES.

Where No Jurisdiction to Award Mandamus. —

7. Strangers to the Cause — Agents. — Ordinarily a person cannot be punished as for a contempt for the violation of an order, or the disobedience of an injunction, issued in a cause to which he is a stranger.[1]

Contempt of Agent. — Where the order is disobeyed by an agent, with knowledge of its service on his principal, he may be punished for contempt.[2] But an agent cannot be punished for contempt for the violation of an order as to which his principal is a stranger.[3]

8. Right to Personal Notice and Hearing. — When it is claimed that an injunctional or other order, made during the progress of a cause in a court of chancery, has been violated or not complied with, the contemnor is entitled to personal notice of the institution of proceedings to punish him for contempt, that he may appear and controvert or demur to the affidavits or information on which the proceeding may be based.[4] The service of a motion to commit for the disobedience of an injunction on the solicitor of record of the contemnor is held in *England* to be insufficient.[5]

9. Nature of Punishment. — The wilful violation of an injunction is ordinarily a criminal contempt, and is punishable primarily as such in the interest of public justice and for the purpose of vindicating the power and maintaining

The county commissioners of a county in Alabama, who were required by statute to levy and assess such a special tax upon real and personal property as would be sufficient to meet the interest falling due upon certain bonds of the county, discharged their duty when a sufficient levy had been made, and the governor of the state was notified of the failure of the collector to give bond for the collection of any taxes other than those levied for general purposes; and a writ of mandamus awarded "to cause the tax to be collected," such writ being in excess of the jurisdiction of the court, was void; and the commissioners, being adjudged to be in contempt of that command, and imprisoned therefor by order of the court, were discharged on a writ of habeas corpus. *Ex p.* Rowland, 104 U. S. 604.

Decree Requiring Execution of Deed. — In Berry *v.* Innes, 35 Mich. 189, it was held that the defendant was not in contempt for disobedience of a decree requiring him to execute, acknowledge, and deliver to the complainant a deed with special covenant of warranty, until a deed had been presented to him for execution and he had refused. See also Berry *v.* Innes, 46 Mich. 518.

Disobedience of Void Subpœna Duces Tecum. — A court has no jurisdiction to make an order requiring an employee of a telegraph company to search for and produce all messages from and to a large number of persons therein named, between specified dates; hence the disobedience of such an order by him is no contempt, and where there has been a commitment for such supposed contempt he will be discharged on habeas corpus. *Ex p.* Jaynes, 70 Cal. 638. See the title PRODUCTION OF DOCUMENTS.

1. Strangers. — Sickels *v.* Borden, 4 Blatchf. (U. S.) 14; McKinney *v.* Frankfort, etc., R. Co., 140 Ind. 95; St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230; Bowery Sav. Bank *v.* Richards, 3 Hun (N. Y.) 366; Shelby *v.* Burtis, 18 Tex. 644.

Assignee. — Where an injunction was obtained against the enforcement of a deed of trust, given to secure a promissory note, the court has no jurisdiction to punish for contempt an assignee of the note who obtained it before the injunction was granted and who was not a party to the suit. Shelby *v.* Burtis, 18 Tex. 644.

A Petition for the Appointment of a Receiver for a corporation showed that the corporate property had been transferred to an alleged new company, but such new company was not a party; and where, the receiver having been appointed, the officers having control of the property refused to surrender it, and the court granted a writ directing the sheriff to place the receiver in possession and to arrest for contempt the persons refusing to surrender possession, it was held that, the new corporation and its officers not being parties, the court had no jurisdiction to grant the writ, and that a refusal to obey such order did not render the person refusing liable for contempt. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230.

2. Agents. — Aldinger *v.* Pugh, 57 Hun (N. Y.) 181, 19 Civ. Pro. Rep. (N. Y.) 91, *affirmed* 132 N. Y. 407. And see Cameron *v.* Kapinos, 89 Iowa 561.

3. An attorney is not guilty of contempt because, after the entry of an order enjoining the creditors of a corporation from prosecuting actions against it, he advised and brought a suit in another court for nonresident creditors who were not bound by the injunction. State *v.* Nathans, (S. Car. 1897) 27 S. E. Rep. 52.

4. Angerstein *v.* Hunt, 6 Ves. Jr. 488; Taylor *v.* Roe, 68 L. T. 213; Flommerfelt *v.* Zellers, 7 N. J. L. 31. But see O'Callaghan *v.* O'Callaghan, 69 Ill. 552.

See, for a Full Treatment of this phase of the subject, the title CONTEMPT, 4 ENCYC. OF PL. AND PR. 764.

5. In Ellerton *v.* Thirsk, 1 Jac. & W. 376, the lord chancellor said: "I think he must be personally served. I should not like to make an order for committing a party, though counsel should appear for him, if I knew that he had not been served. Another notice is therefore necessary."

the dignity of the court. When punished as a civil contempt it is treated not as an offense against the dignity of the court, but as an offense against the party in whose behalf the writ issued, and where a fine is imposed it is solely for his indemnity.[1] There are some cases where the violation of an injunction may properly be punished as both a civil and a criminal contempt. The nature of the proceedings, however, being entirely different in each case, it would seem that the contemnor could not well be punished for both in the same proceeding.[2]

XII. Contempt by Newspaper Publications — 1. In General. — The publication of inaccurate accounts of pending causes, or of matter which has a tendency to prejudice the public as to their merits, or of matter tending to bring the court into disrepute, and thus to interfere with the due administration of justice, has always been regarded as contempt of court.[3]

2. Attack on Integrity of the Court. — The publication of libelous and scandalous matter in a newspaper, which reflects upon the conduct of a court of record in reference to a pending suit, tending in some manner to impede, interrupt, or embarrass the proceedings of the court in reference thereto, or to

1. See People *v.* McKane, 78 Hun (N. Y.) 157. It would be impossible to lay down a rule of general application as to punishments for contempts for violations of injunctions. The procedure and punishment in such cases are frequently regulated by statute, and where no statute exists, the practice differs in different jurisdictions. See the title Contempt, 4 Encyc. of Pl. and Pr. 764.

2. *In re* Pierce, 44 Wis. 411; Haines *v.* Haines, 35 Mich. 138; Matter of Watson, 3 Lans. (N. Y.) 408.

Very few instances can be found where a court undertakes to punish the violation of an injunction as both a civil and a criminal contempt; when done, separate proceedings would seem to be necessary. In the one case the fine goes to the aggrieved party as an indemnity, and in the other to the state. See the title Contempt, 4 Encyc. of Pl. and Pr. 764.

In the case of Doubleday *v.* Sherman, 8 Blatchf. (U. S.) 45, a defendant who was found guilty of wilfully violating an injunction was fined a sufficient amount to cover the solicitor's fees expended by the plaintiff in prosecuting the contempt, to be turned over to the latter as indemnity, and committed until the payment of costs and the entire fine including the amount taxed as the plaintiff's indemnity.

3. **Newspaper Publications — General Rule** — *England.* — *In re* Printer of St. James's Evening Post, 2 Atk. 469; Daw *v.* Eley, L. R. 7 Eq. 49; Littler *v.* Thomson, 2 Beav. 129; Tichborne *v.* Mostyn, L. R. 7 Eq. 55, note 1; *In re* Cheltenham, etc., Railway Carriage, etc., Co., L. R. 8 Eq. 580.

Canada. — Reg. *v.* Wilkinson, 41 U. C. Q. B. 42, 47.

United States. — Hollingsworth *v.* Duane, Wall. (C. C.) 77; U. S. *v.* Duane, Wall. (C. C.) 102.

California. — Matter of Buckley, 69 Cal. 1; *Ex p.* Barry, 85 Cal. 603, 20 Am. St. Rep. 248; Matter of Shortridge, 99 Cal. 527, 37 Am. St. Rep. 78.

Colorado. — Cooper *v.* People, 13 Colo. 337; People *v.* Stapleton, 18 Colo. 568; Bloom *v.* People, 23 Colo. 416.

Illinois. — People *v.* Wilson, 64 Ill. 196, 16 Am. Rep. 528.

Indiana. — *Ex p.* Wright, 65 Ind. 504; Cheadle *v.* State, 110 Ind. 301, 59 Am. Rep. 199.

Iowa. — State *v.* Dunham, 6 Iowa 245; State *v.* Anderson, 40 Iowa 207.

Montana. — State *v.* Faulds, 17 Mont. 140.

Nebraska. — Percival *v.* State, 45 Neb. 741; Rosewater *v.* State, 47 Neb. 630.

New Hampshire. — Tenney's Case, 23 N. H. 162; Matter of Sturoc, 48 N. H. 428, 97 Am. Dec. 630.

New Jersey. — Matter of Cheeseman, 49 N. J. L. 115, 60 Am. Rep. 596.

New Mexico. — *In re* Hughes, (N. Mex. 1895) 43 Pac. Rep. 692.

New York. — Matter of Bronson, 12 Johns. (N. Y.) 460; People *v.* Freer, 1 Cai. (N. Y.) 518.

North Carolina. — Matter of Moore, 63 N. Car. 397; *Ex p.* Biggs, 64 N. Car. 202.

Ohio. — State *v.* Post, 6 Ohio Dec. 200; Myers *v.* State, 46 Ohio St. 473.

Oklahoma. — Burke *v.* Territory, 2 Okla. 499.

Oregon. — State *v.* Kaiser, 20 Oregon 50.

Pennsylvania. — Respublica *v.* Oswald, 1 Dall. (Pa.) 319, 1 Am. Dec. 246; Bayard *v.* Passmore, 3 Yeates (Pa.) 438.

West Virginia. — State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

Contempts may arise "by speaking or writing contemptuously of the court or judges acting in their judicial capacity, by printing false accounts * * * of causes then depending in judgment, and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost among the people." 4 Bl. Com. 285.

In the case of *In re* Printer of St. James's Evening Post, 2 Atk. 469, the court thus defined the several classes of contempts in this regard: "There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons, before the cause is heard."

influence its decision therein, may be punished by the court as a contempt.[1]

Necessary that Finding Show Intent. — It has been held, in a state where all indirect contempts are reviewable on appeal, that the judgment finding a publisher of a newspaper guilty of contempt must show that the publication was made with the intent of bringing the court into contempt, and the language used must be found and set out.[2]

3. Tending to Prejudice a Cause. — A court has the inherent power, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt the publication of any article, with reference to a pending cause, which is calculated to prejudice the jury as to its merits or to obstruct the court in the discharge of its duties.[3]

Where Publication Does Not Prejudice the Cause. — Where, however, the publication complained of can have no tendency to prejudice the cause, the publisher of a newspaper is not guilty of contempt in publishing the testimony, even

1. Attack on Integrity of Court — *United States.* — U. S. *v.* Duane, Wall. (C. C.) 102.

California. — Matter of Buckley, 69 Cal. 1; *Ex p.* Barry, 85 Cal. 603, 20 Am. St. Rep. 248.

Colorado. — Cooper *v.* People, 13 Colo. 337; People *v.* Stapleton, 18 Colo. 568; Bloom *v.* People, 23 Colo. 416.

Indiana. — *Ex p.* Wright, 65 Ind. 504; Cheadle *v.* State, 110 Ind. 301, 59 Am. Rep. 199.

Illinois. — People *v.* Wilson, 64 Ill. 196, 16 Am. Rep. 528.

Montana. — State *v.* Faulds, 17 Mont. 140.

Nebraska. — Rosewater *v.* State, 47 Neb. 630; Percival *v.* State, 45 Neb. 741.

New Hampshire. — Tenney's Case, 23 N. H. 162.

New Jersey. — Matter of Cheeseman, 49 N. J. L. 115, 60 Am. Rep. 596.

New Mexico. — *In re* Hughes, (N. Mex. 1895) 43 Pac. Rep. 692.

North Carolina. — Matter of Moore, 63 N. Car. 397.

Ohio. — State *v.* Post, 6 Ohio Dec. 200; Myers *v.* State, 46 Ohio St. 473.

Oklahoma. — Burke *v.* Territory, 2 Okla. 499.

Oregon. — State *v.* Kaiser, 20 Oregon 50.

West Virginia. — State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

Canada. — Reg. *v.* Wilkinson, 41 U. C. Q. B. 42.

In Mississippi it has been held that the power to punish for these indirect contempts was at war with the constitution of the state. *Ex p.* Hickey, 4 Smed. & M. (Miss.) 751.

Reflections on Judicial Conduct. — Publications which charge that persons stigmatized as "corruptionists and political thugs" have such influence with the Supreme Court as to prevent the rendering of a decision by it in a cause wherein they had been convicted of a crime and appealed to that court, and state that "there must be influence of some kind at work somewhere; * * * there can be no earthly excuse for the Supreme Court in any manner shielding them from the punishment they so richly deserve; * * * it would be interesting to know what mysterious but evidently powerful influence has retarded the machinery of justice so strikingly in this case," constitute contempt of court. People *v.* Stapleton, 18 Colo. 568.

The publication of an article in a newspaper charging a judge with "deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice," in the trial of a pending case, is a contempt of court. *Ex p.* Barry, 85 Cal. 603, 20 Am. St. Rep. 248.

The publication of an article containing imputations against the character of a judge, and imputing to him conduct in respect to the case then being tried, which, if true, would render him unfit to try the case, with ground to believe that the paper when published will be circulated in the court room during the trial and there read, is a contempt of court. Myers *v.* State, 46 Ohio St. 473.

The publication of an article in a newspaper which reflects upon the conduct of the court in reference to a pending suit, and tends either to influence its decision or to impede the proceedings in reference thereto, is properly punished by the court as a contempt. State *v.* Kaiser, 20 Oregon 50.

2. *In re* Deaton, 105 N. Car. 59.

3. Tending to Prejudice a Cause — *England.* — Littler *v.* Thomson, 2 Beav. 129; Daw *v.* Eley, L. R. 7 Eq. 49; *In re* Cheltenham, etc., Railway Carriage, etc., Co., L. R. 8 Eq. 580; *In re* Printer of St. James's Evening Post, 2 Atk. 469.

Canada. — Bothwell's Election Case, 40 Ont. Rep. 224; Reg. *v.* Wilkinson, 41 U. C. Q. B. 47.

California. — Matter of Shortridge, 99 Cal. 527, 37 Am. St. Rep. 78.

New Hampshire. — Tenney's Case, 23 N. H. 162; Matter of Sturoc, 48 N. H. 428, 97 Am. Dec. 630.

New York. — People *v.* Freer, 1 Cai. (N. Y.) 518.

Pennsylvania. — Respublica *v.* Oswald, 1 Dall. (Pa.) 319, 1 Am. Dec. 246; Bayard *v.* Passmore, 3 Yeates (Pa.) 438.

The publication of an article in a newspaper, reflecting in severe and opprobrious terms on the character of a prosecution then pending in court, the publication being made at a time and under circumstances which would bring it to the notice of the jurors, is a contempt of court and punishable as such by summary process. Matter of Sturoc, 48 N. H. 428, 97 Am. Dec. 626.

Addresses to Out-door Meetings — And where the publishing of the matter is by addresses to out-of-door meetings, it is equally a contempt. Reg. *v.* Castro, L. R. 9 Q. B. 219.

though the court may order that it shall not be published.[1]

4. Attack on Grand Jury. — The publication of an article containing an attack on a grand jury, while in session, and tending to bring the jurors into disrepute and to interrupt a legitimate investigation by them of a matter before them, is a contempt.[2]

5. Publication Must Relate to Pending Cause. — A slanderous and libelous publication concerning the judge, in relation to an act already done, or a decision rendered, cannot be punished by the court as a contempt. However criminal the publication may be, it lacks that necessary ingredient to constitute a contempt, of tending to prejudice the cause or to impede its progress.[3]

6. Summary Punishment Not Unconstitutional. — The constitutional provisions of the various state constitutions guaranteeing liberty of speech and of publication, invariably qualify such guaranty by providing that persons shall be responsible for the abuse of that liberty. Even in the absence of such expressed qualifications, it could not be said that such guaranties afforded absolute immunity from punishment to those who abuse that privilege.[4]

7. Punishment within Discretion of Court. — Whether or not a person shall be punished for the publication of matter tending to prejudice the cause, is entirely within the discretion of the court, and a party to the cause cannot raise on error the action of the court.[5]

1. Where There Is No Tendency to Prejudice Cause. — The object of the section of the *California* Code authorizing the court to direct the trial to be private was solely to secure decorum in the conduct of trials involving the relation of the sexes, and the disobedience of the order of a court that the testimony be not published is not a contempt, unless it is of such nature as to impede, embarrass, or obstruct the court in the discharge of its duties. Matter of Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78.

2. Attack on Grand Jury. — U. S. *v.* Duane, Wall. (C. C.) 102; Fishback *v.* State, 131 Ind. 304.

3. Publication Must Relate to Pending Cause. — *Ex p.* Barry, 85 Cal. 603, 20 Am. St. Rep. 248; Storey *v.* People, 79 Ill. 45, 22 Am. Rep. 158; People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; Cheadle *v.* State, 110 Ind. 301, 59 Am. Rep. 199; State *v.* Dunham, 6 Iowa 245; State *v.* Anderson, 40 Iowa 207; Rosewater *v.* State, 47 Neb. 630; State *v.* Kaiser, 20 Oregon 50; Bayard *v.* Passmore, 3 Yeates (Pa.) 438. But see State *v.* Morrill, 16 Ark. 384, in which case the publication held to be a contempt was made after the determination of the cause.

Where Cause Still Open. — But where a decree of the court is still open to modification, rehearing, or appeal, the publication of a letter charging the judge with unfairness and improper conduct during the trial of the case relates to a pending cause. *In re* Chadwick, (Mich. 1896) 67 N. W. Rep. 1071.

4. Constitutional Provisions. — State *v.* Morrill, 16 Ark. 385; Cooper *v.* People, 13 Colo. 337; People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; State *v.* Faulds, 17 Mont. 140; Burke *v.* Territory, 2 Okla. 499; Respublica *v.* Oswald, 1 Dall. (Pa.) 319, 1 Am. Dec. 246.

In the course of the opinion in State *v.* Morrill, 16 Ark. 402, the court said: "The counsel for the defense supposed that the power of the courts to punish, as for contempt, the publication of libels upon their proceedings was cut off by the seventh section of the Bill of Rights, which is in these words: 'That printing presses shall be free to every person; and no law shall ever be made to restrain the rights thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject — being responsible for the abuse of that liberty.' The last clause of the section, 'being responsible for the abuse of that liberty,' is an answer to the argument of the learned counsel. It is a well known fact, that the bench and the bar have been, in this and all other countries where the law has existed as a distinct profession, the ablest and most zealous advocates of liberal institutions, the freedom of conscience, and the liberty of the press; and none have guarded more watchfully the encroachments of power on the one hand, or deprecated more earnestly tendencies to lawless anarchy and licentiousness on the other. The freedom of the press, therefore, has nothing to fear from the bench in this state. No attempt has ever been made, and we may venture to say never will be, to interfere with its legitimate province, on the part of the judiciary, by the exercise of the power to punish contempts."

In *Illinois* it is held that the court is not a competent judge as to whether there has been an abuse of the privilege. In the case of Storey *v.* People, 79 Ill. 45, 22 Am. Rep. 158, inferentially *overruling* People *v.* Wilson, 64 Ill. 196, 16 Am. Rep. 528, the court, after deciding that the constitutional guaranty applies to words published in regard to judicial conduct, thus concludes: "When it is conceded that the guaranty of this clause of the constitution extends to words spoken or published in regard to judicial conduct and character, it would seem necessarily to follow that the defendant has the right to make a defense which can only be properly tried by a jury, and which the judge of a court, especially if he is himself the subject of the publication, is unfitted to try."

5. The issuance of process for contempt charged to have been committed by the pub-

XIII. Contempt of Legislature — **1. In England.** — The same inherent power of punishing for contempt belongs to Parliament in England. The House of Commons has it, not because it is a representative body with legislative functions, but because it is a part of the high court of Parliament, the highest court in the realm.[1]

2. In English Colonies. — A legislative assembly of an English colony, not being a judicial body, has no inherent right to punish for contempt,[2] and except in those cases where Parliament has invested them with it they cannot exercise it.[3]

3. In United States — *a.* No General Power to Punish. — In the United States the judicial power is vested by the various constitutions in the courts created by the constitutions, and such others as may be created. Neither Congress nor the state legislatures succeeded to those inherent and unlimited powers of punishing for contempts possessed by the English Parliament. Though there was judicial sanction for the prevalence of such an idea in the past,[4] it is now generally recognized that where there is not found in the constitution any general power in the legislature to punish for contempt, that power is limited to cases expressly provided for by the constitution or to cases where the power is necessarily implied from the constitutional functions and duties to the proper performance of which it is essential.[5]

lishers of newspapers during the progress of a cause rests entirely within the sound discretion of the court, and cannot be controlled by the parties, nor can they appeal from the court's action in the matter. People *v.* Durrant, 116 Cal. 179.

1. Contempt of Legislature — In England. — Shaftsbury's Case, 1 Mod. 144; Crosby's Case, 3 Wils. 188; Rex *v.* Flower, 8 T. R. 314; Reg. *v.* Paty, 2 Salk. 503; Burdett *v.* Abbott, 14 East 1; Murray's Case, 1 Wils. 299; Sheriff's Case, 11 Ad. & El. 273, 39 E. C. L. 80; Howard *v.* Gosset, 10 Q. B. 359, 59 E. C. L. 359.

2. English Dependencies. — Doyle *v.* Falconer, L. R. 1 P. C. 328; Keilly *v.* Carson, 4 Moo. P. C. 63; Fenton *v.* Hampton, 11 Moo. P. C. 347; *Ex p.* Brown, 5 B. & S. 280, 117 E. C. L. 280; Stockdale *v.* Hansard, 9 Ad. & El. 1, 36 E. C. L. 13.

3. Speaker of Assembly *v.* Glass, L. R. 3 P. C. 560; Dill *v.* Murphy, 1 Moo. P. C. N. S. 487.

4. United States. — See Anderson *v.* Dunn, 6 Wheat. (U. S.) 204; Stewart *v.* Blaine, 1 MacArthur (D. C.) 453; Story Const., §§ 845, 849. See State *v.* Matthews, 37 N. H. 450; Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

5. Extent of Power. — Kilbourn *v.* Thompson, 103 U. S. 168, *overruling* Anderson *v.* Dunn, 6 Wheat. (U. S.) 204; People *v.* Keeler, 99 N. Y. 463, 52 Am. Rep. 49; *In re* Falvey, 7 Wis. 630.

Kilbourn v. Thompson. — In the case of Kilbourn *v.* Thompson, 103 U. S. 168, recognized as the most authoritative case in this country as to the power of any legislature to punish for contempts under the constitution creating it, and *overruling* the case of Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, relating to the power possessed by Congress to punish contempts, the court in part said: "The powers of Congress itself, when acting through the concurrence of both branches, are dependent solely on the Constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are 'reserved to the states respectively, or to the people.' * * * By the second clause of the fifth section of the first article, 'each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member;' and by the clause immediately preceding, it 'may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.' These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either house of Congress to punish for contempts. The advocates of this power have, therefore, resorted to an implication of its existence, founded on two principal arguments. These are (1) its exercise by the House of Commons of England, from which country we, it is said, have derived our system of parliamentary law; and (2) the necessity of such a power to enable the two houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them. That the power to punish for contempt has been exercised by the House of Commons in numerous instances is well known to the general student of history, and is authenticated by the rolls of the Parliament. And there is no question but that this has been upheld by the courts of Westminster Hall."

After a discussion of the principles on which the power in the House of Commons rests, and after showing that those principles can have no application to the legislative bodies of the United States, the court continues: "We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. * * * It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers

b. PUNISHMENT OF CONTUMACIOUS WITNESS — (1) *In General.* — The power of the legislature to punish as for a contempt a contumacious witness, summoned to give testimony before a committee appointed by it, depends

intrusted to government, whether state or national, are divided into the three grand departments — the executive, the legislative, and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. * * * In the main, however, that instrument, the model on which are constructed the fundamental laws of the states, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another. * * * The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative. * * * We are of opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the speaker, under which Kilbourn was imprisoned, are in like manner void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority. * * * We must, therefore, hold, notwithstanding what is said in the case of Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, that the resolution of the House of Representatives finding Kilbourn guilty of contempt, and the warrant of its speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the House was without authority in the matter."

The Chapman Case. — In *In re* Chapman, 166 U. S. 661, the court, by Mr. C. J. Fuller, says: "In Kilbourn *v.* Thompson, 103 U. S. 168, among other important rulings, it was held that there existed no general power in Congress or in either house to make inquiry into the private affairs of a citizen; that neither house could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership as a mere matter of private concern, and that consequently there was no authority in either house to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent, or details of the business of the firm in question, but only whether that firm confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any senator to buy or sell for him any of that stock whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness, simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two houses, they cannot be defeated on purely sentimental grounds."

New York Statute. — As by the New York Penal Code, § 724, it is declared that it does not affect "any power conferred by law upon any public body * * * to impose or inflict punishment for a contempt," the provision of the Revised Statutes conferring the power upon either house of the legislature to punish as for a contempt a witness refusing to answer before it, or before a committee in legislative proceedings (1 Rev. Stat. 154, § 13, subd. 4), was not abrogated by the two provisions of the Penal Code, one (§ 69) making such refusal a misdemeanor, the other (§ 719) declaring that offenses specified in said code, committed after its going into effect, must be punished according to its provisions "and not otherwise." People *v.* Keeler, 99 N. Y. 463, 52 Am. Rep. 49. In this case it was further held that where the statute relates to the proceedings of the legislative body itself and is necessary and appropriate to enable it to perform its constitutional functions, it is not such an invasion of the province of the judiciary as to bring it within any implied prohibition of the Constitution; and that the power of obtain-

primarily upon whether his testimony is required in a matter of which the house had conferred on it, by the Constitution, jurisdiction to inquire; and, secondly, whether the witness has in fact been guilty of a contempt. Unless these two essentials co-exist, the legislature is without authority to punish.[1]

Where Answer Will Incriminate. — The same rule, of course, applies to the case of a refusal of a witness to answer a question on the grounds that the answer would incriminate him, before a legislative committee, as to one before a court. Such refusal is not a contempt.[2]

(2) *Right to Take Testimony in Election Contests.* — One of the functions, which is in its nature judicial, conferred by the Constitution on Congress, and on each state legislature by the constitution of the state, is the right to judge of the qualifications of its own members and to determine contests for membership in that body.[3] While engaged in these functions a legislature has the power to punish for contempt the contumacy of a witness summoned before it.[4]

(3) *Right to Investigate Conduct of Members.* — A legislative body has unquestioned authority to examine into the conduct of its members, with the view of exercising its constitutional right of expelling those whose conduct may be found unworthy.[5] Hence, it may institute an inquiry to ascertain the

ing information for the purpose of framing laws to meet supposed or apprehended evils is necessary and belongs to the legislature; and statutory provisions, such as are contained in the Revised Statutes (1 Rev. Stat. 158, § 1 *et seq.*), authorizing legislative committees to take testimony and summon witnesses are within the limits of legislative powers, as is also a statute authorizing either house to enforce its process by imprisonment of a recusant witness.

1. Contumacious Witnesses. — Kilbourn *v.* Thompson, 103 U. S. 168.

A firm which was a debtor to the government was charged with having become interested in a "real estate pool," to the disadvantage of its creditors. A committee of the House was authorized to investigate this charge, and a subpœna was issued to one of the members of the firm to produce certain books and papers before the committee. The witness summoned refused to produce the books and papers, or to testify, and was committed for contempt. The court held that the investigation was not in the exercise of one of the judicial functions imposed on Congress, and that the imprisonment was illegal. Kilbourn *v.* Thompson, 103 U. S. 168.

It seems that this power may only be exercised where the investigation which the legislative committee was conducting was a legislative proceeding which the House was authorized to institute; and also that an investigation instituted for the mere purpose of investigation, or for political purposes, not connected with any intended legislation or other matters upon which the House can act, is not a legislative proceeding. Where, however, public institutions belonging to the state, or public offices, are ordered to be investigated, it is to be presumed that it is with a view of some legislative action in regard to them. People *v.* Keeler, 99 N. Y. 463, 52 Am. Rep. 49.

It Was Held in Massachusetts, that where the committee was appointed by the House of Representatives to investigate the affairs of the State Liquor Agency, the refusal of a witness to testify after having been summoned before it was "disrespect to the House by contemptuous behavior in its presence" within the meaning of the Constitution. Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

2. Where Answer Would Incriminate or Degrade. — Emery's Case, 107 Mass. 172, 9 Am. Rep. 22. See *supra*, *Contempt by Witnesses — Self Crimination*. And see the title WITNESSES.

Section 102 of the Revised Statutes, declaring that the refusal of any witness, summoned by authority of either house of Congress, to give testimony or produce papers upon "any matter under inquiry," before either house, or any committee thereof, is a contempt, and punishable by indictment and prosecution, is not so connected with section 103, which provides that no witness is privileged to refuse to testify upon the ground that his testimony would tend to disgrace or otherwise render him infamous, that the unconstitutionality of the latter section would render the former unconstitutional. *In re* Chapman, 166 U. S. 661. This was a prosecution by indictment, but an affirmance by the Supreme Court of the constitutionality of the statute is a matter of importance as to the power of Congress to punish for contempt a contumacious witness.

3. Elections. — See Kilbourn *v.* Thompson, 103 U. S. 168. And see also the title CONSTITUTIONAL LAW, vol. 6, p. 882.

4. Power of Committee to Command Clerk to Produce Poll-book. — A committee of either house while engaged in taking testimony and making investigations as to a contest of membership, pending therein, with the power to send for persons and papers, may command a clerk of court to produce before such committee poll-books of which he has the custody, affecting the election as to which there is a contest. His refusal to obey the command is a contempt of the House, and may be punished by imprisonment during the session of the legislature. *Ex p.* Dalton, 44 Ohio St. 143, 58 Am. Rep. 800.

5. Conduct of Members of Legislature. — *Ex p.* Lawrence, 116 Cal. 298; *In re* Falvey, 7 Wis. 630.

truth of a charge that some of its members have been guilty of accepting bribes, and for that purpose may compel the attendance of witnesses before a committee appointed by the legislature for that purpose, and inflict punishment as for contempt for their refusal to attend or testify.[1]

(4) *Power to Compel Production of Private Papers.* — Whether or not the legislature may have the jurisdiction to institute the particular inquiry, it cannot compel, for its inspection, the production of the private books or papers of a private citizen. The government can have no greater right in this regard than a citizen, to both of whom the courts are open.[2]

4. Limitation of Legislative Power to Punish by Imprisonment. — Whether the legislative body be the creature of a constitution, as are all in the United States, or whether in most respects it possess supreme functions, as do the Houses of Parliament in England, the duration of the imprisonment which it may impose as a punishment for the contempt terminates upon the adjournment of the session.[3]

XIV. Other Instances of Contempt. — **An Attempt to Bribe a Juror** is punishable as a contempt though no prejudice is shown to have resulted to either party.[4] An attempt to create the belief that a juror or other officer of the court having active duties to perform upon a trial can be bribed, is a contempt of court.[5] And approaching a juror in court for the purpose of influencing his action is a contempt.[6]

Endeavoring to Arrange a Signal with one of the jurymen to give information as to how the jury stood with regard to the verdict constitutes contempt.[7]

Intimidation of Grand Jury. — Writing and sending insulting and threatening letters to a grand jury in relation to matters which are the subject of their investigation is a contempt of court.[8]

A Newspaper Reporter who conceals himself in the jury room and afterwards publishes the proceedings therein is guilty of a flagrant contempt.[9]

Influencing Witness to Absent Himself. — Inducing a person to leave the county of his residence, that he may not attend the trial of a cause in which he has been subpœnaed as a witness, is a contempt.[10] Although a witness has not yet been subpœnaed an attempt to prevent his attendance is nevertheless a contempt.[11]

Interference with Judicial Proceedings — Falsely Justifying as Surety. — Sureties in an undertaking bond given to discharge an attachment are, by justifying falsely, guilty of "unlawful interference" with the proceedings in the action, which the *New York* Code makes punishable as a civil contempt.[12] The sureties on

1. Examination into Charges of Bribery. — *Ex p.* Lawrence, 116 Cal. 298; *In re* Falvey, 7 Wis. 630.

Where the state senate was investigating the conduct of its members, under a published charge that some of them had taken bribes, and had called as a witness the editor of the newspaper publishing such charge, his refusal to give the names of those from whom he had received the information was a contempt of the legislature. The senate had power to examine into the alleged criminal conduct with a view to the expulsion of any member found guilty. *Ex p.* Lawrence, 116 Cal. 298.

2. Production of Private Papers. — Kilbourn *v.* Thompson, 103 U. S. 168; Matter of Pacific R. Commission, 32 Fed. Rep. 241; *In re* McLean, 37 Fed. Rep. 648. But see Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676, *affirming* a contrary doctrine. See the title Production of Documents.

3. Anderson *v.* Dunn, 6 Wheat. (U. S.) 204; *Ex p.* Dalton, 44 Ohio St. 143, 58 Am. Rep. 800; Crosby's Case, 3 Wils. 188; Burdett *v.* Abbott, 14 East 1.

The constitution of *Massachusetts* limits the term of imprisonment to thirty days, thus placing a further check on the limits set by general parliamentary law, to the time of the adjournment of the legislature. Burnham *v.* Morrisey, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

4. Langdon *v.* Wayne Circuit Judges, 76 Mich. 358.

5. Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224.

6. Cuddy, Petitioner, 131 U. S. 280.

7. State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

8. Matter of Tyler, 64 Cal. 434.

9. Matter of Choate, 24 Abb. N. Cas. (N. Y. Oyer & T. Ct.) 430; Orman *v.* State, 24 Tex. App. 495. See *supra*, *Contempt by Newspaper Publications*.

10. Hale *v.* State, 55 Ohio St. 210.

11. Montgomery *v.* Palmer, 100 Mich. 436.

12. People *v.* Tamsen, 17 Misc. Rep. (N. Y. Supreme Ct.) 212.

an appeal bond in an action are guilty of a contempt in justifying falsely.[1]

XV. Summary Punishment of Contempts — 1. Guaranty of Trial by Jury. — A summary punishment for contempt of court is not an infringement of those provisions of the several constitutions, which guarantee to every citizen a trial by jury.[2]

2. Indictability of Offense No Bar to Punishment. — The fact that the act may be indictable or punished in some other manner, does not deprive the court of the essential power to punish it as a contempt.[3]

3. Punishment by Fine or Imprisonment — *a.* Criminal Contempts — **Statutes Fixing Maximum Punishment.** — Statutes have been enacted in many states of the Union fixing the maximum punishment that can be inflicted by fine or imprisonment for a criminal contempt of court.[4]

1. Lawrence *v.* Harrington, 63 Hun (N. Y.) 195, *affirmed* 133 N. Y. 690; King *v.* Barnes, 51 Hun (N. Y.) 550, *affirmed* 113 N. Y. 476.

2. **Summary Punishment** — *Alabama.* — *Ex p.* Hamilton, 51 Ala. 66.

Arkansas. — Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

Connecticut. — Huntington *v.* McMahon, 48 Conn. 174.

Iowa. — *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529; State *v.* Anderson, 40 Iowa 207; McDonnell *v.* Henderson, 74 Iowa 619.

Kansas. — State *v.* Durein, 46 Kan. 695.

Kentucky. — Arnold *v.* Com., 80 Ky. 304, 44 Am. Rep. 480.

Minnesota. — State *v.* Becht, 23 Minn. 411.

Missouri. — Hart *v.* Robinett, 5 Mo. 11.

Nebraska. — Gandy *v.* State, 13 Neb. 451; Ludden *v.* State, 31 Neb. 429.

New Hampshire. — State *v.* Matthews, 37 N. H. 450.

New York. — Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551; Patrick *v.* Warner, 4 Paige (N. Y.) 397; People *v.* Bennett, 4 Paige (N. Y.) 282.

North Dakota. — State *v.* Markuson, 5 N. Dak. 147, *reaffirmed* in State *v.* Markuson, (N. Dak. 1897) 73 N. W. Rep. 82.

Oklahoma. — Burke *v.* Territory, 2 Okla. 499.

Texas. — Crow *v.* State, 24 Tex. 12.

See the title Jury and Jury Trial.

The authority to punish for contempts is incident to courts of law and equity, and may be exercised summarily without infringing the constitutional guaranty of trial by jury. *Ex p.* Hamilton, 51 Ala. 66.

Under the North Dakota Statute (Rev. Code, §§ 5932, 5933, 5935), where a criminal contempt of court occurs in open court, and within the personal knowledge and observation of the presiding judge, it may be punished, not only summarily, but without the use of either pleadings or evidence other than the evidence of the judge's senses. State *v.* Root, 5 N. Dak. 487.

3. **Indictability No Bar to Summary Punishment** — *United States.* — U. S. *v.* Debs, 64 Fed. Rep. 724.

California. — *Ex p.* Acock, 84 Cal. 50.

Connecticut. — Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

Georgia. — Pledger *v.* State, 77 Ga. 242.

Kentucky. — Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480.

Massachusetts. — Cartwright's Case, 114 Mass. 230.

Minnesota. — State *v.* District Ct., 52 Minn. 283.

Montana. — State *v.* Faulds, 17 Mont. 140.

New Jersey. — Brown *v.* Farley, 38 N. J. Eq. 186.

New Mexico. — *In re* Hughes, (N. Mex. 1895) 43 Pac. Rep. 692.

New York. — Spalding *v.* People, 7 Hill (N. Y.) 301; Yates *v.* Lansing, 9 Johns. (N. Y.) 417, 6 Am. Dec. 290.

North Carolina. — Matter of Griffin, 98 N. Car. 225.

Ohio. — Hale *v.* State, 55 Ohio St. 210.

Oklahoma. — Burke *v.* Territory, 2 Okla. 499.

South Carolina. — State *v.* Williams, 2 Spears L. (S. Car.) 26.

In Yates *v.* Lansing, 9 Johns. (N. Y.) 417, 6 Am. Dec. 290, the court, speaking through Platt, J., said: "A conviction on indictment will not purge the contempt; nor will a conviction for contempt be a bar to an indictment."

But see State *v.* Blackwell, 10 S. Car. 35, and State *v.* Blocker, 14 Ala. 450. In the latter case it was held that a statute, at that time in force, making the refusal of a witness to testify before a grand jury an indictable offense, deprived the court on which the grand jury was in attendance, of the right to punish such a refusal as a contempt. This decision is based on the theory that the common-law power of vindicating the majesty of the law is impliedly abrogated, and hence superseded, by a statute making the particular offense punishable by indictment, and thus providing an effective mode of procedure which the court did not possess at common law. In addition to this reason, it is said in the *South Carolina* case that either the prosecution by indictment must be a bar to a punishment for contempt, or the punishment for contempt must be a bar to a prosecution by indictment; otherwise the contemnor might be twice punished for the same offense.

Under the Alabama Code of 1876, § 413, a witness refusing to answer any lawful question as to gaming, before a grand jury may be punished for a contempt of court, and also as for a misdemeanor. Newsum *v.* State, 78 Ala. 407.

4. **Statutes Fixing Maximum Punishment.** — In *California* it is provided by Pract. Acts, §§ 488, 489, that a person guilty of contempt may be punished by a fine not exceeding five hundred dollars, and by imprisonment not exceeding five days, except when the performance of an act within the power of the party is sought to

In the Absence of Statute the duration of the imprisonment or the amount of the fine that can be imposed would seem to rest entirely within the sound discretion of the court, governed by the principles of the common law.[1]

Punishment by Fine. — Probably the most frequent method of punishing a criminal contempt is by fine. The imposition of a fine as punishment is a judgment in a criminal case,[2] and as such the fine goes into the treasury of the state.[3]

Punishment by Imprisonment. — Where the criminal contempt is of a very flagrant character, the court punishes it by imprisonment. The sentence is analogous to one imposed in a criminal case, and the imprisonment is its execution.[4]

Imprisonment for the Nonpayment of Fine. — Another instance of punishment by imprisonment for a criminal contempt is where a fine has been imposed, and the contemnor has been committed for its nonpayment. So far as the rights and remedies of the contemnor are concerned, in all respects this punishment is identical with a commitment to prison in the first instance. It is analogous to, if not identical with, an alternate judgment of fine or imprisonment imposed by the court in the case of an ordinary criminal prosecution.[5]

be coerced, when the imprisonment, following the general rule, may be indefinite. Galland *v.* Galland, 44 Cal. 475.

In *Iowa*, by § 3493 of the Code, the punishment for contempt by courts of record is limited to a fine of fifty dollars, and imprisonment not exceeding one day, and all other courts are limited to a fine of ten dollars. State *v.* Myers, 44 Iowa 580.

In *Kansas* no limit is placed on the power of the district courts in matters of contempt during the term of court, but by § 2 of c. 28, Comp. Laws 1879, the judge of the court at chambers may punish by a fine not to exceed one hundred dollars, and imprisonment, or either. *In re* Millington, 24 Kan. 214.

In *Louisiana* under art. 131 of the Code of Practice, the judges of the supreme, district, and parish courts are limited in their authority to punish contempts, to a fine not exceeding fifty dollars, and imprisonment for a period not exceeding ten days. State *v.* Keene, 11 La. 596.

In *Michigan* by statute (Comp. Laws 1871, § 5709), it was provided that when the court in contempt proceedings ordered the payment of money to the injured party, this should stand "instead of a fine." The imposition of a criminal fine in addition is unwarranted. Haines *v.* Haines, 35 Mich. 138.

In *New York*, by § 1111 of the Code of Civil Procedure, as amended by c. 672 of the Act of 1886, punishment for contempt is limited to six months imprisonment within the prison walls. No merely constructive restraint can be taken into account in computing the time. People *v.* Grant, 47 Hun (N. Y.) 604, *affirmed* 111 N. Y. 584.

In *Pennsylvania*, under the 2d section of the Act of June, 1836, commitments for contempts extend only to contempts committed *in facie curiæ*. Com. *v.* Reed, 59 Pa. St. 425.

In *Texas*, by a statute, art. 1541, justices of the peace may punish for a contempt *in facie curiæ*, by a fine not exceeding twenty-five dollars. No limitation seems to be placed on the power of the justices to punish contempts not *in facie curiæ*. *Ex p.* Robertson, 27 Tex. App. 628.

In *Wisconsin*, by R. S. 1858, c. 149, § 25, the punishment of criminal contempts as such is limited to a term of imprisonment of six months and until the costs and expenses are paid. *In re* Pierce, 44 Wis. 411.

1. Every state has probably some general statute which would prevent a commitment, as punishment for a distinctly criminal offense, for an unreasonable length of time. A criminal contempt being a criminal offense, the imposition of a fine or the committal to prison is a judgment in a criminal case. Where contempt of court is classified as a crime it is a misdemeanor, and not a felony. See *In re* Acker, 66 Fed. Rep. 290.

2. Punishment by Fine. — *In re* Acker, 66 Fed. Rep. 290; Langdon *v.* Wayne Circuit Judges, 76 Mich. 358; Matter of Rhodes, 65 N. Car. 518; Sinnott *v.* State, 11 Lea (Tenn.) 281.

3. Fine Goes to the State. — Eads *v.* Brazleton, 22 Ark. 499, 79 Am. Dec. 88; Langdon *v.* Wayne Circuit Judges, 76 Mich. 358; Matter of Rhodes, 65 N. Car. 518.

It is a novelty unknown to the law for the court to order the penalty inflicted on a party to be paid to the party aggrieved. The state alone is entitled to such penalty, and where paid to a party to the action, the Supreme Court will order its repayment. Morris *v.* Whitehead, 65 N. Car. 637.

Where Awarded to Party by Statute. — The statute imposing a forfeiture on a defaulting witness (Clay's Dig. 599, § 21) does not give the party summoning the witness the right to the forfeiture by way of satisfaction, to compensate him for the default of the witness; but is imposed as a punishment on the witness for his disobedience, and is bestowed gratuitously, as a matter of good policy, on the party summoning him. Maclin *v.* Wilson, 21 Ala. 670.

4. Imprisonment. — *Ex p.* Kearney, 7 Wheat. (U. S.) 38; *In re* Acker, 66 Fed. Rep. 290; Cartwright's Case, 114 Mass. 230; Williamson's Case, 26 Pa. St. 9, 67 Am. Dec. 374.

5. Imprisonment for Nonpayment of Fine. — Sinnott *v.* State, 11 Lea (Tenn.) 281.

A fine imposed for a criminal contempt may be required to be worked out, and the contemnor will not be allowed to discharge the

b. CIVIL CONTEMPTS. — As has already been pointed out, the purpose of punishment in the case of a civil contempt, whether by fine or imprisonment, is essentially different from that in a criminal one.[1] Though each has its origin in the essential right of the court to vindicate its authority and enforce obedience to its mandates, in the case of a civil contempt the opposite party is primarily interested, and it is on his motion that the machinery of the tribunal moves. He seeks either to have the court collect a fine from the contemnor and award it to him as an indemnity for damages sustained by him by reason of the contemnor's failure to comply with an order of the court, or he seeks the contemnor's incarceration that a compliance with the order may be coerced. In either case the machinery operates for his sole benefit, and when he is satisfied it ceases.[2]

Compensatory Fine. — The fine imposed as a punishment for a civil contempt is solely for the purpose of compensating the adverse party.[3] Generally the right of a court thus to compensate a party to a suit rests upon and is regulated by statute.[4]

Fine Regulated by Damage to Adverse Party. — The purpose of the court in imposing such fine being to compensate the adverse party, the amount of the fine should be limited to the damage which he has sustained by reason of the contempt.[5]

Imprisonment to Coerce Performance of Act. — The performance of any act, whether it be the payment of money, the delivery of property, or the doing of some other thing adjudged to be within the power of the contemnor and ordered by the court to be performed, which he, in contempt of the order, refuses to obey, is commonly coerced by imprisonment.[6] In such case it is not necessary

fine by taking the insolvent debtor's oath. Sinnott *v.* State, 11 Lea (Tenn.) 281.

1. See *supra, Definitions — Contempt of Court — Civil and Criminal Contempts.*

2. **Civil Contempts.** — See People *v.* McKane, 78 Hun (N. Y.) 154; People *v.* Oyer & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691; State *v.* Knight, 3 S. Dak. 509, 44 Am. St. Rep. 809; Phillips *v.* Welch, 11 Nev. 187.

3. **Compensatory Fines.** — Wells *v.* Oregon, R., etc., Co., 19 Fed. Rep. 20; *In re* North Bloomfield Gravel Min. Co., 27 Fed. Rep. 795; Chapel *v.* Hull, 60 Mich. 167; King *v.* Flynn, 37 Hun (N. Y.) 329; Fall Brook Coal Co. *v.* Hecksher, 42 Hun (N. Y.) 534; Matter of Morris, 45 Hun (N. Y.) 167; Doyle *v.* Doyle, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 265; Poertner *v.* Russel, 33 Wis. 194.

Under §§ 2284 and 2285 of the *New York* Code Civ. Pro., where a trustee has been adjudged guilty of a contempt in failing to pay over money held by him, the court may impose as a fine the amount which he has received and failed to pay, and may direct his imprisonment until its payment. Matter of Morris, 45 Hun (N. Y.) 167.

Under the *Wisconsin* statute (Rev. Stat., c. 149, § 25), an order adjudging persons in contempt and imposing a penalty therefor is not invalid because it directs that in case of the nonpayment of sums of money which they are respectively ordered to pay, they shall be imprisoned in the county jail until the sums are paid, although the fine is not imposed as such *eo nomine*, but they are required instead thereof to pay the plaintiff the value of the property removed. Poertner *v.* Russel, 33 Wis. 194.

4. State *v.* Lonsdale, 48 Wis. 348. See the *New York* and *Wisconsin* cases cited in the last note, under which the proceedings in each case are based on the statute.

Where No Statute Exists. — In the cases of Wells *v.* Oregon R., etc., Co., 19 Fed. Rep. 20, and *In re* North Bloomfield Gravel Min. Co., 27 Fed. Rep. 795 (decided respectively in *Oregon* and *California*), there seems to be no statutory provision for such a fine. See Morris *v.* Whitehead, 65 N. Car. 637, holding that such an order, in the absence of a statute authorizing it, is illegal.

5. **Amount Regulated by Damage to Adverse Party.** — *In re* North Bloomfield Gravel Min. Co., 27 Fed. Rep. 795; Fall Brook Coal Co. *v.* Hecksher, 42 Hun (N. Y.) 534; Foley *v.* Stone, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 224; Doyle *v.* Doyle, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 265.

Indemnity to Be Allowed Party Injured by Civil Contempt. — Punishment to be imposed upon a person adjudged guilty in proceedings to punish for civil contempt is by fine sufficient in amount to indemnify the aggrieved party for loss or injury caused by the misconduct complained of, together with the costs and expenses incurred by him in the contempt proceedings. King *v.* Flynn, 37 Hun (N. Y.) 329.

Under *New York* Code Civ. Pro., § 2284, which provides that a contempt may be punished by "a fine sufficient to indemnify the aggrieved party," where it appeared that the plaintiff in the case was prevented from making the amount of his judgment out of the defendant's property by the filing of a false answer by the latter, a fine of the amount of such judgment will be imposed. Martin Cantine Co. *v.* Warshauer, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 379, 7 Misc. Rep. (N. Y.) 412.

6. **Imprisonment to Coerce Performance** — *United States.* — Matter of Allen, 13 Blatchf. (U. S.) 271.

Alabama. — Vincent *v.* Daniel, 59 Ala. 602.

that the order of commitment designate a definite duration for the imprisonment. The punishment is purely coercive, and it is sufficient that the contemnor be committed until he purge himself of the contempt by signifying his willingness to perform the act, or until the further orders of the court.[1]

XVI. Power of Executive to Pardon. — Attempts by executives to exercise the pardoning power in cases of contempt have been of so rare occurrence that there is very little authority on the subject.

President of the United States. — The President's constitutional power "to grant reprieves and pardons for offenses against the United States" embraces the power to pardon for contempt of the courts of the United States,[2] whether the offense consists in disobedience to the process of the court or misbehavior in its presence.[3]

State Executives. — In *Louisiana*[4] and *Mississippi*[5] the governor is held to have the prerogative of pardon in cases of conviction and punishment for contempt of the authority of a court. On the other hand, in *Texas* it has been declared quite recently that contempt does not fall within the term "criminal cases," as used in the constitutional provision of that state relating to pardons, and that the executive has no authority in such a case.[6]

XVII. Contemnor's Disabilities. — As a general rule a court will not entertain a motion which is regarded as a matter of favor to a person who is in contempt of an order previously made in the cause, or hear him on questions

California. — *Ex p.* Cohn, 55 Cal. 193; *Ex p.* Smith, 53 Cal. 204.

Georgia. — Smith *v.* McLendon, 59 Ga. 523.

Kansas. — State *v.* Burrows, 33 Kan. 10.

Michigan. — Chapel *v.* Hull, 60 Mich. 167.

Minnesota. — State *v.* Becht, 23 Minn. 411.

New Jersey. — Jernee *v.* Jernee, 54 N. J. Eq. 657.

New York. — Matter of Watson, 3 Lans. (N. Y.) 408; People *v.* Tamsen, 17 Misc. Rep. (N. Y. Supreme Ct.) 212; People *v.* Riley, 25 Hun (N. Y.) 587; Matter of Morris, 45 Hun (N. Y.) 167.

North Carolina. — Cromartie *v.* Bladen, 85 N. Car. 211.

Vermont. — *In re* Bingham, 32 Vt. 329.

West Virginia. — State *v.* Irwin, 30 W. Va. 405.

Wisconsin. — Howland *v.* Needham, 10 Wis. 498; *In re* Milburn, 59 Wis. 24.

1. Duration of Imprisonment. — Matter of Allen, 13 Blatchf. (U. S.) 271; Galland *v.* Galland, 44 Cal. 475; *Ex p.* Crittenden, 62 Cal. 534; State *v.* Tipton, 1 Blackf. (Ind.) 166; Kernodle *v.* Cason, 25 Ind. 362; Chapel *v.* Hull, 60 Mich. 167; Jernee *v.* Jernee, 54 N. J. Eq. 657; Forrest *v.* Price, 52 N. J. Eq. 16; People *v.* Tamsen, 17 Misc. Rep. (N. Y. Supreme Ct.) 212; Cromartie *v.* Bladen, 85 N. Car. 211; State *v.* Irwin, 30 W. Va. 405.

Enforcing the Payment of Money. — This is the common mode adopted by a court of chancery to collect alimony adjudged to the wife in divorce proceedings. See the many authorities cited *supra*, *Imprisonment to Enforce Payment of Money Demands — Nonpayment of Alimony.*

2. Power of President to Pardon. — *In re* Mullee, 7 Blatchf. (U. S.) 23; Dixon's Case, 3 Opp. Atty-Gen. 622; Rowan's Case, 4 Opp. Atty.-Gen. 458; Drayton and Sears Case, 5 Opp. Atty.-Gen. 579. See generally the titles Pardon; President of the United States.

3. *In re* Mullee, 7 Blatchf. (U. S.) 23. In this case it was further held that where a fine is imposed by the court as a punishment for a contempt, the case is none the less within the pardoning power of the President, because the amount of the fine is directed by the court, in the order imposing it, to be paid to the plaintiff in a suit in which an injunction was issued, a violation of which constituted the contempt, towards the reimbursement of his expenses in the attachment proceedings in respect of such contempt. The court for this last proposition cites and relies upon the case of Drayton and Sears, 5 Opp. Atty.-Gen. 579.

4. In Louisiana. — State *v.* Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115. In this case the court said: "A contempt of court is an offense against the state, and not an offense against the judge personally. In such a case the state is the offended party, and it belongs to the state, acting through another department of its government to pardon or not to pardon, at its discretion, the offender." See the titles Constitutional Law, vol. 6, p. 882; Governor; Pardon.

5. In Mississippi. — *Ex p.* Hickey, 4 Smed. & M. (Miss.) 751. The constitution of this state authorizes the governor to grant pardons and remit fines in all criminal and penal cases except treason and impeachment. The court held that the term "penal cases" embraced the case of contempt. But it should be observed that in this case the court also declared that the power to punish by fine and imprisonment for consequential or constructive contempt, such as a newspaper publication (the fact in this case) reflecting upon the court, is at war with the state constitution; and further that the facts of this case did not constitute a contempt of the court, but a libel upon the judge.

6. Taylor *v.* Goodrich, (Tex. Civ. App. 1897) 40 S. W. Rep. 515.

involving the merits of the order out of which the contempt arose,[1] except for the purpose of determining the extent of the punishment to be inflicted in the contempt proceedings.[2]

Cannot Affect Legal Rights. — Such disability, however, cannot affect the legal rights of the contemnor.[3] His answer cannot be stricken from the file and judgment pronounced against him without giving him an opportunity to be heard;[4] nor can he be denied the process for which the law provides for

1. Disability of Person in Contempt — *United States.* — Wartman *v.* Wartman, Taney's Dec. (U. S.) 362.

Alabama. — Jacoby *v.* Goetter, 74 Ala. 427.

Arkansas. — Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

California. — *Ex p.* McCarthy, 29 Cal. 395.

Illinois. — Knott *v.* People, 83 Ill. 532.

Indiana. — Smith *v.* Smith, 2 Blackf. (Ind.) 232.

Iowa. — Saylor *v.* Mockbie, 9 Iowa 209.

Michigan. — Atchison, etc., R. Co. *v.* Jennison, 60 Mich. 232.

Missouri. — Coburn *v.* Tucker, 21 Mo. 219.

New Jersey. — State *v.* Ackerson, 25 N. J. L. 209; Endicott *v.* Mathis, 9 N. J. Eq. 110.

New York. — Rogers *v.* Patterson, 4 Paige (N. Y.) 450; Strong *v.* Strong, 5 Robt. (N. Y.) 612.

Tennessee. — Gant *v.* Gant, 10 Humph. (Tenn.) 464, 53 Am. Dec. 736.

Virginia. — Snickers *v.* Dorsey, 2 Munf. (Va.) 505.

Wisconsin. — Mead *v.* Norris, 21 Wis. 311.

Where a defendant who has been served with a subpœna in chancery neglects to appear, so that the bill is taken *pro confesso* against him and referred to the clerk and master to take and report the account, it is not necessary that he should have notice of the time and place of reference, that he may bring forward a defense or allege any new fact. Mussina *v.* Bartlett, 8 Port. (Ala.) 277.

Where a defendant consents to a default and the costs are thereby imposed on him, while in contempt for their nonpayment he cannot be heard on the question of damages, but the court may assess the same on *ex parte* testimony. Robinson *v.* Owen, 46 N. H. 38.

2. Williamson *v.* Carnan, 1 Gill & J. (Md.) 184; Endicott *v.* Mathis, 9 N. J. Eq. 110.

3. May Not Affect Legal Rights. — He may appear and resist all adverse proceedings and is entitled to notice of them. Mead *v.* Norris, 21 Wis. 311.

4. Hovey *v.* Elliott, 167 U. S. 409. See also Peel *v.* Peel, 50 Iowa 521.

In New York. — It was held in Walker *v.* Walker, 82 N. Y. 260, that the court had power, as a punishment for the contempt of a defendant in failing to pay alimony, to order his answer stricken from the files, and to refuse to hear him in the case. A review of the authorities cited by the court will disclose the fact that none go to the extent of depriving the contemnor of his legal right to be heard before judgment.

Nor Can a Petition Be Stricken from the Files on account of scandalous matter therein, when the petition shows a cause of action. Herndon *v.* Campbell, 86 Tex. 168.

The Rule Is Different, However, when the contempt consists in an unjustifiable refusal to pay alimony ordered by the court. In that case the right of the husband to prosecute the action would depend upon his obedience to the order of the court in this regard. Peel *v.* Peel, 50 Iowa 521.

The Supreme Court of the United States, in the case of Hovey *v.* Elliott, 167 U. S. 409, in an exhaustive and able opinion delivered by Mr. Justice White, reviewed the judicial history of the law concerning contempts both in this country and in England. In that case the Supreme Court of the District of Columbia had ordered the answer of a defendant in a chancery suit, pending before it, stricken from the files and a decree *pro confesso* entered against him, as a punishment for contempt in having failed to obey an order requiring him to pay money into court which was the subject of controversy. After stating the case, and referring to § 725 of the U. S. Rev. Stat., which sought to limit the punishment of contempts to the penalties there provided, the court, in part, said: "In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. In McVeigh *v.* U. S., 11 Wall. (U. S.) 259, the court, through Mr. Justice Swayne, said (p. 267): 'In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an

obtaining the testimony of witnesses residing beyond the jurisdiction of the court;[1] nor can an appeal for which the law provides as a matter of right be denied him because he is in contempt;[2] nor can he be refused an opportunity to be heard on the regularity of the order of which he is adjudged to be in contempt.[3]

XVIII. Purging Contempts — 1. In General. — Since the existence of any contempt presupposes as a necessary ingredient to the contemnor's guilt an intention to commit a contempt, he may show that the act or default charged as a contempt resulted from circumstances over which he had no control;[4] or in some cases that he acted in good faith with pure motives, and had no intention of insulting the court or defying its process.[5] The authorities are not harmonious either on the question as to what showing of innocent intent on the part of the contemnor may be sufficient to purge contempts of the same nature, or on the question as to the nature of contempts which may be purged by a showing of *bona fide* motives, and a lack of intention to commit the contempt charged.[6]

2. Difference Between Rule at Law and in Equity. — **The Common-law Rule** was that a person charged with contempt of a court of law was made to answer the

alien enemy, and hence could have no *locus standi* in that forum. * * * The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.' And quoting with approval this language, in Windsor *v.* McVeigh, 93 U. S. 274, the court, speaking through Mr. Justice Field, again said (pp. 277, 278): 'The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.' This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard. * * * Again, in *Ex p.* Wall, 107 U. S. 289, the court quoted with approval the observations as to 'due process of law' made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says: 'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."' And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry, and render judgment only after trial.'" The decision was rested on the want of power in the District Court of Columbia to suppress the answer and render a decree *pro confesso*.

1. Johnson *v.* Superior Ct., 63 Cal. 578.

2. State *v.* Field, 37 Mo. App. 83; Brinkley *v.* Brinkley, 47 N. Y. 40; *Ex p.* Chadwick, 5 Eng. L. & Eq. 83.

3. King *v.* Bryant, 3 Myl. & C. 191.

4. See *infra*, this section, *Inability to Comply with Order*.

5. See *infra*, this section, *Disavowal of Intention to Commit Contempt*.

6. As to how far and as to what classes of contempts may be purged by a showing of want of intention, see *infra*, this section, *Disavowal of Intention to Commit Contempt*.

contempt on oath, and if by his oath he cleared himself of the contempt he was discharged. No testimony was taken by the court to rebut his own ;[1] but should he swear falsely, he was subsequently prosecuted for perjury.[2]

In Courts of Equity. — This method of making a defendant answer on oath in a court of law to a criminal charge was probably derived from the practice in courts of equity, whose orders and decrees formerly operated only *in personam*, and whose sole method of enforcing them was by process of contempt. A radical difference, however, existed as to the finality of the contemnor's answer in these courts. In courts of equity, generally, the primary purpose of the punishment being to coerce obedience to its orders and decrees for the benefit of the adverse party, his affidavits can be rebutted.[3]

Modifications of the Rule in Courts of Law. — The rule which prevails in courts of chancery, by which the entire question of the contempt, including the truth of the contemnor's testimony, is tried in one proceeding, would seem to be the more reasonable practice. It is less cumbersome, more effective, and decidedly more analogous to the common-law practice in all other respects. The reason on which the difference in practice was based — i. e., because most proceedings in a court of equity are instituted by private individuals for the purpose of enforcing or protecting their rights, and most proceedings in a court of law were instituted for the sole purpose of vindicating the dignity of the court — has little application in the United States now, where in most states the systems of the procedure in the two courts are blended under a code practice.[4] In any event, manifestly the logical distinction between contempts in this regard would relate to the nature of the particular contempt, rather than to the court within which it occurred.[5]

3. Inability to Comply with Order — *a.* In General. — Where the contempt results from a failure to obey an order of the court, a showing that such failure was due to an actual inability to comply with the order purges the contempt.[6]

1. Common-law Rule — Answer of Contemnor Conclusive. — Rex *v.* Vaughan, 2 Doug. 516; Rex *v.* Sims, 12 Mod. 511; U. S. *v.* Dodge, 2 Gall. (U. S.) 313; *In re* May, 1 Fed. Rep. 737; Buck *v.* Buck, 60 Ill. 105; Haskett *v.* State, 51 Ind. 176; Burke *v.* State, 47 Ind. 528; State *v.* Earl, 41 Ind. 464; People *v.* Few, 2 Johns. (N. Y.) 290; Matter of Walker, 82 N. Car. 95; Matter of Moore, 63 N. Car. 397; Thomas *v.* Cummins, 1 Yeates (Pa.) 40; Underwood's Case, 2 Humph. (Tenn.) 46.

2. U. S. *v.* Dodge, 2 Gall. (U. S.) 313; *In re* May, 1 Fed. Rep. 737; Rex *v.* Sims, 12 Mod. 511; Rex *v.* Vaughan, 2 Doug. 516; Bac. Abr., Attachment, B.

3. Rule in Courts of Equity — Evidence Introduced to Prove and to Rebut. — Rex *v.* Vaughan, 2 Doug. 516; Childrens *v.* Saxby, 1 Vern. 207; Buck *v.* Buck, 60 Ill. 105; Magennis *v.* Parkhurst, 4 N. J. Eq. 433; State *v.* Matthews, 37 N. H. 450; Underwood's Case, 2 Humph. (Tenn.) 46; Rutherford *v.* Metcalf, 5 Hayw. (Tenn.) 58.

In commenting upon the difference in the practice in the two courts in this regard, Sir William Blackstone observes: "In the courts of law the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for if he clears himself by his answers, the complaint is totally dismissed." 4 Bl. Com. 288. But see Murdock's Case, 2 Bland. (Md.) 487, 20 Am. Dec. 381, in which the chancellor held that where a defendant charged with contempt in violating an injunction makes answer by either denying or justifying, no proofs or affidavits can be introduced in opposition to the answer of the accused, and the contempt being purged, he is entitled to his discharge.

4. A sheriff is in contempt of a court of law for a failure to return process thereto. The proper practice in such a case is to enter a judgment *nisi* for the amount of the fine, requiring him to show cause why it should not be made final. He must answer thereto under oath, and the court is the sole judge, not only as to whether the answer purges the contempt, but it may receive other evidence tending to rebut the answer, after which it may make the judgment final or may remit the fine either wholly or in part. Crow *v.* State, 24 Tex. 12.

Where a person charged with a criminal contempt testifies that he acted in good faith, and intended no disrespect to the court, such testimony does not so far purge the contempt that no further proceedings can be had against him except a prosecution for perjury. Practice in this state is to receive other testimony and settle the whole question of contempt in one proceeding. Huntington *v.* McMahon, 48 Conn. 175.

5. See Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105, where, although in that instance the contempt consisted of the disobedience of a decree of the chancery court, which the court found to be a civil contempt, it was held that the true test as to the conclusiveness of the contemnor's answer depended on the nature of the contempt.

6. Inability to Obey — *California.* — Galland *v.* Galland, 44 Cal. 475; Williams *v.* Dwinelle,

b. When Inability Result of Fault of Contemnor. — But the inability to comply with the order must not have resulted from any act of the contemnor in anticipation of the order; nor from any negligent or criminal failure to perform a duty which the law enjoined and which was formerly within his power.[1]

51 Cal. 442; Matter of Wilson, 75 Cal. 580; Adams *v.* Haskell, 6 Cal. 316, 65 Am. Dec. 517.

Connecticut. — Hull *v.* Harris, 45 Conn. 544.

Georgia. — Browning *v.* Hadley, 33 Ga. 271; Carlton *v.* Carlton, 44 Ga. 216; Cowart *v.* Dunbar, 56 Ga. 417.

Illinois. — Wightman *v.* Wightman, 45 Ill. 167; O'Callaghan *v.* O'Callaghan, 69 Ill. 552; Blake *v.* People, 80 Ill. 11; Kadlowsky *v.* Kadlowsky, 63 Ill. App. 292; Schuele *v.* Schuele, 57 Ill. App. 189.

Indiana. — *Ex p.* Wright, 65 Ind. 504.

Iowa. — State *v.* Smith, 9 Iowa 334; Peel *v.* Peel, 50 Iowa 521; Hogue *v.* Hayes, 53 Iowa 377; Allen *v.* Allen, 72 Iowa 502.

Kansas. — State *v.* Dent, 29 Kan. 416.

Kentucky. — Lockridge *v.* Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52.

Maine. — Dwelly *v.* Dwelly, 46 Me. 377; Russell *v.* Russell, 69 Me. 336.

Michigan. — Scott *v.* Layng, 59 Mich. 43.

Minnesota. — Register *v.* State, 8 Minn. 214; Hurd *v.* Hurd, 63 Minn. 443.

New Jersey. — State *v.* Newark, etc., Turnpike Co., 2 N. J. L. 318; Walton *v.* Walton, 54 N. J. Eq. 607.

New York. — Morgan *v.* Morgan, 16 Abb. Pr. N. S. (N. Y. C. Pl.) 291; Cochran *v.* Ingersoll, 13 Hun (N. Y.) 368; Worden *v.* Orange County Bank, 1 Wend. (N. Y.) 309; Matter of Davidson, 5 Dem. (N. Y.) 224; Myers *v.* Trimble, 3 E. D. Smith (N. Y.) 607; Matter of Ockershausen, 59 Hun (N. Y.) 200; McCartan *v.* Van Syckel, 10 Bosw. (N. Y.) 694.

North Carolina. — Wood *v.* Wood, Phil. L. (N. Car.) 538; Kane *v.* Haywood, 66 N. Car. 1; Pain *v.* Pain, 80 N. Car. 322; Boyett *v.* Vaughan, 89 N. Car. 27.

Ohio. — State *v.* Hasleps, Wright (Ohio) 500.

Oregon. — Newhouse *v.* Newhouse, 14 Oregon 290.

Pennsylvania. — Ormsby *v.* Ormsby, 1 Phila. (Pa.) 578; Stevenson's Estate, 7 W. N. C. (Pa.) 65.

South Carolina. — Cooper *v.* Scott, 2 Mc Mull. L. (S. Car.) 150; Thomas *v.* Aitken, Dudley L. (S. Car.) 292; Dawkins *v.* Pearson, 2 Bailey L. (S. Car.) 619.

Wisconsin. — Wright *v.* Wright, 74 Wis. 439.

1. Fault of Contemnor. — *Ex p.* Kellogg, 64 Cal. 343; Neal *v.* Price, 11 Ga. 297; Martin *v.* Huson, 42 Ga. 83; Wise *v.* Chaney, 67 Iowa 73; Haines *v.* Haines, 35 Mich. 138; McCartan *v.* Van Syckel, 10 Bosw. (N. Y.) 694; Myers *v.* Trimble, 3 E. D. Smith (N. Y.) 607; McClung *v.* McClung, 33 N. J. Eq. 462; Pitman *v.* Clarke, 1 McMull. L. (S. Car.) 316; *In re* Andrew, 7 H. & N. 87; Staples *v.* Staples, 87 Wis. 592.

Where the contemnor creates an inability in anticipation of the order of court, a showing of the existence of such inability does not purge the contempt. *Ex p.* Kellogg, 64 Cal. 343; McCartan *v.* Van Syckel, 10 Bosw. (N. Y.) 694; Myers *v.* Trimble, 3 E. D. Smith (N. Y.) 607.

Misappropriation of Funds by Attorney. — An attorney who has been committed for contempt in failing to obey an order of court to pay over certain moneys to which his client was entitled will not be relieved of such imprisonment by a judge at chambers, on habeas corpus, because he testifies that he is utterly unable to pay the amount of the rule, or any part thereof. Smith *v.* McLendon, 59 Ga. 523.

But see Kane *v.* Haywood, 66 N. Car. 1, in which it was held that a showing of absolute inability to pay the money ordered is sufficient to purge the contempt of the attorney in failing to obey the order.

By an Administrator. — The plaintiff, when ordered by the judge of a court to pay the administrator certain moneys which had come into his hands, belonging to the estate, refused to pay the money on the ground that he had received it as the clerk of a prior administrator, and had paid it out (without authority) to the widow of the decedent, and that he had in his possession no more money either of his own or belonging to the estate. The court held that such a showing did not purge him of the contempt in disobeying the order. Wise *v.* Chaney, 67 Iowa 73. But see *In re* Hilles, 13 Phila. (Pa.) 340.

By Receiver. — Upon an information filed against a receiver of an insolvent corporation, it appeared that he had taken some of the company's funds without order of court, and had appropriated them to his own use; that no entry of the taking had been made upon his books till after the filing of the information. He was ordered to restore the money so taken to his co-receiver, but he failed to comply with this order, and in an answer to show cause why he should not be adjudged for contempt, testified, admitting the fact, but stating that he thought he had a right to take the money as compensation for his services; that he intended no wrong, but from poverty he was unable to restore it. He was adjudged guilty of contempt and committed to prison. On appeal the court held (without passing upon the question of right to appeal) that this proceeding was criminal in nature; that his testimony was not conclusive in his favor; that the question of contempt did not depend upon his intention; that the commitment was not only to compel restoration but to punish for contempt, and that, therefore, his inability to make restitution was no defense. Cartwright's Case, 114 Mass. 230.

Failure of Sheriff to Levy Execution. — An execution was placed in the hands of a sheriff, and a rule was taken against him requiring him to show cause why he should not be adjudged guilty of a contempt in failing to make the amount of the execution. For cause, he showed that he had been notified by the judgment debtor that the judgment was obtained on a debt made prior to a certain time, and that its collection was suspended by a resolution of the General Assembly; that the judg-

4. Disavowal of Intention to Commit Contempt — *a.* CRIMINAL CONTEMPTS. — Inasmuch as the essence of a criminal contempt of court consists in a wilful defiance of its authority or in the doing of some act tending to degrade its dignity or to impair the effectiveness of its judgments or orders, the generally recognized doctrine is, that a contempt of such nature will be purged by a disavowal of all intent to commit it, and by a showing that the contemptuous action or default was innocent and resulted from ignorance.[1]

Attachment. — And a court will not award an attachment where it is apparent that no contempt was intended.[2]

ment debtor had promised to save him harmless in the event of his not proceeding to collect the same. It was held upon this showing that it was the sheriff's duty to have proceeded to collect the money due on the execution unless restrained by legal process from so doing, and that his answer did not purge the contempt. Martin *v.* Huson, 42 Ga. 83.

A sheriff cannot be relieved from an attachment for contempt issued against him, nor can he have it dissolved, unless he can show that he has used all the means in his power to obviate and repair the consequences of his former default; and that the loss did not arise from his negligence, but from the absolute insolvency of the judgment debtor. Pitman *v.* Clarke, 1 McMull. L. (S. Car.) 316.

1. Disclaimer of Intention to Commit. — Matter of Fitton, 16 How. Pr. (N. Y. Supreme Ct.) 303; McQuade *v.* Emmons, 38 N. J. L. 397; State *v.* Goff, Wright (Ohio) 79; State *v.* Coulter, Wright (Ohio) 421; Wells *v.* Com., 21 Gratt. (Va.) 500. See also Rex *v.* Vaughan, 2 Doug. 516; Rex *v.* Sims, 12 Mod. 511; U. S. *v.* Dodge, 2 Gall. (U. S.) 313; *In re* May, 1 Fed. Rep. 737; Buck *v.* Buck, 60 Ill. 105; Haskett *v.* State, 51 Ind. 176; Burke *v.* State, 47 Ind. 528; State *v.* Earl, 41 Ind. 464; People *v.* Few, 2 Johns. (N. Y.) 290; Matter of Walker, 82 N. Car. 95; Matter of Moore, 63 N. Car. 397; Thomas *v.* Cummins, 1 Yeates (Pa.) 40; Underwood's Case, 2 Humph. (Tenn.) 46: in all of which cases the rule of the conclusiveness of the contemnor's answer in a court of law, as to his non-intention of committing the contempt, was said to prevail.

Illustrations. — An officer had in charge a prisoner on a writ of habeas corpus, and the officer made return to the writ that he had no opposition to the discharge, and had no further return to make thereon, whereupon the prisoner was discharged; but before leaving the court room, without any warrant or process, the officer again arrested the prisoner, and carried him back to the same prison. On an order for the officer to show cause why he should not be punished for contempt, he answered that he acted in pursuance of instructions and the order of one of the police commissioners, and supposed it was his duty, as policeman, to obey the orders of such commissioner. And it appeared that the commissioner at the same time was attorney and counsel for a party complainant, who desired the re-arrest of the prisoner on a charge of larceny. It was held that the circumstances in which the officer was placed by the positive instructions of his superior officer, led to the conclusion that he acted in obedience of such orders, and in ignorance of the consequences of his act, and were sufficient to relieve him from punishment. Matter of Fitton, 16 How. Pr. (N. Y. Supreme Ct.) 303.

Although it is contempt of court to muster and examine a military company, with martial music, so near a court as to disturb its proceedings, yet in a case where all intention of disturbing the court is disclaimed, and supposed to have been more thoughtless than wilful, the officer arrested will be discharged on paying the costs. State *v.* Goff, Wright (Ohio) 79; State *v.* Coulter, Wright (Ohio) 421.

Where a rule was made upon an attorney to show cause why he should not be punished for contempt of court in aiding to obstruct the execution of a decree of the Chancery Court, it was held that he purged himself of the contempt by answering under oath, that in what he had done he acted in good faith, without any design, wish, or expectation of committing any contempt of court. Wells *v.* Com., 21 Gratt. (Va.) 500.

Arkansas Statute. — Under a statute "to regulate the practice in the Supreme Court," it was necessary for the clerks of the trial courts, to whom writs of error were directed, either to indorse upon the writ, or to attach to their returns, a certificate with their seals. A failure to make such return was a contempt of the Supreme Court, and a clerk would not be excused because he was ignorant of the law, nor because he stated in his answer that no contempt was intended. State *v.* Simmons, 1 Ark. 265.

2. Where Court Will Not Award Attachment. — After a change in the law which required an officer to perform a particular act, and under which a writ of mandamus had issued, ordering him to perform it, the court refused to grant an attachment for contempt against him for not continuing to comply with the writ, where it appeared that he acted in good faith and according to his best judgment as to the effect produced by the change in the law. State *v.* Harvey, 14 Wis. 152.

Although the judge of an inferior court did not obey an order of the Supreme Court, and thereby subjected himself to an attachment for contempt, yet where his return to a mandamus showed that there was no intentional contempt, the Supreme Court issued an *alias* mandamus instead of an attachment. *Ex p.* Woodruff, 4 Ark. 630.

The Georgia Statute required that criminal cases be transmitted to the Supreme Court within or immediately after the expiration of fifteen days from serving the bill of exceptions. The Supreme Court held that although it was the duty of clerks to know of and com-

Attack on Court — Motions — Arguments — Publications. — This general rule, however, does not apply where the contempt consists of written, spoken, or published matter concerning the integrity of the court. The construction and tendency of such expressions are generally considered as matter of law for the court. Contemptuous language addressed to a judge in open court, or contemptuous motions or arguments filed in a cause, or a contemptuous publication made during the pendency of a trial, cannot be purged by disclaiming any intention to commit a contempt, if in the opinion of the court the language used is contemptuous;[1] but the practice is to consider the *bona fides* of such disclaimer, in extenuation of the offense.[2]

Attack on Parties or Witnesses. — Where, however, the contempt consists not of an attack upon the court, but on parties or witnesses to the cause, it has been held that it may be purged by a disclaimer of any intention to commit a contempt and by expressions of contrition.[3] In such case the apology must be directed to the court and not to the parties.[4]

b. CIVIL CONTEMPTS — **Failure to Comply with Order — Inability.** — Where the civil contempt consists in a failure to comply with a judgment, order, or decree of court, made or rendered for the benefit of the adverse party, the contempt is purged where it is shown that such failure is due to an inability to comply

ply with this statute, yet as it was recent in its application to criminal cases, it would not issue an attachment for contempt. Matter of Contempt by Two Clerks, 91 Ga. 113.

1. Hughes *v.* People, 5 Colo. 436; People *v.* Wilson, 64 Ill. 197, 16 Am. Rep. 528; Dodge *v.* State, 140 Ind. 284; *In re* Woolley, 11 Bush (Ky.) 95; People *v.* Freer, 1 Cai. (N. Y.) 485; People *v.* Freer, 1 Cai. (N. Y.) 518.

Upon an Application for a Change of Venue based upon the prejudice of the judge, involving the judicial acts or character of the judge, if the language used is contemptuous it cannot be purged by an avowal that no contempt was intended. Hughes *v.* People, 5 Colo. 436.

Addressed to Judge in Open Court. — A disclaimer of all intentional disrespect, or of a design to embarrass the administration of justice, will not purge a contempt of court of which an attorney has been guilty by addressing to the judge language which in itself is contemptuous. Dodge *v.* State, 140 Ind. 284.

The construction and tendency of a publication, as bearing upon its character as a contempt, is a matter of law for the court. People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528.

In North Carolina the common-law rule seems to prevail strictly. Members of the bar published above their own signatures the following scandalous matter: "The judges of the Supreme Court singly or *en masse*, moved from that becoming propriety so indispensable to secure the respect of the people, and throwing aside the ermine, rushed into the mad contest of politics, under the excitement of drums and flags." In another place the publication intimated that "such judges will yield to every temptation to serve their fellow partisans, and are unfit to hold the balance of justice." It was held that a disavowal by them upon oath of any intention to commit a contempt of the court was sufficient to purge the contempt, and that they should be discharged. Matter of Moore, 63 N. Car. 397. See also Henry *v.* Ellis, 49 Iowa 205, holding that evidence going to show the intent of the contemnor was admissible for the purpose of purging the contempt.

An attorney, who was also the editor of a newspaper, published a contemptuous article assailing the court. The disavowal was in the following words: "This respondent respectfully answers: That as an attorney and counselor in this court he has ever been respectful, both in his deportment and language, to his Honor Judge E. W. Jones, and disavows having ever entertained any intention of committing a contempt of court, or any purpose to destroy or impair its authority, or the respect due thereto." The court held that, although more general than there was occasion for, the disavowal was sufficient to excuse, if not to acquit; even although in a subsequent paragraph the respondent insisted that the article was not libelous; that by becoming an attorney he had not lost his rights as an editor; that the article was written in the latter character; and that it did not transcend the limits to criticism upon public men, allowed to the freedom of the press. *Exp.* Biggs, 64 N. Car. 202.

2. Good Faith — Extenuation. — *In re* Woolley, 11 Bush (Ky.) 95; People *v.* Freer, 1 Cai. (N. Y.) 485; People *v.* Freer, 1 Cai. (N. Y.) 518.

Where a petition for rehearing, filed by an attorney in a case, contained expressions apparently intended to be scandalous and offensive, the sworn disavowal by the attorney of an intention to commit a contempt was regarded as in some degree palliating the offense. *In re* Woolley, 11 Bush (Ky.) 95.

3. Attack on Parties or Witnesses to Cause. — Felkin *v.* Herbert, 10 Jur. N. S. 62; People *v.* Few, 2 Johns. (N. Y.) 290.

4. Apology to Court and Not to Party. — In order to purge a contempt committed by the publisher of a newspaper, in attributing falsehoods to persons who had made affidavits in a cause, after the filing of affidavits but before hearing, the publisher should apologize and express his contrition to the court, and he is not obliged to apologize to the persons to

which has not been brought about by an act or default of the contemnor.[1]

Damage to Adverse Party. — When the contempt consists in a failure to comply with or the disobedience of an order, injunctional or otherwise, resulting in loss or damage to the adverse party, it neither purges the contempt nor repairs the wrong done for the contemnor to avow or to show that he acted from *bona fide* motives and with no intention of being guilty of a contempt. In such case the question of contempt *vel non* is purely a question of law.[2]

Evidence of the Motives with which the contemnor acted, however, is admissible for the purpose of showing the character of the contempt and of eliminating from it any criminal element, that it may be limited to the repairing of the damage done the adverse party.[3] And where the damage was merely nominal,

whom the falsehoods have been imputed. Felkin *v.* Herbert, 10 Jur. N. S. 62.

1. Inability to Perform Act for Benefit of Adverse Party. — Obviously this general rule applies whether the alleged contempt be civil, consisting of a failure to comply with an order made for the benefit of an adverse party, or purely criminal. Both are treated together. See *supra*, *Inability to Comply with Order*.

2. Damage Caused to Adverse Party. — Wartman *v.* Wartman, Taney's Dec. (U. S.) 362; Wilcox Silver Plate Co. *v.* Schimmel, 59 Mich. 525; Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105; Watson *v.* Citizens' Sav. Bank, 5 S. Car. 159.

On a bill filed praying that certain money held in trust by the defendant be brought into court, the defendant answered admitting that he had the money in his hands, but resisting the claim to it set up by the complainant. An order was made requiring the money to be brought into court. This order was disobeyed, and as a showing why he should not be punished for contempt, the defendant showed that he had previously paid the money to the persons whom he considered to be entitled to it. The court held that the question whether a contempt had or had not been committed did not depend on the intention of the party, but on the act done. Wartman *v.* Wartman, Taney's Dec. (U. S.) 362.

Neither the belief, motive, nor intent with which a writ of injunction is disobeyed in any manner varies the responsibility of the contemnor, and he will not be allowed to purge the contempt by showing that in committing a breach of the injunction he acted not for himself, but as agent for a stranger to the cause, and was ignorant that such act was a breach of the injunction. Wilcox Silver Plate Co. *v.* Schimmel, 59 Mich. 525.

Contempt proceedings instituted by private individuals for the purpose of protecting or enforcing their rights are civil. In these proceedings the state of mind of the offending party toward the court is immaterial, and it does not purge the contempt for the contemnor to show that he did not intend in what he did to contemn the authority of the court. Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105.

Where in a suit by a creditor against a bank to wind up its affairs on the ground of insolvency, an order is made enjoining the bank, its officers or agents, from paying out money or disposing of its property, it is a contempt for its attorney to advise its officers and stockholders to file a petition in bankruptcy with a view of removing its property beyond the jurisdiction of the court. A disavowal of an intention to commit a contempt does not purge the contempt or relieve the attorney from the consequences of the act committed by him. Watson *v.* Citizens' Sav. Bank, 5 S. Car. 159.

Reasons for the Rule. — In the case of Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105, where the wrong complained of consisted in the disobedience of an injunction to the detriment of an adverse party, after clearly drawing the line between civil and criminal contempts the court observes: "The proceeding here belongs to the second class" (referring to civil contempts), "and the question is whether in such a case the court is warranted in taking any action *in personam*, in the absence of a wilful intention to contemn its dignity and authority and to disregard its order. I think, upon principle, that the answer must be in the affirmative, provided, of course, the person acting contrary to the order of the court, or failing to act in accordance therewith, as the case may be, is conscious of the quality of his act or non-action in that respect. For instance, if A be ordered to pay a sum of money to B, and, being able so to do, fails to make the payment, of what consequence is it to B what may have been the motive which induced the failure, or what may have been the state of A's mind toward the court? And if B brings the breach of its order to the attention of the court, and asks that its process do issue against A therefor, must his application be refused if A can satisfy the court that he entertained no disregard for the court, and did not mean to set its order at defiance? So in the case of a nuisance. If A be enjoined from so using a dam on his land as to flood B's land, and fails to observe the injunction, and B's land is flooded thereby, in any and all such cases it seems to me that it is no answer to the complaint of the injured party to say that the party inflicting the injury meant no disrespect to the court. The injury suffered by the complaining party is neither increased nor diminished, nor in any way affected, by the state of mind towards the court of the party inflicting the injury; and the breach of the injunction consists in doing the forbidden thing, and not in the intention with which it is done."

3. Motive as Mitigating Punishment. — Vose *v.* Reed, 1 Woods (U. S.) 647; William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121; Des Moines St. R. Co. *v.* Des Moines Broad Gauge St. R.

the punishment has been limited to a nominal fine and the payment of costs.[1]

5. Erroneous Advice of Counsel. — A showing that the contemnor acted under the erroneous advice of his counsel as to the proper and legal course to pursue will not suffice to purge the contempt committed;[2] although when such advice is given, received, and acted upon in good faith, it will mitigate the punishment, by eliminating the criminal element from contempt.[3]

Co., 74 Iowa 585; State *v.* Collins, 62 N. H. 694.

Where a person has been guilty of a technical contempt, in violating an injunction, but declares on oath that he was not aware of the violation, and submits to the direction of the court, he will be allowed to purge the contempt by undoing or reversing his acts, when it is practicable to do so. Vose *v.* Reed, 1 Woods (U. S.) 647.

1. Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 74 Iowa 585.

Where No Damage Was Suffered by Adverse Party. — Where the conduct of parties sought to be attached for a violation of an injunction, was literally a breach of the injunction, but not so in spirit, and where it clearly appeared that there was not only no intention to disregard the injunction, but a supposition that the action would receive the approbation of the court, and no damage was suffered by the adverse party, they were not punished for the contempt. Fraas *v.* Barlement, 25 N. J. Eq. 84.

2. **Advice of Counsel — Will Not Justify Disobedience of Order.** — Bate Refrigerating Co. *v.* Gillett, 30 Fed. Rep. 683; Buffum's Case, 13 N. H. 14; Cape May, etc., R. Co. *v.* Johnson, 35 N. J. Eq. 422; McKillopp *v.* Taylor, 25 N. J. Eq. 139; Fitzgerald *v.* Christl, 20 N. J. Eq. 90; Lansing *v.* Easton, 7 Paige (N. Y.) 364; Capet *v.* Parker, 3 Sandf. (N. Y.) 662; Hawley *v.* Bennett, 4 Paige (N. Y.) 164; Power *v.* Athens, 19 Hun (N. Y.) 165; Rogers *v.* Paterson, 4 Paige (N. Y.) 450; Columbia Water Power Co. *v.* Columbia, 4 S. Car. 389; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864. See the title ADVICE OF COUNSEL, vol. 1, p. 898.

Neither the advice of his attorney that the injunction is illegal, nor the declared intent of the magistrate to disregard it, will justify or excuse the party enjoined, in violating the injunction. Capet *v.* Parker, 3 Sandf. (N. Y.) 662.

An attempt to justify a disobedience of an injunction, by showing that the act was committed after consultation with counsel and upon his advice that notice of the injunction might safely be disregarded, affords no justification. Cape May, etc., R. Co. *v.* Johnson, 35 N. J. Eq. 422; McKillopp *v.* Taylor, 25 N. J. Eq. 139.

It will not palliate a contempt for a contemnor to show that he acted under the advice of counsel, where it appeared that the latter was without the necessary papers to form an opinion, or time to deliberate upon the question, and heard only the contemnor's version of the affair. Fitzgerald *v.* Christl, 20 N. J. Eq. 90.

Reason for the Rule. — In Hawley *v.* Bennett, 4 Paige (N. Y.) 164, it was said that, so far as the rights of the party have been "affected by the breach of an injunction, it is no defense to the person who has been guilty of violating the same, that he did it under the advice of counsel; although if he has acted in good faith it may be sufficient to protect him from punishment as for a criminal contempt. The rights of parties must be protected against the wrongful acts of the adverse party although he may have acted under the advice of counsel."

Contra. — When a witness before a referee refuses to answer questions which are ruled by the referee to be proper, but in doing so acts upon the advice of counsel, he will be excused from the punishment for contempt which otherwise would be imposed. U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9.

3. **When Advice of Counsel Will Palliate Offense.** — Matthews *v.* Spangenberg, 15 Fed. Rep. 813; Bate Refrigerating Co. *v.* Gillett, 30 Fed. Rep. 683; Power *v.* Athens, 19 Hun (N. Y.) 165; Lansing *v.* Easton, 7 Paige (N. Y.) 364; People *v.* St. Louis, etc., R. Co., 19 Abb. N. Cas. (N. Y. Supreme Ct.) 1; Billings *v.* Carver, 54 Barb. (N. Y.) 40; Hawley *v.* Bennett, 4 Paige (N. Y.) 164; Columbia Water Power Co. *v.* Columbia, 4 S. Car. 389. See the title ADVICE OF COUNSEL, vol. 1, p. 898.

Where a contemnor in disobeying an injunction acts under the mistaken advice of counsel that such injunction is superseded by an appeal taken therefrom, the fine imposed should not exceed the actual damage sustained by the adverse party. Power *v.* Athens, 19 Hun (N. Y.) 165.

The fact that contemnors in violating an injunction acted under erroneous advice of counsel, will not protect them from a fine sufficient to compensate the adverse party, although such advice may palliate the offense so as to protect them from further punishment. Lansing *v.* Easton, 7 Paige (N. Y.) 364.

That a party acted under an advice of counsel, does not relieve him from the charge of contempt. It is a matter of mitigation only. Columbia Water Power Co. *v.* Columbia, 4 S. Car. 389.

The fact that persons in violating an injunction acted on the advice of counsel, will not purge them of contempt; but such fact will be considered by the court in imposing the punishment. Bate Refrigerating Co. *v.* Gillett, 30 Fed. Rep. 683.

Where the defendant has been guilty of a contempt in disregarding an injunction of the court, but the act of contempt does not appear to be at all wilful or defiant, but merely the exercise of a supposed right under advice taken and given in good faith, it does not deserve punishment as such, but he should make the orator whole as to the damages sustained thereby. Matthews *v.* Spangenberg, 15 Fed. Rep. 813.

The wise exercise of the discretion vested in the court requires it to relieve a party when the effect of his counsel's mistaken advice may be to keep him in jail indefinitely, by reason

CONTENTION. — A violent effort to obtain something, or to resist a person, claim, or injury; contest; quarrel.[1]

CONTENTS. — Contained within limits.[2]

CONTEST. — The primary meaning of the verb "to contest" is to make a subject of dispute, contention, or litigation; to call in question, to controvert, to oppose, to dispute. It is further defined as meaning, to defend, as a suit or other judicial proceeding; to dispute or resist, as a claim, by course of law; to litigate.[3]

of his inability to pay a large sum of money. Hence where a defendant was adjudged guilty of contempt in failing to appear and submit to an examination as to his property, and it was shown that such failure was caused by the advice of counsel, given in good faith and in good faith relied upon by the defendant, that there had been no service of the original order, the order was modified so as to direct that the defendant be adjudged guilty of the contempt charged, and be fined, unless he appeared and submitted to an examination under the original order, and made an affidavit to the effect that he had made no transfer of his property, since the order for his examination, except and unless under the provisions of the bankrupt act. Billings *v.* Carver, 54 Barb. (N. Y.) 40.

Where Counsel is Ill-Advised as to Facts. — The advice of counsel may under some circumstances be a palliation of the offense of his client in disobeying the lawful process of a court, but the extent of such palliation must depend upon the character of such advice and the circumstances under which it has been given. The offense will be palliated by such advice to the extent only of making it a reckless disobedience of the process of the court instead of a wilful contempt, when the advice is hasty and inconsiderate, or where the party through carelessness has failed to give the counsel correct information as to the facts of the case. State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864.

Failure to Appear in Contempt Proceedings. — After a judgment against a party in contempt for violating an injunction, if it is shown that the failure to appear and defend resulted from excusable neglect, or that of his attorney, and where on account of such failure there is reason to believe that injustice has been done, the judgment may properly be vacated. Mead *v.* Norris, 21 Wis. 315.

Advice of Military Commander. — Although a subordinate military officer must not obey an unlawful order of his superior in command, yet, as he acts at his peril in disobeying such an order, it should be held greatly to extenuate the offense of a contempt of court committed by a subordinate under the orders of his superior. State *v.* Sparks, 27 Tex. 627.

1. Webster's Dict.

2. Webster's Dict.

Will. — In Cockerell *v.* Essex, 32 W. R. 634, it was held that a bequest of all "the ***contents*** of my house" would carry a box of jewels deposited at a bank for safe custody. See generally the title WILLS.

Contents of a Promissory Note, or Chose in Action. (See also the title UNITED STATES COURTS.) — The eleventh section of the Judiciary Act of 1789 declares that no district or circuit court shall have cognizance of any suit to recover the ***contents*** of any promissory note or other chose in action in favor of an assignee, etc. In Wilkinson *v.* Wilkinson, 2 Curt. (U. S.) 583, it is said: "The term 'other chose in action' is broad enough to comprehend either case, and the word ***contents*** is too ambiguous to restrain that general term. The ***contents*** of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account."

A suit to compel the specific performance of a contract or to enforce its other stipulations is a suit to recover the ***contents*** of a chose in action. The court said: "This principle was settled in the early case of Sere *v.* Pitot, 6 Cranch (U. S.) 332, under section 11 of the Act of Sept. 29, 1789, c. 20, which is re-enacted in section 629 of the Revised Statutes. There the plaintiffs were the general assignees of the effects of an insolvent debtor, by operation of law. It was contended that the statute applied only to a voluntary assignment of a particular chose in action, and that the word ***contents*** did not apply to accounts or unliquidated claims, but was confined to transferable paper. But the court held that the statute intended to except suits in virtue of equitable assignments, as well as suits in virtue of legal assignments, and to exclude from the federal courts the assignee of all the open accounts of a merchant, as well as the same person when the assignee of a particular note. The court say: 'The term 'other chose in action' is broad enough to comprehend either case, and the word ***contents*** is too ambiguous in its import to restrain that general term. The ***contents*** of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account.' Following out this principle, the obligation or the promise contained in a contract is its ***contents***, when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such ***contents***." Corbin *v.* Black Hawk County, 105 U. S. 666; Shoecraft *v.* Bloxham, 124 U. S. 730. See also Republic Iron Min. Co. *v.* Jones, 37 Fed. Rep. 723; Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 115; Simons *v.* Ypsilanti Paper Co., 33 Fed. Rep. 193.

Insurance. (See also the title FIRE INSURANCE. And see CONTAIN.) — In Farmers' Mut. F. Ins. Assoc. *v.* Kryder, 5 Ind. App. 430, it was held that insurance on a barn and its ***contents*** did not cover horses killed by lightning outside of the barn, although they were stabled in the barn.

Contents Unknown. — See the title BILLS OF LADING, vol. 4, pp. 523, 524.

3. Webster's Dict., *followed* in Robertson *v.* State, 109 Ind. 116.

CONTEXT. — See such titles as CONTENTS; STATUTES; WILLS, etc.

CONTIGUOUS. (See ADJACENT, vol. 1, p. 633; ADJOINING, vol. 1, p. 635; and the titles ABUTTING OWNERS, vol. 1, p. 224; BOUNDARIES, vol. 4, p. 756; EASEMENTS; FENCES; WATER AND WATERCOURSES.) — "Contiguous" is defined to be adjacent, in actual close contact, touching, near.[1]

Contested and Doubtful. — A *Georgia* statute provided that the executors and administrators might compromise ***contested*** or doubtful claims. In construing this statute the court, in Maynard *v.* Cleveland, 76 Ga. 71, said: "The two words ***contested*** and 'doubtful' are not precisely synonymous, so as to make the use of both an idle repetition. A claim may be ***contested***, which the executor sees to be beyond doubt as to its legality, and which no court would hold to be of doubtful obligation. So the executor may have just cause to doubt its validity, and an enlightened court would consider it of uncertain force, and yet no actual ***contests*** have arisen. But whether it be ***contested*** or doubtful, this section covers it. That claims whose justice and legality may be questioned are the matters here referred to, appears from the following clause in the section, 'to submit such matters to arbitration.'" See also DOUBTFUL; and see the title EXECUTORS AND ADMINISTRATORS.

Contested Election. (See also the title ELECTIONS.) — In Robertson *v.* State, 109 Ind. 116 it is said: "The phrase '***contested*** elections' has no technical or legally defined meaning. An election may be said to be ***contested*** whenever an objection is formally urged against it which, if found to be true in fact, would invalidate it. This must be true both as to objections founded upon some constitutional provision as well as upon any mere statutory enactment."

In Burke *v.* Perry, 26 Neb. 420, it is said: "A ***contest*** of an election must be what its name implies — an adversary proceeding by which the matters in controversy may be settled upon issues joined."

The Constitution of *Missouri* provided that in all cases of ***contested*** elections, the ballots cast might be counted and compared with the list of voters. In construing this provision the court, in State *v.* Francis, 88 Mo. 561, said: "The question then arises, what is meant by the phrase '***contested*** elections,' as employed in the above sections of the constitution? Relator's contention is, that it relates to any proceeding in which the election of one holding an office is ***contested***; while respondent insists that it relates only to statutory ***contests*** in which the contestant seeks not only to oust the intruder, but to have himself inducted into the office. The latter we think the correct view."

Same — English Decisions. — In Anthony *v.* Leger, 1 Hagg. Cons. Rep. 13, it is said: "When a poll is demanded the election commences with it, as being the regular mode of popular election; the show of hands being only a rude and imperfect declaration of the sentiments of the voting electors." See also Muntz *v.* Sturge, 8 M. & W. 302, to the same effect.

Contested Probate. — See the title PROBATE.

1. Webster's Dict., *quoted* in Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168.

Actually Touching. — The charter of the New Orleans Water-Works Company (Acts La. 1877, p. 51) provides, in section 18, "that nothing in this act shall be so construed as to prevent the city council from granting to any person or persons, ***contiguous*** to the river, the privilege of laying pipes to the river, exclusively for his or their own use." The Supreme Court of the United States decided in New Orleans Water-Works Co. *v.* Rivers, 115 U. S. 674, that the proprietor of a building five blocks from the river was not "a ***contiguous*** person." Therefore, no lot can be ***contiguous*** unless it actually fronts on the river, or is separated from the river only by a public highway, with no private owner intervening, or, possibly, on a block or square so situated. New Orleans Water-Works Co. *v.* Ernst, 32 Fed. Rep. 5.

Deed. — The primary meaning of ***contiguous*** is in actual contact or touching. It has therefore been held that a deed conveying certain salt works and lands ***contiguous*** thereto did not convey land separated from the works by a distance of about three-quarters of a mile. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396.

Contiguous Proprietors. — ***Contiguous*** proprietors, under a statute which forbids the closing of public roads without the consent of the ***contiguous*** property owners, mean those whose land actually touches the road, or through whose land the road passes. Vicinal are not necessarily ***contiguous*** proprietors. Raxedale *v.* Seip, 32 La. Ann. 435.

Local Assessments. (See also the title SPECIAL ASSESSMENTS.) — The words "***contiguous*** property," as used in the statute in relation to special taxation for local improvements, are to be understood in their popular sense; the word ***contiguous*** meaning in actual or close contact, touching, or near. If the improvement is of a street or sidewalk, ***contiguous*** property is such as abuts upon the street or sidewalk, or is bounded by the street. Adams County *v.* Quincy, 130 Ill. 567.

Mechanics' Lien. (See also the title MECHANICS' LIEN.) — A *Missouri* statute provided that only one lien should be necessary where the separate buildings should be erected under one general contract and upon ***contiguous*** lots. In construing this statute the court said in Bulger *v.* Robertson, 50 Mo. App. 503: "As a further objection to the enforcement of this lien it is claimed that these two buildings are not upon ***contiguous*** lots. This contention has for its basis the fact, that although the two houses on which the slate work was done are located on adjoining platted lots, yet as the two buildings are apparently separated by another house (also located on one of the lots), and that the owner had made separate deeds of trust on each half lot, then it is contended that this effected a division of said fifty-foot lots into twenty-five foot lots, and that the two houses on which the work was done were thus thrown on lots that were not ***contiguous***. We must hold this point, too, against the defendants.

CONTINGENCY. (See CONTINGENT, and the references there given.) — A "contingency" is a fortuitous event which comes without design, foresight, or expectation.[1]

Contiguous lots, referred to in the statute, are intended to mean the lots that are bounded and described on the recorded plats of cities and towns (where there is any such platting), and such as lie adjacent or adjoining to each other. Fitzgerald *v.* Thomas, 61 Mo. 500. Lots 18 and 19, on which are situated the two buildings in part constructed by this plaintiff, are adjoining, platted lots, and are therefore *contiguous* lots."

Homestead. (See also the title HOMESTEAD.) — In Linn County Bank *v.* Hopkins, 47 Kan. 582, it is said: "A homestead is defined to be a person's dwelling place with that part of his landed property which is about and *contiguous* to it. *Contiguous* means touching sides, adjoining, adjacent. Two tracts of land touching only at one point are not *contiguous*."

Navigable River — Municipal Corporations. — In Vogel *v.* Little Rock, 54 Ark. 335, it was held that territory separated from a city by a navigable river was *contiguous* within the meaning of a statute authorizing municipal corporations to annex *contiguous* territory lying in the same county.

So, in Houghton County *v.* Blacker, 92 Mich. 638, it was held that lands might be *contiguous* though separated by a navigable river. The court said: "Some argument is made that the legislature was bound under the provisions of section 3, article 4, declaring that 'each representative district shall consist * * * of convenient and *contiguous* territory,' to unite Keweenaw and Isle Royal counties to the county of Houghton, for the reason that, within the meaning of the constitution, they were not convenient and *contiguous* territory to any other county. This clause in the constitution does not bear the restricted meaning contended for. It does not mean in contact by land. Certainly, so far as the islands are concerned, they may be considered *contiguous*, although separated by wide reaches of navigable deep waters."

Fire Insurance. (See also the title FIRE INSURANCE.) — A policy contained the following condition: "If the risk shall be increased by the erection or use of any building *contiguous* thereto, without the consent of this company indorsed thereon, this policy shall be null and void." It was held that a building erected at a distance of twenty-five feet was not to be construed as *contiguous* within the meaning of the condition, and the policy was not therefore avoided. The court said: "The term must be given its proper definition and meaning, as commonly received and understood, to the end that policy-holders may not be misled or left in doubt as to their duty. See Webst. Dict., *Contiguous* and 'Adjacent.' Plaintiff's building was separated and detached from other buildings when insured. It in fact remained so when destroyed. But the defendant insists that the term *contiguous*, as here used, does not mean merely adjoining, or in immediate proximity, but that it is also applicable to objects near by, and that, upon the facts of this case, it should be held that the shop was sufficiently near to be within the condition. This construction is not admissible. The matter would be left altogether too doubtful and ambiguous for the protection of the assured. We cannot hold that a building twenty-five or any particular number of feet from a detached dwelling is *contiguous* to it. Arkell *v.* Commerce Ins. Co., 69 N. Y. 191; Hill *v.* Hibernia Ins. Co., 10 Hun (N. Y.) 26." Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 433.

In Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168, it was held that the word *contiguous* in a policy of insurance meant in actual close contact; a distance of fifty feet was held to destroy the *contiguity*.

1. People *v.* Yonkers, 39 Barb. (N. Y.) 272. And in that case it was held, as the power of commissioners in making assessments for street improvements extended only to known and fixed expenses, that the insertion of an item for *contingencies* made the assessment void. See also the title SPECIAL ASSESSMENTS.

Trustee Process. (See also the title GARNISHMENT.) — Under the provisions of *Maine* Rev. Stat. 1841, c. 119, § 63 (Rev. Stat. 1857, c. 86, § 55), enacting that no person shall be adjudged trustee "by reason of any money or other thing due from him to the principal defendant, unless it is, at the time of the service of the writ upon him, due absolutely, and without depending upon any *contingency*," the liability of the trustee is not necessarily to be determined upon his disclosure made at the first term, if there are matters to be settled afterwards, in order to ascertain the fact and amount of the trustee's indebtedness to the principal defendant. The *contingency* referred to in the statute is one which may prevent the principal from having any claim upon the trustee, or right to call on him to account; and not one which, although the principal may require the trustee to account, may show, on settlement made, that there is nothing due. Cutter *v.* Perkins, 47 Me. 557.

When labor contracted for is performed, and there remains only to fix its amount and value, the fact that by the contract the payment is to be made on an estimate and certificate of a third person does not constitute a *contingency* within the meaning of the statute. Rev. Stat., c. 86, § 55. The phrase, "due absolutely and not on a *contingency*," is applicable to the past earnings of a party payable in the future on the estimate and certificate of a third person. Thus, the defendant wrought for the railroad company to the end of May. By the contract, he was to be paid on the middle of June, for the work of May, on the estimate and certificate of the company's engineer. On June 4th the company was served with the plaintiff's summons to answer as the trustees of Gowen; the estimate and certificate were completed on June 10th. It was held (1) that the company were chargeable as trustees; (2) that payment was due absolutely and not on a *contingency*; (3) that the amount due on June 1st was not payable until the 15th. Rev. Stat., c. 86, § 61. Ware *v.* Gowen, 65 Me. 534.

CONTINGENT. (See also the titles ATTORNEY AND CLIENT, vol. 3, p. 440; CHAMPERTY AND MAINTENANCE, vol. 5, p. 824; ESTATES; LEGACIES AND DEVISES; REMAINDERS AND EXECUTORY INTERESTS; USES; WILLS.) — The word "contingent" when applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present interest exists, and that whether such interest or right ever will exist, depends upon a future uncertain event. The legal definition of the word concurs with its ordinary acceptation in showing that the term "contingent" implies a possibility.[1]

CONTINUANCE. — See ENCYC. OF PLEADING AND PRACTICE, titles ADJOURNMENT, vol. 1, p. 238; CONTINUANCES, vol. 4, p. 822.

CONTINUE, CONTINUOUS, ETC. — To "continue" means to remain in a given place or condition; to remain in connection with; to abide; to stay.[2]

1. Jemison *v.* Blowers, 5 Barb. (N. Y.) 692. And it was there held that the term ***contingent*** demand was inapplicable where a present claim existed, or where it was certain to arise in future; and is only applicable where there is no claim *in præsenti* and where it is uncertain whether in fact any will ever arise.

In Law a remainder which depends upon an uncertainty is a ***contingent*** remainder, and so an expense which depends upon some future uncertain event is a ***contingent*** expense. People *v.* Yonkers, 39 Barb. (N. Y.) 272.

Bankruptcy — Contingent Liability. (See also the title INSOLVENCY AND BANKRUPTCY.) — Under the *United States* Bankrupt Act of 1867 the only ***contingent*** liabilities allowed to be proved were those contracted by the bankrupt. A ***contingent*** liability contracted by a bankrupt, in its legal signification, means an obligation of the bankrupt arising from his contract; the duty to perform which is dependent, as to when or whether the obligation shall become absolute, upon the occurrence of an event the happening of which is a matter of some uncertainty. Heywood *v.* Shreve, 44 N. J. L. 104.

The *Maine* statute of 1878 contained the same provision. A contract given by one partner to another to assume all the debts of the firm, and save him harmless therefrom, is not such a claim as may be proved against the estate of the obligor in insolvency until there has been a breach. It is not a ***contingent*** debt nor a ***contingent*** liability, for until the breach there is no liability. The ***contingency*** is whether there ever will be a debt or liability. A ***contingency***, depending upon a breach of a contract by one of the parties, is not such as is required under the insolvent law to make a ***contingent*** debt or liability. Fernald *v.* Johnson, 71 Me. 437. See also Greene *v.* Dyer, 32 Me. 460; Woodard *v.* Herbert, 24 Me. 358.

In Zimmer *v.* Schleehauf, 115 Mass. 52, it was held that a liability for tort was not within the statute.

Contingent Fees. — See the titles ATTORNEY AND CLIENT, vol. 3, p. 440; CHAMPERTY AND MAINTENANCE, vol. 5, p. 824.

2. State *v.* Murphy, 32 Fla. 197. The court in that case said further: "The words '***continued*** in office' imply not the beginning of a new and different holding, but the prolongation of one already existing. To ***continue*** in office is to remain in it."

Maintained. — An engagement to construct and ***continue*** a railroad from one point to another is not an agreement to maintain it there. The court said: "It was rather faintly pressed that the proposition in the Act of the 16th of March, 1831, to the city, to engage to construct and ***continue*** the railroad from the intersection of Vine and Broad streets, down Broad to Cedar street, and accepted, was as an agreement to maintain it there. This is a position which is not at all maintainable. In the collocation of the words used, ***continue*** so obviously means to extend, that argument is not required to refute the position. See Webst. Dict., *ad verb.* 'continue.'" Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 263.

Continued Notice. (See also the title NOTICE.) — In Matter of Smith, 1 Ashm. (Pa.) 354, it was held that a ***continued*** notice in a daily newspaper did not necessarily mean a daily continuance.

Continued Drunkenness — Divorce. (See also the titles DIVORCE; HABITUAL DRUNKARD.) — A statute provided that a divorce should be granted for ***continued*** drunkenness. The court said: "The words '***continued*** drunkenness' are used in their ordinary sense in our statutes, and signify gross and confirmed habits of intoxication." Gourlay *v.* Gourlay, 16 R. I. 705.

Continuous. (See also CONSTANT, vol. 6, p. 880.) — ***Continuous*** use means a use which is constant and uninterrupted. Suffield *v.* Brown, 4 De G. J. & S. 199.

Continuous Injury. — By the term "***continuous*** injury" (as a ground for an injunction), is not meant never ceasing, but recurring at repeated intervals, so as to be of repeated occurrence, and so as to be of the same sort of damnification to the plaintiff as an actual continuous mischief would be. Wood *v.* Sutcliffe, 8 Eng. L. & Eq. 220. See also the title INJUNCTIONS.

Continuous Line. — In Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, it was held that two railroads form a ***continuous*** line when their tracks and rails join so that a train may pass from the tracks and rails of the one directly upon that of the other; they form a "connected" line when this can be done by means of an intervening or connecting road.

Perpetual in the Sense of Continuous. — Fairchild *v.* Masonic Hall Assoc., 71 Mo. 530. And see PERPETUAL.

Continuous Services. (See also the title MILITARY LAW.) — Where a naval officer resigned his commission one day and upon the next was appointed to a higher office, it was held

CONTINUOUS EASEMENT. — See the title EASEMENTS.

CONTRA. — *Contra* is a Latin adverb and preposition meaning against, over against, opposite, in front of. In introducing a legal citation it means "to the contrary."[1]

CONTRABAND OF WAR. (See the titles INTERNATIONAL LAW; WAR.) — Articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that by so doing injury is done to the other belligerent.[2]

that his service was ***continuous***. U. S. *v.* Alger, 151 U. S. 362.

Continuous Open Current Account. (See also the title LIMITATION OF ACTIONS.) — It was provided that the statute of limitations should begin to run only from the date of the last item of a ***continuous*** open current account. The court thus construed the phrase "***continuous*** open current account:" "An account, to be ***continuous***, must be without break or interruption; by the term 'open' we mean something that is not closed; and the term 'current,' as used in the statute, signifies 'running,' 'passing,' a 'connected series.' See Webster's Unabridged Dictionary. Hence a ***continuous*** open current account is an account which is not interrupted or broken, not closed by settlement or otherwise, and is a running, connected series of transactions." Tucker *v.* Quimby, 37 Iowa 19.

Continuous Passage. (See also the title TICKETS AND FARES.) — The purchaser of a "train check" issued to another person upon a limited ticket and expressed to be good only for a ***continuous*** passage, is not entitled to subsequently pursue the journey begun by the purchaser of the ticket, though the check be offered for passage within the time limited thereon. The court said: "Then, as to the instruction which the court gave of its own motion, it is self-contradictory. It tells the jury that the check was valid for one ***continuous*** passage, and yet it tells them that two men can ride on it, one succeeding the other at a point on the line of ***continuous*** passage. In other words, it makes the words '***continuous*** passage,' on the face of the check, refer to a ***continuous*** passage of the defendant's trains, or of the check, and not to a ***continuous*** passage of the passenger to whom it is issued. This, we take it, is not the meaning of the words. * * * The ***continuous*** passage referred to in the check is the ***continuous*** passage of the person to whom it was first issued, and of no other person; and this person cannot, without the consent of the carrier, introduce another person in his stead." Walker *v.* Wabash, etc., R. Co., 15 Mo. App. 341.

"Continuous Carriage" as Used in Interstate Commerce Act. — This Act does not include or apply to all carriers engaged in interstate commerce, but only such as use a railway or a railway and water craft "under a common control, management, or arrangement" for a "***continuous*** carriage or shipment" of property from one state to another; nor does it apply to the carriage of property by rail wholly within one state, although shipped from or destined to a place without the state, so that such place is not in a foreign country. *Exp.* Koehler, 30 Fed. Rep. 867. See also the title INTERSTATE COMMERCE.

Continuing Guaranty. — One who enters into what is called a "***continuing*** guaranty" is one who undertakes to be responsible for moneys to be advanced or goods to be sold to another from time to time. Buck *v.* Burk, 18 N. Y. 343. See also the title GUARANTY.

New or Continuing Contract. (See also the title LIMITATION OF ACTIONS.) — A statute provided that payment upon a contract should be evidence of a new or ***continuing*** contract. In Engmann *v.* Immel, 59 Wis. 257, the court said that the word ***continuing*** as there used has its natural meaning of perpetuating, protracting, or prolonging from one time to another.

Continuing Trustee. (See also the title TRUSTS AND TRUSTEES.) — The words "***continuing*** trustee" apply to a person who ***continues*** to act in a trust together with trustees or a trustee newly appointed, and not to a person who is not to ***continue*** to be a trustee after new trustees are appointed, but who ceases to be a trustee at the moment they are appointed. *In re* Coates, 34 Ch. Div. 376. See also *In re* Glenny, 25 Ch. Div. 611; Travis *v.* Illingworth, 2 Dr. & Sm. 344; *In re* Norris, 27 Ch. Div. 333; Nicholson *v.* Wright, 5 W. R. 431, 26 L. J. Ch. 312; Pell *v.* De Winton, 2 De G. & J. 13.

Continuation of Damages. — In Brown *v.* Grand Trunk R. Co., 24 U. C. Q. B. 350, it is said that several unconnected acts of damage, each complete in itself and unconnected with any other, will not constitute a ***continuation*** of damages.

Continuance. — See NON-CONTINUANCE.

Continuance of Change of Possession. — See the article FRAUDULENT SALES AND CONVEYANCES.

1. Century Dictionary.

Contra Bonos Mores. — This phrase signifies "against good morals," and is frequently applied to illegal contracts. See the title ILLEGAL CONTRACTS.

Contra Formam Statuti. — This phrase means "against the form of the statute," and was the formal conclusion of an indictment for an offense created by statute. See ENCYC. OF PLEADING AND PRACTICE, title INDICTMENTS.

Contra Pacem. — This phrase means "against the peace."

2. Elrod *v.* Alexander, 4 Heisk. (Tenn.) 345.

CONTRACT LABOR LAW.

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CROSS-REFERENCES.

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I. INTRODUCTORY — 1. Meaning of Term. — The name "Contract Labor Law" is generally applied to the Act of Congress of Feb. 26, 1885, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia."

2. Outline of Statute. — The main provisions of the Act are, first, that the prepayment of transportation, or the assistance or encouragement of the migration, of aliens or foreigners under contracts to labor in the United States is unlawful; second, that such contracts made previous to their migration are void; third, that every person or corporation guilty of unlawfully assisting or encouraging the immigration of such laborers is subject to a penalty; fourth, that the master of any vessel knowingly bringing such laborers into the country is to be deemed guilty of a msidemeanor.[1] This statute has been supplemented by several subsequent enactments providing, among other things, for the inspection of vessels bringing passengers to the United States; for preventing the landing of aliens included in the prohibition of the Act, and enforcing their return if they have actually landed; forbidding, under the penalty of the original Act, the encouragement of immigration by circulating in foreign countries advertisements containing promises of employment, and forbidding owners of vessels, either directly or by their agents, to solicit immigration, except by ordinary commercial advertising; and enlarging the penal provision of the original Act so as to render not only masters of vessels but all others who assist in bringing prohibited aliens into the country guilty of misdemeanor.[2]

1. 23 U. S. Stat. at Large 332; 1 Supp. U. S. Rev. Stat. (2d ed.) 479.
2. 24 U. S. Stat. at Large 414, 1 Supp. U. S. Rev. Stat. (2d ed.) 541; 25 U. S. Stat. at Large 565, 1 Supp. U. S. Rev. Stat. (2d ed.) 633; 26 U. S. Stat. at Large 1084, 1 Supp. U. S. Rev. Stat. 934; 27 U. S. Stat. at Large 569, 2 Supp. U. S. Rev. Stat. 117.

3. History of Statute. — Previous to the passage of the Act of 1885 it had become the practice for large capitalists in the United States to contract with their agents abroad for the shipment of great numbers of an ignorant, servile class of foreign laborers, under contract by which the employer agreed upon the one hand to prepay their passage, while on the other hand the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. This evil finally became so flagrant that the "Contract Labor Law" was, under the influence of the trade-unions and labor associations, introduced into Congress and passed, with the design of protecting the interests of the laboring class; of raising the standard of foreign immigrants; and of discontinuing the migration of those who had not sufficient means to pay for their own passage.[1]

II. CONSTITUTIONALITY OF STATUTE. — The Act of 1885 and the legislation supplementary to it are constitutional as valid exercises by Congress of the power to regulate commerce,[2] and of the power inherent in sovereignty to forbid the entrance of foreigners, or to regulate their admission as it may see fit, which power is vested in the United States in the national government.[3]

III. WHO ARE EXCLUDED — 1. Statute Affects Only Alien Immigrants. — The statutes regulating the exclusion of contract laborers are directed only against alien immigrants, and consequently alien residents when returning after a temporary absence in a foreign country are not within the purview of the acts, and cannot be excluded.[4]

2. Character of Occupation Followed — *a.* GENERALLY. — The statute has been held by the United States Supreme Court to be directed solely against the importation of unskilled cheap labor,[5] and it is therefore to be construed as limited to cases where the assisted immigrant is brought into the country

1. The object and history of this legislation is fully examined in U. S. *v.* Craig, 28 Fed. Rep. 795; U. S. *v.* Holy Trinity Church, 36 Fed. Rep. 303, 143 U. S. 457; U. S. *v.* Laws, 163 U. S. 258; U. S. *v.* Gay, 80 Fed. Rep. 254.

2. In U. S. *v.* Craig, 28 Fed. Rep. 795, it was held that the Contract Labor Law of 1885 was an exercise by Congress of the right "to regulate commerce with foreign nations," within the scope of that power as determined in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1; Smith *v.* Turner, 7 How. (U. S.) 283, and subsequent decisions. To the same effect see *In re* Florio, 43 Fed. Rep. 114.

3. Ekiu *v.* U. S., 142 U. S. 659. See also the title CHINESE EXCLUSION ACTS, vol. v., p. 1102.

In Lees *v.* U. S., 150 U. S. 476, Brewer, J., discussing the constitutionality of the Contract Labor Law, said: "This question was elaborately considered by Mr. Justice Brown, then a judge of the District Court, in U. S. *v.* Craig, 28 Fed. Rep. 795, and the conclusion reached that there was nothing in the Act conflicting with the Constitution. In Church of the Holy Trinity *v.* U. S., 143 U. S. 457, its constitutionality was assumed; and since the Chinese Exclusion Case, 130 U. S. 581, and the case of Fong Yue Ting *v.* U. S., 149 U. S. 698, affirming fully the power of Congress over the exclusion of aliens, there can be little doubt in the matter. Given in Congress the absolute power to exclude aliens, it may exclude some and admit others, and the reasons for its discrimination are not open to challenge in the courts. Given the power to exclude, it has a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition. The importation of alien laborers, who are under previous contract to perform labor in the United States, is the act denounced, and the penalty is visited not upon the alien laborer — although by the amendment of February 23, 1887, 24 Stat. 414, c. 220, he is to be returned to the country from which he came — but upon the party assisting in the importation. If Congress has power to exclude such laborers, as by the cases cited it unquestionably has, it has the power to punish any who assist in their introduction."

4. *In re* Panzara, 51 Fed. Rep. 275; *In re* Martorelli, 63 Fed. Rep. 437; *In re* Maiola, 67 Fed. Rep. 114.

5. U. S. *v.* Laws, 163 U. S. 258; Holy Trinity Church *v.* U. S., 143 U. S. 457, *reversing* 36 Fed. Rep. 303. The last case was an action brought in the United States Circuit Court against the plaintiff in error to recover the penalty under the Act for the importation of an alien clergyman under a contract to enter into its service as rector and pastor. The United States Supreme Court, after a full examination of the spirit and intent of the statute, concluded that it was intended only to prevent the influx of cheap unskilled labor under contract; and applying the rule that a statute is to be construed according to its spirit and not according to its letter, where a literal construction would lead to absurd results, held that the importation of clergymen was not within the statute, and that the defendant was, therefore, not liable.

under contract to perform manual labor or service.[1]

b. OCCUPATIONS AND PERSONS EXCEPTED BY STATUTE. — Congress by specific enumeration in the Contract Labor Law and legislation amendatory thereof has declared that certain classes of persons performing labor or service shall not be affected by the provisions of the statute: thus —

Domestic Servants. — The Statute of 1885 excepts from its provisions persons employed strictly as personal or domestic servants.[2]

Actors, Artists, Lecturers, and Singers. — The provisions of the Act of 1885 do not apply to "professional actors, artists, lecturers, and singers." [3]

Ministers, College Professors, etc. — The Act of March 3, 1891, adds a further exception in favor of ministers of any religious denomination, persons belonging to any recognized profession, and professors for colleges and seminaries.[4]

Members of Family and Relatives of Residents. — The Act of 1885 contained a proviso that it should not be construed to prohibit any individual from assisting any

1. U. S. *v.* Gay, 80 Fed. Rep. 254. In this case it was held that a declaration in an action to recover the penalty under the statutes, which failed to state the character of the labor or service which the immigrant was under contract to perform, failed to bring the case within the terms of the statute as construed by the United States Supreme Court in Holy Trinity Church *v.* U. S., 143 U. S. 457. "The court," said Baker, D. J., "cannot indulge the presumption that the labor or service which the immigrant was under contract to perform was manual, in the absence of such averment."

2. Act of Feb. 26, 1895, § 5; 1 Supp. U. S. Rev. Stat., 2d ed., 480.

Under Coachman. — In the case of *In re* Howard, 63 Fed. Rep. 263, it was held that an alien employed as an "under coachman," whose duties consisted in assisting to keep the stables, horses, and carriages of his employer in good order, in driving the horses when his employer, or any of his employer's family, went out in one of the carriages, and in accompanying on horseback the younger members of the family when horseback riding, was a domestic servant within the exception of the statute. The court said: "Apparently he has no other duties. He produces nothing. He does no work on the farm, or in the garden, or in the dairy, as in *In re* Cummings, 32 Fed. Rep. 75. Under the sole direction of Mr. Morton [his employer] and of Mr. Morton's family, he performs services which minister exclusively to their personal comfort and enjoyment. He lives at his employer's residence in Rhinecliff, boarding with the coachman in a small cottage of Mr. Morton's, immediately adjoining his coach house, and sleeps in a room over the coach house, where two of Mr. Morton's cooks also have their rooms. Upon such proof as this, and there being no dispute here as to the facts, it seems entirely clear that relator is employed 'strictly as a personal or domestic servant.'"

Farm Servant or Dairyman. — In the case of *In re* Cummings, 32 Fed. Rep. 75, it was held that an alien employed as a farm servant or dairyman, having charge of a herd of cattle, the surplus dairy products of the herd being sold on the market, was not a domestic servant within the exception of the statute. The court based its opinion upon the ground that his labor was devoted, in part at least, to the production of merchandise which competed with the product of others whose entire attention was given to manufacturing such products.

3. Act of Feb. 26, 1885, § 5; 1 Supp. U. S. Rev. Stat. (2d ed.) 480.

Professional Artists. — A woman imported from Paris to perform labor or service as a trimmer of hats is not a "professional artist," within the meaning of the statute. U. S. *v.* Thompson, 41 Fed. Rep. 28. The court said: "Milliners, dressmakers, tailors, cooks, and barbers (some of whom no doubt call themselves 'artists') are not 'artists' within the popular and received import of that word."

4. Act of March 3, 1891, § 5, 1 Supp. U. S. Rev. Stat. (2d ed.) 935; Act of March 3, 1893, § 6, 2 Supp. U. S. Rev. Stat. 118.

Before the passage of this amendment it had been held that the prohibition of the Act of 1885 did not include a minister of a religious society. Holy Trinity Church *v.* U. S., 143 U. S. 457. See *supra*, this section.

Person Belonging to Recognized Profession — Chemist. — In U. S. *v.* Laws, 163 U. S. 258, it was held that a contract made with an alien in a foreign country to come to the United States as a chemist on a sugar plantation in Louisiana, in pursuance of which contract such alien did come to this country, and was employed on the sugar plantation, his expenses being paid by the defendant, was not a contract to perform labor or service prohibited under the Contract Labor Law. The court, after adverting to the general purposes of the Act as not intended to embrace skilled labor, called attention to the fact that by the amendment of 1891, persons belonging to any recognized profession were excepted from its provisions, and said: "We think a chemist would be included in that class. Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded, may certainly at this time be fairly regarded as in the practice of a profession. * * * The fact that the individual in question by this contract had agreed to sell his time, labor, and skill to one employer, and in one prescribed branch of the science, does not in the least militate against his being a professional chemist; nor does it operate as a bar to the claim that while so employed he is nevertheless practicing a recognized profession."

member of his family, relative, or personal friend to immigrate to the United States.[1] This provision is repealed as to relatives and personal friends by the Act of 1891.[2]

IV. Penalty for Assisting Prohibited Immigrants — 1. When Penalty Recoverable. — In order that a person shall incur the penalty created by the Act of 1885, three things are essential: first, the immigrant must, previous to his becoming a resident of the United States, have entered into a contract to perform labor or service therein; second, he must have actually migrated or entered into the United States in pursuance of such contract; third, the person sought to be charged must have prepaid his transportation, or otherwise assisted or solicited his immigration with knowledge of the illegal contract.[3]

The Contract for Labor. — No person by the act of assisting the importation or migration of an alien incurs the penalty provided by the statute unless at the time of the assistance given the alien is known to be under a contract or agreement to perform labor or service in the United States.[4]

2. Jurisdiction of Actions for Penalty. — The United States District Court has jurisdiction concurrent with that of the United States Circuit Court over actions brought to enforce the penalty provided by the Act of 1885, for aiding the importation of contract laborers.[5]

1. Act of Feb. 26, 1885, § 5, 1 Supp. U. S. Rev. Stat. (2d ed.) 480.

2. Act of March 3, 1891, § 5, 1 Supp. U. S. Rev. Stat. (2d ed.) 935.

In this Act it is provided, however, that the sections excluding persons insane or diseased, convicts, paupers, polygamists, and contract laborers, "shall not be held to exclude persons living in the United States from sending for a relative or friend who is not of the excluded classes, under such regulations as the Secretary of the Treasury may prescribe." Act of March 3, 1891, § 1, 1 Supp. U. S. Rev. Stat. (2d ed.) 934.

3. U. S. *v.* Craig, 28 Fed. Rep. 799; U. S. *v.* Borneman, 41 Fed. Rep. 752; Moller *v.* U. S., 57 Fed. Rep. 490. See also U. S. *v.* River Spinning Co., 70 Fed. Rep. 978.

4. Moller *v.* U. S., 13 U. S. App. 472, 57 Fed. Rep. 490; U. S. *v.* Edgar, 4 U. S. App. 41, 48 Fed. Rep. 91, *affirming* 45 Fed. Rep. 44. In the last case the defendant, in consequence of certain correspondence between himself and two alien laborers in England, advanced the money for them to come to the United States. It was held that the defendant was not liable under the statute, and that the letters failed to make out a complete enforceable contract because the agreement lacked the necessary elements of consideration and mutual assent. The United States Circuit Court of Appeals said: "The letter written by one of the Englishmen, and defendant's answer, did not make a contract or agreement of any kind, until something further should be done. The act of the Englishmen in getting the tickets at Liverpool, and coming to Philadelphia, was necessary to complete the contract or agreement, such as it was. In other words, when the defendant prepaid the Englishmen's passage, and thus assisted and encouraged them to come to the United States, there was no contract for labor which had been previously made by them; and so the case is not within the statute. The point has been ruled the same way in other circuits. U. S. *v.* Craig, 28 Fed. Rep. 795; U. S. *v.* Borneman, 41 Fed. Rep. 751." In delivering the judgment of the Circuit Court in this case, Thayer, J., said: "In my judgment the letters do not constitute an 'express contract,' and taken in connection with what had been done up to the time the transportation was paid are insufficient to establish an 'implied contract.' * * * The language [of the defendant's letters] is, 'we can give you steady work,' etc. It is reasonable to infer, both from the language employed and from the situation of the parties, that the defendant was unwilling, and did not intend, to enter into a positive engagement to employ [the aliens] until they had arrived in this country and were found to be suitable persons to employ."

In U. S. *v.* Great Falls, etc., R. Co., 53 Fed. Rep. 77, which was an action to recover the penalty under the statute, the complaint alleged that the defendant entered into an express parol contract upon a certain date with one L., an alien, by which the defendant agreed that in consideration that the alien would migrate into the United States it would employ him at wages satisfactory to himself; and that thereupon L., in consideration of the promise, and in pursuance of the agreement, did immigrate, and in pursuance of said contract worked as a laborer for the defendant; and that the defendant prepaid his transportation. Upon demurrer based upon the contention that the complaint failed to show an acceptance of the contract by L. it was held that under the statute of Montana providing that pleadings shall be liberally construed with a view to substantial justice between the parties, an acceptance of the contract was sufficiently alleged and the demurrer was overruled. This case differs from the preceding in that here the contract was held to be complete in all its essential elements when L. began his migration to the United States, while in the other case there was no enforceable contract at any time.

5. Lees *v.* U. S., 150 U. S. 476; U. S. *v.* Whitcomb Metallic Bedstead Co., 45 Fed. Rep. 89.

3. Nature of Action for Penalty. — An action to recover the penalty provided by the statute is of a penal and *quasi* criminal nature, and the defendant in such an action cannot be compelled to be a witness against himself.[1]

V. Exclusion and Deportation of Prohibited Immigrants. — The supplementary acts of 1887 and 1891 provide for the inspection of passenger vessels by inspection officers under the regulation of the Secretary of the Treasury. It is made the duty of these authorities to prevent the landing of contract laborers and of other persons excluded by the immigration laws of the United States, and after their landing to provide for their return to the country whence they came.[2]

Decisions of Immigration Officials Are Final. — The decisions of these inspection officers are reviewable only by the superintendent of immigration and the Secretary of the Treasury,[3] but inquiry into the facts by the courts may always be had upon habeas corpus, so far as is necessary to determine whether the tribunal excluding the aliens had jurisdiction.[4]

CONTRACTOR. — See the title Independent Contractor.

1. Lees *v.* U. S., 150 U. S. 476. See also U. S. *v.* Whitcomb Metallic Bedstead Co., 45 Fed. Rep. 89.

A contrary decision was reached in Moller *v.* U. S., 13 U. S. App. 472, 57 Fed. Rep. 490, which must be considered as *overruled* in the case cited from the United States Supreme Court.

Founded on Tort — Arrest. — An action to recover the penalty provided by the Contract Labor Law is not an action founded on contract, but rests on a tort consisting in the violation of a statute. It is not, therefore, within a provision exempting from arrest any action founded "on a contract express or implied." U. S. *v.* Banister, 70 Fed. Rep. 44.

2. See Act of Feb. 23, 1887, 1 Supp. U. S. Rev. Stat. (2d ed.) 541; Act of March 3, 1891, 1 Supp. U. S. Rev. Stat. (2d ed.) 934; Act of March 3, 1893, 2 Supp. U. S. Rev. Stat. 117; *In re* Bucciarello, 45 Fed. Rep. 463.

Refusal of Master to Return Aliens a Misdemeanor. — Section 10 of the Act of Congress of March 3, 1891, provides that prohibited immigrants shall, if practicable, be immediately sent back on the vessel in which they were brought over; and that if the master, agent, consignee, or owner of the vessel refuses to receive back on board the vessel such immigrants, or neglects to detain them thereon, or refuses or neglects to return them to the port from which they came, or to pay the cost of their maintenance while on land, he is guilty of a misdemeanor. The duty thus imposed on the masters and other officers of vessels, is an absolute duty to do the things required of them respectively. It admits of no excuse. They must at their peril conform to the provisions of the statute. They cannot be excused by showing that due care was exercised in the matter. The word "neglect" used in the statute must be construed as equivalent to "fail" or "omit." Warren *v.* U. S., 5 U. S. App. 656.

Negligently Permitting Aliens to Land — Burden of Proof. — The eighth section of the Act of March 3, 1891, renders the officers of vessels criminally responsible for failure to adopt due caution to prevent the landing of excluded aliens, and provides that such officers, who knowingly or negligently permit such persons to land, shall be deemed guilty of a misdemeanor. To justify a conviction under this section it is necessary for the government to prove wilful or negligent permission to escape. U. S. *v.* Spruth, 71 Fed. Rep. 678. In this case the case of Warren *v.* U. S., 5 U. S. App. 656, 58 Fed. Rep. 559, was *distinguished* and *criticised* by the court.

3. Fong Yue Ting *v.* U. S., 149 U. S. 698; Ekiu *v.* U. S., 142 U. S. 651; U. S. *v.* Arteago, 68 Fed. Rep. 883; U. S. *v.* Rogers, 65 Fed. Rep. 787; *In re* Howard, 63 Fed. Rep. 263; *In re* Vito Rullo, 43 Fed. Rep. 62.

The provisions of the statutes of 1891 and 1893 are common to all classes of excluded immigrants. See the title Immigration.

4. *In re* Howard, 63 Fed. Rep. 263; *In re* Maiola, 67 Fed. Rep. 114; *In re* Panzara, 51 Fed. Rep. 275; *In re* Vito Rullo, 43 Fed. Rep. 62.

The courts, however, cannot consider additional evidence on habeas corpus; they can only direct a rehearing before the commissioners. *In re* Day, 27 Feq. Rep. 678; *In re* Cummings, 32 Fed. Rep. 75.

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By Charles W. Moores.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title CONTRACTS, 4 ENCYCLOPÆDIA OF PLEADING AND PRACTICE 913.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ACCOMMODATION PAPER, vol. 1, p. 334; *ACCORD AND SATISFACTION*, vol. 1, p. 408; *ACCOUNTS*, vol. 1, p. 433; *ACT OF GOD*, vol. 1, p. 584; *AGENCY*, vol. 1, p. 930; *ALIENS*, vol. 2, p. 64; *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181; *APPLICATION OF PAYMENTS*, vol. 2, p. 433; *ARBITRATION AND AWARD*, vol. 2, p. 533; *ASSIGNMENTS*, vol. 2, p. 1007; *ATTORNEY AND CLIENT*, vol. 3, p. 278; *AUCTIONS AND AUCTIONEERS*, vol. 3, p. 487; *BAILMENTS*, vol. 3, p. 732; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *BILLS OF SALE*, vol. 4, p. 555; *BONDS*, vol. 4, p. 618; *BREACH OF PROMISE OF MARRIAGE*, vol 4, p. 882; *CATCHING BARGAIN*, vol. 5, p. 764; *CHAMPERTY AND MAINTENANCE*, vol. 5, p. 815; *COMPOSITION WITH CREDITORS*, vol. 6, p. 376; *CONDITIONAL SALES*, vol. 6, p. 436; *CONSIDERATION*, vol. 6, p. 815; *CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES, post; CONTRACTS OF HIRE, post; CONTRIBUTION AND EXONERATION, post; CORPORATIONS, post; COUNTIES, post; COVENANTS; DAMAGES; DEEDS; DEPOSIT; DURESS; ESCROW; ESTOPPEL; FRAUD AND*

MISREPRESENTATION; FRAUDS, STATUTE OF; GAMBLING CONTRACTS; GUARANTY; GUARDIAN AND WARD; HUSBAND AND WIFE; ILLEGAL CONTRACTS; IMPAIRMENT OF OBLIGATION OF CONTRACTS; IMPLIED CONTRACTS; IMPLIED WARRANTY; INDEMNITY CONTRACTS; INFANTS; INSANITY; INSOLVENCY AND BANKRUPTCY; INTERPRETATION AND CONSTRUCTION; INTOXICATION; LIMITATION OF ACTIONS; LOANS; MERGER; MISTAKE; MUNICIPAL CORPORATIONS; NOVATION; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PARENT AND CHILD; PAROL EVIDENCE; PAYMENT; PLEDGE AND COLLATERAL SECURITY; PRIVATE INTERNATIONAL LAW; RECITALS; REFORMATION AND CANCELLATION; RELEASE; RESCISSION; RESTRAINT OF TRADE; REWARDS; SALES; SEAL; SPECIFIC PERFORMANCE; STATES; SUBROGATION; SUBSCRIPTIONS; SUNDAY; SURETYSHIP; TENDER; TOWNS AND TOWNSHIPS; ULTRA VIRES; UNDUE INFLUENCE; UNITED STATES; USAGES AND CUSTOMS; USURY; VENDOR AND PURCHASER; WAIVER; WARRANTY; WORKING CONTRACTS.

I. **Introductory — Scope of Title.** — The policy of this work is to break up larger titles into smaller ones, as experience has abundantly shown that this course conduces to thoroughness and accuracy. In pursuance of this policy many of the topics embraced in the ordinary text-book on this subject are not discussed herein, but are reserved as separate and independent titles. The purpose of this article is to present certain general principles applicable alike to all contracts, thus obviating repetition in the treatment of the other divisions of the law on this subject. For the precise scope of this article, the reader is referred to the table of cross-references, as well as to the synopsis preceding.

II. **Definition.** — A contract has been defined to be an agreement upon a sufficient consideration, to do or not to do a particular thing.[1]

1. 2 Blackstone Com. 442.

Other Definitions. — Chief Justice Marshall defines it thus: "A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing." Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 197.

By the *Louisiana* Code (1889), § 1761, it is declared to be "An agreement by which one person obligates himself to another to give, to do, or permit, or not to do something expressed or implied by such agreement."

"A mutual assent of two or more persons competent to contract, founded on a sufficient and legal motive, inducement, or consideration, to perform some legal act, or to omit to do anything, the performance of which is not enjoined by law." Chitty on Contracts, p. 3.

"An executory contract is an agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing." 2 Kent's Com. 449.

"A contract is a voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing." Burnett, J., in Robinson *v.* Magee, 9 Cal. 81, 70 Am. Dec. 638.

The various definitions are collated and discussed in Justice *v.* Lang, 42 N. Y. 493, 1 Am. Rep. 576, and the following by Comyn is adopted: "A simple contract is defined in our law books to be 'a bargain or agreement voluntarily made upon good consideration, between two or more persons, capable of contracting, to do, or forbear to do, some lawful act.'"

In Fletcher *v.* Peck, 6 Cranch (U. S.) 87, the court, by Chief Justice Marshall, said, on page 136: "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. * * * A contract executed is one in which the object of contract is performed."

Mr. Justice Washington, in his opinion in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 656, said: "What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Under this definition, says Mr. Powell, it is obvious that every feoffment, gift, grant, agreement, promise, etc., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds that the ingredients requisite to form a contract are, parties, consent, and an obligation to be created or dissolved; these must all concur.

It Involves a Mutual or Common Purpose that the thing contemplated is to be done. If this purpose is wanting, as where the formality of contracting is gone through with in jest, there is no real agreement.[1]

Includes Necessary Legal Implications. — It comprehends not only what the exact words of the instrument literally signify, but also whatever the law necessarily implies from the language used.[2]

III. CONTRACTS CLASSIFIED — 1. In General. — The principal and most useful classifications of contracts are, first, into express contracts and implied contracts; second, into executed contracts and executory contracts. Each of these classifications will be considered separately.[3]

2. Express and Implied Contracts — *a.* IN GENERAL. — **An Express Contract** is one whose terms are declared by the parties at the time they enter into it.[4]

The Term Implied Contract as ordinarily used in English and American law involves an ambiguity.[5] It is applied loosely to denote, first, contracts implied

because the regular effect of all contracts is on one side to acquire, and on the other to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done or omitted."

According to its etymology a contract is a drawing together of the minds of parties until they meet in agreement. The elements of a complete contract are a lawful subject-matter, a sufficient consideration, and the *aggregatio mentium*, or mutual assent, of the parties. Fuller *v.* Kemp, 138 N. Y. 231.

An agreement is a mutual consent of the minds of the parties concerned respecting some property or right that is the object of the stipulation, or something that is to be done or forborne; a transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised or stipulated by the other; and any words manifesting *congregatio mentium* are sufficient to constitute a contract. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

Definitions of contract and discussions thereon are to be found in the following cases: Mather *v.* Bush, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; Toledo Bank *v.* Toledo, 1 Ohio St. 639 *et seq.*; State *v.* Carew, 13 Rich. L. (S. Car.) 498, 91 Am. Dec. 245; McCracken *v.* Hayward, 2 How. (U. S.) 608; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213.

Contract Distinguished from Instrument by Which Witnessed. — A contract is not to be confused with the instrument by which it is witnessed. It results altogether from the consent, the *aggregatio mentium* of the parties, without which there can be no contract. Erwin *v.* Kentucky Bank, 5 La. Ann. 4.

1. Mutual Purpose — Agreements in Sport. — Armstrong *v.* McGhee, Add. (Pa.) 261.

Where the defendant gave his check for three hundred dollars to the plaintiff for a watch worth fifteen dollars, but the whole transaction was in sport, it was held that there could be no recovery upon the check notwithstanding the defendant had retained the watch and made no offer to return it until the trial. Keller *v.* Holderman, 11 Mich. 248, 83 Am. Dec. 737.

2. State *v.* Laclede Gaslight Co., 102 Mo. 472, 22 Am. St. Rep. 789, where the court says: "Whatsoever the law necessarily implies in a statute or in a contract is as much part and parcel thereof as if expressly stated therein." See also Rogers *v.* Kneeland, 10 Wend. (N. Y.) 219; Hutchinson *v.* Lord, 1 Wis. 286, 60 Am. Dec. 381.

3. Other Classes of Contracts are occasionally mentioned. Such are unilateral and bilateral contracts, severable contracts, entire contracts, etc. These terms, where they are of any importance, are defined in their proper places in this work.

4. 2 Bl. Com. 443; Hertzog *v.* Hertzog, 29 Pa. St. 465.

5. Criticism of Term "Implied Contract." — In Hertzog *v.* Hertzog, 29 Pa. St. 465, the following passage from Blackstone's Commentaries was quoted: "Implied [contracts] are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay him as much as his labor deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value." Upon this passage, the court observed: "This is the language of Blackstone, 2 Com. 443, and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this. * * * It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary: for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the for-

in fact, that is, obligations where, in the absence of a formal contract, a mutual intention to contract is shown by the acts of the parties or from surrounding circumstances;[1] and, second, obligations implied in law, that is, obligations imposed by law without regard to the intentions of the parties, or even contrary to their intentions, for the purpose of enforcing legal duties by actions *ex contractu*.[2] Contracts implied in law are also known as constructive contracts, or, adopting a term from the civil law, as *quasi* contracts.[3] Implied contracts are treated in a separate title in this work.[4]

b. EXPRESS CONTRACTS CLASSIFIED. — Express contracts are properly divided into two classes; contracts under seal or specialties, and contracts in parol.[5]

(1) *Contracts by Specialty* — (a) **In General.** — These are reduced to writing

mer are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty."

1. Contracts Implied in Fact. — In People *v.* Speir, 77 N. Y. 144, in construing the words "a contract express or implied," as used in a statute abolishing imprisonment for debt, it was said: "We think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which, if broken, an action will lie for damages, or is implied when the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances; and in either case must be the result of the free and *bona fide* exercise of the will, producing the *aggregatio mentium*, the joining together of two minds, essential to a contract at common law."

2. Contracts Implied in Law. — Constructive contracts (that is, contracts implied in law) are fictions of law adopted to enforce legal duties by actions of contract, where no proper contract exists, either express or implied. Hertzog *v.* Hertzog, 29 Pa. St. 465.

In People *v.* Speir, 77 N. Y. 144, this class of contracts is thus characterized: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. (Addison on Contracts 22.) And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called *quasi* contracts because, without being contracts, they produce obligations in the same manner as actual contracts.'"

Contracts Implied in Law and Contracts Implied in Fact Distinguished. — A contract implied in law is not an actual contract — that is, an actual meeting of the minds of the parties, an actual, mutual understanding to be inferred from language, acts, and circumstances, by the jury; but a contract and promise implied by the law in point of fact where there is no contract, no mutual understanding, and so no promise. It is a legal fiction invented and used for the sake of the remedy. Ladd, J., in Sceva *v.* True, 53 N. H. 627. In this case the learned judge further observed: "The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says that it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the *obligationes quasi ex contractu* of the civil law, which seem to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of a remedy not strictly furnished either by actions *ex contractu* or actions *ex delicto*."

3. See the last note *supra*.

4. See the title IMPLIED CONTRACTS.

5. "All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol, nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing." Rann *v.* Hughes, 7 T. R. 346, note *a*. See also Whitehill *v.* Wilson, 3 P. & W. (Pa.) 405, 24 Am. Dec. 326.

Contracts by specialty properly include contracts of record, although Mr. Bishop makes

and are under seal.[1] They include contracts of record.[2] Contracts of record prove themselves, that is to say, the bare production of them is sufficient evidence of their existence without further proof. Another characteristic is that they may be enforced by *scire facias*, a writ which lies only on contracts of record.[3]

The Seal Has Lost Much of Its Significance through the changes which the statutes have made in the common law. In many states the statutes have overthrown the distinction between sealed and unsealed instruments and have rendered ineffectual the ancient presumptions with which the common law had surrounded all formal undertakings. Thus, in the ancient times, the seal created a presumption of a consideration; it created an estoppel against all parties by rendering all recitals conclusive; and it merged all prior agreements in parol and superseded them.[4]

(b) **Common-Law Characteristics of Specialties** — *aa.* CONSIDERATION PRESUMED. — To support a contract under seal no consideration need be proved,[5] for at common law a sealed instrument ordinarily imports a consideration, and, with a few exceptions, may not be impeached on account of its consideration.

Exceptions to this rule have been declared where the consideration has failed,[6] or where it is immoral or unlawful,[7] or is in unlawful restraint of

the latter a third and separate class. Bishop on Contracts, § 25. See Parsons on Contracts, p. 7.

1. See the titles BONDS; DEEDS; ESTOPPEL; MERGER; SEALS.

2. **Contracts of Record.** — See the titles JUDGMENTS; RECOGNIZANCE.

Contracts of record comprise judgments, recognizances, statutes merchant and staple, and recognizances in the nature of statutes staple.

3. See the title SCIRE FACIAS in the ENCYC. OF PLEADING AND PRACTICE.

4. See the titles CONSIDERATION, vol. 6, p. 667; ESTOPPEL; MERGER; and generally the title SEALS.

Distinctions Between Sealed and Unsealed Instruments Abolished. — In a number of states all distinctions between sealed and unsealed instruments are abolished.

California. — McCarty *v.* Beach, 10 Cal. 462; Ortman *v.* Dixon, 13 Cal. 33.

Indiana. — Leonard *v.* Bates, 1 Blackf. (Ind.) 172; Patterson *v.* Salmon, 3 Blackf. (Ind.) 131; Fitzgerald *v.* Smith, 1 Ind. 313.

Kansas. — Mount Pleasant Tp. *v.* Hobart, 25 Kan. 719.

Kentucky. — Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472.

Michigan. — McKinney *v.* Miller, 19 Mich. 142; Barton *v.* Gray, 57 Mich. 623; Fowler *v.* Hyland, 48 Mich. 179; Lockwood *v.* Bassett, 49 Mich. 549.

Raises Rebuttable Presumption of Consideration. — In others, the seal merely creates a presumption of consideration which may be rebutted as freely as if the seal were absent. Giles *v.* Williams, 3 Ala. 316, 37 Am. Dec. 692; Smith *v.* Busby, 15 Mo. 388, 57 Am. Dec. 207; Aller *v.* Aller, 40 N. J. L. 446; Case *v.* Boughton, 11 Wend. (N. Y.) 106; Withers *v.* Greene, 9 How. (U. S.) 213.

5. Shubrick *v.* Salmond, 3 Burr. 1639; Pillans *v.* Van Mierop, 3 Burr. 1670; Sharington *v.* Strotton, Plowd. 308; Cooch *v.* Goodman, 2 Q. B. 580, 42 E. C. L. 817; Fallowes *v.* Taylor, 7 T. R. 472.

See also the title CONSIDERATION, vol. 6, p. 667.

Imports Consideration. — Under the common law a gratuitous instrument under seal may be enforced, as the seal imports a consideration.

California. — McCarty *v.* Beach, 10 Cal. 462.

Delaware. — Garden *v.* Derrickson, 2 Del. Ch. 386, 95 Am. Dec. 286.

Indiana. — Leonard *v.* Bates, 1 Blackf. (Ind.) 172.

Kentucky. — Hanna *v.* McKenzie, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122.

Maine. — Van Valkenburgh *v.* Smith, 60 Me. 97.

Maryland. — Mitchell *v.* Williamson, 6 Md. 210.

Massachusetts. — Page *v.* Trufant, 2 Mass. 159, 3 Am. Dec. 41; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83; Hayes *v.* Kyle, 8 Allen (Mass.) 300; Mather *v.* Corliss, 103 Mass. 571.

Missouri. — Bates *v.* Hinton, 4 Mo. 78.

New Jersey. — Aller *v.* Aller, 40 N. J. L. 446.

New York. — Gray *v.* Barton, 55 N. Y. 68, 14 Am. Rep. 181.

North Carolina. — Walker *v.* Walker, 13 Ired. L. (35 N. Car.) 335; Harrell *v.* Watson, 63 N. Car. 454; Parker *v.* Flora, 63 N. Car. 474.

Pennsylvania. — Burkholder *v.* Plank, 69 Pa. St. 225.

Virginia. — Harris *v.* Harris, 23 Gratt. (Va.) 737.

6. **Where Consideration Fails.** — Yard *v.* Patton, 13 Pa. St. 285. *Compare* Doughty *v.* Miller, 50 N. J. Eq. 529.

7. **Where Consideration Unlawful or Immoral** — *England.* — Collins *v.* Blantern, 2 Wils. 341, 1 Smith's L. Cas. 387.

United States. — Kennett *v.* Chambers, 14 How. (U. S.) 38.

Kentucky. — Wilhite *v.* Roberts, 4 Dana (Ky.) 172.

New York. — Bruce *v.* Lee, 4 Johns. (N. Y.) 410; Gray *v.* Hook, 4 N. Y. 449.

North Carolina. — Logan *v.* Plummer, 70 N. Car. 388; Martin *v.* Amos, 13 Ired. L. (35 N. Car.) 201.

trade, in which case its seal will not save it.[1]

Rule in Equity. — In equity, however, the rule of the common law fails. For example, specific performance will not be decreed where the contract, although under seal, is without consideration.[2]

bb. Estoppel by Seal. — Between all parties to an instrument under seal and all claiming through the original parties the common law created an estoppel to deny the truth of the recitals which it contained.[3]

cc. Merger of Former Transactions. — A third feature of the specialty is the fact that it merges all earlier agreements between the parties and supersedes them.[4]

(2) *Parol or Simple Contracts.* — More properly this class of contracts should be termed simple contracts, for under the common law they include written as well as oral agreements, and they are distinguished from special contracts by the fact that they are not under seal.[5]

Pennsylvania. — Gompers *v.* Rochester, 56 Pa. St. 194; Fox *v.* Mensch, 3 W. & S. (Pa.) 444.

In Martin *v.* Amos, 13 Ired. L. (35 N. Car.) 201, the court said: "The object of all laws is to repress vice and to promote the general welfare of the state, and no one can be assisted by the law in enforcing demands founded on a breach or violation of its principles. * * * It is the public good which allows a contract to be impeached for the illegality of the consideration. Nor does a seal, which in itself imports a consideration, protect the contract from being investigated in a court of common law. A defendant, therefore, though he is not at liberty to show that a bond executed by him is without consideration, may nevertheless prove that the consideration upon which it was given is illegal, as being immoral or contrary to public policy."

1. Contracts in Restraint of Trade. — If the contract, even though under seal, is in partial restraint of trade, it must have a consideration to support it; if the restraint is general, it is void. Mitchel *v.* Reynolds, 1 P. Wms. 181, 1 Smith's L. Cas. 417; Mallan *v.* May, 11 M. & W. 665; Palmer *v.* Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204; Alger *v.* Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119; Gompers *v.* Rochester, 56 Pa. St. 194; Yard *v.* Patton, 13 Pa. St. 285. See also Hutton *v.* Parker, 7 D. P. C. 739; Wickens *v.* Evans, 3 Y. & J. 329; Lange *v.* Werk, 2 Ohio St. 520; Keeler *v.* Taylor, 53 Pa. St. 467, 91 Am. Dec. 221.

2. Rule in Equity — Specific Performance — *England.* — Kekewich *v.* Manning, 1 De G. M. & G. 188; Walroud *v.* Walroud, 1 Johns. 18, 28 L. J. Ch. 97.

Alabama. — Roney *v.* Moss, 74 Ala. 390.

Kentucky. — Buford *v.* McKee, 1 Dana (Ky.) 107.

Maryland. — Black *v.* Cord, 2 Har. & G. (Md.) 100; Snyder *v.* Jones, 38 Md. 542.

Minnesota. — Lamprey *v.* Lamprey, 29 Minn. 151.

New York. — Hayes *v.* Kershow, 1 Sandf. Ch. (N. Y.) 258.

Pennsylvania. — Bayler *v.* Com., 40 Pa. St. 37, 80 Am. Dec. 551; Keeler *v.* Taylor, 53 Pa. St. 467, 91 Am. Dec. 221.

Texas. — Short *v.* Price, 17 Tex. 397.

Virginia. — Keffer *v.* Grayson, 76 Va. 517.

Wisconsin. — Smith *v.* Wood, 12 Wis. 382; Williams *v.* Williams, 50 Wis. 317.

3. Estoppel by Deed — *England.* — Lainson *v.* Tremere, 1 Ad. & El. 792, 28 E. C. L. 214; Bowman *v.* Taylor, 2 Ad. & El. 278, 29 E. C. L. 90; Goodtitle *v.* Bailey, 2 Cowp. 601; Fairtitle *v.* Gilbert, 2 T. R. 171; Shelley *v.* Wright, Willes 9; Slatterie *v.* Pooley, 6 M. & W. 664; Newhall *v.* Holt, 6 M. & W. 662; Howard *v.* Smith, 3 M. & G. 254, 42 E. C. L. 139, 3 Scott N. R. 574; Fox *v.* Waters, 12 Ad. & El. 43, 40 E. C. L. 18; Hayne *v.* Maltby, 3 T. R. 438.

United States. — Carver *v.* Jackson, 4 Pet. (U. S.) 1; Dundas *v.* Hitchcock, 12 How. (U. S.) 256; Gibson *v.* Lyon, 115 U. S. 439.

Alabama. — Bunkley *v.* Lynch, 47 Ala. 211.

Connecticut. — Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Illinois. — Pinckard *v.* Milmine, 76 Ill. 453; Blackburn *v.* Bell, 91 Ill. 434; Orthwein *v.* Thomas, 127 Ill. 554, 11 Am. St. Rep. 159.

Indiana. — Butler *v.* Myer, 17 Ind. 77; Stein *v.* Indianapolis Bldg. Loan Fund, etc., Assoc., 18 Ind. 237, 81 Am. Dec. 353; Price *v.* Pollock, 47 Ind. 362; Hill *v.* Minor, 79 Ind. 48; Losey *v.* Bond, 94 Ind. 67.

Iowa. — Williams *v.* Swetland, 10 Iowa 51.

Kansas. — Case *v.* Steele, 34 Kan. 90.

Massachusetts. — Tuite *v.* Stevens, 98 Mass. 305; Howard *v.* Chase, 104 Mass. 249; Knight *v.* Thayer, 125 Mass. 25; Johnson *v.* Thompson, 129 Mass. 398.

Minnesota. — Conner *v.* Howe, 35 Minn. 518.

Missouri. — Stevenson *v.* Saline County, 65 Mo. 425.

New York. — Jackson *v.* Parkhurst, 9 Wend. (N. Y.) 209; Freeman *v.* Auld, 44 N. Y. 50; Ryerson *v.* Willis, 81 N. Y. 277.

Pennsylvania. — Zeigler's Appeal, 35 Pa. St. 173; Crooks *v.* Douglass, 56 Pa. St. 51; Ashmead *v.* McCarthur, 67 Pa. St. 326.

For a Full Treatment of This Subject see the titles Deeds; Estoppel; Recitals; Seals.

As to Recital of Consideration, see also the title Consideration, vol. 6, p. 760.

4. Van Vleit *v.* Jones, 20 N. J. L. 340, 43 Am. Dec. 633; McNaughton *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731.

For a full treatment of this subject, see the title Merger.

5. Some contracts are required by statute to be in writing, but the writing is only evidence of the contract, and consideration is as necessary as if the contract rested merely in spoken words. See the title Frauds, Statute of.

At common law all contracts not under seal

Require Consideration. — Simple or parol contracts, unlike contracts under seal, require a consideration to support them.[1]

3. Executed and Executory Contracts. — **An Executory Contract** is one in which a party binds himself to do or not to do a particular thing.[2]

An Executed Contract is one in which the object of the contract is performed.[3]

Distinction. — An executory contract conveys a chose in action; an executed contract, a chose in possession.[4]

Impairment of Obligation of Executed Contract. — Executed contracts are within the meaning of the clause of the Federal Constitution which forbids any state to pass a law impairing the obligation of contracts.[5] That a grant is a contract within this provision of the Constitution, is no longer an open question.[6]

4. Entire and Divisible Contracts. — **A Contract Is Entire** when by its terms, nature, and purposes it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and interdependent.

A Divisible Contract is one in its nature and purposes, susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.[7]

Question of Intention. — The question depends largely upon the intention of the parties as determined from the language of the contract and the subject-matter.[8]

Price Apportioned to Each Item — Distinct Considerations. — Where the contract expressly apportions the price to each item to be performed,[9] or where it embraces several undertakings, each supported by a distinct consideration, the contract is severable.[10]

An Agreement to Do Several Things at Several Times is divisible,[11] unless the consideration to be paid is entire.

are deemed to be in parol, and are called simple contracts. Rann *v.* Hughes, 7 T. R. 346, note *a;* Quigly *v.* Muse, 15 La. Ann. 197; Stabler *v.* Cowman, 7 Gill. & J. (Md.) 284; Perrine *v.* Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388; Ballard *v.* Walker, 3 Johns. Cas. (N. Y.) 60, *per* Kent, J.

1. See the title CONSIDERATION, vol. 6, p. 667.

2. Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch (U. S.) 136. See also *supra*, this title, *Definition*, and notes thereto.

3. Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch (U. S.) 136.

Executed and Executory Contracts — Blackstone's Definitions. — "A contract may also be either executed, as if A agrees to change horses with B and they do it immediately; in which case the possession and the right are transferred together: or it may be executory, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract executed (which differs nothing from a grant) conveys a chose in possession; a contract executory conveys only a chose in action." 2 Black. Com. 443.

A Contract Performed on One Side Only is not an executed contract. Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 27 U. S. App. 1.

4. M'Donald *v.* Hewett, 15 Johns. (N. Y.) 349, 8 Am. Dec. 241; Roberts *v.* Beatty, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410.

5. "Since the Constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former." Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch (U. S.) 137. See also Terrett *v.* Taylor, 9 Cranch (U. S.) 43.

6. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 656; McGee *v.* Mathis, 4 Wall. (U. S.) 143.

See generally the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

7. Wooten *v.* Walters, 110 N. Car. 251, *per* Merrimon, C. J.

8. Intention. — Loud *v.* Pomona Land, etc., Co., 153 U. S. 564; Southwell *v.* Beezley, 5 Oregon 458. See the title INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

"In determining this question the courts must be guided by a respect to general convenience, and by the good sense and reasonableness of the particular case." Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

9. More *v.* Bonnet, 40 Cal. 251, 6 Am. Rep. 621.

10. Keeler *v.* Clifford, 165 Ill. 544; Pierson *v.* Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831.

The rule thus stated applied to a written proposition offering to sell a farm at a certain price and give up a chance of purchasing two lots, and for a certain other consideration give up a banking business and sell a town lot. McDaniels *v.* Whitney, 38 Iowa 60.

11. Badger *v.* Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611.

"Where an agreement embraces a number of distinct subjects, which admit of being sepa-

Sale of Several Distinct Things — One Consideration. — If the contract is for the sale of several distinct things, but all for one consideration, it is entire.[1]

A Joint Undertaking by Two Persons to Purchase Land is an entirety which neither can repudiate without the other's consent.[2]

Entire Contract — How Enforced. — If the contract is entire it can be enforced only in its entirety.[3]

A Breach as to any material part of an entire contract is a complete discharge, and releases the other party from his obligation to perform.[4]

rately executed and closed, the general rule is that it shall be taken distributively and each subject be considered as forming the matter of a separate agreement after it is so closed." Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

1. One Consideration — Several Distinct Things. — See Roberts *v.* Beatty, 2 P. & W. (Pa.) 63, 21 Am. Dec. 418; Alcott *v.* Hugus, 105 Pa. St. 350; Ferry *v.* Wilson, (City Ct.) 41 N. Y. St. Rep. 463, 17 N. Y. Supp. 453, *reversed* in (C. Pl.) 46 N. Y. St. Rep. 672, 19 N. Y. Supp. 209.

Thus a contract for the sale of a town lot and personal property, all for one consideration, is not divisible, except by the consent of both parties thereto and the making of a new contract. Scheland *v.* Erpelding, 6 Oregon 258.

A purchase of two parcels of merchandise at an auction is an entire contract; and a receipt of payment for one parcel is no waiver of a demand for the other. Tompkins *v.* Haas, 2 Pa. St. 74.

Where a contract calls for the sale of a specified amount of a certain commodity for a certain price, to be paid in equal monthly instalments, it is entire and binds the seller to a delivery of the entire amount sold and the purchaser to pay the full price. So held in Cherry Valley Iron Works *v.* Florence Iron River Co., 64 Fed. Rep. 569, 22 U. S. App. 655, where the court said, on p. 662: "The fact that there were subordinate stipulations in regard to the dates of delivery and of payment would not break it up into separate contracts for each instalment of the ore. It is sufficient to cite upon this point the cases of Mersey Steel, etc., Co. *v.* Naylor, L. R. 9 App. 434, in the English House of Lords, and Norrington *v.* Wright, 115 U. S. 203. And the contract being entire, as soon as the parties had entered upon its performance by partial delivery and payment the mere failure of the vendee to make the subsequent payments would not of itself absolve the vendor from proceeding with the deliveries."

A contract by the state to sell one hundred and sixty acres of land at "one dollar per acre, *i. e.*, the sum of one hundred and sixty dollars," with interest payable annually at the rate of six per cent., with the condition that if the purchaser shall fail to pay the principal sum or interest thereon according to the terms of the contract the land shall revert," is entire, and the failure to pay interest accrued upon any part forfeits all the land so bought. State *v.* Jones, 21 Nev. 510.

2. Merriman *v.* Norman, 9 Heisk. (Tenn.) 269.

3. Entire Contract Cannot Be Enforced Piecemeal — *England.* — Bigg *v.* Whisking, 14 C. B. 195, 78 E. C. L. 195; Elliott *v.* Thomas, 3 M. & W. 170; Dalby *v.* Pullen, 3 Sim. 29; Cato *v.* Thompson, 9 Q. B. Div. 616.

United States. — Kenner *v.* Bitely, 45 Fed. Rep. 133.

Alabama. — Batre *v.* Simpson, 4 Ala. 305.

Illinois. — Taylor *v.* Beck, 13 Ill. 376.

Massachusetts. — Miner *v.* Bradley, 22 Pick. (Mass.) 459; Clark *v.* Baker, 5 Met. (Mass.) 460.

Michigan. — Allen *v.* McKibbin, 5 Mich. 449; Keystone Lumber, etc., Co. *v.* Dole, 43 Mich. 370; Ætna Ins. Co. *v.* Resh, 44 Mich. 55, 38 Am. Rep. 228; Baldwin *v.* Fletcher, 48 Mich. 604.

Missouri. — Hill *v.* Rich Hill Coal Min. Co., 119 Mo. 9.

New York. — Baker *v.* Higgins, 21 N. Y. 397; Husted *v.* Craig, 36 N. Y. 221; Butler *v.* Rice, 17 Hun (N. Y.) 406.

Oregon. — Scheland *v.* Erpelding, 6 Oregon 258.

Pennsylvania. — Carmalt *v.* Platt, 7 Watts (Pa.) 318; Quigley *v.* DeHaas, 82 Pa. St. 267.

Wisconsin. — Malbon *v.* Birney, 11 Wis. 107; Jackson *v.* Cleveland, 15 Wis. 107.

In an action upon a contract for the delivery of an "entire lot of broom brush," it is error to instruct the jury that if they believe from the evidence that the plaintiff has substantially performed the agreement, they will find in his favor. Such a contract is to be performed in full. Taylor *v.* Beck, 13 Ill. 376.

If, under an entire contract for a gross sum, a factor sells goods some of which belong to his principal and some to himself, the principal cannot sever the contract and maintain an action for the value of his goods from the purchaser. Roosevelt *v.* Doherty, 129 Mass. 301, 37 Am. Rep. 356.

4. Breach of Entire Contract. — See *infra*, this title, *Methods of Discharge — Breach.*

And But One Right of Action Lies for breach of an entire contract, even though there be two or more acts each amounting to a breach of the contract. Cockley *v.* Brucker, 54 Ohio St. 214. There the court said: "In this case the consideration on both sides is entire, and it is therefore clear that the contract is entire and indivisible. For the breach of such a contract only one action can be maintained. As the contract is single and entire, so the cause of action for its breach is single and entire, even though there be different acts, each of which constitutes a breach of the contract. The breach of the contract may be more aggravated, but it cannot be more ample, by many acts in violation thereof than by one act. One act sufficient to cause a breach of the contract puts an end thereto, and many acts cannot do more than end the contract. For putting an end to the contract, by one or many breaches thereof, one action lies; and upon a final judgment being rendered in such action,

Must Be Fully Performed. — One who has undertaken a duty under the provisions of such a contract must fulfil it wholly, as a condition precedent, before he may recover any part. If he sues before this entire right accrues his action is premature and must fail,[1] unless the evidence be such as to establish a waiver.[2]

Severable Contract — Apportionment. — If it is severable, on the other hand, and for any reason entire performance cannot be had, an apportionment will be allowed.[3] The breach of one of the agreements in such a contract does not constitute the breach of another.[4]

Further Instances of contracts that have been adjudged to be entire, and those held to be divisible, are given in the note below.[5]

all the damages and causes of action arising from such breach of the contract become merged into such judgment. If, from the nature of the contract and the breach thereof, the party injured has sustained damages, and has also other property rights under the contract, he must include his whole claim in one action; and if he omits a part, and recovers judgment for a part only, he cannot sustain another action for the omitted part, because the whole injury caused by the breach of the contract is merged in the judgment recovered on the part sued for. A single cause of action cannot be split up into two or more causes of action, neither can two or more actions be sustained against the same party on a single cause of action. Stein *v.* Steamboat Prairie Rose, 17 Ohio St. 471, 93 Am. Dec. 631, and cases there cited; Erwin *v.* Lynn, 16 Ohio St. 539, and cases there cited; Ewing *v.* McNairy, 20 Ohio St. 315; James *v.* Allen County, 44 Ohio St. 226, 58 Am. Rep. 821."

1. Entire Contract — Full Performance — *California.* — Krumb *v.* Campbell, 102 Cal. 370.

Colorado. — McGonigle *v.* Klein, 6 Colo. App. 306.

Connecticut. — Rockwell *v.* Newton, 44 Conn. 333.

Delaware. — Bayard *v.* McLane, 3 Han. (Del.) 139.

Indiana. — Forkner *v.* Purl, 1 Ind. 489.

Mississippi. — Butt *v.* Williams, (Miss. 1894) 15 So. Rep. 130; Timberlake *v.* Thayer, 71 Miss. 279.

New York. — Cronin *v.* Tebo, 71 Hun (N. Y.) 59; Mount *v.* Lyon, 49 N. Y. 552.

North Carolina. — Dula *v.* Cowles, 2 Jones L. (47 N. Car.) 454; Niblett *v.* Herring, 4 Jones L. (49 N. Car.) 262; Thigpen *v.* Leigh, 93 N. Car. 49.

Pennsylvania. — Martin *v.* Schoenberger, 8 W. & S. (Pa.) 367; Roberts *v.* Beatty, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410.

Vermont. — Brown *v.* Kimball, 12 Vt. 617.

Wisconsin. — Jackson *v.* Cleveland, 15 Wis. 107.

2. Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509; Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716. See *infra*, this title, *Methods of Discharge — Performance.*

Under a contract for the delivery of provisions for a year the plaintiff cannot recover for part of the time only, unless he has been prevented by the defendant from a complete performance. Krouse *v.* Deblois, 1 Cranch (C. C.) 156. *Compare* Voss *v.* Varden, 1 Cranch (C. C.) 410.

Acceptance of Benefits. — From the acceptance and appropriation of beneficial services, materials furnished, or goods sold, in part performance of an entire contract, the law generally implies a promise to make compensation. Clark *v.* Moore, 3 Mich. 55; Allen *v.* McKibbin, 5 Mich. 449; Wildey *v.* Fractional School Dist. No. 1, 25 Mich. 419; Wilson *v.* Wagar, 26 Mich. 452; Begole *v.* McKenzie, 26 Mich. 470; Chapman *v.* Dease, 34 Mich. 375; Howell *v.* Medler, 41 Mich. 641; Gage *v.* Meyers, 59 Mich. 300.

But to have this effect acceptance must be unequivocal, and it cannot be presumed from ordinary acts. Fildew *v.* Besley, 42 Mich. 100, 36 Am. Rep. 433. See the title WAIVER.

3. Severable Contracts — Apportionment. — Antigo Bank *v.* Union Trust Co., 149 Ill. 343; Keeler *v.* Clifford, 165 Ill. 544; McMullen *v.* Kelso, 4 Tex. 235; Jackson *v.* Cleveland, 15 Wis. 107.

4. Hutchens *v.* Sutherland, 22 Nev. 363.

5. Entire Contracts — Instances. — A contract for a specific service at an agreed price is entire, and the price is not due until the whole service is rendered. Rockwell *v.* Newton, 44 Conn. 333; Hulse *v.* Bonsack Mach. Co., 65 Fed. Rep. 864; Cutter *v.* Powell, 6 T. R. 320.

A contract to trade a grocery stock for land, stock, and notes, is entire, and is not severed by part performance before the stipulated time. Haslack *v.* Mayers, 26 N. J. L. 284.

A. agreed with B. to furnish storage, from October until May, for from fifteen thousand to thirty thousand barrels of lime, and to deliver it at the end of his wharf in May, for which he was to receive fifteen cents per barrel. In November, after twenty thousand barrels had been received, they caught fire without any fault on A.'s part, and the lime was ruined. The contract was held to be entire, and A. was not permitted to recover anything for storage, nor to retain a sum paid him on account thereof. Archer *v.* McDonald, 36 Hun (N. Y.) 194.

An agreement to support one during life is an entire continuing contract; and upon a total breach thereof the promisee may recover full and final damages, i. e., not only the expenses of support up to the time of trial, but also the prospective expense during life. Schell *v.* Plumb, 55 N. Y. 592, 46 How. Pr. (N. Y.) 11.

C. and B. entered into a written agreement of copartnership for the term of five years; C. agreeing to furnish the use of a mill owned by him, and the necessary capital to conduct the business, which was to be for the joint profit of both, and B. agreeing to devote his entire time, ability, and energy to the successful prosecution of the business, and to render an

IV. The Elements of a Contract — 1. General Statement. — The essential elements of a contract are the existence of two or more contracting parties, a

account once each month. It was held that such a contract is entire, and not separable. Cockley *v.* Brucker, 54 Ohio St. 214.

A contract subscribing for a copy of a book to be published and delivered in instalments, payment to be made for each part as delivered, is an entire contract, and the subscriber who has received one part and paid for it cannot, without returning such part, defend an action in damages for refusing to take and pay for the rest on the ground that he was induced to enter into the contract by fraud. Barrie *v.* Earle, 143 Mass. 1, 58 Am. Rep. 126.

One contracted for the use of rooms, and board for three months, at fifty-six dollars per week, in weekly payments. At the end of two months he left. He was liable for the remaining time. Fiegel *v.* Latour, 81* Pa. St. 448.

" On the first day of October next, due A. B. Roberts two bureaus at Carnahan's shop, in Butler. May 31, 1826. Wm. Beatty." " On the first day of January, due Abner B. Roberts, two bureaus at Carnahan's shop, in Butler, and one dough-chest. May 31, 1826. Wm. Beatty." The contract was adjudged entire. Roberts *v.* Beatty, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410.

A contract employing one to serve as clerk until a designated time and then become a partner is entire. Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

A contract to hire for a year at so much per week, payable weekly, is entire. Olmstead *v.* Bach, 78 Md. 132, 44 Am. St. Rep. 273. See Larkin *v.* Hecksher, 51 N. J. L. 133; Rockwell *v.* Newton, 44 Conn. 333.

So is an agreement to lumber different sections, although some of the sections are entirely disconnected from the others. Lee *v.* Briggs, 99 Mich. 487.

Where one subscribed to a railway enterprise, the railway company in consideration therefor binding itself to establish, equip, and operate its road, build shops and engine-houses in a certain city, and make it the terminus of a division, the contract is entire, and the subscriber, unless materially benefited by the part performance, may recover all he has paid on his subscription. McFarland *v.* Lyon, 4 Tex. Civ. App. 586.

A contract to convey three houses is entire, and if the vendor cannot convey all he may not recover the price of one. Martin *v.* Fridenberg, 169 Pa. St. 447.

An undertaking by brokers, on behalf of a customer, to purchase a certain quantity of mortgage bonds, and, should he wish at any time to get rid of them, take them off his hands at cost, is entire. Johnston *v.* Trask, 116 N. Y. 136, 15 Am. St. Rep. 394.

An agreement by two of the three stockholders of a corporation, who are also directors, that in consideration of the purchase of stock the purchaser shall be engaged as manager for two years, at the end of which time, if he retire from the corporation, they will repurchase his stock at a stipulated figure, is entire, and the agreement of employment, being against public policy, invalidates the whole contract. Wilbur *v.* Stoepel, 82 Mich. 344, 21 Am. St. Rep. 568.

Other Illustrations of Entire Contracts are found in the following cases:

Colorado. — Sperry *v.* Pittsburg Short-Method Smelting, etc., Co., (Colo. App. 1897) 48 Pac. Rep. 315.

Iowa. — McDaniels *v.* Whitney, 38 Iowa 60.

Massachusetts. — Phelps *v.* Sheldon, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; Clark *v.* Sawyer, 121 Mass. 224.

Minnesota. — Weber *v.* Clark, 24 Minn. 354.

Missouri. — Murphy *v.* St. Louis, 8 Mo. App. 483.

New York. — Husted *v.* Craig, 36 N. Y. 221; Mount *v.* Lyon, 49 N. Y. 552; Butler *v.* Butler, 77 N. Y. 472, 33 Am. Rep. 648.

North Dakota. — Shelly *v.* Mikkelson, 5 N. Dak. 22.

Ohio. — Burckhardt *v.* Burckhardt, 36 Ohio St. 279, 51 Am. Rep. 842; Carnegie *v.* Lancaster, etc., R. Co., 1 Ohio N. P. 300.

Pennsylvania. — West Republic Min. Co. *v.* Jones, 108 Pa. St. 55; Carmalt *v.* Platt, 7 Watts (Pa.) 318; Quigley *v.* DeHaas, 82 Pa. St. 267; Hartley *v.* Decker, 89 Pa. St. 470.

Tennessee. — Barker *v.* Reagan, 4 Heisk. (Tenn.) 596; Tarbox *v.* Hartenstein, 4 Baxt. (Tenn.) 78.

Divisible Contracts — Illustrations. — A contract is severable which provides for the shipment by one party to the other of whatever milk he should have, at a stipulated price. McLaughlin *v.* Hess, 164 Pa. St. 570.

So is a contract of one person to represent three others in selling coal and take equal amounts from each, the three being unconnected in any way. Shipman *v.* Straitsville Cent. Min. Co., 158 U. S. 356.

Where A contracts to cut and deliver at B's mill a million feet of merchantable logs within the year, at an agreed sum per thousand feet, to be scaled and received as each one hundred thousand feet are placed in a certain creek, the contract is divisible and not entire. Tenny *v.* Mulvaney, 8 Oregon 129.

A contract to deliver twelve thousand carboys of vitriol at a specified price, in tanks, at the purchaser's factory, two thousand monthly, in daily deliveries, as wanted, settlements monthly, by notes at four months, was held to be severable. Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218.

The defendant's contract to deliver to the plaintiffs thirty tons of starch per year, for two years, though entire in its terms is divisible in its character, so that the plaintiffs might, at the expiration of the first year, sustain an action against the defendant for a breach, on his part, of that portion of the contract which was to be performed that year. Mixer *v.* Williams, 17 Vt. 457.

An agreement to pasture a certain number of cattle in a particular pasture, and give them the entire range of the pasture, is not entire so as to preclude the plaintiff from a recovery for the pasturing, to the extent of the actual benefit received by the defendant, by proof that the plaintiff suffered the fences to

meeting of their minds by which each gives his voluntary assent to the thing agreed upon, and an obligation, either created or dissolved, which constitutes the subject-matter of the undertaking.[1]

2. Parties — *a.* IN GENERAL — **More than One Essential.** — It need hardly be stated that there must be more than one party to a contract, for no one can make a binding contract with himself alone, nor can any one sue himself to enforce an obligation.[2]

remain in such poor condition that other cattle broke in and consumed the grass, so that it could not sustain the entire number contracted for, and thereby the defendant was compelled to withdraw a portion of his cattle and give them pasture elsewhere. Brackett *v.* Morse, 23 Vt. 554.

Upon a valid contract of sale of the north half of a lot, where the vendor fraudulently gave a deed for the whole lot, it was held that the contract was divisible as to the two halves of the lot, and the fraud as to the south half did not vitiate the whole, and that it was error to set aside the whole deed. Allen *v.* Brown, 43 Ga. 305.

For Other Instances of Divisible Contracts see the following cases:

California. — Veerkamp *v.* Hulburd Canning, etc., Co., 58 Cal. 229, 41 Am. Rep. 265.

Illinois. — Keeler *v.* Clifford, 165 Ill. 544.

Iowa. — Dibol *v.* Minott, 9 Iowa 403.

Kentucky. — Berryman *v.* Hewit, 6 J. J. Marsh. (Ky.) 462.

Michigan. — Engle *v.* White, 104 Mich. 15.

New York.—Virtue *v.* Beacham, (City Ct.) 41 N. Y. St. Rep. 466, 17 N. Y. Supp. 450; Arnot *v.* Pittston, etc., Coal Co., 5 Thomp. & C. (N. Y.) 143, 2 Hun (N. Y.) 591, 23 Am. Rep. 190.

Ohio. — Morgan *v.* Ward, Wright (Ohio) 474.

Oregon. — Steeples *v.* Newton, 7 Oregon 110, 33 Am. Rep. 705.

Pennsylvania. — Scott *v.* Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753.

South Dakota. — Frost *v.* Williams, 2 S. Dak. 457.

Texas. — Hollis *v.* Chapman, 36 Tex. 1.

Vermont. — Scofield *v.* Grow, 63 Vt. 283.

Virginia. — Jackson *v.* Ligon, 3 Leigh (Va.) 161; Evans *v.* Kingsberry, 2 Rand. (Va.) 131.

1. This analysis follows Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 656.

In Loaiza *v.* Superior Ct., 85 Cal. 11, 20 Am. St. Rep. 197, the court said that to constitute a contract there must be parties capable of contracting, consent, a lawful object, and a sufficient consideration.

Comyn Analyzes a Contract Thus: "Six things appear necessary to concur: 1. A person able to contract. 2. A person able to be contracted with. 3. A thing to be contracted for. 4. A good and sufficient consideration, or *quid pro quo*. 5. Clear and explicit words to express the contract or agreement. 6. The assent of both the contracting parties." *Quoted* in Justice *v.* Lang, 42 N. Y. 493, 1 Am. Rep. 576.

In Toledo Bank *v.* Toledo, 1 Ohio St. 622, the court, by Bartley, C. J., says on page 657: "These essential elements of a contract are the following, to wit: 1. The assent or agreement of two competent parties. 2. A legal and competent object or subject-matter. 3. A mutual legal consideration. 4. And a mutuality of obligation. In the absence of either one of these essential requisites, there is no contract." *Followed* in State *v.* Barker, 4 Kan. 379, 96 Am. Dec. 175.

In Clark *v.* Great Northern R. Co., 81 Fed. Rep. 282, the court said: "The fundamentals of a legal contract are parties, subject-matter, consideration, and assent. There can be no contract if any one of these elements is lacking, and to enforce a contract by legal proceedings it is necessary to set forth the contract with precision and certainty, so as to show a complete contract."

2. Must Be More than One Party. — Canterberry *v.* Miller, 76 Ill. 355; Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121; Cecil *v.* Laughlin, 4 B. Mon. (Ky.) 30; Muhling *v.* Sattler, 3 Metc. (Ky.) 285, 77 Am. Dec. 172. See also Faulkner *v.* Lowe, 2 Exch. 595.

In Eastman *v.* Wright, 6 Pick. (Mass.) 321, the court said: "It is a first principle that in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee." This doctrine is adopted in Thayer *v.* Buffum, 11 Met. (Mass.) 398; Belknap *v.* Gibbens, 13 Met. (Mass.) 471; Terry *v.* Brightman, 132 Mass. 318. In the case last cited the owners of a vessel sued the charterer of the vessel, one of the owners, upon a charter party executed between them. The court denied the remedy, saying that the plaintiff "cannot sue as part owner without joining the other part owners with him as coplaintiffs; and if all the owners were joined as plaintiffs, Brightman [the defendant] would be both a plaintiff and a defendant. The agreement, having been made by all the owners jointly with one of their own number, cannot be enforced at law." *Citing* the above cases, and Hatsall *v.* Griffith, 2 Cromp. & M. 679; Chanter *v.* Leese, 4 M. & W. 295. See also Abbott *v.* Hills, 158 Mass. 396.

There must not only be a party promising, but a party to enforce the promise. Underwood *v.* Waldron, 12 Mich. 73; Toledo, etc., R. Co. *v.* Lamphear, 54 Mich. 579.

Promise by or to Indefinite Multitude. — "A promise made to everybody is not a promise to any person; and a promise by a multitude, or an indefinite and unidentified number of individuals, to jointly do a particular thing, cannot be enforced." Clark *v.* Great Northern R. Co., 81 Fed. Rep. 282.

Obligation of A to A and B, or Vice Versa. — A man cannot be obligor to himself as obligee, nor can he be obligee to himself as obligor. An instrument in which he appears as sole obligee and also as sole obligor is a nullity. If he appears as sole obligee and also as a co-obligor with others, the effect of the instrument

b. CAPACITY TO CONTRACT. — The parties must be capable of contracting at the time they enter into the undertaking, for without capacity to contract there can be no assent and no obligation.[1]

(1) *Extent of Capacity — Insanity.* — The party to be bound by the contract must be able to understand its nature before he can bind himself by it. He must be of sound mind.[2]

Proof of Insanity Avoids Contract. — It is competent for one to prove, in avoidance of his contract, that he was *non compos mentis* when he entered into it.[3]

A Full Treatment of the contracts of persons insane and *non compos mentis* will be found under another title.[4]

(2) *Infants.* — The general rule is elementary that the contracts of infants are voidable. An exception exists with regard to contracts for necessaries. The whole subject of infants' contracts and the rules of law with regard to their affirmance or disaffirmance is treated elsewhere in this work.[5]

(3) *Married Women.* — At the common law the legal existence of a married woman is considered, except in certain special cases,[6] as merged in that of her husband; her contracts are, therefore, absolutely void. Great changes have been introduced in regard to the status of married women by modern statutes. Especially have these statutes made changes with regard to a *femme covert's* power to contract with reference to her separate property.[7]

(4) *Agents and Corporations.* — The powers of agents to contract, and the interpretation and construction of contracts entered into by agents, have been

is that the others are alone bound to him, and he is not bound at all as obligor. Cecil *v.* Laughlin, 4 B. Mon. (Ky.) 30, *citing* Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121; Morrison *v.* Stockwell, 9 Dana (Ky.) 172. See also Faulkner *v.* Faulkner, 73 Mo. 327.

1. Capacity to Contract. — Competent parties are essential to a valid contract. Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79; Toledo, etc., R. Co. *v.* Lamphear, 54 Mich. 575.

One who is competent to contract at law is competent in equity. Devall *v.* Devall, 4 Desaus (S. Car.) 79.

2. Insanity. — Sentance *v.* Poole, 3 C. & P. 1, 14 E. C. L. 179.

3. *Connecticut.*— Webster *v.* Woodford, 3 Day (Conn.) 90; Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119.

Indiana. — Wilder *v.* Weakley, 34 Ind. 181; Reinskopf *v.* Rogge, 37 Ind. 207; Musselman *v.* Cravens, 47 Ind. 1; Copenrath *v.* Kienby, 83 Ind. 18.

Maine. — Thornton *v.* Appleton, 29 Me. 298.

Massachusetts. — Mitchell *v.* Kingman, 5 Pick. (Mass.) 431.

Missouri. — Tolson *v.* Garner, 15 Mo. 494.

New Hampshire. — Lang *v.* Whidden, 2 N. H. 435.

On an agreement for the exchange of land, the plaintiff, being of unsound mind, delivered the note of a third person to the defendant, which was afterwards paid to the defendant; and the court permitted the plaintiff to show his incapacity at the time of making the agreement, and to recover the amount of the note. Rice *v.* Peet, 15 Johns. (N. Y.) 503.

Where one of the parties is mentally incapable of contracting, the contract is void as an entirety, and as to all the others. Hickman *v.* Glazebrook, 18 Ind. 210. A sale of chattels by such a one is void, both as to the purchaser and those claiming under him. Harris *v.* Harris, 64 Cal. 108.

An insane person is not competent to pledge a promissory note held by him, although the party taking it neither knows, nor has any reason to suspect, the insanity, and uses no unfairness in obtaining the note; and he may recover it in an action in trover. Seaver *v.* Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372.

Contracts for Necessaries. — The contracts of insane persons, if not wholly void, are at all events voidable, unless they relate to necessaries suited to their condition in life. Fitzgerald *v.* Reed, 9 Smed. & M. (Miss.) 94.

A lunatic may make a contract for necessaries suitable to his station in life and be compelled to perform the same, notwithstanding an inquisition of lunacy. Bagster *v.* Portsmouth, 7 D. & R. 614, 16 E. C. L. 304, 5 B. & C. 170, 11 E. C. L. 190, 2 C. & P. 178, 12 E. C. L. 79; *In re* Rhodes, 44 Ch. Div. 94.

If imposition or fraud be shown the rule changes. Bagster *v.* Portsmouth, 7 D. & R. 614, 16 E. C. L. 304, 5 B. & C. 170, 11 E. C. L. 190, 2 C. & P. 178, 12 E. C. L. 79.

Executed Contracts. — Insane persons are bound by their executed contracts where such contracts are fair and reasonable, and where the other parties entered into them in the ordinary course of business, not knowing of the mental unsoundness, and where the parties cannot be placed *in statu quo.* Abbott *v.* Creal, 56 Iowa 175. To the same effect see Molton *v.* Camroux, 4 Exch. 19, 6 Eng. Rul. Cas. 71.

4. See the title INSANITY.

Intoxication. — As to the contracts of drunken persons, see the title INTOXICATION.

5. See the title INFANTS.

6. As where the wife is a sole trader by the custom of London, or her husband is civilly dead.

7. See the titles HUSBAND AND WIFE; SEPARATE PROPERTY OF MARRIED WOMEN.

fully discussed elsewhere.[1] The validity of the contracts of corporations depends upon the express or implied powers of the corporations, and, as all their contracts must be made by agents, upon the authority vested in the agent through whom the contract is made and the manner in which the contract is executed. These subjects are thoroughly treated in their proper places under other titles.[2]

(5) *Government.* — A consideration of contracts with the national and state governments will be found under other titles.[3]

c. JOINT, AND JOINT AND SEVERAL CONTRACTS — **Definitions.** — A contract which imposes its obligation in its entirety upon two or more persons on the one hand, or confers a right upon two or more upon the other hand, is a joint contract. If the obligation so imposed rests in its entirety upon each of the persons so bound on the one hand, or the right so given is complete and indivisible in each of the persons on the other hand, in whose favor the contract runs, the contract is several.[4]

Construction — Suit on Joint Contract. — A contract which employs the words "we undertake," or "we agree," or a note which reads "we promise to pay," is joint and binds all the makers so that each is liable for the entire obligation and neither is suable alone; for a suit against one of joint obligors alone to which the others might have been made parties bars any proceedings against the latter.[5] And a dismissal as to one of two or more who have been sued jointly upon a joint contract will discharge all.[6]

When Less than All Joint Obligors May Be Sued. — To this rule the courts recognize the following exceptions, viz.: that where one obligor has died the survivor may sue or be sued, and subsequent proceedings be instituted against his estate;[7] where the parties omitted from the first suit are outside the jurisdiction of the court, or beyond its process, they may be sued afterwards wherever found;[8] and where one of a number of joint obligors is an infant, a recovery

1. See the title AGENCY, vol. 1, p. 930.

2. See the titles CORPORATIONS; MUNICIPAL CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; and the titles under which particular corporations are treated, for instance BANKS AND BANKING, vol. 3, p. 787; BUILDING AND LOAN ASSOCIATIONS, vol. 4, p. 999; RAILROADS, etc.

3. See the titles UNITED STATES; STATES. As to local governmental divisions, see the titles COUNTIES; MUNICIPAL CORPORATIONS.

4. See 1 Bouv. Inst., § 681.

Contract by Several to Perform Work — Presumed Joint. — "The presumption of law is that when two persons enter into a contract to perform certain work together, in consideration of a certain sum of money to be paid to them jointly therefor, it is a joint contract." Noyes *v.* Barnard, 15 U. S. App. 527.

5. *Indiana.* — Nicklaus *v.* Roach, 3 Ind. 78; Crosby *v.* Jeroloman, 37 Ind. 264; Barnett *v.* Juday, 38 Ind. 86; Cox *v.* Maddux, 72 Ind. 206; Lawrence *v.* Sample, 97 Ind. 53; Merriman *v.* Barker, 121 Ind. 74.

Louisiana. — New Orleans *v.* Ripley, 5 La. 121, 25 Am. Dec. 175.

Massachusetts. — New Haven, etc., R. Co. *v.* Hayden, 119 Mass. 361.

New York. — Peters *v.* Sanford, 1 Den. (N. Y.) 224; Suydam *v.* Barber, 18 N. Y. 468, 75 Am. Dec. 254; Candee *v.* Smith, 93 N. Y. 349; Rider L. Raft Co. *v.* Roach, 97 N. Y. 378.

An agreement reciting that "the plaintiffs are to pay * * *," and "the plaintiffs are to pay, in addition," is a joint obligation and not several. Eller *v.* Lacy, 137 Ind. 436.

To a written contract made in form between two, and signed by the parties named, at the same time, a third person adds, "I agree to be security for the promisor in the above contract," with his signature; the latter is liable as a joint promisor. Norris *v.* Spencer, 18 Me. 324.

If one of the parties appears to have negotiated both for himself and others, each of whom was to perform a separate part of the contract, and this was known and understood by the other party, he cannot look to one alone for damages consequent upon the failure by all to perform the conditions of the contract. Stover *v.* Metzgar, 1 W. & S. (Pa.) 269.

6. Van Leyen *v.* Wreford, 81 Mich. 606.

7. **Where One Co-obligor Has Died** — *United States.* — Noyes *v.* Barnard, 15 U. S. App. 527.

Indiana. — Brown *v.* Benight, 3 Blackf. (Ind.) 39, 23 Am. Dec. 373; Devol *v.* Halstead, 16 Ind. 287; Cox *v.* Maddux, 72 Ind. 206.

Massachusetts. — Curtis *v.* Mansfield, 11 Cush. (Mass.) 152; Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327; New Haven, etc., R. Co. *v.* Hayden, 119 Mass. 361.

But this is a matter under statutory regulation.

8. **Where One Party Outside Jurisdiction** — *Indiana.* — Barnett *v.* Juday, 38 Ind. 86; Cox *v.* Maddux, 72 Ind. 206 [*citing* Root *v.* Dill, 38 Ind. 169]; Merriman *v.* Barker, 121 Ind. 80.

Maine. — Dennett *v.* Chick, 2 Me. 191, 11 Am. Dec. 59.

Massachusetts. — Tappan *v.* Bruen, 5 Mass. 193.

may be had against the others and a discharge as to the infant.[1]

Several Joint Obligees may agree to a severance, and where, under such an agreement, the obligor promises to pay to each his several share, each has his separate right of action.[2]

Joint Contract — Remedy Must Be By or Against All Joint Parties. — Where the obligation is joint the remedy is against all jointly, and where the benefit runs to two or more jointly, the remedy is in the beneficiaries jointly, as one party.[3]

If the Interests of the Obligees Are Several, they may not maintain a joint action.[4]

Joint or Several? — Interest of Parties Is Real Criterion. — The real question, in determining whether the obligees under a contract are joint or several, is not what the terms of the contract are, but what is the real interest of the parties. If the interest of the obligees is joint, it matters not that the contract in its terms is several; it is a joint contract in the enforcement of which all must join.[5]

Contract Cannot Be Enforced by One of Several Joint Obligees. — A contract in favor of a number of persons jointly cannot be enforced by one of them alone.[6]

One Joint Obligor May Receive Satisfaction and Give Discharge. — Among joint obligees any one may receive satisfaction for the entire obligation and execute a valid discharge therefor. The remedy of other joint obligees is against him and not against the one who has made payment to him.[7] This

1. Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520. But see Chandler *v.* Parkes, 3 Esp. N. P. 76.

2. Angus *v.* Robinson, 59 Vt. 585, 59 Am. Rep. 758; Hopk. Sel. Cas. Contr. 551.

3. Where the obligation is joint the liability is joint. Rider L. Raft Co. *v.* Roach, 97 N. Y. 378.

Where, in a mortgage by one partner executed in his own name, but on behalf of the firm, and upon property held by him in trust for the firm, he promised to assume the payment of certain notes of another person, they being for the purchase of the real estate, and the firm having an interest in the real estate, it was held that the contract was the joint contract of all the partners, and not the several contract of each. Crosby *v.* Jeroloman, 37 Ind. 264.

The owners of railway shares may contract with A, agreeing that they, as an aggregation of individuals, shall transfer their shares to him and he give them in exchange other shares or pay a sum of money. A's promise is to the shareholders jointly, leaving it to them to arrange the distribution of the shares or money among themselves, and is unobjectionable. Upon such a promise the shareholders have a joint right of action. Marie *v.* Garrison, 83 N. Y. 14.

A written contract read: "I, A B, bind myself" to have a certain incumbrance released, "I having this day sold forty acres of said land to C and D," to whom the bond was delivered. It was held by the court that the names of the obligees were implied if not expressed, and that the action on the contract was properly a joint action. Linder *v.* Lake, 6 Iowa 164.

4. Several persons in whose favor a promise is made, upon a consideration which moves from another, must all join in an action thereon against the promisor, unless the interest of each of the parties to be benefited is specifically stated in the contract. Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Starrett *v.* Gault, 165 Ill. 99.

5. **Joint Interest Makes Contract Joint.** — Dumanoise *v.* Townsend, 80 Mich. 302; Capen *v.* Barrows, 1 Gray (Mass.) 379 [*following* Slingsbie's Case, 5 Coke 19; Anderson *v.* Martindale, 1 East 497; and *distinguishing* and *criticising* Dunham *v.* Gillis, 8 Mass. 462; Tippet *v.* Hawkey, 3 Mod. 263; Rolls *v.* Yate, Yelv. 177, 1 Bulst. 25; Bradburne *v.* Botfield, 14 M. & W. 559. See also New Haven, etc., R. Co. *v.* Hayden, 119 Mass. 361; Sager *v.* Tupper, 38 Mich. 258; Eastman *v.* Clark, 53 N. H. 276, 16 Am. Rep. 192; Murphey *v.* Weil, 92 Wis. 475; Edmunds *v.* Bushell, L. R. 1 Q. B. 97.

6. Cannon *v.* Maull, 4 Harr. (Del.) 223; Osborn *v.* Martha's Vineyard R. Co., 140 Mass. 549.

West Virginia Statute. — Under the West Virginia Code of 1868, which provides that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only," it has been held that in case of a contract equally for the benefit of several neither could sue. Johnson *v.* McClung, 26 W. Va. 659.

Annuity to A and B "During Their Natural Lives." — A promise to pay "J. S. or his wife A. S." an annuity "during their natural lives" is a promise to pay during their joint lives and the life of the survivor; and action upon it brought while both live must be a joint action. Hayden *v.* Snell, 9 Gray (Mass.) 365, 69 Am. Dec. 294; Osgood *v.* Pearsons, 4 Gray (Mass.) 455; Willoughby *v.* Willoughby, 5 N. H. 244.

7. Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121; Clark *v.* Patton, 4 J. J. Marsh. (Ky.) 33, 20 Am. Dec. 203; Wilson *v.* Mower, 5 Mass. 411; Eastman *v.* Wright, 6 Pick. (Mass.) 323.

Effect of Partial Receipt to One. — Where a receipt is given to one for his portion of the entire joint debt it operates to release him from any liability on the balance, and he becomes a several instead of a joint obligor. Baldwin *v.*

is illustrated in the law of partnership.[1]

Words Creating Several Obligation. — If the language is "I promise," or "we or either of us promise," or "we bind ourselves and each of us," it creates a joint and several liability upon which suit may be brought against all the obligors jointly, or against any one or more severally, as desired.[2]

Gray, 4 Martin N. S. (La.) 192, 16 Am. Dec. 169. But it does not release the others. Harrison *v.* Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; Spencer *v.* Williams, 2 Vt. 209, 19 Am. Dec. 711; Lacy *v.* Kynaston, 1 Ld. Raym. 688, 12 Mod. 552; Dean *v.* Newhall, 8 T. R. 168.

1. See the title PARTNERSHIP.

"We are of opinion that any one of two or more joint obligees, by an arrangement with the principal debtor to the prejudice of the surety, without his consent, may effect a release of the surety in equity without consulting his co-obligees. Any one of the obligees may receive the money due on the note or obligation. Any one of the obligees may release the debt. Co-obligees occupy the attitude of partners, and all are, in general, bound by the acts of any one." Clark *v.* Patton, 4 J. J. Marsh. (Ky.) 33, 20 Am. Dec. 203.

2. Language Construed to Make Joint and Several Obligation — *Connecticut.* — Carter *v.* Carter, 2 Day (Conn.) 442, 2 Am. Dec. 113; Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74; Salomon *v.* Hopkins, 61 Conn. 47.

Illinois. — Pogue *v.* Clark, 25 Ill. 333.

Indiana. — Maiden *v.* Webster, 30 Ind. 317.

Iowa. — Harvey *v.* Irvine, 11 Iowa 82.

Massachusetts. — Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27.

New York. — Van Alstyne *v.* Van Slyck, 10 Barb. (N. Y.) 383.

See also the title BILLS AND NOTES, vol. 4, p. 110.

Covenant to Indemnify Two Against Liability on Joint and Several Bond. — A covenant made by A with B and C, to indemnify them against liability on a bond wherein they are bound jointly and severally, follows the bond, and is also joint and several. Hughes *v.* Oregon R., etc., Co., 11 Oregon 437.

Several and Joint and Several Contracts — Instances. — A contract which provides that each of the parties is to hold an undivided portion of property to be bought in the name of one of them, and to pay each his portion of the price, is not a joint obligation. In an action on it it is not necessary to join all the parties. Each party promises separately for himself to do a distinct thing. Fuselier *v.* Lacour, 3 La. Ann. 162.

Where several insurance companies have agreed to unite in resisting claims under policies issued by them respectively upon the same property, and appoint a committee to employ counsel to defend suits brought upon the policies, and authorize the committee to make assessments *pro rata* to defray expenses, this fact does not entitle one employed as counsel by the committee to sue the companies jointly for services rendered in conducting the defenses to the suits; his claim is against the companies severally, not jointly. Adriatic F. Ins. Co. *v.* Treadwell, 108 U. S. 361.

A written agreement by a number of persons to "pay the sum annexed to their names," in order to make up an aggregate sum to be paid to another person in consideration of services to be rendered, creates a several and not a joint obligation. Moss *v.* Wilson, 40 Cal. 159.

Where four persons who did not buy as partners agreed to pay fifteen hundred dollars for a printing press and materials, in instalments, "each of the said first parties to be held personally responsible for one-fourth of" such amount, the obligation so created was a several and not a joint obligation, and neither of the promisors was liable for more than his share, or one-fourth of the whole. Larkin *v.* Butterfield, 29 Mich. 254.

A standard writer says: "When the parties engage for the performance of distinct and several duties, mere words of plurality, such as 'we bind ourselves,' will not make the contract joint." 1 Addison on Contracts (8th ed.) 39.

Subscription Papers, Several. — In Landwerlen *v.* Wheeler, 106 Ind. 523, the court, by Zollars, J., said, on page 526: "If the portion of the contract relied upon by appellant were, 'We, the undersigned, promise to pay the following subscriptions set opposite our names,' there would be no room to doubt that the contract would be several, and that each subscriber, and he alone, would be liable for the amount set opposite his name." *Citing* Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181; Erie, etc., R. Co. *v.* Patrick, 2 Abb. App. Dec. (N. Y.) 72, 2 Keyes (N. Y.) 256; Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137. See also Hall *v.* Thayer, 12 Met. (Mass.) 130; Davis *v.* Hendrix, 59 Mo. App. 444; Burnap *v.* Sylvania Butter Co., 1 Ohio Dec. 110; Darnall *v.* Lyon, (Tex. App. 1892) 19 S. W. Rep. 506; Davis, etc., Bldg., etc., Co. *v.* Cupp, 89 Wis. 673; Davis, etc., Bldg., etc., Co. *v.* Jones, 66 Fed. Rep. 124, 32 U. S. App. 32.

See the title SUBSCRIPTIONS.

An agreement reading, "We, the subscribers, hereby agree to pay to the city the cost of the curbstone so placed opposite our land on our side of the street," is a several contract. Springfield *v.* Harris, 107 Mass. 532. See Current *v.* Fulton, 10 Ind. App. 617; Beck *v.* Pounds, 20 Ga. 36.

Where a contract, signed by three persons, recited that one of the three had lent to a corporation a certain sum of money, payable at a fixed time, and continued, "We, for value received, hereby jointly and severally guarantee the repayment of said loan and interest at the time the same shall be payable," the legal effect in an action by the lender against the other parties to the contract is that each should assume a liability to repay one-third of the loan. Colt *v.* Learned, 118 Mass. 380.

In Current *v.* Fulton, 10 Ind. App. 617, the agreement in question was between certain subscribers to a project for establishing a natural gas well, and another party, the contract to be binding upon condition that others

Contract by Several Presumed Joint. — It has been held that where an obligation is undertaken by two or more, it will be presumed to create a joint liability, in the absence of express words to render it joint and several, and consequently where an implied promise raised by law imposes a liability on two or more, the liability is joint only.[1]

d. PRIVITY — PERSONS AFFECTED BY CONTRACT — (1) *Privity.* — **Privity of Contract** is defined to be the relation which subsists between the immediate parties to the contract.[2] The general rule is that privity is necessary to enable a person to enforce a contract.[3]

Where the Promisee Is in Fact Acting as the Agent of a Third Person, although this fact is unknown to the promisor, the principal is the real party to the contract and may enforce it in his own name.[4]

(2) *Contract for Benefit of Third Person.* — The right of a third person to sue on a contract made for his benefit between others, to the consideration of which he is a stranger, is a subject of great conflict in the authorities.[5]

(a) **History — English Doctrine.** — It was early held that, whatever the general rule, where the person to be benefited was the child of the promisee the child could maintain an action against the promisor upon the contract.[6] But this was regarded as a special case controlled by the near relationship of the parties, and the general rule was declared that a stranger to the consideration could maintain no action upon a contract.[7] This general rule was reiterated in later cases, and has become the firmly established doctrine in England, admitting of no exception even in the case of parties nearly related to each other.[8]

also subscribed. This was held to be a joint contract, binding upon all and irrevocable by any one of the subscribers without the consent of the rest. See also Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298.

1. Elliott *v.* Bell, 37 W. Va. 834, *citing* 1 Parsons on Contr. 11.

2. Sweet's L. Dict., *sub voce* Privity.

In Woods *v.* Ayres, 39 Mich. 345, the court said, on page 350: "Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself. Marzetti *v.* Williams, 1 B. & Ad. 415, 20 E. C. L. 412; Beirne *v.* Dord, 5 N. Y. 95, 55 Am. Dec. 321. To constitute either the one or the other, the parties must occupy towards each other a contract status, and there must be that connection, mutuality of will, and interaction of parties, generally expressed though not very clearly by the term 'privity.'" And on page 351: "The privity essential to a contract must proceed from the will of the parties." See also Toledo, etc., R. Co. *v.* Lamphear, 54 Mich. 575.

Whenever there is privity of contract between the plaintiff and defendant, as when the promise is made directly to the plaintiff, although the consideration therefor proceeds from a stranger the defendant is liable to the plaintiff in an action on the contract, because of such privity. Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238.

3. See *infra*, this section, *Contract for Benefit of Third Person.*

4. See the title AGENCY, vol. 1, p. 1168.

5. For discussion of special classes of cases illustrating this subject, see the titles FIRE INSURANCE; MORTGAGES; PARTNERSHIP; REWARDS; WATERWORKS AND WATER COMPANIES.

6. **Old English Doctrine — Near Relatives.** — The leading case on this subject is Dutton *v.* Poole, 2 Lev. 210, 1 Vent. 318, 332, *affirmed* in the Exch. Chamber, P. Raym. 302. In this case a tenant in fee simple being about to cut down timber to raise his daughter's marriage portion, the defendant, his heir at law, in consideration of his forbearing to do so, promised to pay a sum of money to the daughter, and it was held that an action lay upon the promise by the husband of the daughter, the court saying: "It might be another case if the money had been to have been paid to a stranger, but there is such a nearness of relation between the father and child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." In the case of Bourne *v.* Mason, 1 Vent. 6, a case was cited, "of a promise to a physician that if he did such a cure he [the patient] would give such a sum of money to himself and another to his daughter, and it was resolved the daughter might bring an assumpsit;" and the court approved the decision upon the ground that "the nearness of the relation gives the daughter the benefit of the consideration performed by her father."

7. **General Rule — Third Party Cannot Sue.** — Bourne *v.* Mason, 1 Vent. 6; Crow *v.* Rogers, 1 Stra. 592. The latter case was an action of assumpsit in which the plaintiff declared that whereas one A. was indebted to him in a certain sum, it was agreed, for a valuable consideration, between the defendant and A., that the defendant should pay A.'s debt to the plaintiff. Upon demurrer it was held that no action would lie, the plaintiff being a stranger to the consideration.

8. Price *v.* Easton, 4 B. & Ad. 433, 24 E. C.

(b) **Authorities in the United States.** — The earliest case in the United States upon this subject seems to have arisen in New York, and the doctrine was broadly laid down, following what was at that time conceived to be the English rule, that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise.[1] The principle here announced has been recognized in most of the United States, though it has now received, as will be seen later, considerable modification. In some states, however, the English rule obtains.

aa. States Adopting English Rule — **Massachusetts.** — The earlier cases in Massachusetts exhibited a tendency to allow an action to a third party for whose benefit a contract was made, though he was a stranger to the consideration;[2] but the later cases adhere firmly to the rule that "a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently a promise made by one person to another for the benefit of a third person who is a stranger to the consideration will not support an action by the latter," and confine the exceptions created by the earlier cases to the narrowest limits.[3]

The Principal Exception Recognized in Massachusetts consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it is

L. 96; Tweddle *v.* Atkinson, 1 B. & S. 393, 101 E. C. L. 393. In the latter case the validity of the exception established in the early cases with regard to promises made to a parent for the benefit of a child was distinctly brought in question, and it was held that such an exception was not to be sustained, and the old cases were overruled or disapproved. See Gandy *v.* Gandy, 30 Ch. Div. 57. See also Moot *v.* Gibson, 21 Ont. Rep. 248.

Action for Money Had and Received. — Where a debtor of the plaintiff transmitted a sum of money to the defendant, who admitted having received it, and, being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it, and these facts were communicated to the plaintiff by the defendant's authority, it was held that on his failing to pay, the plaintiff was entitled to maintain an action for money had and received. Lilly *v.* Hays, 5 Ad. & El. 548, 31 E. C. L. 396. The facts here amount to a new contract between the parties, and do not constitute an exception to the general rule.

1. Schemerhorn *v.* Vanderheyden, 1 Johns. (N. Y.) 139, 3 Am. Dec. 304, decided by the Supreme Court of New York in 1806. After laying down the doctrine as stated in the text, the court said: "This was the doctrine of the King's Bench in the case of Dutton *v.* Poole, 2 Lev. 210, affirmed in error. The same principle has since that time been repeatedly sanctioned by the decisions of the English courts. *Vide* Piggott *v.* Thompson, 3 B. & P. 149." In the notes to Piggott *v.* Thompson, 3 B. & P. 149, note *a*, it is said, referring to the case of Dutton *v.* Poole, 2 Lev. 210: "In that case, indeed, some stress was laid upon the nearness of relationship between the plaintiff's wife and her father, to whom the promise was made, but another case has since occurred to which that reason does not apply." Martyn *v.* Hind, 2 Cowp. 437, a case, however, which is useless as an authority upon this question, is then cited; and the remark of Buller, J., in Marchington *v.* Vernon, 1 B. & P. 101, note *b*, that "if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it," is quoted.

2. **Early Massachusetts Cases.** — Felton *v.* Dickinson, 10 Mass. 287; Hall *v.* Marston, 17 Mass. 575; Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154; Carnegie *v.* Morrison, 2 Met. (Mass.) 381; Brewer *v.* Dyer, 7 Cush. (Mass.) 337.

3. **Modern Massachusetts Doctrine.** — The leading case declaring the modern Massachusetts doctrine is Mellen *v.* Whipple, 1 Gray (Mass.) 317. This has been followed in a number of subsequent cases: Field *v.* Crawford, 6 Gray (Mass.) 116; Dow *v.* Clark, 7 Gray (Mass.) 198; Colburn *v.* Phillips, 13 Gray (Mass.) 64; Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691; Exchange Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381; Marston *v.* Bigelow, 150 Mass. 45; Saunders *v.* Saunders, 154 Mass. 337; Borden *v.* Boardman, 157 Mass. 410; Aldrich *v.* Carpenter, 160 Mass. 166.

Promise to Parent for Benefit of Child No Exception to General Rule. — In Marston *v.* Bigelow, 150 Mass. 45, it was held that a promise made to a father for the benefit of a son would not support an action by the son. The case of Felton *v.* Dickinson, 10 Mass. 287, which had previously been supposed to establish the existence of this exception in Massachusetts (see Mellen *v.* Whipple, 1 Gray (Mass.) 323; Exchange Nat. Bank *v.* Rice, 107 Mass. 37), was distinguished upon the ground that under the peculiar facts of that case the son had an interest in and was a privy to the contract.

delivered to him, to pay such creditors.[1]

In Michigan the rule is established that a promise made by one to another for the benefit of a third will not support an action by the latter.[2]

In New Hampshire the rule is laid down that no stranger to the consideration can take advantage of the contract, even though made for his benefit, and the consideration must move from the party entitled to sue.[3]

In Vermont the same doctrine obtains, and only the person to whom the promise is made and from whom the consideration moves is entitled to sue.[4]

bb. AMERICAN DOCTRINE — THIRD PARTY MAY SUE — (*aa*) *Generally.* — The doctrine that a third party for whose benefit a contract is made may sue upon it, is adopted in most of the United States, and is frequently referred to, therefore, as the "American doctrine." This principle has been most completely developed in New York. It will be well, therefore, to state the result of the New York decisions before collecting the authorities from other states.

(*bb*) *New York.* — The courts of New York at an early day declared the doc-

1. Where Defendant Holds Money of Plaintiff. — Mellen *v.* Whipple, 1 Gray (Mass.) 317; Carnegie *v.* Morrison, 2 Met. (Mass.) 381; Frost *v.* Gage, 1 Allen (Mass.) 262; Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154; Hall *v.* Marston, 17 Mass. 575; Putnam *v.* Field, 103 Mass. 556; Exchange Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1.

This exception does not cover the case of a promise made upon valuable consideration by a third person to a debtor to pay all the latter's debts, without any specification of the names or number of his creditors, or of the amount of their demands. Dow *v.* Clark, 7 Gray (Mass.) 198.

In Borden *v.* Boardman, 157 Mass. 410, the facts were that A., a contractor, agreed to erect a house for the defendant. A. procured the plaintiff to do certain work in connection with the building, and upon a partial settlement between A. and the defendant it was agreed that the defendant should retain the money due from A. to the plaintiff and should pay it to the plaintiff. Subsequently A. abandoned the contract, and upon the refusal of the defendant to pay over the money to the plaintiff this action was brought. It was held by the court, applying the general rule, that the plaintiff was not entitled to recover.

2. Michigan. — Pipp *v.* Reynolds, 20 Mich. 88; Turner *v.* McCarty, 22 Mich. 265; Hicks *v.* McGarry, 38 Mich. 667; Hunt *v.* Strew, 39 Mich. 368; Hidden *v.* Chappel, 48 Mich. 527; Edwards *v.* Clement, 81 Mich. 513; Wheeler *v.* Stewart, 94 Mich. 445; Linneman *v.* Moross, 98 Mich. 178, 39 Am. St. Rep. 528.

3. New Hampshire. — Butterfield *v.* Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; Warren *v.* Batchelder, 15 N. H. 129.

It is held, however, that if a debtor A deposits money with B, a third person, to pay A's creditor C, C may elect to accept the transaction as payment by A, and to adopt B as a new debtor in the place of A. Bringing suit against B is not sufficient evidence of such an election, but demand and refusal, followed by suit, appears to be sufficient. Warren *v.* Batchelder, 16 N. H. 580; Lang *v.* Henry, 54 N. H. 57.

In Chamberlain *v.* New Hampshire F. Ins. Co., 55 N. H. 249, in discussing the rule, which is declared to admit of no exception, that the person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves, the court said: "To entitle a party to sue upon a promise, the promise need not, necessarily, in express terms, be addressed to the party entitled to sue. In terms, it may be addressed to a party who, in law, shall be regarded as the agent of the party from whom the consideration moves, and the real party thus offering the inducement to the promise may bring the suit upon it in his own name, notwithstanding the promisor may have promised nothing to him directly. 'The consideration,' it is said, 'must proceed from the promisee; or, more strictly the law considers the promise to be made to the person from whom the inducement to make it comes, or, in other words, from whom the consideration moves.'" In this case it was held that where a house was insured against fire in the name of A, the policy stipulating that in case of loss the insurance was to be paid to B, who held a mortgage on the premises, and it appeared that the insurance was actually obtained by B, who paid the premiums on the policy, B was the proper party to bring suit on the policy.

4. Vermont. — Crampton *v.* Ballard, 10 Vt. 251; Pangborn *v.* Saxton, 11 Vt. 79; Hall *v.* Huntoon, 17 Vt. 244, 44 Am. Dec. 332; Corey *v.* Powers, 18 Vt. 587; Fugure *v.* Mutual Soc., 46 Vt. 362; Davenport *v.* North Eastern Mut. L. Assoc., 47 Vt. 528. See also Tuttle *v.* Catlin, 1 D. Chip. (Vt.) 366, 12 Am. Dec. 691; Cummings *v.* Blaisdell, 43 Vt. 382. But see Rutland, etc., R. Co. *v.* Cole, 24 Vt. 33.

Apparently, however, an exception is recognized where one person gives money to another to pay over to a third. In such a case the third person may sue for it, as the money has become his property, and the person who has received it is treated as his bailee. Crampton *v.* Ballard, 10 Vt. 251; Pangborn *v.* Saxton, 11 Vt. 79; Phelps *v.* Conant, 30 Vt. 277.

In Davenport *v.* North Eastern Mut. L. Assoc., 47 Vt. 528, it was held that a declaration which alleged a promise to pay to the wife and children of the insured, for a consideration moving from the insured, would not support an action by the personal representative of the insured, and that the right of action was in the wife and children.

trine that a third person, for whose benefit a contract was made between others, might maintain an action on the contract against the promisor. This ruling has been adhered to in a long line of cases, and represents the established doctrine in that state.[1] The courts have not, however, been entirely satisfied with the doctrine, and they have repeatedly declared that the rule is to be confined to its original limits.[2] Thus it is established that incidental benefit to a third party is not sufficient to give him a right of action upon a contract. To have this effect the contract must have been entered into for his benefit, or at least such benefit must be the direct result of performance and within the contemplation of the parties.[3] There must also be a legal obligation of duty on the part of the promisee to such third party, the theory of the cases being that such an obligation so connects him with the contract as to be a substitute for any privity with the promisor.[4]

(*cc*) *Doctrine in Other States.* — In a large number of states the doctrine established in New York is recognized, but the abuse of the principle is guarded against as in New York by the rule that incidental benefit is not sufficient to give a right of action; there must be a direct object to benefit a person in order to entitle him to sue, and a legal duty owing to him by the promisee.[5]

1. New York. — Schemerhorn *v.* Vanderheyden, 1 Johns. (N. Y.) 140, 3 Am. Dec. 304; Farley *v.* Cleveland, 4 Cow. (N. Y.) 432, 15 Am. Dec. 387, *affirmed* 9 Cow. (N. Y.) 639; Lawrence *v.* Fox, 20 N. Y. 268; Burr *v.* Beers, 24 N. Y. 178, 80 Am. Dec. 327; Garvey *v.* Jarvis, 46 N. Y. 312, 7 Am. Rep. 335; Hutchings *v.* Miner, 46 N. Y. 460, 7 Am. Rep. 369; Todd *v.* Weber, 95 N. Y. 181, 47 Am. Rep. 20; Gifford *v.* Corrigan, 117 N. Y. 257, 15 Am. St. Rep. 508; Societa Italiana, etc., *v.* Sulzer, 138 N. Y. 468; Clark *v.* Howard, 150 N. Y. 232.

2. Durnherr *v.* Rau, 135 N. Y. 219; Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Ætna Nat. Bank *v.* New York Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Merrill *v.* Green, 55 N. Y. 270; Pardee *v.* Treat, 82 N. Y. 385.

3. Durnherr *v.* Rau, 135 N. Y. 219; Garnsey *v.* Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Lake Ontario Shore R. Co. *v.* Curtiss, 80 N. Y. 219.

4. Incidental Benefit Insufficient. — Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Townsend *v.* Rackham, 143 N. Y. 516; Garnsey *v.* Rogers, 47 N. Y. 233, 7 Am. Rep. 440.

The case of Lawrence *v.* Fox, 20 N. Y. 268, which is considered the leading case in New York and the foundation of the doctrine under discussion, arose upon these facts. A., at the request of the defendant, loaned him the sum of three hundred dollars, stating at the time that he owed that sum to the plaintiff. The defendant, in consideration of the loan, promised to pay the money to the plaintiff. It was held that the plaintiff was entitled to maintain an action against the defendant upon this promise. Two of the judges (Johnson, C. J., and Denio, J.) based their opinion upon the ground that the promise was to be regarded as made to the plaintiff through the medium of his agents, whose action he could ratify, although the promise was made without his knowledge. And Comstock, J., dissented, basing his dissent upon the doctrine of Price *v.* Easton, 4 B. & Ad. 433, 24 E. C. L. 96, and Mellen *v.* Whipple, 1 Gray (Mass.) 317.

In Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195, the court said: "Judges have differed as to the principle upon which Lawrence *v.* Fox, 20 N. Y. 268, and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who by bringing his action adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In every case there must be a legal right founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit."

5. *United States.* — The general rule is recognized in Hendrick *v.* Lindsay, 93 U. S. 143; Austin *v.* Seligman, 18 Fed. Rep. 519; National Bank *v.* Grand Lodge, 98 U. S. 123.

But this is not a universal rule, and the limitations supported by the later New York cases are recognized. Constable *v.* National Steamship Co., 154 U. S. 73; Sayward *v.* Dexter, 72 Fed. Rep. 765.

A third person cannot take advantage of such a beneficial contract where it is inconsistent with another contract previously entered into by him. Constable *v.* National Steamship Co., 154 U. S. 73.

Alabama. — Mason *v.* Hall, 30 Ala. 599; Carver *v.* Eads, 65 Ala. 190; Huckabee *v.* May, 14 Ala. 263. See also Potts *v.* Gadsden First Nat. Bank, 102 Ala. 286; Pugh *v.* Barnes, 108 Ala. 167; Burton Lumber Co. *v.* Wilder, 108 Ala. 669.

California. — Chung Kee *v.* Davidson, 73 Cal. 522, 102 Cal. 188; Buckley *v.* Gray, 110 Cal. 339, 52 Am. St. Rep. 88; Savings Bank *v.* Thornton, 112 Cal. 255; Tyler *v.* Mayre, 95 Cal. 160; Cal. Civ. Code, § 1559.

Colorado. — Lehow *v.* Simonton, 3 Colo. 346; Green *v.* Richardson, 4 Colo. 584; Green *v.* Morrison, 5 Colo. 18.

Florida. — Wright *v.* Terry, 23 Fla. 160.

Illinois. — Crandall *v.* Payne, 154 Ill. 627;

In Connecticut, Maryland, and Pennsylvania, while the general rule is stated as in England, exceptions are recognized which seem to make the result of the decisions in those states much the same as in those recognizing the American doctrine.[1]

Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467; Daub *v.* Englebach, 109 Ill. 267; Bay *v.* Williams, 112 Ill. 91, 54 Am. Rep. 209; Snell *v.* Ives, 85 Ill. 279; Bristow *v.* Lane, 21 Ill. 194; Hume *v.* Brower, 25 Ill. App. 130; Boals *v.* Nixon, 26 Ill. App. 517; Williamson-Stewart Paper Co. *v.* Seaman, 29 Ill. App. 68.

Indiana. — Stevens *v.* Flannagan, 131 Ind. 122; Leake *v.* Ball, 116 Ind. 214; Carnahan *v.* Tousey, 93 Ind. 561; Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671.

"It has been many times decided that a promise made by one to another from whom the consideration moves, for the benefit of a third, may be sued on by the party for whose benefit the promise was made." Clodfelter *v.* Hulett, 72 Ind. 141. *Citing* Raymond *v.* Pritchard, 24 Ind. 318; Josselyn *v.* Edwards, 57 Ind. 212; Campbell *v.* Patterson, 58 Ind. 66; Carter *v.* Zenblin, 68 Ind. 436; Fisher *v.* Wilmoth, 68 Ind. 449.

Iowa. — Johnson *v.* Collins, 14 Iowa 63; Johnson *v.* Knapp, 36 Iowa 616; Rice *v.* Savery, 22 Iowa 470; Lamb *v.* Tucker, 42 Iowa 118. See also Gooden *v.* Rayl, 85 Iowa 592, holding that a minor may maintain an action for damages for the breach of a contract made by his parents in his behalf.

Kansas. — Burton *v.* Larkin, 36 Kan. 246, 59 Am. Rep. 541; Hardesty *v.* Cox, 53 Kan. 618; Anthony *v.* Herman, 14 Kan. 494; Harrison *v.* Simpson, 17 Kan. 508; Floyd *v.* Ort, 20 Kan. 162; Alliance Mut. L. Assur. Soc. *v.* Welch, 26 Kan. 632.

Kentucky. — Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340, 25 Am. St. Rep. 536; Dodge *v.* Moss, 82 Ky. 441; Mize *v.* Barnes, 78 Ky. 506; Smith *v.* Lewis, 3 B. Mon. (Ky.) 229; Allen *v.* Thomas, 3 Metc. (Ky.) 198, 77 Am. Dec. 169; Lucas *v.* Chamberlain, 8 B. Mon. (Ky.) 276.

Louisiana. — New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338; La. Civ. Code 1870, § 1890. See also Mitchell *v.* Cooley, 5 Rob. (La.) 243; Brandon *v.* Hughes, 22 La. Ann. 360.

Maine. — Bohanan *v.* Pope, 42 Me. 93; Machias Hotel Co. *v.* Coyle, 35 Me. 405, 58 Am. Dec. 712. See also Lewis *v.* Sawyer, 44 Me. 337; Maxwell *v.* Haynes, 41 Me. 559; Dearborn *v.* Parks, 5 Me. 81, 17 Am. Dec. 206; Coffin *v.* Bradbury, 89 Me. 476.

Minnesota. — Jefferson *v.* Asch, 53 Minn. 446, 39 Am. St. Rep. 618; Union R. Storage Co. *v.* McDermott, 53 Minn. 407; Lake *v.* Albert, 37 Minn. 453; Stariha *v.* Greenwood, 28 Minn. 521; Follansbee *v.* Johnson, 28 Minn. 311; Jordan *v.* White, 20 Minn. 91; Hawley *v.* Wilkinson, 18 Minn. 525; Sanders *v.* Classon, 13 Minn. 379; Van Eman *v.* Stanchfield, 10 Minn. 255.

Mississippi. — See Sweatman *v.* Parker, 49 Miss. 19.

Missouri. — Howsom *v.* Trenton Water Co., 119 Mo. 304, 41 Am. St. Rep. 654; Ellis *v.* Harrison, 104 Mo. 270; Fitzgerald *v.* Barker, 70 Mo. 687; Meyer *v.* Lowell, 44 Mo. 328. See also Beardslee *v.* Morgner, 4 Mo. App. 139; Raum *v.* Kaltwasser, 4 Mo. App. 573; Rogers *v.* Gossnell, 58 Mo. 589.

Nebraska. — Hare *v.* Murphy, 45 Neb. 812; Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44; Lyman *v.* Lincoln, 38 Neb. 794; Barnett *v.* Pratt, 37 Neb. 349; Shamp *v.* Meyer, 20 Neb. 223; Fitzgerald *v.* McClay, 47 Neb. 816.

Nevada. — Miliani *v.* Tognini, 19 Nev. 133; Ruhling *v.* Hackett, 1 Nev. 360.

New Jersey. — Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141; Sell *v.* Steller, 53 N. J. Eq. 397; Bennett *v.* Merchantville Bldg., etc., Assoc., 44 N. J. Eq. 116 Cubberly *v.* Cubberly, 33 N. J. Eq. 82, 591; Crowell *v.* Saint Barnabas Hospital, 27 N. J. Eq. 650.

North Carolina. — See Draughan *v.* Bunting, 9 Ired. L. (31 N. Car.) 10; White *v.* Hunt, 64 N. Car. 496.

North Dakota. — See Parlin *v.* Hall, 2 N. Dak. 473; Dakota Comp. Laws, § 3499.

Ohio. — Thompson *v.* Thompson, 4 Ohio St. 333; Trimble *v.* Strother, 25 Ohio St. 378; Emmitt *v.* Brophy, 42 Ohio St. 82; Society of Friends *v.* Haines, 47 Ohio St. 423; Laws *v.* Scales, 1 Cinc. Wkly. L. Bul. 314. See Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 Ohio St. 69.

Oregon. — Baker *v.* Eglin, 11 Oregon 333; Hughes *v.* Oregon R., etc., Co., 11 Oregon 437; Schneider *v.* White, 12 Oregon 503; Chrisman *v.* State Ins. Co., 16 Oregon 289; Parker *v.* Jeffery, 26 Oregon 186; Washburn *v.* Interstate Invest. Co., 26 Oregon 436.

Rhode Island. — Urquhart *v.* Brayton, 12 R. I. 169; Wood *v.* Moriarty, 15 R. I. 518; Wilbur *v.* Wilbur, 17 R. I. 295.

South Carolina. — Brown *v.* O'Brien, 1 Rich. L. (S. Car.) 268, 44 Am. Dec. 254; Thompson *v.* Gordon, 3 Strobh. L. (S. Car.) 196.

Tennessee. — M'Carty *v.* Blevins, 5 Yerg. (Tenn) 195, 26 Am. Dec. 262.

Texas. — McCown *v.* Schrimpf, 21 Tex. 22, 73 Am. Dec. 221; Stadler *v.* Talley, 3 Tex. App. Civ. Cas., § 472; Mathonican *v.* Scott, 87 Tex. 396. See also Monroe *v.* Buchanan, 27 Tex. 241.

West Virginia. — Johnson *v.* McClung, 26 W. Va. 659.

Wisconsin. — Larson *v.* Cook, 85 Wis. 564; Grant *v.* Diebold Safe, etc., Co., 77 Wis. 72; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 57 Am. Rep. 249; Platteville *v.* Hooper, 63 Wis. 383; Kollock *v.* Parcher, 52 Wis. 393; Bassett *v.* Hughes, 43 Wis. 319; McDowell *v.* Laev, 35 Wis. 175; Putney *v.* Farnham, 27 Wis. 187; Gray *v.* McDonald, 19 Wis. 217; Cotterill *v.* Stevens, 10 Wis. 422.

1. Connecticut. — In Meech *v.* Ensign, 49 Conn. 191, 44 Am. Rep. 225, this question is examined at length. The rule is laid down that actions upon contracts must be brought by the party making the contract and from whom the consideration moved; but it is admitted that an exception exists in "those cases in which the parties confessedly con-

In Virginia the authorities leave the question open.[1]

(*dd*) *Revocation — Acceptance by Third Party* — **Promise Irrevocable When Accepted by Third Party.** — Where a promise by one to another for the benefit of a third party has been accepted by such third party and in some manner acted upon, the third party obtains a vested right of action upon the promise, and the contract becomes irrevocable.[2]

Subject to Equities Between Original Parties. — The right of a third party to recover is subject to the equities between the original parties springing out of the contract between them. Thus where the promise is void, as between the promisor and promisee, for fraud, or want or failure of consideration, the third party is not entitled to maintain an action upon the promise.[3]

(*ee*) *Instruments under Seal.* — Contracts under seal are held in many states not to be within the rule allowing a third party for whose benefit a contract is made to bring suit upon it.[4] In other jurisdictions the distinction is not recognized and the rule is applied both to sealed and unsealed contracts.[5]

(*ff*) *Statutes.* — The provision of the civil practice acts of the states adopting the reformed procedure, that actions must be brought in the name of the real party in interest, gives a right of action upon contracts to third parties for

tracted for the benefit of third persons, not incidentally but as the principal object." The case of Dutton *v.* Pool, 1 Vent. 318, is commented upon as illustrating the exception, and it is said that "that case" in modern times in this country would be upheld on the ground that the promise was intended for the benefit of the daughter as its object." It is held, however, that no mere incidental benefit to be derived by a third party from a contract is sufficient to give him a right of action upon it. See also Treat *v.* Stanton, 14 Conn. 451; Steene *v.* Aylesworth, 18 Conn. 244.

Maryland. — In a matter of simple contract a promise to one for the benefit of another may be enforced by the person for whose benefit the promise was made. Unless the promisee has some beneficial interest himself he cannot enforce the suit. Seigman *v.* Hoffacker, 57 Md. 321, *per* Irving, J. See also Small *v.* Schaefer, 24 Md. 143.

A promise by a debtor to his creditor to pay his debt to a third person will not enable such third person to maintain an action at law in his own name for its recovery; but where one person pays money to another for the use of a third, or where a person having ready money belonging to another agrees with that other to pay it over to a third, in both these cases an action may be brought in the name of the person beneficially interested. Owings *v.* Owings, 1 Har. & G. (Md.) 484. See also O'Neal *v.* School Com'rs, 27 Md. 227.

Pennsylvania. — In Merriman *v.* Moore, 90 Pa. St. 78, it is laid down as a rudimentary principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. *Citing* Hoff's Appeal, 24 Pa. St. 200; Townsend *v.* Long, 77 Pa. St. 143, 18 Am. Rep. 438; Justice *v.* Tallman, 86 Pa. St. 147. See also Beers *v.* Robinson, 9 Pa. St. 229.

The tendency of the court, however, seems to be to confine the exceptions to the general rule that no one can sue on a contract to which he is not a party, to "cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests;" as where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose. Adams *v.* Kuehn, 119 Pa. St. 76; Delp *v.* Bartholomay Brewing Co., 123 Pa. St. 42; Hostetter *v.* Hollinger, 117 Pa. St. 606; Kountz *v.* Holthouse, 85 Pa. St. 235; Guthrie *v.* Kerr, 85 Pa. St. 303; Blymire *v.* Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458; Torrens *v.* Campbell, 74 Pa. St. 470; Freeman *v.* Pennsylvania R. Co., 173 Pa. St. 274; Mississippi Cent. R. Co. *v.* Southern R. Assoc., 8 Phila. (Pa.) 107. See also Brown *v.* German-American Title, etc., Co., 174 Pa. St. 455.

1. Virginia. — See Jones *v.* Thomas, 21 Gratt. (Va.) 101; Willard *v.* Worsham, 76 Va. 392; Ross *v.* Milne, 12 Leigh (Va.) 204, 37 Am. Dec. 646.

2. Gifford *v.* Corrigan, 117 N. Y. 257, 15 Am. St. Rep. 508. To the same effect, see Mitchell *v.* Cooley, 5 Rob. (La.) 240; Brandon *v.* Hughes, 22 La. Ann. 360; Trimble *v.* Strother, 25 Ohio St. 378. See also Merrick *v.* Giddings, 1 Mackey (D. C.) 394; Amonett *v.* Montague, 75 Mo. 43. And *compare* Rogers *v.* Gosnell, 58 Mo. 589.

3. Dunning *v.* Leavitt, 85 N. Y. 30, 39 Am. Rep. 617. To the same effect are Ellis *v.* Harrison, 104 Mo. 270; Brandon *v.* Hughes, 22 La. Ann. 360; Trimble *v.* Strother, 25 Ohio St. 378.

4. Instruments under Seal an Exception. — Millard *v.* Baldwin, 3 Gray (Mass.) 484; Saunders *v.* Saunders, 154 Mass. 338; Chamberlain *v.* New Hampshire F. Ins. Co., 55 N. H. 261; Crowell *v.* Saint Barnabas Hospital, 27 N. J. Eq. 650; Ross *v.* Milne, 12 Leigh (Va.) 209, 37 Am. Dec. 646.

5. No Exception as to Sealed Contracts. — Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467; Hume *v.* Brower, 25 Ill. App. 130; Rogers *v.* Gosnell, 51 Mo. 466; Coster *v.* Albany, 43 N. Y. 399; Emmitt *v.* Brophy, 42 Ohio St. 82; Hughes *v.* Oregon R., etc., Co., 11 Oregon 437; McDowell *v.* Laev, 35 Wis. 171; Bassett *v.* Hughes, 43 Wis. 319.

whose benefit they are made.[1] In some states special statutes exist conferring a right of action under these circumstances.[2]

(c) **Doctrine in Equity.** — The rule that a third person, not a party to a contract, cannot bring suit upon it, is subject to the following exception in England: If the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B may enforce the contract in a court of equity.[3]

In the United States the distinction between the rules at law and in equity has been rarely adverted to,[4] the cases being usually decided upon other grounds. But where the effect of a contract is to create a trust the *cestui que trust* may doubtless enforce it.[5]

(d) **Actions in Tort Arising from Breach of Contract.** — The rule is well established that no third person has a right to bring an action *ex delicto* for injuries resulting from a breach of contract between two contracting parties, unless the third person sustains an injury for which he would have a right of action though no such contract had been made.[6]

(3) *Third Person Acquiring Rights by Transfer or Substitution.* — Rights under a contract may be acquired by persons not parties to it in the first instance, by novation,[7] by assignment,[8] and by subrogation.[9]

3. Assent. — The free mutual assent of the parties is necessary to constitute a contract.[10]

1. Rice *v.* Savery, 22 Iowa 470; Ellis *v.* Harrison, 104 Mo. 270. See also Pomeroy on Remedies, § 139; and the title PARTIES, in the ENCYC. OF PLEADING AND PRACTICE.

But the promisee is himself the trustee of an express trust, and may, therefore, enforce the promise in his own name. Ellis *v.* Harrison, 104 Mo. 270.

2. See, for instance, Cal. Civ. Code, § 1659; Dakota Comp. Laws, § 3499.

3. Gandy *v.* Gandy, 30 Ch. Div. 67, *per* Cotton, L. J. In the same case Bowen, L. J., said: "It is sufficient to say that in the case of Tweddle *v.* Atkinson, 1 B. & S. 393, 101 E. C. L. 393, to which we were referred, the true common-law doctrine has been laid down. But whatever may have been the common-law doctrine, if the true intent and the true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common-law doctrine, and would in a court of equity be allowed to enforce their rights under the deed." See also *In re* Flavell, 25 Ch. Div. 89; Colyear *v.* Mulgrave, 2 Keen 81; Gale *v.* Gale, 6 Ch. Div. 144; Moot *v.* Gibson, 21 Ont. Rep. 248. But in the absence of an agreement creating a trust the rule in equity is the same as that at law. *In re* Rotherham Alum, etc., Co., 25 Ch. Div. 103.

4. But see Bird *v.* Lanius. 7 Ind. 615; Miller *v.* Billingsly, 41 Ind. 489. In these cases it is stated that the rule in equity was always that a third person for whose benefit a contract is made might sue upon it. No authority, however, is cited, and it is probable that no other cases exist wherein so broad a doctrine has been laid down.

5. "A trust cannot certainly be less capable of being enforced because founded in a contract." Turner, V. C., in Page *v.* Cox, 10 Hare 163.

Where a trust has been created for a third party without his knowledge of it at the time, he may affirm the trust and enforce it. Metropolis Bank *v.* Guttschlick, 14 Pet. (U. S.) 19. See Neilson *v.* Blight, 1 Johns. Cas. (N. Y.) 205; Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 262, 8 Am. Dec. 492.

6. Winterbottom *v.* Wright, 10 M. & W. 109; Longmeid *v.* Holliday, 6 Exch. 761; Buckley *v.* Gray, 110 Cal. 339, 52 Am. St. Rep. 88; Fowler *v.* Athens City Water-Works Co., 83 Ga. 219; Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 24 Am. St. Rep. 333; Peabody Bldg., etc., Assoc. *v.* Houseman, 89 Pa. St. 261, 33 Am. Rep. 757.

For a full consideration of this subject, see the title NEGLIGENCE; and for special applications, see the titles ABSTRACT OF TITLE, vol. 1, p. 221; ATTORNEY AND CLIENT, vol. 3, p. 398; DRUGGISTS; TELEGRAPHS AND TELEPHONES; WATER WORKS AND WATER COMPANIES.

7. See the title NOVATION.

8. See the title ASSIGNMENTS, vol. 2, p. 1007.

9. See the title SUBROGATION.

10. **Assent Essential** — *England.* — Chinnock *v.* Ely, 4 DeG. J. & S. 638.

United States. — Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564; Kleinhans *v.* Jones, 37 U. S. App. 185; Clark *v.* Great Northern R. Co., 81 Fed. Rep. 282.

Alabama. — Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101.

California. — Morrill *v.* Nightingale, 93 Cal. 455, 27 Am. St. Rep. 207.

Indiana. — Cass County *v.* Crockett, 111 Ind. 316.

Louisiana. — Holtzman *v.* Millaudon, 18 La. Ann. 29.

Maine. — Belfast, etc., R. Co. *v.* Unity, 62 Me. 148.

Maryland. — King *v.* Warfield, 67 Md. 246, 1 Am. St. Rep. 384.

Michigan. — Ferguson *v.* Hemingway, 38 Mich. 159; Woods *v.* Ayres, 39 Mich. 351;

Assent Wanting — Contract Not Binding. — If this assent is wanting on the part of one who signs a contract, his act has no more efficacy than if it had been done under duress or by a person of unsound mind.[1]

Toledo, etc., R. Co. *v.* Lamphear, 54 Mich. 580.

Missouri. — Jones *v.* Durgin, 16 Mo. App. 370.

New York. — Livingston *v.* Rogers, 1 Cai. (N. Y.) 583; Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Wood *v.* Edwards, 19 Johns. (N. Y.) 205; Keep *v.* Goodrich, 12 Johns. (N. Y.) 397; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Law *v.* Pemberton, 10 Misc. Rep. (N. Y. C. Pl.) 362.

Ohio. — Dayton, etc., Turnpike Co. *v.* Coy, 13 Ohio St. 92.

Virginia. — Innis *v.* Roane, 4 Call (Va.) 379.

Assent Must Be in Legal Form. — There is no valid contract if the assent upon which it rests is not legally given. Thus where the "railway act" required the ratification by a majority of the stockholders of agreements between railway companies, an agreement not so ratified may be avoided. Great Western R. Co. *v.* Grand Trunk R. Co., 25 U. C. Q. B. 37.

It Must Embrace the Entire Contract. — Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225; Mutual L. Ins. Co. *v.* Young, 23 Wall. (U. S.) 85; Tilley *v.* Cook County, 103 U. S. 155; Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill, 119 U. S. 149; Compania Bilbaina, etc., *v.* Spanish-American Light, etc., Co., 146 U. S. 497; Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564; Crabtree *v.* St. Paul Opera-House Co., 39 Fed. Rep. 746; Sibley *v.* Felton, 156 Mass. 273; Whiteford *v.* Hitchcock, 74 Mich. 208.

In Kleinhans *v.* Jones, 37 U. S. App. 185, the court said: "Where it is apparent that one party has not consented to the several terms to which the other has agreed, no contract is formed. If the divergence is of anything which partakes of the substance of the contract at all, there is no legal agreement, and the court is not at liberty to speculate upon the question whether some stipulation which it might think of minor importance, or some variation which it might think would not have influenced the parties in making the contract, can be dispensed with, and the parties held in disregard of them." *Citing* National Bank *v.* Hall, 101 U. S. 50; Eggleston *v.* Wagner, 46 Mich. 620.

All Parties Must Assent. — Until a written agreement prepared to be signed by several parties has been signed by all, it is not binding on any. Barber *v.* Burrows, 51 Cal. 404, 473. *Compare* Mattoon *v.* Barnes, 112 Mass. 463. And see Bean *v.* Parker, 17 Mass. 591; Wood *v.* Washburn, 2 Pick. (Mass.) 24; Howe *v.* Peabody, 2 Gray (Mass.) 556; Russell *v.* Annable, 109 Mass. 72, 12 Am. Rep. 665.

The omission of his signature by the obligor named in an instrument authorizes the others to retract; but they must do so seasonably, before the contract takes effect. McNamara *v.* Jarvis, 2 La. Ann. 591.

A tripartite agreement cannot be established by a paper signed by one party only. Wilcox *v.* Saunders, 4 Neb. 569.

The want of the signature to an obligation of some of the parties who were to become jointly liable with those who signed renders a contract incomplete, and no action can be maintained on it. Fish *v.* Johnson, 16 La. Ann. 29.

Distinguishing between these cases and those where the promises were independent, the court said, in Mattoon *v.* Barnes, 112 Mass. 463: "Most, if not all, of the cases of this class are cases where the parties executing the instrument would have a remedy, by way of indemnity or contribution, against the other parties named, which remedy is lost by the failure of such other parties to execute the instrument. The reasons for holding the instrument void are that it was intended that all the parties should execute it, that each executes it upon the implied condition that it is to be executed by the others, and, therefore, that until executed by all it is inchoate and incomplete, and never takes effect as a valid contract. On the other hand, where these reasons do not apply, it is held that a party who signs and delivers an instrument is bound by the obligations he therein assumes, although it is not executed by all the parties named in it." *Citing* Cutter *v.* Whittemore, 10 Mass. 442; Adams *v.* Bean, 12 Mass. 137, 7 Am. Dec. 44; Warring *v.* Williams, 8 Pick. (Mass.) 322; Herrick *v.* Johnson, 11 Met. (Mass.) 26; Yale *v.* Wheelock, 109 Mass. 502. See also Butrick *v.* Tilton, 141 Mass. 93.

Assent of Parties Must Be Communicated to each other. Kleinhans *v.* Jones, 37 U. S. App. 185. *Citing* Smith *v.* Hughes, L. R. 6 Q. B. 607; Cornish *v.* Abington, 4 H. & N. 549; Cox *v.* Troy, 5 B. & Ald. 474, 7 E. C. L. 163; Browne *v.* Hare, 3 H. & N. 495; Shepherd *v.* Gillespie, L. R. 3 Ch. 764; *In re* East of England Banking Co., L. R. 4 Ch. 14; Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; White *v.* Corlies, 46 N.Y. 467. See *infra*, this title, *Formation and Execution — Express Agreement — Offer and Acceptance.*

Assent Need Not Be Simultaneous. — This mutual assent of the parties need not occur at the same time. Falls *v.* Gaither, 9 Port. (Ala.) 605; Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409; Goodpaster *v.* Porter, 11 Iowa 164.

1. In Girard *v.* St. Louis Car-Wheel Co., 123 Mo. 358, 45 Am. St. Rep. 556, the court said: "Those facts, when established, destroyed the substance of the agreement which the release in form expressed. They took from the apparent contract what was essential to its legal force and validity, namely, the element of assent by the plaintiff. That element is a necessary part of every contract. Without it, a mere writing, expressing some formula of words, imposes no obligation. The signature of plaintiff obtained to such a paper, without the assent of his mind to the act, deprived him of no legal right." See also the titles DURESS; FRAUD; INSANITY; and the titles treating particular contracts, as BONDS, vol. 4, p. 631; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 200. 325; RELEASE.

Leaving Blanks to Be Filled. — A person who

Presumption of Assent from Signature. — Affixing a signature to a contract, however, creates a conclusive presumption, except as against fraud, that the signer read, understood, and assented to it.[1]

Accepting Contract Tendered and Signed. — The same presumption arises with almost equal force as to one who executes a contract by accepting the instrument tendered by the other party, his own signature being unnecessary. An instance is found in the acceptance of a shipping contract or bill of lading.[2]

signs a blank piece of paper cannot, in the absence of elements of estoppel, be bound by an obligation written thereon, unless it can be shown that he gave the person who wrote it authority. Richards *v.* Day, 137 N. Y. 183, 33 Am. St. Rep. 704. See generally the title ALTERATION OF INSTRUMENTS, subd. *Filling Blanks*, vol. 2, p. 249.

1. Signature Creates Presumption of Assent — *England.* — Lewis *v.* Great Western R. Co., 5 H. & N. 867.

Arizona. — History Co. *v.* Dougherty, (Arizona 1892) 29 Pac. Rep. 649.

Indiana. — Keller *v.* Equitable F. Ins. Co., 28 Ind. 170; Wray *v.* Wray, 32 Ind. 126; Nebeker *v.* Cutsinger, 48 Ind. 436; American Ins. Co. *v.* McWhorter, 78 Ind. 136; Robinson *v.* Glass, 94 Ind. 211; Cross *v.* Herr, 96 Ind. 96; Norris *v.* Scott, 6 Ind. App. 21.

Massachusetts. — Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 80; Squire *v.* New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162.

Michigan. — McEwan *v.* Ortman, 34 Mich. 325.

Minnesota. — Quimby *v.* Shearer, 56 Minn. 534.

Missouri. — Campbell *v.* Van Houten, 44 Mo. App. 231.

New York. — Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526; Shepard *v.* New York Cent., etc., R. Co., (Supreme Ct.) 18 N. Y. Supp. 665.

Pennsylvania. — Wolf *v.* Western Union Tel. Co., 62 Pa. St. 87, 1 Am. Rep. 387.

One who was making a contract actually affixed his signature to a paper referring in plain terms to a condition on the back of the paper itself, and accepted another paper containing the same conditions at the same time. These transactions were repeated several times, with precisely similar papers in each case. Under such circumstances the law must presume that he understood and assented to each condition in the contract. Hartness *v.* Great Western R. Co., 2 Mich. N. P. 80. See also the title TELEGRAPHS AND TELEPHONES.

An agreement signed by the promisor, without reading, and at the request of an insurance agent, although under alleged false representations, has been held to be binding. Maine Mut. Marine Ins. Co. *v.* Hodgkins, 66 Me. 109. See also the title INSURANCE.

Fraud or Force in Procuring Execution of Contract. — The element of voluntary assent is wanting if the contract was procured by fraud or by force, and the signer was in no way at fault.

England. — Throughgood's Case, 2 Coke 9*b*, 6 Eng. Rul. Cas. 202; Cundy *v.* Lindsay, L. R. 3 App. 459, 47 L. J. Q. B. 481, 6 Eng. Rul. Cas. 211.

Alabama. — Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

Illinois. — Taylor *v.* Atchison, 54 Ill. 196, 5 Am. Rep. 118.

Indiana. — Cline *v.* Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Baldwin *v.* Bricker, 86 Ind. 221.

Michigan. — McGinn *v.* Tobey, 62 Mich. 252, 4 Am. St. Rep. 848.

Missouri. — Corby *v.* Weddle, 57 Mo. 452.

Nebraska. — Omaha First Nat. Bank *v.* Lierman, 5 Neb. 247; Willard *v.* Nelson, 35 Neb. 651, 37 Am. St. Rep. 455.

New York. — Whitney *v.* Snyder, 2 Lans. (N. Y.) 477; Osborn *v.* Robbins, 36 N. Y. 365.

Ohio. — DeCamp *v.* Hamma, 29 Ohio St. 467.

Pennsylvania. — Schuylkill County *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441.

Wisconsin. — Walker *v.* Ebert, 29 Wis. 194, 9 Am. Rep. 548; Kellogg *v.* Steiner, 29 Wis. 626; Griffiths *v.* Kellogg, 39 Wis. 290, 20 Am. Rep. 48; Bowers *v.* Thomas, 62 Wis. 480.

See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 200, 325.

2. Contents Presumptively Known and Assented to. — A shipper must acquaint himself with the contents of the contract executed by him, and he will be held chargeable with a knowledge thereof although he fails to do so. Zimmer *v.* New York Cent., etc., R. Co., 137 N. Y. 460; Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453. See also the title BILLS OF LADING, vol. 4, p. 507.

One who accepts a pass and travels upon it is deemed to have accepted it upon the conditions printed thereon, whether he reads and signs them or not. Quimby *v.* Boston, etc., R. Co., 150 Mass. 365. See also the title TICKETS AND FARES.

Exception — Accepting Without Opportunity to Examine. — The rule is otherwise where no opportunity has been had to examine the contract before accepting it. Thus in Zimmer *v.* New York Cent., etc., R. Co., 137 N. Y. 460, it is said: "Cases where parties proposing to have articles of property transported by a common carrier deliberately enter into some necessary contract relating to the transportation differ materially from those cases of travelers who commit their trunks, or articles of baggage, to an agent of some express or transfer company, and receive at the moment some paper, which, as it has been said, amounts simply to a voucher enabling them to follow and identify their property. The difference is very obvious in the circumstances, which in the one case usually admit of no negotiation, or discussion; while in the other the shipment of the property is a matter of arrangement, with full opportunity for deliberate action." See also Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153; Grossman *v.* Dodd, 137 N. Y. 599, *affirming* 63 Hun (N. Y.) 324; Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701.

Acceptance in Reliance on Representations. — If one party assents to a contract because he relies on the representations of the other it will be presumed, as between the two, that the assent is given on condition the representations are true, and the representations will be given a contractual effect.[1]

Common Mutual Understanding Implied. — Assent necessarily implies a meeting of the minds of all contracting parties, a coming together upon the common ground of a mutual understanding of facts and of subject-matter. Until all understand alike, there can be no assent, and, therefore, no contract.[2]

1. Reliance on Representations. — Duncan *v.* Hogue, 24 Miss. 671; Hoock *v.* Bowman, 42 Neb. 80, 47 Am. St. Rep. 691; Center *v.* Weed, 138 N. Y. 532.

2. Mutuality of Understanding and Assent Is Requisite — *England.* — Calverley *v.* Williams, 1 Ves. Jr. 210; Baldwin *v.* Milderbeger, 2 Hall (N. Y.) 176; Chinnock *v.* Ely, 4 DeG. J. & S. 643; Raffles *v.* Wickelhaus, 2 H. & C. 906, 33 L. J. Exch. 160, 6 Eng. Rul. Cas. 198; Appleby *v.* Johnson, L. R. 9 C. P. 158.

United States. — Mutual L. Ins. Co. *v.* Young, 23 Wall. (U. S.) 85; National Bank *v.* Hall, 101 U. S. 43; Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29.

Alabama. — Hodges *v.* Sublett, 91 Ala. 588.

California. — Golden State, etc., Iron Works *v.* Angell, 89 Cal. 643.

Illinois. — Ripley *v.* Daggett, 74 Ill. 351.

Indiana. — Coppage *v.* Gregg, 127 Ind. 359.

Maine. — Belfast, etc., R. Co. *v.* Unity, 62 Me. 148.

Massachusetts. — Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 80; Kyle *v.* Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Patton *v.* Taft, 143 Mass. 140.

Michigan. — Crane *v.* Partland, 9 Mich. 493; Ahearn *v.* Ayres, 38 Mich. 692.

New York. — Coles *v.* Bowne, 10 Paige (N. Y.) 526; First Baptist Church *v.* Brooklyn F. Ins. Co., 28 N. Y. 153; Booth *v.* Bierce, 38 N. Y. 463, 98 Am. Dec. 73; Frazer *v.* Small, (Supreme Ct.) 13 N. Y. Supp. 468, 59 Hun (N. Y.) 619; Sidney Glass Works *v.* Barnes, 86 Hun (N. Y.) 374; Saltus *v.* Pruyn, 18 How. Pr. (N. Y. Supreme Ct.) 512.

Pennsylvania. — Powers *v.* Curtis, 147 Pa. St. 340.

Texas. — O'Neal *v.* Knippa, (Tex. 1892) 19 S. W. Rep. 1020; Gulf, etc., R. Co. *v.* Dawson, (Tex. Civ. App. 1893) 24 S. W. Rep. 566; Skeeters *v.* Slater Milling Co., 4 Tex. Civ. App. 665.

Vermont. — Bedell *v.* Wilder, 65 Vt. 406, 36 Am. St. Rep. 871.

Wisconsin. — Greve *v.* Ganger, 36 Wis. 369.

The assent must be to the same thing in the same sense. Hazard *v.* New England Marine Ins. Co., 1 Sumn. (U. S.) 218; Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177; People *v.* Auditor-Gen., 17 Mich. 183; Davis *v.* Bush, 28 Mich. 435; Eggleston *v.* Wagner, 46 Mich. 610; Toledo, etc., R. Co. *v.* Lamphear, 54 Mich. 582.

Illustrations. — An ambiguous and misunderstood telegraphic offer cannot be made the basis of a contract. Clay *v.* Ricketts, 66 Iowa 362. Nor can an offer which was modified or withdrawn before an unconditional acceptance. Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45.

Thus, where the offer was in these words: "We are authorized to offer Michigan fine salt in full carload lots of eighty to ninety-five bbls., delivered in your city, at eighty-five cents per bbl.," and the plaintiff responded by wire: "You may ship me two thousand barrels Michigan fine salt as offered in your letter," the court held that the offer was not an explicit offer to sell, and that there was no binding contract. Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516. See also Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155, and Kinghorne *v.* Montreal Tel. Co., 18 U. C. Q. B. 60.

A letter contained the proposal to sell a "few jars," to which by way of answer an order by wire was sent for five hundred gross of jars. The order was never accepted, but the reply stated that only two hundred and fifty gross could be furnished. It was held that the letter and telegram did not constitute a contract for five hundred gross. Allen *v.* Kirwan, 159 Pa. St. 612.

Certain articles of partnership provided for a dissolution on an offer in writing to buy or sell. One of the partners, under this arrangement, had sold the other an interest which was not wholly paid for, and subsequently offered to buy out that partner's share at the estimated value of its proportion to the whole business. This latter offer was accepted. It was held that as the offerer must have intended to have a deduction for the unpaid interest, and the other party did not so understand it, the minds of the parties had never met, and the agreement would not be enforced. Braeutigam *v.* Edwards, 38 N. J. Eq. 542.

Application being made to a railway agent for freight rates on five hundred bundles of lath, he quoted rates based on one hundred bundles, having misunderstood the parties as to the amount of the shipment. On these facts, it was held that the minds of the parties did not meet so as to form a contract, and that the railway company could recover full rates. Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177.

Where one writes to another, offering to sell him a horse for a certain price, and the latter answers that he might purchase the horse if it would suit him, which he is certain it will, this is not enough to show a contract. Stagg *v.* Compton, 81 Ind. 171.

Parties Bound Though Terms of Contract Differently Understood. — Where two parties enter into a writing specifying the terms of their contract they are mutually bound by these terms as expressed in the writing and as construed by the court, although the understanding of one as to the effect of these terms may differ from the understanding of the

4. Subject-Matter — *a.* ITS CONSTITUENTS. — The subject-matter of a contract comprehends the consideration passing from one party to the other and the obligation which this consideration creates. The expression "subject-matter" is employed often inaccurately, as it seems, to signify the matter or thing concerning which the parties contract.[1] But the definition first given is more suitable.

(1) *Consideration.* — The subject of consideration is fully treated under a separate title.[2]

Mutuality. — Closely related to the doctrine of consideration is the rule as to the mutuality of contract. Mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other,[3] that is, neither party is bound unless both are bound.[4]

other. Baines *v.* Woodfall, 6 C. B. N. S. 657, 95 E. C. L. 657, 6 Jur. N. S. 19, 28 L. J. C. P. 338; Miller *v.* Lord, 11 Pick. (Mass.) 11.

It has been held that where the parties agree upon the terms of a contract, they are bound by it, although their understanding of those terms is not precisely the same; as where one understood a particular instalment to bear interest, while the other did not so understand it. Neufville *v.* Stuart, 1 Hill Eq. Ch. (S. Car.) 159.

Assent Inferred from Conduct — Estoppel. — In Phillip *v.* Gallant, 62 N. Y. 256, one of the contracting parties was a Frenchwoman to whom the terms of the contract were explained by the interpreter, a clerk in the other party's office. Without the knowledge of either contracting party these terms, and particularly their legal effect, were misrepresented to the Frenchwoman, but there was no fraud and the mistake was not mutual, for the woman gave the man to understand that she knew what she was undertaking to do. It was held that there was a binding contract. The court adopted the following from the opinion of Blackburn, J., in Smith *v.* Hughes, L. R. 6 Q. B. 597: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Whether Minds Met, a Question for Jury. — Where a conversation is relied upon to prove a contract, it is for the jury to decide whether the minds of the parties met in such an assent as to create thereby a valid contract, or whether what passed between them was a loose conversation, neither understood nor intended as an agreement. Thruston *v.* Thornton, 1 Cush. (Mass.) 89. See also Winchester *v.* Howard, 97 Mass. 304, 93 Am. Dec. 93.

1. Thus, where a horse is hired, the horse is sometimes called the subject-matter of the agreement. With greater propriety, it should be said that the subject-matter of the agreement comprehends the hire or use of the horse and the consideration paid therefor.

2. See the title CONSIDERATION, vol. 6, p. 667.

3. Spear *v.* Orendorf, 26 Md. 37; Ewins *v.* Gordon, 49 N. H. 444. See also the titles CONSIDERATION, vol. 6, pp. 689, 730; SPECIFIC PERFORMANCE.

In Vogel *v.* Pekoc, 157 Ill. 342, the court said: "It is a general rule, well understood, that a contract between parties must be mutual. Weaver *v.* Weaver, 109 Ill. 225; Chitty on Contracts, 15; Bishop on Contracts, § 78, p. 32; Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305. In the case last cited it is said: 'In contracts, where the promise of the one party is the consideration for the promise of the other, promises must be concurrent, and obligatory upon both at the same time.' 1 Chitty 297; 1 Carnes 594. In Chitty on Contracts, *supra*, the author says: 'The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing that if the one party never were bound, on his part, to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.'"

4. Necessity of Mutuality — *England.* — Cooke *v.* Oxley, 3 T. R. 653.

United States. — Clark *v.* Great Northern R. Co., 81 Fed. Rep. 282; American Cotton Oil Co. *v.* Kirk, 34 U. S. App. 60.

Illinois. — Weaver *v.* Weaver, 109 Ill. 225; Minnesota Lumber Co. *v.* Whitebreast Coal Co., 56 Ill. App. 248.

Indiana. — Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 492, 3 Am. St. Rep. 674.

Maine. — Bean *v.* Burbank, 16 Me. 458, 33 Am. Dec. 681.

Michigan. — Finley Shoe, etc., Co. *v.* Kurtz, 34 Mich. 90; Michigan College of Medicine *v.* Charlesworth, 54 Mich. 522; Pierce *v.* Pierce, 55 Mich. 629; Wilkinson *v.* Heavenrich, 58 Mich. 574, 55 Am. Rep. 708; Davie *v.* Lumberman's Min. Co., 93 Mich. 491.

Minnesota. — Bailey *v.* Austrian, 19 Minn. 535; Stensgaard *v.* Smith, 43 Minn. 11, 19 Am. St. Rep. 205.

New York. — Burnet *v.* Bisco, 4 Johns. (N. Y.) 235; Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Townsend *v.* Corning, 23 Wend. (N. Y.) 444.

Pennsylvania. — Hill *v.* Roderick, 4 W. & S. (Pa.) 221.

Wisconsin. — Dodge *v.* Hopkins, 14 Wis. 630; Atlee *v.* Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103.

Where two parties to an instrument enter into mutual covenants, which are interchangeably considerations for each other, if either party neglects or refuses to bind himself he thus renders the instrument void for want of

Want of Mutuality — How Remedied. — Want of mutuality in the inception of the contract may be remedied by the subsequent conduct of the parties, or by the execution of the agreement.[1]

Does Not Imply Identity of Remedy or Form. — The rule that contractual obligations must be mutual does not mean that each party must have the same remedy in case of a breach,[2] except in suits for specific performance,[3] nor that both engagements must be expressed in the same form, for one may be in writing and the other in parol.[4]

(2) *Continued Existence of Thing Contracted for.* — Just as there must be two or more parties who contract, so there must be some sort of mutual interchange of benefits and concessions, the delivery of a consideration by one and the assumption of an obligation by the other, to complete the transaction. Where the thing which is the subject of negotiation turns out to have no existence, present or potential, or to have ceased to exist before the agreement is completed, and the parties are ignorant of the fact, no obligation is created, for this situation is only possible where there has been a mutual mistake of fact; and a mutual mistake about a matter of fact avoids the contract.[5]

mutuality, and he cannot avail himself of it as obligatory upon the other, nor can he render it obligatory upon the other by any subsequent act of his own, without the latter's assent. Dodge *v.* Hopkins, 14 Wis. 630. See Townsend *v.* Corning, 23 Wend. (N. Y.) 435.

Previous to the organization of the plaintiff corporation, the defendant agreed in writing to make the turnpike, known as the Dayton, Watervliet, and Xenia Turnpike Road, across his farm, at the engineer's estimate, provided it crossed in a specified direction, or, if he could not make it, to "pay for it at the same rate, and take the same in stock in said road, and have it ready by the time the rest of the road is ready for travel." The plaintiff company, when afterwards incorporated, located the road across the farm of the defendant, in the direction specified in the instrument, and then built the road across the farm, and tendered stock to the amount of the engineer's estimate for the defendant, and demanded payment. It was held that the contract did not bind the defendant for want of mutuality. Dayton, etc., Turnpike Co. *v.* Coy, 13 Ohio St. 84.

Contracts cannot arise from the action of one party alone when the other has no power to prevent his action. Thornton *v.* Sturgis, 38 Mich. 639.

1. South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 98 Ala. 400, 39 Am. St. Rep. 74; Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112, 39 Am. St. Rep. 284; Nutting *v.* McCutcheon, 5 Minn. 382; Willetts *v.* Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31. See also the title CONSIDERATION, vol. 6, p. 689.

Executed by One or Both. — Want of mutuality is no defense to an executed contract. Grove *v.* Hodges, 55 Pa. St. 504. See also Jones *v.* Durgin, 16 Mo. App. 370.

When a contract which lacks mutuality in its inception is subsequently corrected in this particular by act of the parties, and executed, all questions arising from this defect are put at rest. Nutting *v.* McCutcheon, 5 Minn. 382. See also Welch *v.* Whelpley, 62 Mich. 16, 4 Am. St. Rep. 810.

In Storm *v.* U. S., 94 U. S. 76, the court, by Clifford, J., said: "Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have in fact been performed in good faith, and without prejudice to the defendant. Morton *v.* Burn, 7 Ad. & El. 19, 34 E. C. L. 18. Agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties. * * * Cases often arise where the agreement consists of mutual promises, the one promise being the consideration for the other; and it has never been seriously questioned that such an agreement is valid, and that the parties are bound to fulfil their respective obligations."

2. **Mode of Remedy Need Not Be Mutual.** — One may sue upon covenant, the other in assumpsit. Grove *v.* Hodges, 55 Pa. St. 504.

3. See the title SPECIFIC PERFORMANCE.

4. Grove *v.* Hodges, 55 Pa. St. 504.

A written agreement for the delivery of hogs at a price specified, signed by the vendor and written by the vendee, has sufficient mutuality. Wise *v.* Ray, 3 Greene (Iowa) 430.

5. See the titles ACT OF GOD, vol. 1, p. 584; IMPOSSIBLE CONTRACTS; MISTAKE.

Subject Destroyed or Nonexistent — *England.* — Strickland *v.* Turner, 7 Exch. 208.

Illinois. — Bradford *v.* Chicago, 25 Ill. 423 (void judgment); Anderson *v.* Armstead, 69 Ill. 452.

Maryland. — Franklin *v.* Long, 7 Gill & J. (Md.) 407.

Massachusetts.—Canton Sav. Inst. *v.* Murphy, 156 Mass. 305.

Michigan. — Gibson *v.* Pelkie, 37 Mich. 380.

New York. — Gove *v.* Wooster, Hill & D. Supp. (N. Y.) 30.

Ohio. — Cook *v.* Andrews, 36 Ohio St. 178; Scioto F. Brick Co. *v.* Pond, 38 Ohio St. 65.

Pennsylvania. — Muhlenberg *v.* Henning, 116 Pa. St. 138.

Tennessee. — King *v.* Doolittle, 1 Head (Tenn.) 77.

Vermont. — Ketchum *v.* Catlin, 21 Vt. 191.

Explanation of Principle. — This does not mean that the subject in relation to which the parties are contracting must have an actual existence at the time. It may have a potential existence merely. Many executory agreements relate altogether to such things.[1] It means that if the parties believe it to be an actuality when it is not, there is such a mistake of fact as will defeat the agreement.

Where Performance Dependent on Continued Existence of Person or Thing. — When performance of a contract is dependent upon the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation.[2]

b. REQUIREMENTS AS TO SUBJECT-MATTER — (1) *Certainty.* — In order to constitute a valid verbal or written contract the subject-matter of the agreement must be expressed by the parties in such terms that it can be ascertained to a reasonable degree of certainty. The court will not enforce a part of an entire contract, nor make a new agreement for the parties.[3]

See also Fritzler *v.* Robinson, 70 Iowa 500; Griffith *v.* Sebastian County, 49 Ark. 24.

"If in a negotiation for the sale of property it should appear that the seller had reference to one article and the buyer to another, or if the parties supposed the property to be in existence, when in fact it had been destroyed, no contract would grow out of the negotiation." Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 86.

In Gibson *v.* Pelkie, 37 Mich. 380, the contract related exclusively to a judgment which proved to be void. The court said: "There was no subject-matter. The parties supposed there was a judgment, and negotiated and agreed on that basis, but there was none. Where they assumed there was substance there was no substance. They made no contract, because the thing they supposed to exist, and the existence of which was indispensable to the institution of the contract, had no existence." *Citing* Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Sherman *v.* Barnard, 19 Barb. (N. Y.) 291; Silvernail *v.* Cole, 12 Barb. (N. Y.) 685; Allen *v.* Hammond, 11 Pet. (U. S.) 63; Hazard *v.* New England Marine Ins. Co., 1 Sumn. (U. S.) 218; Smidt *v.* Tiden, L. R. 9 Q. B. 446; Couturier *v.* Hastie, 5 H. L. Cas. 673.

Illustrations. — Where a cargo of grain was sold while it was in transit by sea, and it turned out to have been destroyed before the sale, the contract was invalid. Couturier *v.* Hastie, 5 H. L. Cas. 673.

One who had covenanted to dig one thousand tons of potter's clay every year was discharged from his covenant by a showing that at the time of the covenant there was not that much clay under the land. Clifford *v.* Watts, L. R. 5 C. P. 577.

Where a person bought an annuity which at the time had ceased to exist by virtue of the death of the annuitant, he was allowed to recover the price paid for it. Strickland *v.* Turner, 7 Exch. 208. And see Cochrane *v.* Willis, L. R. 1 Ch. 58.

Where one railway company sued another for breach of a contract to co-operate in an effort to secure such legislation as would result in an appropriation of public lands for the roads, and it appeared that all available lands had been exhausted so that the effort would be in vain, the plaintiff's right of recovery was denied. Dubuque Southwestern R. Co. *v.* Cedar Rapids, etc., R. Co., 66 Iowa 366.

Where, in making the contract, the parties contemplated the passage of legislative acts which were essential to the object of the contract, and the passage of which they confidently expected, they cannot enforce the contract where the legislature refuses to pass those acts, and adopts other measures entirely defeating the object the parties had in view. Miles *v.* Stevens, 5 Pa. L. J. 513, 3 Pa. St. 21, 45 Am. Dec. 621.

Where the contract is by one to buy a warehouse and by another to sell, and the warehouse is destroyed by an inevitable accident before the time arrives for the execution of the contract, each party is discharged from his obligation. Powell *v.* Dayton, etc., R. Co., 12 Oregon 488.

Where there is an agreement for the sale of chattels, and while the transaction is pending the property is destroyed, the parties being eqally ignorant of the fact, the foundation of the contract fails. Thompson *v.* Gould, 20 Pick. (Mass.) 139, *quoting* 2 Kent Com. (2d ed.) 367.

1. A promise to pay certain notes when they shall be executed is a binding executory agreement, and takes effect on the execution of the notes. Fitzgerald *v.* Barker, 85 Mo. 13.

2. **Implied Condition as to Continued Existence.** — Siegel *v.* Eaton, 165 Ill. 550; Lorillard *v.* Clyde, 142 N. Y. 456. See the title IMPOSSIBLE CONTRACTS.

3. **Certainty.** — Chitty on Contracts (11th Am. ed.) 92.

England. — Guthing *v.* Lynn, 2 B. & Ad. 232, 22 E. C. L. 63; Taylor *v.* Brewer, 1 M. & S. 290; Roberts *v.* Smith, 4 H. & N. 315.

Alabama. — Erwin *v.* Erwin, 25 Ala. 236; Adams *v.* Adams, 26 Ala. 272.

Illinois. — Canterberry *v.* Miller, 76 Ill. 355.

Maryland. — Thomson *v.* Gortner, 73 Md. 474.

Massachusetts. — Whelan *v.* Sullivan, 102 Mass. 204; Ashcroft *v.* Butterworth, 136 Mass. 511; Freeland *v.* Ritz, 154 Mass. 257, 26 Am. St. Rep. 244.

Michigan. — Cummer *v.* Butts, 40 Mich. 322, 29 Am. Rep. 530; Bumpus *v.* Bumpus, 53 Mich. 346.

(2) *Legality.* — The obligation assumed, or the consideration given, must be lawful; and by this is meant that it must not be immoral, or in conflict with the statutes, or against public policy.[1]

(3) *Fairness.* — It must be fair, that is to say, free from deceit, fraud, or imposition, practiced by one of the contracting parties upon the other.[2]

(4) *Mistake.* — That there must be no mutual understanding or mistake relative to the subject-matter of the contract, is elementary.[3]

c. CONDITIONS — (1) *Generally.* — **A Conditional Contract** is an executory agreement, the performance of which depends upon a condition. It is not simply an executory contract, since an executory contract may be an absolute agreement to do or not to do something; but it is a contract whose very existence depends upon a contingency or condition.[4]

New York. — Buckmaster *v.* Consumers' Ice Co., 5 Daly (N. Y.) 313.

Pennsylvania. — Sherman *v.* Kitsmiller, 17 S. & R. (Pa.) 45. See also Baxter *v.* Bishop, 65 Iowa 582; Clay *v.* Ricketts, 66 Iowa 362. For a full treatment of this subject see the title INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

1. See the titles ILLEGAL CONTRACTS; PUBLIC POLICY; RESTRAINT OF TRADE.

2. See the titles DECEIT; FRAUD; ILLEGAL CONTRACTS; SPECIFIC PERFORMANCE.

3. Mutual mistake renders assent impossible. See this title, *supra*, *The Elements of a Contract — Assent.* See generally the titles MISTAKE; REFORMATION AND CANCELLATION.

4. Campbell, J., in Nashville, etc., R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574.

"That which is a condition must be some provision which cannot be severed from the agreement and leave it, within a fair interpretation, as their contract." Montreal Bank *v.* Recknagel, 109 N. Y. 491.

The promise of a judgment creditor, for a certain purpose and on certain conditions, to discharge the judgment, is not obligatory save upon a substantial performance of the conditions. Crosby *v.* Wood, 6 N. Y. 369. See also the titles BILLS AND NOTES, vol. 4, p. 84; CONDITIONS, vol. 6, p. 499; CONDITIONAL SALES, vol. 6, p. 436; DEEDS; LEASE; IMPLIED WARRANTY; SALES; and *infra*, this title, *Formation and Execution.*

Instances of Conditional Contracts. — A covenant to furnish security at any time if required is not an independent stipulation. It is an essential condition, and goes to the whole of the consideration; and the party failing to furnish it within a reasonable time after demand forfeits his rights under the agreement. Blackwell *v.* Fosters, 1 Metc. (Ky.) 88.

A written obligation acknowledging an indebtedness, on account of real estate speculations between the parties, and conditioned that it is to be paid out of the proceeds of the lands when sold, is conditional, and is not to be enforced until the lands have been sold. Breaux *v.* Lauve, 24 La. Ann. 179.

Where a steamer was sold "upon this express condition," that it is not "to be run on any of the routes of travel, etc.," it was held to be a condition, not a covenant. Hale *v.* Finch, 1 Wash. Ter. 566.

A licensee agreed to pay certain royalties "or else forfeit the right to manufacture" under the license, "if the patentees" should so elect. It was held that an action for the royalties could not be maintained. Wing *v.* Ansonia Clock Co, 102 N. Y. 531.

An artist having agreed to make a crayon portrait which should be satisfactory to the person ordering it, neither the artist nor the jury can decide that the person ordering the portrait ought to be satisfied with that made. Moore *v.* Goodwin, 43 Hun (N. Y.) 534.

In consideration of a settlement, a mining company, admitting a certain sum to be due the plaintiff for extra work under a contract, bound itself to pay the sum from the first net proceeds of ores from its mines, crushed and reduced at its mills, the debt not to be collectible until then, nor otherwise, and only to the extent of such net proceeds. No such net proceeds having been had, it was held that the plaintiff had no right of action, nor could he enforce a vendor's lien. Toombs *v.* Consolidated Poe Min. Co., 15 Nev. 444.

Where the contract is entire and indivisible and contains within its terms no means of apportionment, and nothing can be shown *aliunde* to establish an apportionment nor to show the relative or absolute values of the several conditions, no action will lie upon it to recover the consideration, if unpaid, nor upon a *quantum meruit*, until all the conditions have been performed; and if the consideration has been paid in advance, and only part of the conditions are performed, the entire consideration can be reclaimed. Yet this conclusion, in any given case, the law reaches with reluctance, and only when it is perfectly clear that by no construction or evidence can there be any apportionment or determination of values. Missouri, etc., R. Co. *v.* Fort Scott, 15 Kan. 435.

In an action on a subscription, the defense set up was, that it was agreed, before signing the paper, that the subscription should be void unless two hundred thousand dollars should be subscribed, and unless a branch office of the company should be established in New York city; and neither of these conditions had been fulfilled. This was held a good defense, if proved. Brewers' F. Ins. Co. *v.* Burger, 10 Hun (N. Y.) 56. See the title SUBSCRIPTIONS.

A contracted to pay to B a price named for a tract of land, in case he found a vein of good merchantable coal, not less than four feet in thickness, in a shaft then being sunk by him on the land. B sued on the contract, claiming that A had not found such a vein owing to his negligence. It was held that A was bound to make a reasonable effort to find such a vein, in

Condition Plainly Expressed. — If the contract in plain and unambiguous language makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties.[1]

Implied Conditions. — This condition need not be expressed in terms; it may be tacit, inherent in the very nature of the transaction and which the law supplies where the parties are silent. It is thus the legitimate result from the operation of law, the character of the contract, and the presumed intent of the parties.[2]

Performance of Incidental Acts Implied. — It is an implied condition to every contract, that the party to be bound by it will do whatever acts are necessarily incidental to the performance of the contract in accordance with a reasonable interpretation of its provisions.[3]

(2) *Precedent.* — A condition which must be performed before the agreement of the parties becomes a valid and binding contract is called a condition precedent.[4]

Future Promise on Day Which May Come Before Consideration Performed. — Where a contract consists of mutual executory promises it is often difficult to determine whether the one promise is a condition precedent to the performance of the other, or whether they are to be construed as independent of one another. The rule has been stated, that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act

view of the known depth of veins in the vicinity, and by using the ordinary methods and appliances, and that the jury was to decide what constituted a reasonable effort. Skidmore *v.* Eikenberry, 53 Iowa 621.

Where a mare insured to get with foal is sold by the owner's executor within eleven months of the date when she was served, this sale being violative of a condition that a sale by the owner within that time should forfeit the insurance, the price for the service may be recovered, although the mare be not with foal. The insurance is conditional and the condition is binding. Cummins *v.* Peed, 109 Ind. 71.

1. Dwight *v.* Germania L. Ins. Co., 103 N. Y. 347, 57 Am. Rep. 729, by Ruger, C. J. *Citing* Appleby *v.* Astor F. Ins. Co., 54 N. Y. 253; Foot *v.* Etna L. Ins. Co., 61 N. Y. 571; Graham *v.* Fireman's Ins. Co., 87 N. Y. 69, 41 Am. Rep. 349; Armour *v.* Transatlantic F. Ins. Co., 90 N. Y. 450.

2. **Conditions Implied.** — Moss *v.* Smoker, 2 La. Ann. 989.

Before an implied condition will relieve one from a written promise unconditional on its face, it must very clearly and cogently result from the nature of the contract. A risk not so improbable as not to suggest itself will be considered assumed. Moss *v.* Smoker, 2 La. Ann. 989.

In a contract to manufacture an article of known value and use, the condition is implied that the article manufactured shall be suitable for the use to which it is ordinarily put. Robson *v.* Miller, 12 S. Car. 586, 32 Am. Rep. 518. *Compare* Gerst *v.* Jones, 32 Gratt. (Va.) 518, 34 Am. Rep. 773.

3. **Incidental Acts.** — Thus a contract to construct an arch at a particular place imposes a duty on the contractor to build all wing walls and abutments necessary in that place. Denmead *v.* Coburn, 15 Md. 29.

A's promise to perform work for B "on a frame barn," no place being designated, requires B to provide a frame on which the work is to be done, and give notice to A, before he can claim performance of A's promise. Wilder *v.* Little, Wright (Ohio) 388.

A contract to quarry, burn, and deliver cement requires the promisor, at his own cost, to furnish fuel necessary to the preparation of the cement. Preston *v.* Lawrence Cement Co., 78 Hun (N. Y.) 96.

4. **Condition Precedent.** — Redman *v.* Etna Ins. Co., 49 Wis. 438. Here the court said: "A condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect. That is to say, the contract is made in form, but does not become operative as a contract until some future specified act is performed or some subsequent event occurs." See also Willington *v.* West Boylston, 4 Pick. (Mass.) 101; Hunt *v.* Livermore, 5 Pick. (Mass.) 395; Jarvis *v.* Rogers, 3 Vt. 339.

Whenever, by the terms of the agreement, the entire consideration of the demand claimed is to be performed at or previous to the performance of the demand, the performance of the consideration becomes a condition precedent. Barry *v.* Alsbury, Litt. Sel. Cas. (Ky.) 151.

Senseless Conditions. — Impossible or senseless conditions annexed to a contract are inoperative and void. The obligation of the contract remains absolute, if it is not for the doing of an illegal thing. If, however, any sense or certainty can be made of the conditions, they and the obligation shall all stand.

is to be performed, an action may be brought for the money or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent."[1]

Promise to Be Executed on a Day After Consideration Performed. — When a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., to be performed, no action can be maintained for the money, etc., before performance.[2]

Merrill *v.* Bell, 6 Smed. & M. (Miss.) 730; Stockton *v.* Turner, 7 J. J. Marsh. (Ky.) 192.

1. Sergeant Williams, in a note to Pordage *v.* Cole, 1 Saund. 320*a*. The statement of the rule is founded upon the case of Thorp *v.* Thorp, 12 Mod. 455, 1 Salk. 171, 1 Ld. Raym. 665, where Chief Justice Holt, in an elaborate opinion, discusses the distinction between independent and dependent conditions. See also Wilks *v.* Smith, 10 M. & W. 355; Northampton Gas Light Co. *v.* Parnell, 15 C. B. 630, 80 E. C. L. 630; Eastern Counties R. Co. *v.* Phillipson, 16 C. B. 2, 81 E. C. L. 2; Norwich *v.* Norfolk R. Co., 4 El. & Bl. 397, 82 E. C. L. 397; Allard *v.* Belfast, 40 Me. 369; Lord *v.* Belknap, 1 Cush. (Mass.) 279; State *v.* Winona, etc., R. Co., 21 Minn. 472; Robb *v.* Montgomery, 20 Johns. (N. Y.) 15; Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455; Edgar *v.* Boies, 11 S. & R. (Pa.) 445; Stevenson *v.* Kleppinger, 5 Watts (Pa.) 420; Lowry *v.* Mehaffy, 10 Watts (Pa.) 387; Cobbs *v.* Fountaine, 3 Rand. (Va.) 484.

Executory Promise — Part Payment to Be Made Before Performance. — In Terry *v.* Duntze, 2 H. Bl. 389, where A covenanted to build a house for B and complete it on or before a day named, in consideration of a sum of money which B covenanted to pay to A in instalments as the work progressed, the last instalment to be paid on completion, it was held that the completion of the house was not a condition precedent to the payment of the money, and that A might recover the whole sum although the building was not completed at the time named. This case was followed in Seers *v.* Fowler, 2 Johns. (N. Y.) 272, and Havens *v.* Bush, 2 Johns. (N. Y.) 387. But in Cunningham *v.* Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332, the court, by Kent, C. J., *disapproved* Terry *v.* Duntze, 2 H. Bl. 389, and overruled the cases which followed it. In the opinion of the court it is said: "The error in that case, and in the two cases in this court which followed it, consisted in holding the covenants to be independent throughout because a part of the consideration money was to be paid before the entire service was to be performed. This might have been the case if the contract in all those cases had not provided that a certain part of the consideration was to be paid on the completion of the service, and which rendered the service, *pro tanto*, a condition precedent. There is nothing unreasonable nor unusual in such an agreement. It has been the constant language of the English courts, that the dependence or independence of covenants depended on the good sense and meaning of the contract." In further criticism of the English case it was said: "Because two several sums of money were to be paid before the whole was performed, and when only a part of the service was performed, the court held the covenants independent, and as we understand the case, and as the reporter understood it, that the plaintiff might maintain his action for the entire consideration, without any averment of performance. This was contrary to the plain understanding of the parties, and was not warranted by any of the cases referred to. It was sufficient for the plaintiff to have shown the advance of the building as stipulated, to have entitled him to the instalment then to be paid; but to have entitled himself to the last instalment, he was bound to aver and show a completion of the contract."

The doctrine established by the New York case last cited was followed in McLure *v.* Rush, 9 Dana (Ky.) 64; Allen *v.* Sanders, 7 B. Mon. (Ky.) 593; Mason *v.* Chambers, 4 Litt. (Ky.) 253. And see Lord *v.* Belknap, 1 Cush. (Mass.) 279; Tompkins *v.* Elliot, 5 Wend. (N. Y.) 496; Kettle *v.* Harvey, 21 Vt. 301.

When mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. When mutual covenants go only to a part of the consideration on both sides, and when a breach may be paid for in damages, the defendant has a remedy on his covenant, and is not allowed to plead it as a condition precedent. 1 Bouv. Inst., § 701. See also Pordage *v.* Cole, 1 Saund. 320, note.

2. Thorp *v.* Thorp, 12 Mod. 460, 1 Salk. 171; Pordage *v.* Cole, 1 Saund. 320*b*; Bean *v.* Atwater, 4 Conn. 9, 10 Am. Dec. 91; Dey *v.* Dox, 9 Wend. (N. Y.) 133, 24 Am. Dec. 137; Morris *v.* Sliter, 1 Den. (N. Y.) 59; Rider *v.* Pond, 18 Barb. (N. Y.) 179.

The payment of money cannot be made to depend upon the performance of a condition by the party to whom it is to be paid, if the condition, by its terms, may not be performed until after the date at which the money is to be paid. Front St., etc., R. Co. *v.* Butler, 50 Cal. 574.

Instances of Condition Precedent. — A covenant that a deed shall be executed "when the consideration money is paid" is on a condition precedent. Passmore *v.* Moore, 1 J. J. Marsh. (Ky.) 591; Sprigg *v.* Albin, 6 J. J. Marsh. (Ky.) 161; Simpson *v.* Pease, 53 Me. 497.

Where a written contract for work to be performed entitles the contractor to payment upon filing a certain certificate with a stipulated officer, such a filing of the prescribed certificate is a condition precedent to payment. Adams *v.* New York, 4 Duer (N. Y.) 295.

When two persons agree, the one to stay an execution against the other, the latter, on his part, to forfeit a certain collateral security if he does not settle the claim under the execution,

Construction as Independent Promises Favored. — Courts are disinclined to construe the promise to do certain things within a given time in consideration of the payment of money as a condition precedent unless compelled to do so in order to carry out the express intention of the parties.[1]

Whether Mutual Promises Independent or Conditional Depends on Intent. — Whether conditions are precedent or subsequent, or are mere independent promises, is to be determined by an inquiry into the true intent of the parties as indicated by the contract. Technical words and technical rules of which the parties were probably ignorant will not outweigh the evident intent and purpose of the contracting parties.[2]

Performance of Condition Precedent Essential. — Strict performance of conditions precedent is required,[3] and the fact that the performance of the condition

by a certain day, the staying of the execution is a condition precedent. Wier *v.* Church, N. Chip. (Vt.) 95.

If one covenants that he will pay a debt if it cannot be collected of another by due process of law, it is a compliance with the condition if the covenantee exert reasonable diligence to collect. Thomas *v.* Woods, 4 Cow. (N. Y.) 173.

The obtaining of good water may be made a condition precedent to the right to compensation for digging a well. And money advanced on the contract may be recovered back if the water is not good. Keller *v.* Oberreich, 67 Wis. 282.

An obligation to pay a sum of money on a given day, "to be discharged in any good trade, to be delivered at any one of several places," charges the debtor, if he would save the condition, with the duty to give notice of the place where he will have the goods, and to have them there, on the day, duly set apart. Barrett *v.* Eller, 6 Jones L. (51 N. Car.) 550.

Where an obligation is contracted on condition that an event shall happen within a fixed time, the condition will be considered to have failed when the event has not occurred within the time. Yeatman *v.* Broadwell, 1 La. Ann. 424.

A contract provided that A should undertake to the best of his ability to remove an incumbrance from B's land, and that B should pay A for his services, etc., or convey certain land to him "when and not until the undertaking of the said A * * * shall have been duly performed." This contract was held to mean that A was to remove the incumbrance, and not merely to use his best ability to remove it; and that nothing was due A until the incumbrance had been removed by him. Badger *v.* Gallaher, 113 Ill. 662.

Instances Held Not to Be Conditions Precedent. — In contracts for manufactured goods a condition that the materials shall come from a particular place is not to be considered precedent to the right of recovering pay for the same, unless such was the obvious intention of the parties. Mattison *v.* Wescott, 13 Vt. 258.

A written promise to pay a certain sum "in consideration of [the promisee's] assuming debts of W." is an absolute promise. The assumption called for is not a condition precedent to the liability to perform the promise. Overton *v.* Curd, 8 Mo. 420.

A provision that all claims for damages are to be presented at a particular place for settlement is not a condition precedent to liability. Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19.

Monthly payments stipulated for in an advertising contract are not a condition precedent to a recovery for refusing to publish all advertisements undertaken under the other provisions of the contract. Clegg *v.* New York Newspaper Union, 72 Hun (N. Y.) 395.

That a stipulation to refer to arbitration controversies arising out of the contract does not make arbitration a condition precedent, see Oakwood Retreat Assoc. *v.* Rathborne, 65 Wis. 177, and cases cited.

1. Construction of Provisions as Conditions Precedent Not Favored. — Front St., etc., R. Co. *v.* Butler, 50 Cal. 574. See Clinton *v.* Hope Ins. Co., 45 N. Y. 454. See also the title INTERPRETATION AND CONSTRUCTION.

Where A contracted as follows for the sale of a leasehold interest in land: "I hereby agree to transfer to B one half of my interest, etc., for $800, in case he pays the money within three months from this date; he now pays $500 of that sum," it was held that time was not of the essence of the contract, it being apparent that the $500 was paid not for an option to buy, but as part of the price of a purchase already made. Pedrick *v.* Post, 85 Ind. 255.

2. Intent Governs. — Barry *v.* Alsbury, Litt. Sel. Cas. (Ky.) 151; Johnson *v.* Reed, 9 Mass. 83, 6 Am. Dec. 36; Tileston *v.* Newell, 13 Mass. 406; Gardiner *v.* Corson, 15 Mass. 500; Barruso *v.* Madan, 2 Johns. (N. Y.) 145; Finlay *v.* King, 3 Pet. (U. S.) 374.

3. Performance. — Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 317; Turner *v.* Baker, 30 Ark. 186; Barney *v.* Giles, 120 Ill. 154; Bruce *v.* Snow, 20 N. H. 484; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447.

As to pleading performance, see the title CONDITIONS PRECEDENT, 4 ENCYC. PL. AND PR. 626.

The defendant, by a written contract, agreed to convey to the plaintiff's intestate certain real estate, upon payment of certain designated notes given as the consideration therefor. In an action upon the agreement, it was held that the payment of the notes as they matured was a condition precedent, and that the death of the plaintiff's intestate did not operate to extend the time of payment one year from the date of the death. Simpson *v.* Pease, 53 Me. 497. See also Taylor *v.* Bullen, 6 Cow. (N. Y.) 624.

has been rendered impossible for any cause except the act of the obligee or the act of God [1] will not release the party bound thereby from his obligation to perform it before suit.

Effect of Failure to Perform. — Failure to perform a condition precedent is a breach of the contract. It involves the one so failing in all the consequences of a breach, deprives him of his remedies under the contract, releases the other party from liability to perform, and affords the latter a right of action against him.[2]

(3) *Concurrent or Dependent.* — Where the conditions of a contract are such that the parties must perform their promises at the same time, they are known as conditions concurrent. Neither party is bound to do the first act, but each must be able and ready to perform his own, and the one who is ready and able to perform has a right of action against the one who is not.[3]

Effect of One Party's Refusal to Perform. — If the obligations of the parties are mutual and dependent, then the refusal of one to perform without sufficient excuse is equivalent to an abandonment of the contract and releases the other party from any duty to further recognize its obligations.[4]

Dependent Conditions. — Conditions of this sort are known also as dependent conditions.[5]

Chancery cannot relieve against the breach of a condition precedent. Wells *v.* Smith, 2 Edw. Ch. (N. Y.) 78. See also Chipman *v.* Thompson, Walk. (Mich.) 405.

Where a like amount of money is to be paid when a certain residuary interest in an estate shall come to the hands of the payee, so that the amount thereof can be ascertained, the payment is not due until that share has been reduced to possession and converted into money or its equivalent. A previous appraisal or valuation of this interest will not satisfy the condition. Rogers *v.* Law, 1 Black (U. S.) 253.

The plaintiff agreed to ship the peaches grown by him to the defendant during the peach season of 1868, to be sold by the latter on commission at New York, and the defendant agreed to obtain an average price per crate or box of seven dollars. It was held that the shipment of peaches by the plaintiff during the whole of the peach season that year was a condition precedent to the obtaining of an average price of seven dollars per crate or box. Anderson *v.* West, 38 N. Y. Super. Ct. 441.

1. Performance of Condition Impossible. — "A performance of the condition precedent having been voluntarily assumed by the plaintiff could only be dispensed with or prevented by the opposite party, and would not be excused, although it had become impossible without any default on the part of the plaintiff." Oakley *v.* Morton, 11 N. Y. 30, 62 Am. Dec. 49. *Citing* Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589; Moakley *v.* Riggs, 19 Johns. (N. Y.) 69, 10 Am. Dec. 196. See also Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 317; Nelson *v.* Odiorne, 45 N. Y. 493; Miller *v.* Phillips, 31 Pa. St. 218; Lacy *v.* Hall, 37 Pa. St. 360; and the titles ACT OF GOD, vol. 1, p. 584; IMPOSSIBLE CONTRACTS.

2. Behn *v.* Burness, 3 B. & S. 751, 113 E. C. L. 751, 9 Jur. N. S. 620, 8 L. T. 207, 32 L. J. Q. B. 204, 6 Eng. Rul. Cas. 492. See also *infra*, this title, *Methods of Discharge — Breach.*

3. Concurrent Conditions. —Hammond *v.* Gilmore, 14 Conn. 479; Irwin *v.* Lee, 34 Ind. 319. See Dunham *v.* Pettee, 8 N. Y. 508.

4. Biggers *v.* Pace, 5 Ga. 171; Fletcher *v.* Cole, 23 Vt. 114.

5. Dependent Promises. — See Lester *v.* Jewett, 11 N. Y. 453; Dunham *v.* Pettee, 8 N. Y. 508; Powell *v.* Dayton, etc., R. Co., 12 Oregon 488.

In Campbell *v.* Gittings, 19 Ohio 355, covenants to be performed on the same day are termed "dependent covenants, in which, according to a clear legal principle, performance cannot be exacted from either party as a condition precedent. Both, it is understood, must perform at the same time, neither being under any obligation to trust the other." See also McCoy *v.* Bixbee, 6 Ohio 310, 27 Am. Dec. 258; Dustin *v.* Newcomer, 8 Ohio 50.

Covenants; Whether Dependent or Independent. — When the time has expired for paying the last instalment under a contract for land, the obligations to pay the money and to convey are mutual and dependent covenants, to be executed simultaneously. Runkle *v.* Johnson, 30 Ill. 328, 83 Am. Dec. 191.

Then the party who insists that the other shall perform must show a performance on his own part. If the vendee desires to rescind the contract, it will be enough to show that the other party cannot fulfil; and as a tender of the purchase money would be unavailing, the law does not require it. Runkle *v.* Johnson, 30 Ill. 328, 83 Am. Dec. 191.

Where a contract consists of a promise on the one hand to execute and deliver a deed, and on the other to pay and secure the stipulated price, these acts to occur at the same time, the covenant by one to deliver the deed, and by the other to pay and secure the purchase price, are dependent covenants. The words "provided and upon condition" do not render them other than dependent. Frey *v.* Johnson, 22 How. Pr. (N. Y. Supreme Ct.) 316.

The distinction is stated in Williams *v.* Healey, 3 Den. (N. Y.) 366, thus: "It is well settled that where the covenants between the parties are mutual and both parties are to perform at the same time, the covenants operate as mutual conditions, and neither party can maintain an action until he has performed or

Construction of Stipulations as Dependent Favored. — Unless a contrary intention is manifested by the terms of a contract, stipulations in the instrument will be construed as dependent.[1]

(4) *Subsequent.* — A condition subsequent is defined to be one which enlarges or defeats an estate or right already created.[2] The use of the term is confined almost altogether to estates in lands.

Where Working Forfeiture Not Favored in Equity. — Whether incident to an estate in lands or to a contractual right, however, if its effect is to work a forfeiture the general rule is that equity will not enforce it, but will leave the parties to their rights at law, for equity will not enforce a forfeiture. Neither will equity restrain the parties from acting under their agreement until the right to terminate the agreement has been established at law.[3]

Provision that Contractual Relations Cease on Doing Some Act. — Where the contract provides that upon the doing of some act or the happening of some event the contractual relations shall cease, this provision creates a condition subsequent.[4]

tendered a performance of his part of the agreement. But when it appears from the terms of the agreement, or the nature of the case, that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who has to do the first act may be sued although nothing has been done or offered to be done by the other party." See also Gazley *v.* Price, 16 Johns. (N. Y.) 267.

Where A covenants to purchase certain property from B within five years, B upon payment to make a good and sufficient deed, the covenants are dependent. Powell *v.* Dayton, etc., R. Co., 14 Oregon 356.

The one who sues must show performance or a tender of performance on his part, and a demand, or his action will fail. Neis *v.* Yocum, 9 Sawy. (U. S.) 24; Crabtree *v.* Levings, 53 Ill. 526; Irwin *v.* Lee, 34 Ind. 319; Rappanier *v.* Bannon, (Md. 1887) 7 Cent. Rep. 420; Dunham *v.* Pettee, 8 N. Y. 508.

" It is now settled that a mere readiness to perform is not sufficient, but the plaintiff must aver a tender of performance on his part." Williams *v.* Healey, 3 Den. (N. Y.) 367. *Citing* Johnson *v.* Wygant, 11 Wend. (N. Y.) 48; Parker *v.* Parmele, 20 Johns. (N. Y.) 130, 11 Am. Dec. 253.

1. Hamilton *v.* Thrall, 7 Neb. 210; Davis *v.* Jeffris, 5 S. Dak. 352.

And the order of the covenants in the instrument is not material. Hamilton *v.* Thrall, 7 Neb. 210.

2. Bouvier. See the title CONDITIONS, vol. 6, p. 499.

3. Livingston *v.* Tompkins, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598.

Enforcement in Equity — Forfeiture Indirectly Involved. — It has been held, however, that the enforcement of a condition subsequent may involve a forfeiture indirectly and yet be the proper subject of equitable relief. Thus in McClellan *v.* Coffin, 93 Ind. 460, the court, by Elliott, J., said: " It is no doubt true that forfeitures are not favored in equity. Judge Story says: 'It is a universal rule in equity never to enforce either a penalty or a forfeiture.' Pomeroy is equally explicit; he says: 'It is a well settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies, if any, even though no equitable relief would be given to the defaulting party against the forfeiture.' It must follow that if the relief here sought is strictly that of enforcing a forfeiture it cannot be granted. We think, however, that the relief prayed is not strictly the enforcement of a forfeiture, but is rather the enforcement of a condition which is neither inequitable nor illegal. The cancellation [of contracts and mortgage] is simply the removal of a cloud from appellant's title, and equity will interfere for this purpose whenever the proper case is made, even though the forfeiture of some interest may indirectly result." The court *cites* Leach *v.* Leach, 4 Ind. 628, 58 Am. Dec. 642; Jenkins *v.* Jenkins, 3 T. B. Mon. (Ky.) 327; Scott *v.* Scott, 3 B. Mon. (Ky.) 2; Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75; Devereaux *v.* Cooper, 11 Vt. 103.

Where a party who accepts a deed executes at the same time a bond to the grantor for the performance of an act, to be in fact part of the consideration, his failure to perform the obligation is a breach of the condition subsequent upon which he holds, and a forfeiture of the estate, and forms a proper subject for the interference of a court of chancery. Leach *v.* Leach, 4 Ind. 628, 58 Am. Dec. 642.

4. Cunningham *v.* Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332.

" Parties may agree in advance under what circumstances and upon what contingency the contract shall terminate, or either party be absolved from its obligations, and if the circumstances occur, or the contingency happen, even by the voluntary act of the party claiming the benefit of the stipulation, it will be available to him in the absence of any fraud or *mala fides*." Delaware, etc., R. Co. *v.* Bowns, 58 N. Y. 580. *Citing* Beswick *v.* Swindells, 3 Ad. & El. 868, 30 E. C. L. 249; *Ex p.* Miller, 2 Hill (N. Y.) 418; Lovatt *v.* Hamilton, 5 M. & W. 639. See also Geipel *v.* Smith, L. R. 7 Q. B. 404.

Instances. — A water-works contract with a city contained the condition that the payment of said sum should be "dependent upon the said second party supplying wholesome water during all the term [of the contract]; water to be taken from wells and springs

Condition of Forfeiture Must Be Clear. — It must be apparent that such was the intent of the parties, for in case of doubt the courts will not overthrow a contract or defeat an estate. If what seems to be a condition subsequent is not clearly expressed as a condition and is not a part of the essence of the contract, it will not be allowed to defeat an estate or prevent it from vesting.[1]

Construed as Guaranty Rather than as Condition. — If the contract contains a provision that is susceptible of interpretation as a guaranty rather than as a condition subsequent, this interpretation will prevail. And where such a guaranty is given, the guarantor need not wait until the term of his guaranty has elapsed before he is entitled to claim his compensation for what he has done.[2]

(5) *Waiver of Conditions.* — Rights created by conditional contracts may be waived by acts or speech on the part of the obligee, which indicate an evident intention to release the obligor from the performance of the condition.[3]

sufficient to supply all the inhabitants of said city." It further required that the contract be complied with and perfected in every respect before being accepted or before liability for rent or water used should attach. These were held to be conditions subsequent protecting the city from payment in the event of an inadequate supply. Adrian, etc., Water Works *v.* Adrian, 64 Mich. 584.

The payee of a note promised to release the payment of the principal of it, if, until the payee's death, the maker would pay in advance annually interest at a certain rate above the legal rate. This was not done. It was held that the payee's executor could enforce payment of the principal. Harmon *v.* Adams, 120 U. S. 363.

The plaintiff sold the defendant a horse upon condition subsequent that he could return the horse within a specified time if not satisfactory. During the period the defendant defeated the condition by injuring the horse. It was held that he was liable as upon breach of the condition, but that the plaintiff might sue in assumpsit without setting out the conditional contract. Ray *v.* Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec. 187; Hopk. Sel. Cas. Contr. 577; Moss *v.* Sweet, 16 Q. B. 493, 71 E. C. L. 493, 3 Eng. L. & Eq. 311.

1. Condition Subsequent — Must Be Clear. — Osgood *v.* Abbott, 58 Me. 74; Merrifield *v.* Cobleigh, 4 Cush. (Mass.) 178; Hadley *v.* Hadley Mfg. Co., 4 Gray (Mass.) 140; Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278; Winton *v.* Fort, 5 Jones Eq. (N. Car.) 251; Lawe *v.* Hyde, 39 Wis. 345; Wier *v.* Simmons, 55 Wis. 643.

Where it is made one of the considerations of an agreement to convey land, that the purchaser shall reside thereon, his residing thereon two years, and then leaving, is a sufficient performance on his part. Shaw *v.* Livermore, 2 Greene (Iowa) 338.

Conditions of forfeiture, if valid at all, are limited by the strict provisions of the contract, and cannot be enlarged under any rule of law. Ortman *v.* Monroe First Nat. Bank, 49 Mich. 56.

2. Gilliam *v.* Brown, 116 Cal. 454. See the titles GUARANTY; WARRANTY.

3. Waiver of Condition. — See Kenyon *v.* Knights Templar, etc., 122 N. Y. 247. See also the title WAIVER.

A party who waives the benefit of a condition in the contract excuses the other party from showing a compliance therewith. Attix *v.* Pelan, 5 Iowa 336.

If the promisee voluntarily prevents the performance of the condition or dispenses with it he can take no advantage of the nonperformance.

United States. — Williams *v.* U. S. Bank, 2 Pet. (U. S.) 102.

Connecticut. — Miller *v.* Ward, 2 Conn. 494.

Kansas. — Tracy *v.* Gunn, 29 Kan. 512; Dill *v.* Pope, 29 Kan. 289.

Kentucky. — Marshall *v.* Craig, 1 Bibb (Ky.) 380, 4 Am. Dec. 647; Majors *v.* Hickman, 2 Bibb (Ky.) 218; Carrell *v.* Collins, 2 Bibb (Ky.) 431; Morford *v.* Ambrose, 3 J. J. Marsh. (Ky.) 690; Jones *v.* Walker, 13 B. Mon. (Ky.) 163, 56 Am. Dec. 557.

Massachusetts. — Webster *v.* Coffin, 14 Mass. 196; Seymour *v.* Bennet, 14 Mass. 268; Cooper *v.* Mowry, 16 Mass. 5; Clark *v.* Moody, 17 Mass. 149; Flagg *v.* Dryden, 7 Pick. (Mass.) 52.

Minnesota. — Dodge *v.* Rogers, 9 Minn. 223; Thompson *v.* Libby, 35 Minn. 443.

Missouri. — Clendennen *v.* Paulsel, 3 Mo. 230, 25 Am. Dec. 435.

North Carolina. — Cape Fear, etc., Nav. Co. *v.* Wilcox, 7 Jones L. (52 N. Car.) 481, 78 Am. Dec. 260.

Pennsylvania. — Dickey *v.* M'Cullough, 2 W. & S. (Pa.) 88.

Vermont. — Camp *v.* Barker, 21 Vt. 469.

Wisconsin. — Locke *v.* Williamson, 40 Wis. 377; Keller *v.* Oberreich, 67 Wis. 282.

Although a party to an agreement may insist on the performance of a condition that it shall be reduced to writing, he may waive the condition by recognizing his liability on the contract. Stover *v.* Flack, 30 N. Y. 64.

It is a waiver of the condition in a contract that an overseer shall not carry dogs and horses upon the plantation, if the owner agrees to receive compensation for the horse, or, upon finding the dogs upon the place, merely requests the overseer to remove them, without immediately discharging him. Wright *v.* Morris, 15 Ark. 444.

Proof of Waiver Must Be Clear. — "To constitute a waiver in such a case where it is not expressly made, requires some positive act from which it may reasonably and fairly be inferred." Roberts *v.* Opdyke, 40 N. Y. 266, *citing* Pike *v.* Butler, 4 N. Y. 360. And see Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

Accepting the performance of a condition precedent, after the stipulated time of performance, is only *prima facie* evidence that the parties intended to continue the contract in

Waiver of Condition in Avoidance. — Where the acts of the parties show that the condition upon which an agreement was to become void has been waived, the contract will be enforced as though it contained no such condition.[1]

Character of Acts Constituting Waiver. — If acts are relied upon to establish the waiver of a condition precedent or to excuse the nonperformance of the condition, they must be the proximate cause of the failure to perform, and must be of such a character as to render performance impossible or induce the belief that it was waived.[2]

d. INDEPENDENT PROMISES. — These are the counterpart of dependent conditions. If the obligations created by a contract consist of promises by the parties which are mutually dependent, so that the performance of one is made a condition to the fulfilment of the other, there exists a contract upon conditions concurrent. In such a contract the failure of one party discharges the other.[3] If the promises are independent and unconditional, then neither party is released by the default of the other.[4]

force, on its original terms. It may be rebutted. Porter *v.* Stewart, 1 Vt. 44.

Mere Silence Not Sufficient. — Mere silence on the part of one party, whose obligation depends upon the performance of a condition precedent by the other party, is not a waiver of the condition unless where such silence is inconsistent with any other explanation. Burlington, etc., R. Co. *v.* Boestler, 15 Iowa 555. And see Gray *v.* Blanchard, 8 Pick. (Mass.) 284; Jackson *v.* Crysler, 1 Johns. Cas. (N. Y.) 125.

The forfeiture of a condition is not waived by offering to accept payment if made at once. Hutcheson *v.* McNutt, 1 Ohio 21.

1. Bach *v.* Slidell, 1 La. Ann. 375.

2. Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

A servant whose employer prevents him from fulfilling his contract, and wantonly and without sufficient cause discharges him before the expiration of the term, is entitled to the wages for the whole term. Posey *v.* Garth, 7 Mo. 94, 37 Am. Dec. 183.

But if there is any fault or misconduct on his part towards his employer sufficient to warrant the discharge, and in consequence thereof he is driven from the service of the person by whom he is hired, he is not entitled to any wages. Posey *v.* Garth, 7 Mo. 94, 37 Am. Dec. 183.

3. See *supra*, this section, *Conditions — Concurrent or Dependent.*

4. Independent, Dependent, and Concurrent Covenants Distinguished. — In the note to the case of Pordage *v.* Cole, 1 Saund. 320*a*, Sergeant Williams says: "Where there are several covenants, promises, or agreements which are independent of each other, one party may bring an action against the other for a breach of his covenants, etc., without averring a performance of the covenants, etc., on his, the plaintiff's, part, and it is no excuse for the defendant to allege in his plea a breach of the covenants, etc., on the part of the plaintiff. * * * But where the covenants, etc., are dependent it is necessary for the plaintiff to aver and prove a performance of the covenants, etc., on his part, to entitle himself to an action for the breach of the covenants on the part of the defendant."

In the case of Kingston *v.* Preston, *quoted* by counsel in Jones *v.* Barkley, 2 Doug. 689, Lord Mansfield is reported to have expressed himself to the following effect: "There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."

Illustrations. — A promise to pay a sum of money "in consideration of [the promisee's] assuming debts of W." is an absolute promise. The assumption of such debts is not a condition precedent to the promisor's liability. Overton *v.* Curd, 8 Mo. 420.

Where a contract provides that one of the parties shall deliver to the other a lot of railroad ties at a certain place, on board of cars to be furnished by the latter, the duty to perform the conditions of the agreement is mutual, and the failure of one party to fulfil its requirements will not discharge the other from the performance of his obligation. Council Bluffs Iron Works *v.* Cuppey, 41 Iowa 104.

Where an agreement provides for performance on A's part for a definite period, in consideration of performance on B's part for an indefinite period, which might terminate before A could possibly perform his part of the contract, the undertakings are independent; but if, after A's period has expired, he sues B thereon, the case is the same as though they were dependent. Gillum *v.* Dennis, 4 Ind. 417. See also Irwin *v.* Lee, 34 Ind. 321; Petty *v.* Church of Christ, 95 Ind. 280. And *supra*, this section, *Conditions — Precedent.*

c. ALTERNATIVE PROMISES — OPTIONS. — Where the promise is in the alternative, as to do a thing in one way or another, or on one day or another, the right of election is with the promisor, in the absence of an express provision in the agreement which controls.[1]

If the Option Is Not Exercised by the Time Fixed in the contract, the right of election passes to the promisee.[2]

Promise to Pay Money or Do Other Act — When Becomes Absolute. — If the alternative is the payment in money or in some other commodity on a given day, it becomes an absolute promise to pay money if the other commodity is not paid on the day.[3]

A Promise to Make Payment in Notes becomes a promise to pay in money when the promisor has failed or refused to perform his original undertaking, and an action will lie at once for the recovery of money.[4]

Where the Right of Election Is in the Promisee he is bound to notify the promisor of his choice before he is entitled to any right of action.[5]

Promise to Support — Place of Performance. — With reference to an engagement to support it has been held that, in the absence of any designation of a place where the support is to be furnished, the promisee may name the place.[6]

V. FORMATION AND EXECUTION. — Contractual relations are instituted in two ways, by the express act of the parties and by operation of law.

1. By Act of the Parties. — The parties may make their contract either by express agreement, ordinarily in the form of offer and acceptance, or by such conduct as implies a meeting of the minds with intent to contract, and so creates an implied contract.

a. EXPRESS AGREEMENT — OFFER AND ACCEPTANCE. — All express executory contracts resolve themselves, upon analysis, into an offer by one of the parties, and an acceptance of that offer by the other. The act of acceptance closes the contract, and ordinarily nothing further is required to make the obligations effective. No especial formalities are required. Offer and acceptance may be made by letter, or by telegraph, or by word of mouth. If they constitute a meeting of minds and create a mutual obligation, they form as valid a contract as if they were couched in the most formal phraseology.[7]

1. Disborough *v.* Neilson, 3 Johns. Cas. (N. Y.) 81; Smith *v.* Sanborn, 11 Johns. (N. Y.) 59; Choice *v.* Moseley, 1 Bailey L. (S. Car.) 136, 19 Am. Dec. 661; Mayer *v.* Dwinell, 29 Vt. 298; Dessert *v.* Scott, 58 Wis. 390.

Where the contract is to give possession "on or before" December 25, a demand on December 17 is too early. Perry *v.* Watts, 67 Ga. 602.

Where a gas and oil lease provides that the lessee has "the option to drill the well or not, or pay said rental or not, as he may elect," this provision gives him the option to do whichever he pleases, but does not relieve him from the liability to do one or the other. McMillan *v.* Philadelphia Co., 159 Pa. St. 142.

2. Norris *v.* Harris, 15 Cal. 226.

3. **Promise in Alternative to Pay Money.** — Nesbitt *v.* Pearson, 33 Ala. 668; Townsend *v.* Wells, 3 Day (Conn.) 327; Marshall *v.* Ferguson, 23 Cal. 70; Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 377; Plummer *v.* Keaton, 9 Yerg. (Tenn.) 27; Fleming *v.* Nall, 1 Tex. 246; Chevallier *v.* Buford, 1 Tex. 503; Baker *v.* Todd, 6 Tex. 273, 55 Am. Dec. 775; Dumas *v.* Hardwick, 19 Tex. 238; Smith *v.* Falwell, 21 Tex. 466; Short *v.* Abernathy, 42 Tex. 94; Peck *v.* Hubbard, 11 Vt. 612.

4. Scearce *v.* Gall, 82 Ind. 256.

5. Center *v.* Center, 38 N. H. 318.

6. Norton *v.* Webb, 36 Me. 270, 58 Am. Dec. 745. And see White *v.* Perley, 15 Me. 470.

A Contract to Pay a Debt by Furnishing Board or some other commodity, on the other hand, requires the obligor to furnish the board or other commodity, and gives him no option to make the payment in money. Evans *v.* Norris, 6 Mich. 369; Hawkins *v.* Clermont, 15 Mich. 513; Roberts *v.* Wilkinson, 34 Mich. 129; Mason *v.* Warner, 43 Mich. 443. Nor does it require him to furnish board elsewhere than at the usual place, nor to call upon the obligee and demand that boarders be sent. Evans *v.* Norris, 6 Mich. 369. And see Williams *v.* Jackson, 31 Mich. 485.

7. **Express Agreement.** — See Thruston *v.* Thornton, 1 Cush. (Mass.) 89.

Instances of Contract Arising Out of Accepted Offer. — Letters between the parties may constitute the entire contract. Thames L. & T. Co. *v.* Beville, 100 Ind. 309.

A wrote a letter to B proposing that as part of a contract B should agree to furnish fifteen thousand dollars in stock, and requesting him to signify his acceptance of the terms by telegraphing back: "Proposition as to fifteen thousand stock accepted." B telegraphed: "I will provide for the fifteen thousand stock," intending the dispatch to be regarded as an acceptance. It was held that a refusal to fur-

Unaccepted Offer. — The offer, in whatever form it is made, whether as a simple proposal by letter or by telegraph or as a more formal contract, does not bind the one who makes it until the one to whom it is made accepts it; for an unaccepted offer is not a contract,[1] nor is a promise binding upon its maker

nish the stock rendered him liable. Alford *v.* Wilson, 20 Fed. Rep. 96.

Telegrams communicating a proposal and acceptance of the same, when acted on, form a contract, governing the acts of the parties under the stipulations of the telegrams. Duble *v.* Batts, 38 Tex. 312; Kleinhans *v.* Jones, 37 U. S. App. 193.

The defendant, the proprietor of a theatre, telegraphed to the plaintiff, who was a playwright: "What are your terms for Fernande [the play]? Can I produce it May 7th?" The plaintiff answered: "Twenty dollars per night. You can announce it for May 7th. If you conclude, will send scene plot to-night. Answer." The defendant replied: "Agreed to terms. Piece announced for May 7th. Send manuscript and plot immediately." The plaintiff sent the manuscript and plot, but the defendant did not exhibit the piece. It was held that these messages established a contract between the parties for the exhibition of the play on May 7th, and that the plaintiff was entitled to recover the price named for one night, and no more. Schonberg *v.* Cheney, 6 Thomp. & C. (N. Y.) 200, 3 Hun (N. Y.) 677.

A contract made by telegraphic dispatches was construed and held sufficiently free from ambiguities so that parol evidence to alter or modify the meaning was inadmissible, in Wells *v.* Milwaukee, etc., R. Co., 30 Wis. 605.

A long correspondence between the defendant and the plaintiffs amounted to this, in substance: That the plaintiffs proposed to take a thousand dollars, one-half payable in twenty days, and one-half in sixty days, with interest at one and one-half per cent. per month, for an execution in their favor against a third person, the *fi. fa.* to remain the property and in possession of the plaintiffs until paid for, then to be transferred without recourse. This offer the defendant accepted, but failed to comply with his undertaking thereby assumed. It was held that an action was maintainable on the correspondence. Kimbell *v.* Moreland, 55 Ga. 164.

Upon notification that he had been appointed to teach a designated school, the teacher replied, "Yes, I guess I will take the school." It was held that although this reply contained a request that the school commence at a given date which was subsequently changed to a later date, this constituted an acceptance of the appointment and constituted a contract. School Directors *v.* Newman, 47 Ill. App. 364.

1. When Offer Unaccepted. — See *infra*, this title, subdivision *Quotation of Prices — Ordering Goods;* Ritenour *v.* Mathews, 34 Ind. 279; Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 492, 3 Am. St. Rep. 674; Forster *v.* Ulman, 64 Md. 523; Lincoln *v.* Gay, 164 Mass. 537, 49 Am. St. Rep. 480; Seaton *v.* Pere Marquette Boom Co., 84 Mich. 178; Coquard *v.* School Dist., 46 Mo. App. 6; Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240; Marschall *v.* Eisen Vineyard Co., 7 Misc. Rep. (N. Y. C. Pl.) 674; Emerson *v.* Graff, 29 Pa. St. 358.

A Subscription Paper, by which the signers bind themselves to pay for the shares opposite their names, must be accepted before it becomes a binding contract. Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146.

A stipulation in a subscription paper that the trustees of the fund subscribed should accept the trust in writing is a condition precedent to their right to enforce such subscription. Wiswell *v.* Bresnahan, 84 Me. 397,

See the title SUBSCRIPTIONS.

A Entered upon His Books This Memorandum: "Sold this day to B a bill of lumber, to complete a house for himself, at the following prices." The memorandum indicated different kinds of lumber, with their prices, but no quantity of any one kind. B signed the memorandum, and before leaving A's place of business paid him five hundred dollars. Afterwards B took lumber from A to a small amount, but, concluding not to build, brought suit to recover the balance of his deposit. It was held that the memorandum was a mere offer, not binding on either party before notice of acceptance, and that B's paying the money in advance, without such acceptance, did not alter the case. Smith *v.* Weaver, 90 Ill. 392.

Guaranty. — A proposed to B that he should guarantee the payment of lumber to be sold to C, and B replied that the same might be charged to him. A then sold and delivered the lumber, charging it to C, and in default of payment sued B as guarantor. It was held that B's contract, if any, was as principal debtor and not as guarantor, and that there had been no such acceptance by A of B's proposal as to form a binding contract between them. Smith *v.* Wetherell, 4 Ill. App. 655. See the title GUARANTY.

One Receiving an Offer by Mail from a distance neglected to answer it. He determined to accept the offer, and left home to transact business in various places and to visit the maker of the offer, at whose place he arrived a month later. It was held that there was no acceptance such as would bind the writer of the proposition. Trounstine *v.* Sellers, 35 Kan. 447.

Acceptance Not in Terms of Offer — Sale of Land. — A, in California, offered certain land at a certain price to B, in Iowa. The latter answered that he accepted, that the money was subject to A's order in bank in Iowa, and asked when he could expect the deed. A made no reply. On a suit by B against A for specific performance, it was held that there was no sale. Sawyer *v.* Brossart, 67 Iowa 678, 56 Am. Rep. 371.

Notice of Refusal to Accept. — Where there is no evidence that an offer has been accepted notice of refusal to accept is not necessary; and whether there has been an acceptance or not is a question of fact for the jury. Corning *v.* Colt, 5 Wend. (N. Y.) 254.

An Instrument Which A Alone Signs, and in which he agrees to sell standing timber to B, and declares that he will make a contract

unless the promisee has assented to it.[1]

with B giving him the right to enter on the land and cut and remove the timber upon the payment of money by B, is not a contract, but merely an offer to make one. McDonald *v.* Bewick, 51 Mich. 79.

Employment — Sale of Land. — In McDonald *v.* Bœing, 43 Mich. 394, 38 Am. Rep. 199, the controversy was over the question of employment. The plaintiff wrote the defendant inquiring if certain lands of his were for sale, and, if so, requesting terms. To this the defendant replied that they were for sale at a price named. On receipt of this letter the plaintiff telegraphed, requesting a refusal of the land for twenty days, so that he could buy or make a sale, probably the latter. To this telegram the following reply was sent: "I do not want to give a refusal of any of my lands, but you may go and sell it to good parties, and if you do I will pay you the usual commissions. Please reply." To this letter no reply was ever made, but the plaintiff interested himself in having a man who was looking for land examine the lands in question and negotiate with the defendant for the purchase of them. This resulted in a sale by the defendant personally for a sum less than the amount originally named between the parties. No communication passed between the plaintiff and the defendant after the date of the letter above quoted before the sale was perfected. The court held that as the plaintiff had never notified the defendant of his acceptance of the terms contained in the letter, the defendant had a right to proceed to sell the land himself without incurring any liability in commissions to the plaintiff. See also Fraser *v.* Wyckoff, 63 N. Y. 445; Darrow *v.* Harlow, 21 Wis. 302, 94 Am. Dec. 541. See the titles AGENCY, vol. 1, p. 930; REAL ESTATE BROKERS.

The Party upon Whom a Condition Imposes a Burden must expressly or impliedly accept before the contract completely binds both parties. Accordingly it was held in Cass *v.* Pittsburg, etc., R. Co., 80 Pa. St. 31, that evidence was admissible that an agent of the company agreed to hold the subscription paper as an escrow, and that a third person, without the consent of the agent or subscriber, delivered it to the company. See the titles ESCROW; SUBSCRIPTIONS.

Reservation of Right to Reject Application. — An application for an allotment of space in an exhibition building, accompanied by the payment of the stipulated entrance fee, the institute reserving the right to reject the application, cannot constitute a contract to award the desired space. Demuth *v.* American Institute, 75 N. Y. 502.

Hotel Register — Notice as to Responsibility for Loss of Valuables. — A hotel register contained at the head of each page a printed notice stating that valuables must be placed in the safe or the proprietors would not be responsible for loss. It was held that no contract could be implied as against the persons who signed their names in the register, without proof that their attention was called to it and that they signed their names with intent to be bound by it. Ramaley *v.* Leland, 6 Robt. (N. Y.) 358.

One Party in a Cause Filed a Paper Offering to Be Bound by Certain Terms if the verdict should be in his favor. This offer the court held not to be binding on the maker unless accepted by the other party. Bower *v.* Blessing, 8 S. & R. (Pa.) 243.

Party-wall Contract. — The plaintiff and the defendant owned the east and the west half of a lot, respectively. The defendant wrote to the plaintiff: "If you will buy my lot to build on right away, you need not pay anything on it, and I will lend you what money I have, and more if I could get it. * * * Or you can build a party wall, one-half on my lot, sufficient thickness for a six-story building in time. * * * I will bind myself and assigns to pay half the cost at the time a building is erected on my lot." The court held that the plaintiff must show an acceptance of the offer before he could bind the defendant. Graff *v.* Buchanan, 46 Minn. 254. See the title PARTY WALLS.

A Docket Entry, the "defendants offer A. as bail for stay of execution for six months," signed by A., will not bind A., unless the plaintiff accepts it, and a mere delay of six months does not render him liable. Bieber *v.* Beck, 6 Pa. St. 198.

Order for Goods — Delivery. — An order to give to A. "the goods which he will select, not exceeding over $550, on my account," does not become a contract until assent has been given for delivery of the goods. Upon delivery it renders the drawer liable as principal, and not as guarantor. Ueberroth *v.* Riegel, 71 Pa. St. 280.

A Resolution by a Corporation appointing one to be its superintendent is not *prima facie* a contract. It may be modified or withdrawn before acceptance. Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 85.

1. Promise Not Assented to. — See *supra*, this title, subd. *The Elements of a Contract — Assent.*

United States. — Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225.

Alabama. — Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471.

Illinois. — McKinley *v.* Watkins, 13 Ill. 140; Esmay *v.* Gorton, 18 Ill. 483.

Louisiana. — Holtzman *v.* Millaudon, 18 La. Ann. 29.

Massachusetts. — Baird *v.* Williams, 19 Pick. (Mass.) 381.

Missouri. — Brown *v.* Rice, 29 Mo. 322.

New York. — Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Tuttle *v.* Love, 7 Johns. (N. Y.) 470; Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305.

Pennsylvania. — Shupe *v.* Galbraith 32 Pa. St. 10.

Illustrations. — A mere offer in the words, "You may have a certain piece of land if you can and will pay for it," does not amount to a contract, for there is no mutuality. Chambliss *v.* Smith, 30 Ala. 366.

Upon completing a house the builder offered to make a deduction if the mortar did not harden. It was held that the builder was not bound if the house-owner did not accede to the proposition. Demoss *v.* Noble, 6 Iowa 530. See the title WORKING CONTRACTS.

Withdrawal of Offer. — It is deemed to continue in force until it has been answered, although it may be withdrawn at any time before it has been accepted unconditionally,[1] but not afterward.[2]

An Offer That Has Been Refused is no longer the basis of a contract between the original parties. No subsequent acceptance of it, unless the offer is

A unilateral promise in writing such as a subscription paper, undertaking to pay money on condition certain things shall be done by the promisee, becomes binding upon the signer when the promisee has accepted it and performed the conditions on his part. Kinder *v.* Brink, 82 Ill. 376. See the title SUBSCRIPTIONS.

1. When Offer May Be Withdrawn — *United States.* — Stitt *v.* Huidekopers, 17 Wall. (U. S.) 384.

California. — Keller *v.* Ybarru, 3 Cal. 147.

Colorado. — Sherwin *v.* National Cash Register Co., 5 Colo. App. 162.

Connecticut. — Crocker *v.* New London, etc., R. Co., 24 Conn. 261.

Illinois. — School Directors *v.* Trefethren, 10 Ill. App. 127; Crandall *v.* Willig, 166 Ill. 233.

Iowa. — McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525.

Kentucky. — Burton *v.* Shotwell, 13 Bush. (Ky.) 271.

Massachusetts. — Foster *v.* Boston, 22 Pick. (Mass.) 33.

Michigan. — Challenge Wind, etc., Mill Co. *v.* Kerr, 93 Mich. 328; McDonald *v.* Bewick, 51 Mich. 79; Cooper *v.* Lansing Wheel Co., 94 Mich. 272, 34 Am. St. Rep. 341.

Missouri. — Brown *v.* Rice, 29 Mo. 322.

New Jersey. — Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

New York. — Hamilton *v.* Patrick, 62 Hun (N. Y.) 74.

Wisconsin. — Johnson *v.* Filkington, 39 Wis. 62; McCaffrey *v.* Wagner, 81 Wis. 633.

Knowledge of Withdrawal. — In Dickinson *v.* Dodds, 2 Ch. Div. 463, 45 L. J. Ch. 777, the defendant made to the plaintiff a written offer of his house for a certain price, the offer being left open until the following Friday. Meanwhile the defendant sold the house to A., who informed the plaintiff of the transaction. At the time appointed the plaintiff formally accepted the offer. It was held that his acceptance, being made with actual knowledge of the withdrawal, was of no effect.

Illustrations. — A gratuitous subscription with but a single signer is not binding until it has been accepted by the promisee either in express terms or by a performance of the stipulated conditions. Broadbent *v.* Johnson, 2 Idaho 300; McCabe *v.* O'Connor, 69 Iowa 134.

An agreement to sell lands to B., and to allow him a certain time to determine how much he will take, is a continuing offer, and binding, if accepted within that time, unless it has been revoked. Cheney *v.* Cook, 7 Wis. 413. That it may be revoked, see also Cooke *v.* Oxley, 3 T. R. 653.

A wrote to B: "You will please send me galvanized lightning rods for my house within sixty days, for which I will give you thirty-five cents per foot, due when work is completed." This was held to be merely an offer which A could withdraw at any time before being notified of its acceptance, and which bound neither party until accepted. Weiden *v.* Woodruff, 38 Mich. 130.

A wrote a letter to B, offering him land for a certain sum, specifying no place for making payment or for delivering the deed. B answered, accepting the offer, and telling A to send the deed to the county treasurer of a certain county, or to A's agent if he had one, to be delivered to B on payment of the price. It was held that this was not an unconditional acceptance of A's offer, and therefore A could withdraw his offer after the mailing of B's letter of acceptance. Baker *v.* Holt, 56 Wis. 100.

In a contract for the sale and delivery of five thousand feet of timber was a clause, "And I * * * agree to pay said Q. four and half cents per foot for from six to fifteen thousand feet of same kind and quality of tie timber as aforesaid, and delivered at the place aforesaid during the winter, to be paid on the first day of June, 1874." Q. made no agreement to deliver the additional quantity. The clause was held to be merely an offer revocable at any time before performance or a binding acceptance by Q.; that proof of revocation must be clear and unequivocal to establish it as a matter of law, otherwise it was for the jury; and that on delivery of the timber at the place specified, Q. could maintain suit for the purchase price. Quick *v.* Wheeler, 78 N. Y. 300.

There is no completed contract where the party proposing terms withdraws them before assent to them has been given. Wardell *v.* Williams, 62 Mich. 50, 4 Am. St. Rep. 814. See Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45.

2. Stevenson *v.* McLean, 5 Q. B. Div. 347, 6 Eng. Rul. Cas. 82; Baines *v.* Woodfall, 6 C. B. N. S. 657, 95 E. C. L. 657, 28 L. J. C. P. 338.

The defendant agreed to pay the plaintiff a draft drawn on a certain day. A draft drawn on a different day being presented, the defendant offered to the plaintiff's agent to pay in fifteen days, giving the agent time to communicate with his principal. It was held that this offer was a continuing one which could not be withdrawn after it had been accepted by the plaintiff. Wylie *v.* Brice, 70 N. Car. 422.

A wrote offering to sell B certain goods, directing him to answer "in course of post." The letter being misdirected, B's answer, although sent at once, was received two days later than it ought to have been, and on the day following the one when B's answer should have arrived if the original letter had been properly addressed, A sold the goods to a third person. The court held that there was a contract binding the parties from the moment the offer was accepted, and that B could recover from A in an action for breach of his contract. Adams *v.* Lindsell, 1 B. & Ald. 681, 6 Eng. Rul. Cas. 80.

renewed, will create any obligation.[1]

A Mere Mental Determination to Accept an offer, a determination that is indicated to the other party in no way, either by speech or conduct, is not such an acceptance as will bind the parties or complete a contract.[2]

Manner of Indicating Assent. — If the proposal is explicit, the assent of the other party to it may be indicated by word of mouth as well as by writing; and it may be shown by acts, for acts may be as clear an indication of intent as words can be.[3] It has been held that where words and acts

1. Acceptance After Refusal — *England.* — Hyde *v.* Wrench, 3 Beav. 334, 6 Eng. Rul. Cas. 139.

United States. — Ortman *v.* Weaver, 11 Fed. Rep. 358; National Bank *v.* Hall, 101 U. S. 50.

Alabama. — Derrick *v.* Monette, 73 Ala. 75.

Illinois. — Fox *v.* Turner, 1 Ill. App. 153; Cornwells *v.* Krengel, 41 Ill. 394; Young *v.* Trainor, 57 Ill. App. 632.

Iowa. — Clay *v.* Ricketts, 66 Iowa 362.

Maine. — Jenness *v.* Mount Hope Iron Co., 53 Me. 20.

Michigan. — Eggleston *v.* Wagner, 46 Mich. 610.

Wisconsin. — Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557.

2. Determination to Accept — No Communication. — Trounstine *v.* Sellers, 35 Kan. 447; Mactier *v.* Frith, 6 Wend. (N. Y.) 118, 21 Am. Dec. 262; Frith *v.* Lawrence, 1 Paige (N. Y.) 434; White *v.* Corlies, 46 N. Y. 467, Hopk. Sel. Cas. Contr. 16; Brogden *v.* Metropolitan R. Co., L. R. 2 App. 666, 6 Eng. Rul. Cas. 94.

In White *v.* Corlies, 46 N. Y. 467, Hopk. Sel. Cas. Contr. 16, the plaintiff, a builder, received from the defendants the following note: "Upon an agreement to finish the fitting up of offices * * * in two weeks from date, you can begin at once." Without sending any reply, the plaintiff immediately purchased lumber for the work and began to prepare it. The next day the defendant's note was countermanded. It was held that the buying of the lumber and work upon it were not acts indicative to the defendants of acceptance, and that no contract existed between the parties.

Where persons in possession of railroad lands had never notified the railroad company of their acceptance of its offer to sell the lands, contained in a general printed circular, it was held that there was no contract. Billings *v.* Sanderson, 8 Mont. 201.

An acceptance not communicated to the proposer does not make a contract. Jenness *v.* Mount Hope Iron Co., 53 Me. 20; M'Culloch *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278; Beckwith *v.* Cheever, 21 N. H. 41; Borland *v.* Guffey, 1 Grant's Cas. (Pa.) 394; Shupe *v.* Galbraith, 32 Pa. St. 10; Duncan *v.* Heller, 13 S. Car. 94; M'Iver *v.* Richardson, 1 M. & S. 557; Mozley *v.* Tinkler, 1 C. M. & R. 692; Russell *v.* Thornton, 4 H. & N. 798; *In re* National Sav. Bank Assoc., L. R. 4 Eq. 9.

3. Assent, How Indicated — Speech, Words, and Conduct. — Houghwout *v.* Boisaubin, 18 N. J. Eq. 315. See also Wise *v.* Ray, 3 Greene (Iowa) 430; Dows *v.* Morse, 62 Iowa 231; Brusle *v.* Thomas, 7 La. Ann. 349; Woodworth *v.* Wilson, 11 La. Ann. 402; Tufts *v.* Plymouth Gold Min. Co., 14 Allen (Mass.) 407; W. W. Kendall Boat, etc., Co. *v.* Bain, 46 Mo. App. 581; Young *v.* Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456; Black *v.* Keiley, 23 N. J. Eq. 358; Cutting *v.* Dana, 25 N. J. Eq. 265; Grove *v.* Hodges, 55 Pa. St. 504; Perry *v.* Mount Hope Iron Co., 15 R. I. 380, 2 Am. St. Rep. 902; Richards *v.* Home Assurance Assoc., L. R. 6 C. P. 59, 40 L. J. C. P. 290, 24 L. T. 752, 19 W. R. 893.

The Proposition Must Be Clear and Definite or its acceptance will not close a contract. Taylor *v.* Brewer, 1 M. & S. 290; Guthing *v.* Lynn, 2 B. & Ad. 232, 22 E. C. L. 63; Pearce *v.* Watts, L. R. 20 Eq. 492, 44 L. J. Ch. 492; Roberts *v.* Smith, 4 H. & N. 315, 28 L. J. Exch. 164.

Although Signed by Only One of the Parties named in it, a contract may bind both. Cary *v* McIntyre, 7 Colo. 173.

"When Words of Assent Are Relied Upon as showing the meeting of minds, it is of little consequence how informal they are. Any words which manifest actual agreement will suffice." Pittsburgh, etc., R. Co. *v.* Racer, 10 Ind. App. 503, *quoting* Addison on Contracts, § 15*n*.

In Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262, the court, by Marcy, J., said: "What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter the usual mode of acceptance is by the sending of a letter announcing a consent to accept; where it is made by a messenger a determination to accept, returned through him or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence, under certain circumstances, is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract." *Quoted* in Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511.

An Answer to an Offer to Insure, that "six and a half per cent is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present," is a binding assent. Eames *v.* Home Ins. Co., 94 U. S. 621.

A Proposal in a Personal Interview May Be Accepted by Telegraph. — Cobb *v.* Foree, 38 Ill. App. 255.

And a proposal calling for acceptance by wire or otherwise may be accepted by the sending of a telegram or by a personal verbal acceptance. Watson *v.* Coast, 35 W. Va. 463.

relied upon to establish assent are equivocal, it is a question of law what

Accepting the Benefit of a Contract implies assent to its terms.

England. — Parker *v.* South Eastern R. Co., 2 C. P. Div. 428; Harris *v.* Great Western R. Co., 1 Q. B. Div. 515.

United States. — York Co. *v.* Illinois Cent. R. Co., 3 Wall. (U. S.) 107.

Indiana. — Hauss *v.* Niblack, 80 Ind. 407.

Massachusetts. — Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Monitor Mut. F. Ins. Co. *v.* Buffum, 115 Mass. 343; Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347; Boston, etc., R. Co. *v.* Chilman, 146 Mass. 107; Fonseca *v.* Cunard Steamship Co., 153 Mass. 553.

New York. — Wells *v.* New York Cent. R. Co., 24 N. Y. 181; Dent *v.* North American Steamship Co., 49 N. Y. 390; Germania F. Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163.

North Carolina. — Bailey *v.* Rutjes, 86 N. Car. 517.

Pennsylvania. — Grove *v.* Hodges, 55 Pa. St. 504.

Wisconsin. — Doolan *v.* Manitowoc, 48 Wis. 312; Watters *v.* Glendenning, 87 Wis. 250.

Receiving Periodical Through the Mail. — If a person continues to receive a periodical sent to him through the mails he is bound to pay the subscription price. Ward *v.* Powell, 3 Harr. (Del.) 379; Pembroke *v.* Epsom, 44 N. H. 113; Fogg *v.* Portsmouth Atheneum, 44 N. H. 115, 82 Am. Dec. 191, Hopk. Sel. Cas. Contr. 26; Weatherby *v.* Banham, 5 C. & P. 228, 24 E. C. L. 293.

Landlord and Tenant — Lease. — A landlord, in answer to a letter from tenants whose lease was about to expire, proposing to rent the land for a new term, wrote to them, saying that he expected to be in their county early the following week; that if he did not call or communicate further with them in the course of a few days they could rely on having the land; and proposing certain modifications of the terms named by them. Hearing nothing further from the landlord, the tenants, after a short time, proceeded to plough and to plant their wheat. This was held to prove an acceptance of the landlord's terms, a written acceptance being unnecessary to complete the contract. Springer *v.* Cooper, 11 Ill. App. 267.

A Written Proposal for Plans stipulated that each architect should receive five hundred dollars for his plans, irrespective of relative merit, and that the successful architect "shall not receive five hundred dollars, but he shall be engaged as architect and superintendent, and shall be paid," etc. It was held that the one whose plans were accepted had a right of action for refusal to employ him. Walsh *v.* St. Louis Exposition, etc., Assoc., 16 Mo. App. 502. See the titles ARCHITECTS, vol. 2, p. 815; WORKING CONTRACTS.

Assuming Responsibilities on Strength of Promise. — Incurring risk and liability on the strength of a promise is equivalent to assent if done with the knowledge of the promisor. Sands *v.* Crooke, 46 N. Y. 564; Todd *v.* Weber, 95 N. Y. 181, 47 Am. Rep. 20. See also Strong *v.* Eldridge, 8 Wash. 595, where it was so held although no payee was named in the instrument.

Performing Acts in Accordance with the Proposition as offered will complete the contract and impose upon the party so doing the necessary obligation without calling for a signature from him. Both parties need not sign. And such performance will make the promise obligatory upon the promisor.

California. — Mathewson *v.* Fitch, 22 Cal. 86.

Illinois. — Perkins *v.* Hadsell, 50 Ill. 216; Whitsitt *v.* Pre-emption Presb. Church, 110 Ill. 125.

Indiana. — Street *v.* Chapman, 29 Ind. 142; Fairbanks *v.* Meyers, 98 Ind. 92; Brown *v.* Russell, 105 Ind. 46.

Iowa. — Dows *v.* Morse, 62 Iowa 231; Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112 39 Am. St. Rep. 284; McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525.

Louisiana. — Smith *v.* Morse, 20 La. Ann. 220.

Massachusetts. — Crocket *v.* Boston, 5 Cush. (Mass.) 182; Train *v.* Gold, 5 Pick. (Mass.) 385; Springfield *v.* Harris, 107 Mass. 532; Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286.

Michigan. — McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

New Hampshire. — Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New York. — Barnes *v.* Perine, 9 Barb. (N. Y.) 202; New York, etc., R. Co. *v.* Pixley, 19 Barb. (N. Y.) 428; L'Amoreux *v.* Gould, 7 N. Y. 349, 57 Am. Dec. 524; Miller *v.* McKenzie, 95 N. Y. 575, 47 Am. Rep. 85; Beckwith *v.* Brackett, 97 N. Y. 52.

Ohio. — Dayton, etc., Turnpike Co. *v.* Coy, 13 Ohio St. 93.

Pennsylvania. — Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174.

Wisconsin. — And see Hall *v.* Chicago, etc., R. Co., 48 Wis. 317.

A written agreement between a sick man "of the first part" and a nurse "of the second part" to pay her for nursing, signed by the first party and delivered to the second, who accepts it and performs the service, is binding though not signed by her. Stone *v.* Pennock, 31 Mo. App. 544.

A father promised to pay any one who would take care of his sick son, then over age. It was held that compliance with the proposition was evidence of its acceptance. Patton *v.* Hassinger, 69 Pa. St. 311.

A party who accepts and treats a written contract as binding is bound by it the same as if he had put his signature to it; and such contract is not void for want of mutuality. Attix *v.* Pelan, 5 Iowa 336; Brandon Mfg. Co. *v.* Morse, 48 Vt. 322.

The town of M. voted a bounty to persons who would enlist in the federal service and muster in to its credit. The plaintiff, pursuant to said offer, did enlist and muster in to the town's credit within a reasonable time, and before the town's quota was filled or its bounty fund exhausted. In an action against the town it was held that the facts showed a valid contract, which required nothing further

acts or words amount to contractual assent.[1]

If a Proposal Includes Any Qualifying Conditions, the acceptance of it is an assent to by way of agreement to complete it. Roach *v.* Menomonie, 24 Wis. 527; State *v.* Brown, 20 Wis. 287; Grubb *v.* Menomonee, 21 Wis. 594.

A letter containing an offer, and evidence establishing the performance of the service stipulated for in the offer, prove a contract in writing. Hooker *v.* Hyde, 61 Wis. 204.

Letter of Credit. — A letter of credit operates as a general offer to contract which may be accepted by any person acting upon it and negotiating bills drawn in conformity with its terms. *In re* Agra, etc., Bank, L. R. 2 Ch. 391; Maitland *v.* Chartered Mercantile Bank of India, etc., 38 L. J. Ch. 363; Scott *v.* Pilkington, 2 B. & S. 11, 110 E. C. L. 11. See also Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264; Coolidge *v.* Payson, 2 Wheat. (U. S.) 75; Boyce *v.* Edwards, 4 Pet. (U. S.) 111; Bayard *v.* Lathy, 2 McLean (U. S.) 462, 2 Fed. Cas. No. 1131; Storer *v.* Logan, 9 Mass. 55; Exchange Bank *v.* Rice, 98 Mass. 288; Central Sav. Bank *v.* Richards, 109 Mass. 413; Greele *v.* Parker, 5 Wend. (N. Y.) 414; Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6; Steman *v.* Harrison, 42 Pa. St. 49.

A Written Order to Do a Service at a price named becomes, on its fulfilment, an acknowledgment of a debt to that amount. Black *v.* Bachelder, 120 Mass. 171.

Contract Between Town and Individual — Building Bridge. — Where a citizen made a verbal proposition to a city council that if the city would build half of a bridge across a certain river he would build the other half, or if the city would construct the entire bridge he would pay for half of it, the proposition is binding on him if the city builds the bridge. Long *v.* Battle Creek, 39 Mich. 323, 33 Am. Rep. 384.

Lease. — In Smith *v.* Ingram, 90 Ala. 529, the plaintiff offered to lease a store to H. for a year, a proposition that was neither accepted nor declined. Thereafter H. telephoned to the plaintiff to know if it would be all right to move in, and, receiving an affirmative answer, he did so. This was held sufficient to bind the parties.

Payment of Taxes for Another. — The defendant wrote to the plaintiff offering to reimburse him if he would pay taxes on certain real estate. It was held that the plaintiff's paying the taxes was sufficient acceptance of the offer. Allen *v.* Chouteau, 102 Mo. 309.

Acts Must Be According to the Offer. — Performing acts under an offer does not constitute a binding acceptance of the offer unless the acts are in all respects according to all the material terms and conditions of the offer. If the party ignores these, there is no right of action upon the contract. Northam *v.* Gordon, 46 Cal. 582.

Offer of Lot for Name for New Town. — Where certain persons have platted a new village and offered a house and lot to whomsoever shall suggest the name which shall finally be adopted for the village, the one who suggests the name has substantially complied with the offer. Holt *v.* Wood, 14 Pa. Co. Ct. Rep. 499, 24 Pittsb. L. J. N. S. 443.

Advertisement for Bids. — In Governor, etc. *v.* Petch, 28 Eng. L. & Eq. 470, the defendant had advertised for bids to furnish certain meats, the advertisement stating that after the bid was accepted the successful bidder would "have to sign a written contract." The plaintiff's bid was accepted, and he proceeded to furnish the meats, but failed to enter into the written contract. The court held that in this failure he had failed to accept the offer according to its terms and there was no contract to sue upon.

Part Payment for Work Done under a special contract to build kilns is not an acceptance of the work, but only an acquiescence to that extent. Morrison *v.* Cummings, 26 Vt. 486.

Neither Is a Mere Use of them without objection, where the defect was not apparent and was only discernible after use. Morrison *v.* Cummings, 26 Vt. 486.

Retention of Order for Property — Subsequent Recognition. — Neither the retention of an order for the delivery of property by the drawee, nor the subsequent recognition of it in a letter or in conversation, nor all of them combined, will prove an acceptance of the order; although retaining such an order, unexplained, may justify an inference of acceptance. Briggs *v.* Sizer, 30 N. Y. 647.

Two Sureties in a Bond proposed to the obligee that they should pay it in certain proportions at certain times. He made no answer to this proposition for fourteen months, and then accepted a payment according to its terms. This was held not to amount to such an assent as to bind him. Rutledge *v.* Greenwood, 2 Desaus. (S. Car.) 389.

Exhibition — Retention of Entrance Fee. — When application has been made for exhibition space, and the goods of the applicant offered on the day before the exhibition opened were rejected, the reason given being that there was no space for them, and he was then informed that the entrance fee would be returned to him, and soon after the opening a check for the amount was sent to him, which he refused to accept, it was held that the retention of the fee till after the opening did not indicate that the application was accepted. Demuth *v.* American Institute, 75 N. Y. 502.

When Silence Amounts to Assent. — Although cases may occur in which silence may be held to signify assent on the part of the person to whom an offer is made, yet no legal liability can arise out of mere silence on his part unless he was subject to a duty of speech which was neglected to the harm of the other party. Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 4 Am. St. Rep. 622.

For instances where silence created a presumption of assent, see Phœnix Ins. Co. *v.* Sholes, 20 Wis. 35; Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Slocomb *v.* Lurty, Hempst. (U. S.) 431, 22 Fed. Cas. No. 12949. See also the title ESTOPPEL.

1. Lancaster *v.* Elliott, 28 Mo. App. 86; Whedon *v.* Ames, 28 Mo. App. 243.

those conditions and gives the proposer the right to understand that the acceptance was in all things according to the terms of the offer.[1] Indeed, it imposes no obligation unless it is accepted upon the terms on which it was made.[2]

Prescribing Method of Refusal. — While the proposer may impose conditions which will bind the one who accepts the offer, he has no right to prescribe a form of refusal so as to bind the other party as accepting if he does not refuse in some particular way or within a time limited.[3]

If the Acceptance Is Conditional, no assent is attributable to the proposing party, nor can any contract subsist until the conditions thus suggested have been assented to by the one who made the offer.[4]

1. Proposal with Conditions. — Strong *v.* Catlin, 35 Ala. 607; Hart *v.* Bray, 50 Ala. 446; Potts *v.* Whitehead, 23 N. J. Eq. 512; Drew *v.* Edmunds, 60 Vt. 401, 6 Am. St. Rep. 122; Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427. And see New York, etc., R. Co. *v.* Pixley, 19 Barb. (N. Y.) 428.

2. *United States.* — Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225; Carr *v.* Duval, 14 Pet. (U. S.) 77; Tilley *v.* Cook County, 103 U. S. 161; National Bank *v.* Hall, 101 U. S. 43; Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill, 119 U. S. 151; Arthur *v.* Gordon, 37 Fed. Rep. 558.

California. — Northam *v.* Gordon, 46 Cal. 582.

Indiana. — Cartmel *v.* Newton, 79 Ind. 1.

Iowa. — Baker *v.* Johnson County, 37 Iowa 186.

Kentucky. — Moxley *v.* Moxley, 2 Metc. (Ky.) 309.

Michigan. — Johnson *v.* Stephenson, 26 Mich. 63; Eggleston *v.* Wagner, 46 Mich. 610; Thomas *v.* Greenwood, 69 Mich. 215.

Mississippi. — Waul *v.* Kirkman, 27 Miss. 827.

Missouri. — Egger *v.* Nesbitt, 122 Mo. 667, 43 Am. St. Rep. 596; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 378.

New York. — Tuttle *v.* Love, 7 Johns. (N. Y.) 470.

Texas. — Flomerfelt *v.* Hume, 11 Tex. Civ. App. 30.

Vermont. — Hartford Steam Boiler Inspection, etc., Co. *v.* Lasher Stocking Co., 66 Vt. 439, 44 Am. St. Rep. 859.

3. Thus where a person wrote to another offering to buy a horse and stating that if he received no answer he should assume that the offer was accepted, to which letter no answer was returned, it was held that there was no contract. Felthouse *v.* Bindley, 11 C. B. N. S. 875, 103 E. C. L. 875, 31 L. J. C. P. 204. See also Lewis *v.* Browning, 130 Mass. 173.

4. Where Acceptance Conditional — *England.* — Meynell *v.* Suitees, 1 Jur. N. S. 737, 3 Sm. & Giff. 101, 25 L. J. Ch. 257; Holland *v.* Eyre, 2 Sim. & S. 194; Routledge *v.* Grant, 4 Bing. 653, 15 E. C. L. 99, 1 M. & P. 717, 3 C. & P. 267, 14 E. C. L. 298; Hall *v.* Hall, 12 Beav. 414; Harston *v.* Harvey, 1 Cababé & E. 404; *In re* Leeds Banking Co., L. R. 1 Eq. 225, 35 L. J. Ch. 75; Jackson *v.* Turquand, L. R. 4 H. L. 305, 39 L. J. Ch. 11; *In re* Aberman Ironworks, L. R. 4 Ch. 532, 6 Eng. Rul. Cas. 149; *In re* United Ports, etc., Ins. Co., L. R. 8 Ch. 1002, 43 L. J. Ch. 138; *In re* European Cent. R. Co., L. R. 8 Eq. 438; *In re* United Ports, etc., Ins. Co., L. R. 9 Ch. 392, 43 L. J. Ch. 531; Duke *v.* Andrews, 2 Exch. 290, 17 L. J. Exch. 231; Jordan *v.* Norton, 4 M. & W. 155, 7 L. J. Exch. 281, 6 Eng. Rul. Cas. 142; Appleby *v.* Johnson, L. R. 9 C. P. 158; Hussey *v.* Horne-Payne, 8 Ch. Div. 670, 6 Eng. Rul. Cas. 155; Honeyman *v.* Marryatt, 6 H. L. Cas. 112, 4 Jur. N. S. 17, 26 L. J. Ch. 619; Lucas *v.* Martin, 37 Ch. Div. 597, 57 L. J. Ch. 261, 58 L. T. 862.

United States. — Carr *v.* Duval, 14 Pet. (U. S.) 77; Martin *v.* Northwestern Fuel Co , 22 Fed. Rep. 596; Eliason *v.* Henshaw, 4 Wheat. (U. S.) 228; National Bank *v.* Hall, 101 U. S. 43; Deshon *v.* Fosdick, 1 Woods (U. S.) 286, 7 Fed. Cas. No. 3819; Arthur *v.* Gordon, 37 Fed. Rep. 558; Burmester *v.* Phillips, 25 Fed. Rep. 805; Tilley *v.* Cook County, 103 U. S. 155.

Alabama. — Eskridge *v.* Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344.

Connecticut. — Ocean Ins. Co. *v.* Carrington, 3 Conn. 357.

Illinois. — Webb *v.* Alton M. & F. Ins. Co., 10 Ill. 225; Esmay *v.* Gorton, 18 Ill. 483; Corcoran *v.* White, 117 Ill. 118, 57 Am. Rep. 858; Brinker *v.* Scheunemann, 43 Ill. App. 659.

Indiana. — Cartmel *v.* Newton, 79 Ind. 1; Stagg *v.* Compton, 81 Ind. 171; Havens *v.* American F. Ins. Co., 11 Ind. App. 315.

Iowa. — Baker *v.* Johnson County, 37 Iowa 186; Baxter *v.* Bishop, 65 Iowa 582; Siebold *v.* Davis, 67 Iowa 560; Sawyer *v.* Brossart, 67 Iowa 678, 56 Am. Rep. 371; Gilbert *v.* Baxter, 71 Iowa 327.

Kansas. — Plant Seed Co. *v.* Hall, 14 Kan. 553.

Kentucky. — Moxley *v.* Moxley, 2 Metc. (Ky.) 309; Hutcheson *v.* Blakeman, 3 Metc. (Ky.) 80.

Louisiana. — Barrow *v.* Ker, 10 La. Ann. 120.

Maine. — Jenness *v.* Mount Hope Iron Co., 53 Me. 20.

Massachusetts. — Gowing *v.* Knowles, 118 Mass. 232; Harlow *v.* Curtis, 121 Mass. 320; Putnam *v.* Grace, 161 Mass. 237.

Michigan. — Van Valkenburg *v.* Rogers, 18 Mich. 180; Johnson *v.* Stephenson, 26 Mich. 63; Eggleston *v.* Wagner, 46 Mich. 610; Whiteford *v.* Hitchcock, 74 Mich. 208; Sands, etc., Lumber Co. *v.* Crosby, 74 Mich. 313; Wilkin Mfg. Co. *v.* H. M. Loud, etc., Lumber Co., 94 Mich. 158; De Jonge *v.* Hunt, 103 Mich. 94.

Minnesota. — Beauprè *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

Missouri. — Eads *v.* Carondelet, 42 Mo. 113;

If Time Is Given for the Acceptance of the proposal, the acceptance must be made

Bruner *v.* Wheaton, 46 Mo. 363; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 378.

New Jersey. — Potts *v.* Whitehead, 23 N. J. Eq. 512. See also Runyon *v.* Wilkinson, 57 N. J. L. 420.

New York. — Frith *v.* Lawrence, 1 Paige (N. Y.) 434; Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Hough *v.* Brown, 19 N. Y. 115; Briggs *v.* Sizer, 30 N. Y. 647; McCotter *v.* New York, 37 N. Y. 325; Hamilton *v.* Patrick, 62 Hun (N. Y.) 74; Kirwan *v.* Byrne, 6 Misc. Rep. (N. Y. City Ct.) 528; Nundy *v.* Matthews, 34 Hun (N. Y.) 74.

North Carolina. — Union Nat. Bank *v.* Miller, 106 N. Car. 347, 19 Am. St. Rep. 538; Cozart *v.* Herndon, 114 N. Car. 252.

Pennsylvania. — Borland *v.* Guffey, 1 Grant's Cas. (Pa.) 394; Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339; Allen *v.* Kirwan, 159 Pa. St. 612.

Texas. — Foster *v.* New York, etc., Land Co., 2 Tex. Civ. App. 505.

Vermont. — Bruce *v.* Bishop, 43 Vt. 161.

West Virginia. — Weaver *v.* Burr, 31 W. Va. 736.

Wisconsin. — Baker *v.* Holt, 56 Wis. 100; Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516; Clark *v.* Burr, 85 Wis. 655; Darrow *v.* Harlow, 21 Wis. 302, 94 Am. Dec. 541.

Statements of the Rule. — In Eggleston *v.* Wagner, 46 Mich. 610, the court, by Graves, J., said: "In order to convert a proposal into a promise the constituents of the acceptance tendered must comply with and conform to the conditions and exigencies of the proposal. The acceptance must be of that which is proposed and nothing else, and must be absolute and unconditional. Whatever the proposal requires to fulfil and effectuate acceptance must be accomplished, and the acceptance must include and carry with it whatever undertaking, right, or interest the proposal calls for, and there must be an entire agreement between the proposal and acceptance in regard to the subject-matter and extent of interest to be contracted. If the parties do not refer to the same things in the same sense the transaction is simply one of proposals and counter-proposals."

"An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this, it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand." Woodhull, J., in Potts *v.* Whitehead, 23 N. J. Eq. 512. See also Kyle *v.* Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Carr *v.* Duval, 14 Pet. (U. S.) 77; McKibbin *v.* Brown, 14 N. J. Eq. 13, 15 N. J. Eq. 498; Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225; Tilley *v.* Cook County, 103 U. S. 155; Jordan *v.* Norton, 4 M. & W. 155, 6 Eng. Rul. Cas. 142, 7 L. J. Exch. 281; Huddleston *v.* Briscoe, 11 Ves. Jr. 583; Honeyman *v.* Marryatt, 6 H. L. Cas. 112, 26 L. J. Ch. 619; Routledge *v.* Grant, 4 Bing 653, 15 E. C. L. 99; Kennedy *v.* Lee, 3 Meriv. 441; Hutchison *v.* Bowker, 5 M. & W. 535; Bickford *v.* Great Western R. Co., 28 U. C. C. P. 516.

A Party Who Submits a Counter Proposition instead of accepting an offer cannot abandon the substitute, without the other's consent, and accept the original. Fox *v.* Turner, 1 Ill. App. 153.

Where One Creditor Agreed to Postpone His Claim if "the other creditors would grant the extension desired," he is not bound because one of the other creditors has granted the extension. Heyer *v.* Bromberg, 74 Ala. 524.

Where a Contract Consists of an Offer by Letter and an Acceptance by Letter, and the acceptor wishes to add a condition or qualification, the burden is on him to express that condition or qualification clearly and without ambiguity; if his answer, though ambiguous, is capable of being construed as a simple acceptance of the offer, the one who has made the offer is justified in acting upon it in that sense. English, etc., Credit Co. *v.* Arduin, 40 L. J. Exch. 108, L. R. 5 H. L. 64.

Counter Proposition — Subsequent Acceptance of Original Offer. — Certain rail manufacturers quoted prices to a railway company on lots of rails of not less than two thousand tons. The company replied, ordering twelve hundred tons at the quoted price for future delivery, and its order was declined at once. This was held to end the negotiations, and a subsequent acceptance by the railway company of the original offer was not binding. Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill, 119 U. S. 149, 29 Am. & Eng. R. Cas. 583.

Place for Payment and Delivery. — A. offered to sell on certain terms. The person to whom this offer was made wrote: "If this is the very best offer you can make, you may properly execute the within deed, and send it to Mrs. A., at C., to also sign and acknowledge, requesting her to forward to the State Bank of Wisconsin in Milwaukee, where I will call and pay the money and receive the deed." It was held that as this was not an unconditional acceptance of A.'s offer, and fixed a different place for the delivery of the deed and payment of the money, it was not binding upon A. North Western Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557. See also De Jonge *v.* Hunt, 103 Mich. 94.

Assent to Part of Proposal. — Where the evidence showed that the parties to an agreement did not both assent to the entire contract, but that the assent of one was limited to a part, the contract could not be enforced. Steel *v.* Miller, 40 Iowa 402; Compania Bilbaina, etc. *v.* Spanish-American Light, etc., Co., 146 U. S. 497.

Smaller Quantity of Goods Sent than Ordered — Loss. — If a person gives an order to a merchant to send him a particular quantity of goods on certain terms of credit, and the merchant sends him less goods at a shorter credit, and the goods sent are lost by the way, the merchant must bear the loss, for there is no contract between the parties. Bruce *v.* Pearson, 3 Johns. (N. Y.) 534.

An Applicant for Life Insurance gave his note for the premium and took a receipt from the agent giving the company the right to accept or reject the application. The company did not agree to the terms of the application, but issued a policy with different terms and

within the time or it will create no obligation.[1]

If No Time Is Named the offer is binding only if accepted within a reasonable time, provided it has not been withdrawn in the meanwhile.[2]

When the Obligation Commences. — Where the parties are separated and the contract arises out of an accepted offer, it is often important to determine when the obligation commences. The rule is that the agreement becomes obligatory from the moment the minds of the parties meet,[3] even though a knowledge of this concurrence has not been brought home to them,[4] and though

sent the same to the agent. Before the policy thus issued was delivered the applicant died, the note being unpaid. It was held that there was no mutuality of assent and therefore no contract of insurance. Mutual L. Ins. Co. *v.* Young, 23 Wall. (U. S.) 85. See the title LIFE INSURANCE.

Contract for Sale of Wood. — A landowner proposed to the plaintiff to take wood from his land on certain terms. The plaintiff replied that he would accept the proposition if he could get his brother to assist him. No contract was completed without further notice of acceptance to the owner; nor could an action be maintained by the plaintiff against a third person for taking wood from the land. Beckwith *v.* Cheever, 21 N. H. 41.

Exchange of Property. — Where it was alleged that a contract for the exchange of property had been consummated by correspondence, and it appeared that the final letter of the complainant, in which he claimed to have accepted the proposition of the respondent, contained a condition to which the latter never assented, it was held that no contract had been consummated, and that though the condition might have been of small importance, yet the respondent had a right to an unconditional acceptance of his proposition before he could be bound. Merriam *v.* Lapsley, 2 McCrary (U. S.) 606, 12 Fed. Rep. 457.

1. Time Limited for Acceptance. — Carr *v.* Duval, 14 Pet. (U. S.) 77; Waterman *v.* Banks, 144 U. S. 394; Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35; Potts *v.* Whitehead, 20 N. J. Eq. 55; Union Nat. Bank *v.* Miller, 106 N. Car. 347, 19 Am. St. Rep. 538; Longworth *v.* Mitchell, 26 Ohio St. 342; McMillan *v.* Philadelphia Co., 159 Pa. St. 142.

One Who Has Until a Certain Day to Accept may accept on that day if the offer be still open. Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

After the Time Limited in an Offer Has Expired acceptance is impossible unless with the assent of the proposer, with full knowledge that it was not made within the period named. Adams *v.* Lindsell, 1 B. & Ald. 681, 6 Eng. Rul. Cas. 80; Dunlop *v.* Higgins, 1 H. L. Cas. 387; Waterman *v.* Banks, 144 U. S. 394; Larmon *v.* Jordan, 56 Ill. 204; Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35; M'Cullouch *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278; Lewis *v.* Browning, 130 Mass. 173; Union Nat. Bank *v.* Miller, 106 N. Car. 347, 19 Am. St. Rep. 538; Chency *v.* Cook, 7 Wis. 413; Atlee *v.* Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103.

Where an Individual Makes an Offer by Mail, which expressly or by implication stipulates for an answer by return mail, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. (Dickey, J., *dissenting*.) Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35.

If an offer is made by letter, the proposer requesting an answer by telegraph, "yes" or "no," and stating that unless he receive the answer by a certain date he "shall conclude 'no,'" the offer is made dependent upon an actual receipt of the telegram on or before the date named. Lewis *v.* Browning, 130 Mass. 173.

2. Where No Time Named — Reasonable Time Intended. — Martin *v.* Black, 21 Ala. 721; Ferrier *v.* Storer, 63 Iowa 484, 50 Am. Rep. 752; Chiles *v.* Nelson, 7 Dana (Ky.) 281; Moxley *v.* Moxley, 2 Metc. (Ky.) 309; Mitchell *v.* Abbott, 86 Me. 338, 41 Am. St. Rep. 559; Loring *v.* Boston, 7 Met. (Mass.) 409; Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240; Keck *v.* McKinley, 98 Pa. St. 616; Shaub *v.* Lancaster City, 156 Pa. St. 362.

The defendant addressed a proposal to the plaintiff in the following form: "I will sell you the house now occupied by you for the sum of $5,000. * * * You can occupy the house on rental at $30 per month, for one year, — May 1, 1881, to May 1, 1882, — without repairs, unless property is sold before that time. In case of opportunity to sell, I will give you the refusal on above terms, and in case you decline to purchase, will give you two months' notice to vacate." This offer was held open to acceptance for a reasonable time. Stone *v.* Harmon, 31 Minn. 512.

Where one to whom an offer was made neglected for six months to give notice of his acceptance of it, he was held not to have sent his notice in such reasonable time as to make the acceptance binding on the party who made the offer. McCurdy *v.* Rogers, 21 Wis. 197. *Compare* Mizell *v.* Burnett, 4 Jones L. (49 N. Car.) 249, 69 Am. Dec. 744.

3. Time When Obligation Commences. — Pittsburgh, etc., R. Co. *v.* Racer, 10 Ind. App. 503, and cases cited in the following note.

4. Averill *v.* Hedge, 12 Conn. 424; Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill. & J. (Md.) 1; Mactier *v.* Frith, 6 Wend. (N. Y.) 118, 21 Am. Dec. 262; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Frith *v.* Lawrence, 1 Paige (N. Y.) 434; Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511; Fitzhugh *v.* Jones, 6 Munf. (Va.) 83.

Statement of the Rule. — In Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262, the court said: "An acceptance is the distinct act of one party to the contract as much as the offer is of the other; the knowledge by the party making the offer of the determina-

one of the parties may have died after the act of assent has taken place without learning of it.[1]

Delivery of Answer to Proposer Not Essential. — That is to say, the act of acceptance which completes the contract takes place when the answer containing the assent is sent, properly addressed, whether by messenger, or mail, or telegraph. It does not depend upon the delivery of the answer to the one who made the offer,[2] and it completes the contract even though the delivery never takes place.[3]

tion of the party receiving it is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other." *Citing* Adams *v.* Lindsell, 1 B. & Ald. 681, cited in Routledge *v.* Grant, 4 Bing. 653, 15 E. C. L. 99. Again, on p. 118: "Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? * * * If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. * * * When it [the law] speaks of the operations of the mind, it means such as have been made manifest by overt acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts, and when thus made known; it is effective, although the parties who may claim the benefit of, or be bound by a contract thus made, may for a season remain ignorant of its being made."

1. Haarstick *v.* Fox, 9 Utah 110.

2. *England.* — Adams *v.* Lindsell, 1 B. & Ald. 681, 6 Eng. Rul. Cas. 80; Dunlop *v.* Higgins, 1 H. L. Cas. 381; Duncan *v.* Topham, 8 C. B. 225, 65 E. C. L. 225, 18 L. J. C. P. 310; Potter *v.* Sanders, 6 Hare 1; Household F., etc., Ins. Co. *v.* Grant, 4 Exch. Div. 216, 6 Eng. Rul. Cas. 115, 48 L. J. Exch. 577; Henthorn *v.* Fraser, (1892) 2 Ch. 27, 46 Alb. L. J. 28.

United States. — Tayloe *v.* Merchants' F. Ins. Co., 9 How. (U. S.) 390; Baker *v.* Holt, 56 Wis. 100; Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. (U. S.) 431, 17 Fed. Cas. No. 9635; Garretson *v.* North Atchison Bank, 47 Fed. Rep. 867.

Georgia. — Levy *v.* Cohen, 4 Ga. 1; Bryant *v.* Booze, 55 Ga. 438.

Illinois. — Fox *v.* Turner, 1 Ill. App. 153; Haas *v.* Myers, 111 Ill. 424, 53 Am. Rep. 634.

Indiana. — Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96.

Iowa. — Ferrier *v.* Storer, 63 Iowa 484, 50 Am. Rep. 752; Hunt *v.* Higman, 70 Iowa 406.

Kentucky. — Chiles *v.* Nelson, 7 Dana (Ky.) 281.

Maine. — True *v.* International Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

Massachusetts. — Squire *v.* Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Bishop *v.* Eaton, 161 Mass. 496, 42 Am. St. Rep. 437. *Compare* M'Culloch *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278.

New Jersey. — Potts *v.* Whitehead, 20 N. J. Eq. 55; Hallock *v.* Commercial Ins. Co., 26 N. J. L. 281.

New York. — Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511; Vassar *v.* Camp, 14 Barb. (N. Y.) 341. (See Vassar *v.* Camp, 11 N. Y. 441.) White *v.* Corlies, 46 N. Y. 467, Hopk. Sel. Cas. Contr. 16.

Pennsylvania. — Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339.

Rhode Island. — Perry *v.* Mount Hope Iron Co., 15 R. I. 380, 2 Am. St. Rep. 902.

Vermont. — Hartford Steam Boiler Inspection, etc., Co. *v.* Lasher Stocking Co., 66 Vt. 439, 44 Am. St. Rep. 859.

An Offer to Sell, Contained in a Letter mailed to the writer's agent or friend, with request to communicate it, may, after communication to the person for whom it was intended, be accepted by a written reply from the latter addressed directly to the one who originally made the offer; and, in such case, sending the reply to the post-office through the same agent or friend, first permitting him to read it, and telling him orally that the proposition is accepted, will not prevent the contract from being one made by letter; and the contract will be closed, not from the time of leaving the reply to be carried to the post-office, but from the time of its delivery into the post-office. Bryant *v.* Booze, 55 Ga. 438.

Where acceptance of an offer reaches the maker of the offer, the mode of communicating the acceptance is not material. Perry *v.* Mount Hope Iron Co., 15 R. I. 380, 2 Am. St. Rep. 902.

The contract takes effect from the time of acceptance. It does not relate back to the date of the offer. Felthouse *v.* Bindley, 11 C. B. N. S. 869, 103 E. C. L. 869, 31 L. J. C. P. 204.

3. White *v.* Corlies, 46 N. Y. 467, Hopk. Sel. Cas. Contr. 16; Washburn *v.* Fletcher, 42 Wis. 152; Household F., etc., Ins. Co. *v.* Grant, 4 Exch. Div. 216, 48 L. J. Exch. 577, 41 L. T. 298, 27 W. R. 858, 6 Eng. Rul. Cas. 115.

A proposed a contract with B by letter, the parties living distant from each other. B, accepting the contract, deposited his acceptance in the post-office, addressed, and to be forwarded to A. A did not receive the acceptance. The contract was held to be complete and binding. Vassar *v.* Camp, 11 N. Y. 441.

Unstamped Letter. — Depositing a letter unstamped does not complete the contract, within the rule stated in the text. Blake *v.* Hamburg-Bremen F. Ins. Co., 35 Alb. L. J. 82.

What Law Governs. — And, being governed by the laws of the place where it is executed, a contract by letter or telegraph should be referred to the place whence the acceptance is despatched.[1]

Withdrawal Must Reach Party Before Acceptance Transmitted. — After the acceptance has been made in this way it is too late for the maker of the proposal to withdraw it. To avail anything the withdrawal must reach the person to whom it is addressed before the letter of acceptance has been transmitted.[2]

Acceptance and Withdrawal Simultaneous. — If a letter of acceptance and a subsequently written letter of withdrawal are received at the same moment, there is no contract.[3]

Revocation by Death. — An offer, unaccepted, is revoked by the death of the proposer, and also by the death of the person to whom the offer is made.[4]

b. OFFER BY ADVERTISEMENT — **Notice.** — When a reward is offered by advertisement for the performance of a certain act, with no limitations or restrictions as to the offer, and no additional requirement upon the claimant of the offered bounty, one who performs the act with a view of obtaining the reward need not give notice of that fact to the person making the offer in order to maintain an action for the recovery of the reward.[5]

1. **Conflict of Laws.** — Cowan *v.* O'Connor, 20 Q. B. Div. 640; Taylor *v.* Jones, 1 C. P. Div. 87. See also Male *v.* Roberts, 3 Esp. N. P. 163; Shattuck *v.* Mutual L. Ins. Co., 4 Cliff. (U. S.) 598, 21 Fed. Cas. No. 12715; Levy *v.* Cohen, 4 Ga. 1; Northampton Mut. Live Stock Ins. Co. *v.* Tuttle, 40 N. J. L. 476; Perry *v.* Mount Hope Iron Co., 15 R. I. 380, 2 Am. St. Rep. 902.

See generally the title PRIVATE INTERNATIONAL LAW.

2. **Time of Withdrawal** — *England.* — Dickinson *v.* Dodds, 2 Ch. Div. 463, 34 L. T. N. S. 607, 24 W. R. 594; Adams *v.* Lindsell, 6 Eng. Rul. Cas. 89; Byrne *v.* Van Tienhoven, 49 L. J. C. P. 316, 5 C. P. Div. 344, 42 L. T. 371; Stevenson *v.* McLean, 5 Q. B. Div. 350, 6 Eng. Rul. Cas. 87.

United States. — Tayloe *v.* Merchants' F. Ins. Co., 9 How. (U. S.) 390.

Alabama. — Falls *v.* Gaither, 9 Port. (Ala.) 614.

Arkansas. — Kempner *v.* Cohn, 47 Ark. 519, 58 Am. Rep. 775.

Connecticut. — Averill *v.* Hedge, 12 Conn. 424.

Georgia. — Levy *v.* Cohen, 4 Ga. 1.

Kentucky. — Hutcheson *v.* Blakeman, 3 Metc. (Ky.) 80.

Maryland. — Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

New Hampshire. — Abbott *v.* Shepard, 48 N. H. 14.

Pennsylvania. — Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339.

Vermont. — Hartford Steam Boiler Inspection, etc., Co. *v.* Lasher Stocking Co., 66 Vt. 439, 44 Am. St. Rep. 859.

Wisconsin. — Washburn *v.* Fletcher, 42 Wis. 152.

A Written Proposal to Lease Premises, although without consideration, is binding if accepted according to its terms before revocation and within the time named. Pettibone *v.* Moore, 75 Hun (N. Y.) 461.

Revocation by Mail of an Offer which may be accepted by mail will not prevent the completion of the contract if the acceptance is mailed before receipt of the revocation by the party to whom it is addressed. Henthorn *v.* Fraser, (1892) 2 Ch. 27, 46 Alb. L. J. 28.

Contract by Telegraph — Acceptance Delayed in Transmission. — In Brauer *v.* Shaw, 168 Mass. 198, the defendants offered to let space for cattle in a steamer, subject to prompt acceptance. This offer was made by telegraph at 11.30 A. M., and received at 12.16 P. M. by the plaintiff, who at 12.28 wired acceptance. The delivery of this telegraphic acceptance was delayed until 1.20, and meanwhile at one o'clock the defendants telegraphed revoking their offer, this revocation reaching the plaintiff at 1.43 P. M. The court held that the defendants were bound.

3. Dunmore *v.* Alexander, 9 Sh. & Dunl. 190.

4. **Death of Parties.** — Dickinson *v.* Dodds, 2 Ch. Div. 463, 45 L. J. Ch. 777, 34 L. T. N. S. 607, 24 W. R. 594; Pratt *v.* Baptist Soc., 93 Ill. 475; Beach *v.* First M. E. Church, 96 Ill. 179; Wallace *v.* Townsend, 43 Ohio St. 537, 54 Am. Rep. 829; Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708; Helfenstein's Estate, 77 Pa. St. 328, 18 Am. Rep. 449; Foust *v.* Board of Publication, 8 Lea (Tenn.) 555.

5. **Notice Not Necessary.** — Wilson *v.* McClure, 50 Ill. 366; Harson *v.* Pike, 16 Ind. 140; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Patton *v.* Hassinger, 69 Pa. St. 311; Reif *v.* Page, 55 Wis. 496, 42 Am. Rep. 731. See also Freeman *v.* Boston, 5 Met. (Mass.) 56; Morrell *v.* Quarles, 35 Ala. 544.

Intention to Contract Is Necessary. — There must be a manifest intention to make a contract. Thus, where one lost by theft a harness worth fifteen dollars, and, becoming much excited over the matter, exclaimed that he would give one hundred dollars to any man who would find out the thief, and a like sum to a lawyer for prosecuting him, and one told him the name of the thief, it was held that these circumstances did not manifest an intention to contract. Higgins *v.* Lessig, 49 Ill. App. 459. See also Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Anderson *v.* Public Schools, 122 Mo. 61; Spencer *v.* Harding, L. R. 5 C. P. 561.

See generally the title REWARDS.

Particular Promisee Unnecessary. — Such an offer may become the basis of a binding contract, even though it be not addressed to any particular person. Addressed to the world at large, it becomes a binding obligation, when the acceptance of it has been indicated by the performance of the conditions of the offer.[1]

Knowledge of Offer. — The authorities are not in harmony upon the question whether the person claiming the reward would be allowed to recover if the services were rendered before he learned of the reward.[2]

Official Duty. — It has been held that one who is bound by official duty to perform the service cannot recover the reward.[3]

1. Addressed to the World at Large. — Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126, 1 N. & M. 418, 5 C. & P. 566, 24 E. C. L. 457, 6 Eng. Rul. Cas. 133. In this case the defendant, by a public advertisement, had offered a reward of twenty pounds to any one who would give information which should lead to the discovery of a certain murderer, the same to be payable upon his conviction. The court held that one who gave the information desired was entitled to recover the reward, even though led to inform by other motives than the reward offered.

As Illustrative of the Doctrine Stated, see:

England. — Bhugwandass *v.* Netherlands India Sea, etc., Co., L. R. 14 App. 83.

United States. — Shuey *v.* U. S., 92 U. S. 73.

Alabama. — Morrell *v.* Quarles, 35 Ala. 544; Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48.

California. — Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

Illinois. — Madison First Nat. Bank *v.* Hart, 55 Ill. 62.

Indiana. — Harson *v.* Pike, 16 Ind. 140; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Vigo Agricultural Soc. *v.* Brumfield, 102 Ind. 151, 52 Am. Rep. 657.

Massachusetts. — Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747.

Minnesota. — Union Bank *v.* Shea, 57 Minn. 180.

New Hampshire. — Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

New York. — Pierson *v.* Morch, 82 N. Y. 503.

Pennsylvania. — Cummings *v.* Gann, 52 Pa. St. 484; Holt *v.* Wood, 14 Pa. Co. Ct. Rep. 499, 24 Pittsb. L. J. N. S. 443.

Texas. — Kasling *v.* Morris, 71 Tex. 584, 10 Am. St. Rep. 797.

Wisconsin. — Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

Further Illustrations. — A contract may have its origin in a street-car advertisement addressed to the public in general. Anderson *v.* Public Schools, 122 Mo. 61.

The defendants advertised that they would redeem certain bills of a bank. In a suit upon the promise the objection was made that the promise was to no particular person, and therefore bad. It was held, however, to be a promise to every person who heard the representation. Tarbell *v.* Stevens, 7 Iowa 163.

Where manufacturers of a proprietary medicine advertised that they would pay a certain sum of money to any one who contracted a named disease after having used the medicine in a specified manner, the contracting of the disease in the manner described imposed a binding obligation upon the advertisers and created a contract between them and the plaintiff. Carlill *v.* Carbolic Smoke Ball Co., (1893) 1 Q. B. 256, 47 Alb. L. J. 364, 67 L. T. N. S. 837.

Where a promise was made in writing to pay a certain sum to such persons as should build a court house of a particular description, it was held that the plaintiffs, having erected the court house in accordance with the proposals, were entitled to recover the sum promised. Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62.

When a person at a public meeting, held for the purpose of raising money to procure substitutes for men who had been drafted into the army from his district, declared verbally that he would give a certain sum for that purpose, this declaration became a promise binding upon him to pay such sum to any person who should accomplish the object. Wilson *v.* McClure, 50 Ill. 366.

Where there has been a publication of an offer, the acceptance of it completes the contract, provided that it takes place before the offer is withdrawn. Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 52 Am. Rep. 657.

For a Full Discussion of the subject rewards, in all its phases, see the title REWARDS.

2. Knowledge of Offer — Conflict of Authority. — In the following cases it was held that knowledge of the reward was not necessary: Eagle *v.* Smith, 4 Houst. (Del.) 293; Dawkins *v.* Sappington, 26 Ind. 199; Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728, *overruling* Lee *v.* Flemingsburg, 7 Dana (Ky.) 29; Russell *v.* Stewart, 44 Vt. 170; Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126. The contrary is held in the following cases: Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65; Marvin *v.* Treat, 37 Conn. 97, 9 Am. Rep. 307; Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181; Fitch *v.* Snedeker, 38 N. Y. 248, 97 Am. Dec. 791; Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

3. Matter of Russell, 51 Conn. 577, 50 Am. Rep. 55; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Means *v.* Hendershott, 24 Iowa 78; Pool *v.* Boston, 5 Cush. (Mass.) 219; Gilmore *v.* Lewis, 12 Ohio 281; Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Hatch *v.* Mann, 15 Wend. (N. Y.) 44, *citing* City Bank *v.* Bangs, 2 Edw. Ch. (N. Y.) 95.

See also the titles PUBLIC OFFICERS; REWARDS.

Revocability. — Like any other proposal, it is revocable at any time before it has been accepted or anything has been done in reliance upon it,[1] and notice of the revocation may be made in the same manner in which the original proposal was proclaimed. Personal notice is not required.[2]

c. INCOMPLETE CONTRACT — (1) *In General.* — It has been said in an earlier portion of this discussion that there must be a meeting of the minds of the parties upon the common ground of a mutual understanding of facts and of subject-matter. Not only must the parties understand alike, but their contract must afford a complete expression of this meeting of minds, and leave no material element unexpressed. Offer and assent must coincide, and the result must be a complete obligation.[3]

(2) *Quotation of Prices — Ordering Goods.* — A common illustration is found in the quotation of prices. A quotation of prices is not an offer to sell, in the sense that a complete contract will arise out of the mere acceptance of the rate offered or the giving of an order for merchandise in accordance with the proposed terms. It requires the acceptance by the one naming the price, of the order so made, to complete the transaction. Until thus completed there is no mutuality of obligation.[4]

1. **Offer Revocable** — *United States.* — Shuey *v.* U. S., 92 U. S. 73.

California. — Ryer *v.* Stockwell, 14 Cal. 137, 73 Am. Dec. 634.

Connecticut. — Crocker *v.* New London, etc., R. Co., 24 Conn. 261.

Massachusetts. — Freeman *v.* Boston, 5 Met. (Mass.) 57; Loring *v.* Boston, 7 Met. (Mass.) 409.

New Hampshire. — Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

New York. — Fitch *v.* Snedeker, 38 N. Y. 248, 97 Am. Dec. 791; Jones *v.* Phœnix Bank, 8 N. Y. 228.

Ohio. — Gilmore *v.* Lewis, 12 Ohio 285.

Pennsylvania. — Cummings *v.* Gann, 52 Pa. St. 484.

2. Shuey *v.* U. S., 92 U. S. 73.

See the title REWARDS.

3. See *supra*, this title, *The Elements of a Contract — Assent.*

Where negotiations toward a contract are being carried on by letter and telegraph, there must be a distinct offer on the one hand and an acceptance of it on the other, showing a concurrence of the minds of the parties upon all of its terms, before either party is bound. Deshon *v.* Fosdick, 1 Woods (U. S.) 286.

Answering an inquiry as to whether he owned certain lots, and if so, what was the price, the recipient wrote, naming a price. This was held not to be equivalent to a proposal to sell the lots. The mere statement of the price at which property is held cannot be understood as an offer to sell. The seller may prefer to choose the purchaser, and may not be willing to part with his property to any one who offers his price. Knight *v.* Cooley, 34 Iowa 218.

In Bailey *v.* Austrian, 19 Minn. 535, the plaintiffs were engaged in a foundry business. The defendant promised to supply them with all the Lake Superior pig iron wanted by them in their business between certain dates, at specified prices, and at the same time the plaintiffs promised to purchase from the defendants all of said iron which they might want in their said business during the time named at the prices named. The court said: "Upon the foregoing state of facts the engagement of plaintiffs was to purchase all of said pig iron which they might want in their said business during the time specified; but they do not engage to want any quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at entire liberty to do so at their own option, and whatever might have been defendant's expectation, he is without remedy. In other words, there is no absolute engagement on plaintiff's part to 'want,' and, of course, no absolute engagement to purchase, any iron of defendant. Without such absolute engagement on plaintiff's part, there is no 'absolute mutuality of engagement,' so that defendant 'has the right at once to hold' plaintiffs 'to a positive agreement.'" See also Minnesota Lumber Co. *v.* Whitebreast Coal Co., 56 Ill. App. 248. *Compare* National Furnace Co. *v.* Keystone Mfg. Co., 110 Ill. 427.

4. **Quotation of Prices.** — See *supra*, this title, subdivision, *Subject Matter;* Bailey *v.* Austrian, 19 Minn. 535; Tarbox *v.* Gotzian, 20 Minn. 139; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155; Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516.

Illustrations. — Thus, in Campbell *v.* Lambert, 36 La. Ann. 35, 51 Am. Rep. 1, Lambert agreed to furnish to Campbell such quantities of coal as he might require, for one year, to the extent of sixty thousand barrels, as ordered, at a designated price per barrel. The buyer was under no obligation to order any coal, and the court held that he had no remedy against the proposed seller.

In Houston, etc., R. Co. *v.* Mitchell, 38 Tex. 85, there was a written agreement by A to B to deliver prairie hay not to exceed two hundred tons, payment to be made on the delivery of designated instalments. The court held that B was not bound to take the hay and had no right of action against A.

The plaintiff wrote the defendants: "At what price will you fill my orders for gauge glasses?" The defendants answered: "We

(3) *Preliminary Negotiations.* — Preliminary negotiations which open the way toward a contract are not to be confused with the contract itself.[1]

will supply you with gauge glasses at the same rates we supply A.;" and subsequently wrote: "Our understanding with A. is bill at sight immediately on receipt of goods, and we hope you will comply with the same conditions; * * * the present price is 8½*d.* per lb." There was no completed contract created by the plaintiff's sending an order, and on his failing to pay by sight bill the defendants were not bound to fill further orders. Ashcroft *v.* Butterworth, 136 Mass. 511.

Drake *v.* Vorse, 52 Iowa 417, was a suit for damages for alleged breach of the following: "Des Moines, January 15, '73. I hereby agree to make all the school seat castings that A. S. Vorse may want during the year 1873, at six cents per pound, except ink well covers, and them at three cents each, deliverable on the cars in Eddyville, Iowa. Payments, cash on delivery. P. E. Drake, A. S. Vorse." The court, by Adams, J., in construing the foregoing, said: "Counsel differ widely as to the obligation which it imposes upon the defendant. It binds the plaintiff to make what castings the defendant may want. It does not expressly bind the defendant to anything except to pay in cash on delivery the prices specified. But, conceding that it bound him to order and take of the plaintiff all the castings he should want, it could not, we think, have the effect to preclude him from entering into a partnership, nor would it become obligatory upon the firm. It was certainly the defendant's privilege to discontinue business at any time when it should appear to him that his interest demanded it, and that too, without becoming liable to the plaintiff in damages."

Where one telegraphed asking if the other would sell certain land, adding "Telegraph lowest cash price," and received a reply stating merely the lowest price, and answered agreeing to buy for this price, it was held that there was no contract of sale, for there was no offer to sell, but a mere statement of the lowest price. Harvey *v.* Facey, (1893) App. 552, 62 L. J. P. C. 127, 69 L. T. 504, 42 W. R. 129.

An order for merchandise does not bind the one giving it until some act is done on the faith of it by the person to whom it is given, or until it is accepted. Goodspeed *v.* Wiard Plow Co., 45 Mich. 322.

A written order for the shipment of goods by which the person to whom it is addressed does not undertake to ship the goods on the conditions proposed, but which constitutes no more than a proposition that if the goods are shipped the signer of the order will pay a certain sum at a certain time, lacks the element of mutual assent. McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525.

A mere offer to sell real estate does not become a sale until the offer has been accepted and notice of acceptance has been given to the one who made the offer. Dyer *v.* Duffy, 39 W. Va. 148.

Action was brought in assumpsit upon the following: "You will please send me galvanized lightning rods for my house within sixty days, for which I will give you thirty-five cents per foot, due when work is completed." This was held to be a mere order which the maker, until notified of its acceptance, could withdraw, and which bound neither party until accepted. Weiden *v.* Woodruff, 38 Mich. 130.

An offer to sell and deliver goods may be revoked at any time before acceptance. Smith *v.* Brennan, 62 Mich. 349, 4 Am. St. Rep. 867.

For Further Illustrations see Keller *v.* Ybarru, 3 Cal. 147; McDonald *v.* Bewick, 51 Mich. 79; Wells *v.* Alexandre, 130 N. Y. 642; Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240.

1. Preliminary Negotiations—Illustrative Cases — *England.* — Appleby *v.* Johnson, L. R. 9 C. P. 158; Ridgway *v.* Wharton, 6 H. L. Cas. 238; Hussey *v.* Horne-Payne, L. R. 4 App. 311, 48 L. J. Ch. 846, 41 L. T. 1, 27 W. R. 585, 6 Eng. Rul. Cas. 155; Chinnock *v.* Ely, 4 DeG. J. & S. 638; Bristol, etc., Aerated Bread Co. *v.* Maggs, 44 Ch. Div. 616, 59 L. J. Ch. 472.

Massachusetts. — May *v.* Ward, 134 Mass. 127; Ashcroft *v.* Butterworth, 136 Mass. 511; Sibley *v.* Felton, 156 Mass. 273.

Michigan. — Peek *v.* Detroit Novelty Works, 29 Mich. 313; Gurney *v.* Collins, 64 Mich. 458; Plank's Tavern Co. *v.* Burkhard, 87 Mich. 182.

New York. — Hough *v.* Brown, 19 N. Y. 111.

"Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation." Foster, J., in Lyman *v.* Robinson, 14 Allen (Mass.) 254. See also Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516.

Where one writes to the other that he will buy certain property of him at a certain price, and the latter replies that he may have the property if he will come for it, these letters do not of themselves constitute a contract of sale. Fenno *v.* Weston, 31 Vt. 345.

A written order, given to the agent of a firm, to ship goods, does not become a binding contract until accepted in writing and the buyer notified. Bronson *v.* Herbert, 95 Mich. 478; Weiden *v.* Woodruff, 38 Mich. 130; Aldine Press *v.* Estes, 75 Mich. 100; McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525; Dyer *v.* Duffy, 39 W. Va. 148.

Where the lowest price had been inquired for, and the price stated in reply, an offer by the inquirer to give the price is a mere proposal and not a contract. Harvey *v.* Facey, (1893) App. 552, 62 L. J. P. C. 127, 69 L. T. 504, 42 W. R. 129.

Although the mere consent of the parties will suffice for the perfection of consensual contracts, yet if the parties, in agreeing upon a sale or any other bargain, agree also that there shall be some other formal act, intending that the bargain shall not be deemed complete until this act is performed, the parties, although they may have agreed upon the terms may recede before the act is complete. Dietz *v.* Farish, 53 How. Pr. (N. Y. Super. Ct.) 217.

In the case of a contract under seal, or a deed, the parties are at liberty to recede at any time up to the time of its actual delivery as a living obligation. Dietz *v.* Farish, 53 How. Pr. (N. Y. Super. Ct.) 217.

If the Agreement Is Substantially Reached, however, and nothing remains but to put into writing the terms upon which the parties have agreed, the contract stands completed.[1]

(4) *Future Execution of Formal Contract.* — Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding or agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The true rule may be stated in these words: Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon. But, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract.[2]

C. contracted with H. to buy and ship fish for him to Boston. H. afterwards requested that the fish be shipped to Plymouth, and C. agreed to do so for a certain commission, which H. refused to agree to pay. C. did not send the fish. In an action by H. for a breach of the contract to send fish to Plymouth, it was held that no such contract was ever completed between the parties. Harlow *v.* Curtis, 121 Mass. 320.

The acceptance of a legally made bid for a proposed building was held not to constitute a contract in itself, but merely to entitle the bidder to one in accordance with the proposals. Hughes *v.* Clyde, 41 Ohio St. 339. *Compare* Highland County *v.* Rhoades, 26 Ohio St. 411.

For Further Illustrations of the principle, see:

United States. — Martin *v.* Northwestern Fuel Co., 22 Fed. Rep. 596.

Alabama. — Derrick *v.* Monette, 73 Ala. 75.

Illinois. — Cornwells *v.* Krengel, 41 Ill. 394.

Kentucky. — Allen *v.* Roberts, 2 Bibb (Ky.) 98.

Michigan. — Gates *v.* Nelles, 62 Mich. 444; Ahearn *v.* Ayres, 38 Mich. 692.

Missouri. — Methudy *v.* Ross, 81 Mo. 481.

Nevada. — Morrill *v.* Tehama Consol. Mill, etc., Co., 10 Nev. 125.

New York. — Taylor *v.* Rennie, 35 Barb. (N. Y.) 272; McCotter *v.* New York, 35 Barb. (N. Y.) 609, 37 N. Y. 325; Briggs *v.* Sizer, 30 N. Y. 647.

1. Terms Agreed Upon — *England.* — Bonnewell *v.* Jenkins, 8 Ch. Div. 70; Rossiter *v.* Miller, 5 Ch. Div. 648, L. R. 3 App. 1124.

Maine. — Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 41 Am. St. Rep. 545.

Missouri. — Methudy *v.* Ross, 10 Mo. App. 101.

New York. — Sanders *v.* Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 43 Am. St. Rep. 757. And see Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Blaney *v.* Hoke, 14 Ohio St. 292; Ridgway *v.* Wharton, 6 H. L. Cas. 238.

An agreement actually carried out is none the less a contract because the parties differed as to its terms when they tried to put them in writing and carried it out without doing so. Peck *v.* Miller, 39 Mich. 594.

A contract may be complete, although the obligations and rights of the parties may be made by its terms to depend on the provisions of a contract subsequently to be entered into between one of the parties to the agreement and a third party. Blaney *v.* Hoke, 14 Ohio St. 292.

To prove a special contract to deliver goods, the defendant produced a memorandum containing an agreement by the plaintiffs to furnish ten thousand croquet sets to the defendant at a price named, and two letters from the plaintiffs: "We will undertake the croquet job upon the terms agreed upon when at your place;" and, "We wrote you that we would undertake the job of ten thousand sets." It was held that the contract had been sufficiently proved. Smith *v.* Colby, 136 Mass. 562.

The defendants proposed to the plaintiffs as follows: "We will engage to furnish you a boat load of flour, the last of next week, same quality sent to G. & M., at $4. 7*s.* 6*d.*, free to boat." The plaintiffs sent an immediate answer in these words: "We will take the boat load flour as per your proposition in yours of the 30th inst. Please say to us how we shall remit." The answer was held to be a clear and unqualified acceptance of the proposition. Clark *v.* Dales, 20 Barb. (N. Y.) 42.

2. Question of Intention — *England.* — Ridgway *v.* Wharton, 6 H. L. Cas. 238; Chinnock *v.* Ely, 4 De G. J. & S. 638; Rossiter *v.* Miller, L. R. 3 App. 1124; Jones *v.* Daniel, (1894) 2 Ch. 332; Brogden *v.* Metropolitan R. Co., L. R. 2 App. 666; Winn *v.* Bull, 7 Ch. Div. 29.

Canada. — Lee *v.* Purdy, 2 U. C. Q. B. 193.

United States. — Bean *v.* Clark, 30 Fed. Rep. 225; Riggs *v.* Magruder, 2 Cranch (C. C.) 143.

Alabama. — Hodges *v.* Sublett, 91 Ala. 588.

Louisiana. — Fredericks *v.* Fasnacht, 30 La. Ann. 117; Avendano *v.* Arthur, 30 La. Ann. 316; Montague *v.* Weil, 30 La. Ann. 50.

Maine. — Goodenow *v.* Dunn, 21 Me. 86; Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 41 Am. St. Rep. 545.

Maryland. — Cheney *v.* Eastern Transp. Line, 59 Md. 557.

Missouri. — Methudy *v.* Ross, 81 Mo. 481; Eads *v.* Carondelet, 42 Mo. 113; Green *v.* Cole, 103 Mo. 70; Allen *v.* Chouteau, 102 Mo. 309; Bourne *v.* Shapleigh, 9 Mo. App. 64.

New Jersey. — Water Com'rs *v.* Brown, 32 N. J. L. 504.

New York. — Wood *v.* Edwards, 19 Johns. (N. Y.) 212.

Ohio. — Blaney *v.* Hoke, 14 Ohio St. 292.

d. FORMALITIES ATTENDING EXECUTION — (1) *In General.* — The extent to which the law permits a contract to rest in parol is governed in large measure

Vermont. — Congdon *v.* Darcy, 46 Vt. 478.

See the titles FRAUDS, STATUTE OF; SALES. See also the notes to the preceding subdivision *Preliminary Negotiations.*

Statements of the Rule. — The parties to a parol agreement, which by the understanding between them is to be reduced to writing, cannot escape from its obligations by refusing to execute the written instrument or to proceed further therewith. Blight *v.* Ashley, Pet. (C. C.) 15.

In *England* the rule was stated as follows, by Lord Langdale, Master of the Rolls: "I have no hesitation in saying that by the offer made and accepted as it appears to have been in this correspondence, a binding contract was completed between these parties. It is true that mention is made in the letters of an intended formal contract, to be afterwards drawn up, but there are many cases in which a correspondence referring to the future execution of a more formal agreement has been held to constitute in itself a valid contract, and I think that the correspondence is equivalent to a contract in the present case." Thomas *v.* Dering, 1 Keen 729. Similar expressions appear in the cases of Bonnewell *v.* Jenkins, 8 Ch. Div. 70; Crossley *v.* Maycock, L. R. 18 Eq. 180.

In *Kentucky* the rule has been stated as follows: "If two persons enter into a verbal agreement about a matter as to which an enforceable parol contract can be made, it would be no defense when one of them is sued for a breach of contract that he understood it would not be obligatory unless reduced to writing; nor does a contemporaneous agreement to reduce a contract to writing make its validity depend upon its being actually reduced to writing and signed. The agreement to put it in writing amounts to no more than an agreement by the parties to provide a particular kind of evidence of the terms of their contract, and no more prevents its enforcement upon other legal evidence than an agreement that they would go to a named individual and state to him the terms of their contract, would render the testimony of any other competent witness inadmissible to prove what the contract was." Bell *v.* Offutt, 10 Bush (Ky.) 632.

In *Louisiana* it is held that the reduction of an agreement to writing, signed by the parties, is not necessary to its perfection as a contract, unless it clearly appears that the parties intended that it should not be complete as a contract until so written and signed. Montague *v.* Weil, 30 La. Ann. 50.

In *Nevada* the general rule is said to be "that where parties enter into any agreement and the understanding is that it is to be reduced to writing, or if it is already in a written form that it is to be signed, before it is acted on or to take effect, it is not binding until it is so written or signed." Morrill *v.* Tehama Consol. Mill, etc., Co., 10 Nev. 125. The court *cites* Boyd *v.* Hind, 36 Eng. L. & Eq. 566; Fish *v.* Johnson, 16 La. Ann. 29; Dodge *v.* Hopkins, 14 Wis. 630; Townsend *v.* Hubbard, 4 Hill (N. Y.) 351; Crane *v.* Partland, 9 Mich. 493.

The *New Jersey* court has expressed this view: "The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed; but nevertheless it is always a question of fact depending upon the circumstances of the particular case whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which for greater certainty or to answer some requirement of the law, they designed to have expressed in some formal written agreement." Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

In Pratt *v.* Hudson River R. Co., 21 N. Y. 305, the court, by Selden, J., said on page 308: "A contract to make and execute a certain written agreement, the terms of which are specific, and mutually understood, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear from the evidence that the minds of the parties had met, that a proposition for a contract had been made by one party and accepted by the other, that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract, embodying those terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform."

In *Ohio* it has been held that where an agreement not within the purview of the statute of frauds is in other respects complete, and in the absence of any understanding between the parties that the same shall not be complete until reduced to writing, the same will bind the parties although it may have been understood between them that the agreement should afterwards be formally reduced to writing and signed. Blaney *v.* Hoke, 14 Ohio St. 292.

A Stipulation to Reduce a Valid Written Contract to Some Other Form does not affect its validity, and the stipulation may not be used by either of the parties for the purpose of imposing upon the other additional burdens and obligations, or of evading the performance of any of the provisions of the contract. This rule applies, where by means of letters and telegrams, exchanged between the parties, a clear and definite proposition containing all the requirements of a completed contract is made by one and accepted by the other, with an understanding that the agreement shall be expressed in a formal writing. Sanders *v.* Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 43 Am. St. Rep. 757.

Waiver of Right to Have Contract Reduced to Writing. — In Paige *v.* Fullerton Woolen Co., 27 Vt. 485, the party had entered into an oral contract for the performance of certain work at a stated price, and it was agreed at the time

by the statute of frauds.[1] The proof of parol agreements, and their relation to writings executed by the parties, falls within the province of the law of evidence.[2]

Technical Words are not required to create a lawful contract.[3]

A Written Bargain is of no higher degree than a verbal one. Either may supplant or modify the other.[4]

(2) *Signature*[5] — **Necessity of.** — Subject to the requirements of the statute of frauds,[6] a written instrument does not require the signature of all the parties to it. If signed by one and delivered to another the latter may bind himself as fully by accepting the delivery as if he had attached his manual signature to the writing.[7] Without signing a contract one may become bound by it if he recognizes and adopts its stipulations.[8] A signature is only necessary from the party to be bound.[9] If it has been performed by one party it need only be signed by the other, for there can be no purpose in binding one by a writing to do what he has already done.[10]

Place of Signature. — The signature need not be put at the end of the writing;

that the contract should be put in writing, and the plaintiff told the defendants that unless this was done he would not perform the work by the job, but would charge for it by the day. The contract was never put in writing, and the plaintiff performed a large part of the work, in accordance with the verbal agreement, as if by the contract and with the expectation that he was to have one. It was held that this constituted a waiver of his right to have it put in writing, and that he could not repudiate the entire contract and charge by the day for the work that he had done.

1. See the title FRAUDS, STATUTE OF.

2. See titles EVIDENCE; PAROL EVIDENCE.

3. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

4. See *infra*, this title, *Methods of Discharge*.

One who has agreed that he will only contract by writing in a certain way is not precluded from agreeing in parol to modify the contract; and there is no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143. See Roger Williams Ins. Co. *v.* Carrington, 43 Mich. 252.

5. "**Signing Does Not Necessarily Mean a Written Signature** as distinguished from a signature by mark, by print, by stamp, or by the hand of another." Finnegan *v.* Lucy, 157 Mass. 439.

6. See the title FRAUDS, STATUTE OF; and *supra*, *Assent*.

7. **Signature** — *Colorado*. — Cary *v.* McIntyre, 7 Colo. 173.

Illinois. — Short *v.* Kieffer, 142 Ill. 266; Vogel *v.* Pekoc, 157 Ill. 339.

Indiana. — Street *v.* Chapman, 29 Ind. 142; Fairbanks *v.* Meyers, 98 Ind. 92; Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520.

Iowa. — Dows *v.* Morse, 62 Iowa 232; Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112, 39 Am. St. Rep. 284.

Pennsylvania. — Carnegie Natural Gas Co. *v.* Philadelphia Co., 158 Pa. St. 317.

Vermont. — Brandon Mfg. Co. *v.* Morse, 48 Vt. 322.

A writing signed by one of the parties, taken in connection with evidence of assent to it by the other who treated it as a memorandum of a contract made between them, is admissible in support of a complaint upon a parol contract. Newby *v.* Rogers, 40 Ind. 9.

So where the lessee recorded the lease this act made the contract a binding one. Indianapolis Natural Gas Co. *v.* Kibbey, 135 Ind. 357.

If it shows upon its face that it was to be executed by both parties before it would be binding upon either, and it has been signed by only one, it may not be introduced in evidence for any purpose, not even against the party executing it. Waggeman *v.* Bracken, 52 Ill. 468.

8. **Recognizing and Adopting Contract.** — Marshall *v.* Hann, 17 N. J. L. 425; Grove *v.* Hodges, 55 Pa. St. 504; Paige *v.* Fullerton Woolen Co., 27 Vt. 485. See also the preceding note.

A lease of chattels where the chattels have been delivered to the lessee, need not be signed by the lessor. Singer Mfg. Co. *v.* Converse, 23 Colo. 247.

A memorandum prepared in the presence of all interested, signed by two who incurred the heaviest obligation, and delivered to a mutual friend to be recorded, will bind those who, though they did not sign, have instituted suit for its enforcement. Connolly *v.* Autenrieth, 4 La. Ann. 162.

Upon the following writing, "I have this day bought of A. 16,371 lbs. gross of hogs, amounting to $590.48, to be paid for at the pens at M.," the trial court was in error in holding that A. was not bound by the writing, simply because he had not signed it, when he was actually a party to it. Kieth *v.* Kerr, 17 Ind. 284.

A written instrument, if verbally assented to by the parties, although not signed by them, constitutes a valid agreement between them. Dutch *v.* Mead, 36 N. Y. Super. Ct. 427.

9. Esmay *v.* Gorton, 18 Ill. 483; Plumb *v.* Campbell, 129 Ill. 101; Ames *v.* Moir, 130 Ill. 582.

10. One who contracts to perform certain labor in consideration of the conveyance of an interest in a mine already made to him, is the only one who need sign the contract. Luckhart *v.* Ogden, 30 Cal. 547.

if it is written by the party in any portion of the contract for the purpose of authenticating the instrument it will, as a general rule, bind him.[1]

Form of Signature. — Signing with the initials,[2] or only the Christian name,[3] is sufficient. Indeed, almost any signature may be adopted if clearly intended to be taken in authentication of the instrument.[4] Thus, the validity of the contract is not affected by one's signing it with the English translation of his French name.[5]

Agency. — Nor is it material that another signed it for him, if the act of signing was authorized at the time or adopted or ratified afterwards.[6]

(3) *Attesting Witness.* — For a treatment of this question reference is made to another part of this work.[7]

(4) *Seal.* — This question has been treated in an earlier part of this article.[8]

(5) *Delivery.* — Questions pertaining to delivery most frequently arise in connection with bills and notes, bonds, deeds, and the like, and under the statute of frauds. These matters are all dealt with exhaustively under appropriate titles.[9]

e. RATIFICATION. — Contracts that have been made by one acting in the capacity of an agent without the authority of his principal, and those that

1. Place of Signature. — Johnson *v.* Dodgson, 2 M. & W. 653; Fulshear *v.* Randon, 18 Tex. 275, 70 Am. Dec. 281; Noe *v.* Hodges, 3 Humph. (Tenn.) 162.

In Dickson *v.* Conde, (Ind. 1897) 46 N. E. Rep. 998, in the contract, above the signature of the parties, was written the following: "This agreement is further continued below," and an additional clause was written below the signatures. This latter was held to be a part of the contract, although not signed.

In Steininger *v.* Hoch, 39 Pa. St. 263, it was held that a party is *prima facie* bound by his signature to an instrument importing an obligation, whether it be signed on the right or the left hand of the paper, if there is no ground for an inference that any other was intended to be the signer; but that such a presumption does not exist where the position of the signature is equivocal.

Although in the description given in the body of a written contract of the persons interested, the name of one who signs it and makes part of the advances is omitted, it is nevertheless valid with respect to such person. Staples *v.* Wheeler, 38 Me. 372.

2. Signing with Initials. — Palmer *v.* Stephens, 1 Den. (N. Y.) 471; Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443; Sanborn *v.* Flagler, 9 Allen (Mass.) 474.

3. Christian Name. — Zann *v.* Haller, 71 Ind. 136, 36 Am. Rep. 193; Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245.

4. Selby *v.* Selby, 3 Meriv. 2; Colton *v.* Seavey, 22 Cal. 496; Tustin *v.* Faught, 23 Cal. 237; Middleton *v.* Findla, 25 Cal. 76; Shank *v.* Butsch, 28 Ind. 19; Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

A mark attached to a signature is evidence of the intention to adopt it; but this may be done by any other act expressed clearly. Just *v.* Wise Tp., 42 Mich. 573.

If one signs a contract with his mark, his name nowhere appearing in the contract, this signature is binding. Zimmerman *v.* Sale, 3 Rich. L. (S. Car.) 76.

5. Augur *v.* Couture, 68 Me. 427.

6. Agency. — See the title AGENCY, vol. 1, p. 930.

California. — Videau *v.* Griffin, 21 Cal. 389.

Illinois. — Davis *v.* Cleghorn, 25 Ill. 212.

Kentucky. — Irvin *v.* Thompson, 4 Bibb (Ky.) 295.

Maine. — Frost *v.* Deering, 21 Me. 156.

Massachusetts. — Gardner *v.* Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Merrifield *v.* Parritt, 11 Cush. (Mass.) 590; Burns *v.* Lynde, 6 Allen (Mass.) 305; Wellington *v.* Jackson, 121 Mass. 157, Finnegan *v.* Lucy, 157 Mass. 439.

Michigan. — Just *v.* Wise Tp., 42 Mich. 573; Johnson *v.* Van Velsor, 43 Mich. 208; Eggleston *v.* Wagner, 46 Mich. 610.

New York. — Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285.

Thus, in Clough *v.* Clough, 73 Me. 487, 40 Am. Rep. 386, the deed was signed for the grantor by the grantee, and the grantor adopted the act as his by delivering the instrument.

Where the contract was shown and read to the party, and she took a pencil to sign, but perceived it was already signed by some one for her, and said that she supposed that it was all right, there being no fraud shown, it was held that the execution of the instrument was sufficient. Speckels *v.* Sax, 1 E. D. Smith (N. Y.) 253.

In Bartlett *v.* Drake, 100 Mass. 174, 1 Am. Rep. 101, the deed was signed by the grantor's wife for him and he subsequently acknowledged it. The acknowledgment made the signature his by adoption or ratification.

For Other Cases in regard to this question see the various contracts and instruments constituting separate titles, such as BONDS; DEEDS; WILLS, etc. And see the title FRAUDS, STATUTE OF.

7. See the title ATTESTATION, vol. 3, p. 273, and the references there given.

8. See *supra*, this title, *Contracts Classified — Contracts by Specialty*. See also the title SEAL.

9. See the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 201; BONDS, vol.

have failed to become effective by reason of some inherent vice, may be made obligatory by ratification.[1]

Infancy — Sunday Law. — A contract, ineffectual because made in infancy, becomes obligatory when its maker does some act upon coming of age which recognizes its obligation.[2] According to some authorities a contract, invalid because entered into in violation of the Sunday law, becomes valid by ratification.[3]

Fraud — Duress — Intoxication. — And so with one tainted with fraud,[4] or signed under duress [5] or in a state of intoxication.[6]

Forgery. — According to some authorities, where an act of signing amounts to forgery it may nevertheless be ratified; but other authorities deny this, from considerations of public policy.[7]

A Material Alteration in a written instrument may be ratified, and the instrument as altered will bind the parties.[8]

Ignorance of Any Material Fact in relation to the unauthorized contract will render a ratification of it by conduct an impossibility.[9]

Express or Implied. — Ratification may be express, or it may arise by implication. If it is to be implied, facts must be established from which it necessarily results.[10] Accepting any of the benefits of a contract precludes one from disputing its validity or objecting to any of its provisions,[11] for ratifying part is the ratification of the entire contract.[12]

4, p. 622; DEEDS; ESCROW; FRAUDS, STATUTE OF.

1. Ratification. — See the title AGENCY, vol. 1, p. 118.

"There is no such thing as a ratification by an alleged principal of an act which was not intended by any of the parties to it to bind him." Thomson, J., in Sperry *v.* Pittsburg Short-Method Smelting, etc., Co., (Colo. 1897) 48 Pac. Rep. 315.

One whom a contract does not purport to bind cannot become bound thereby by ratification, but must make a new contract assuming or adopting the obligation. Western Pub. House *v.* District Tp., 84 Iowa 101.

2. See the title INFANTS.

3. See the title SUNDAY.

4. Fraud. — Brown *v.* Brown, 142 Ill. 409; Pintard *v.* Martin, Smed. & M. Ch. (Miss.) 126; Johnson *v.* Jones, 13 Smed. & M. (Miss.) 580; Pearsoll *v.* Chapin, 44 Pa. St. 9.

See the titles FRAUD; DECEIT.

5. Duress. — Ferrari *v.* Board of Health, 24 Fla. 390; Eberstein *v.* Willets, 134 Ill. 101.

See the titles DURESS; UNDUE INFLUENCE.

6. Intoxication. — Carpenter *v.* Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595.

See the title INTOXICATION.

7. See the titles AGENCY, vol. 1, p. 1185; FORGERY.

8. See the title ALTERATION OF INSTRUMENTS, vol. 2, p. 259, where the question is fully treated.

9. Clarke *v.* Lyon County, 7 Nev. 75. And see Blen *v.* Bear River, etc., Water, etc., Co., 20 Cal. 602, 81 Am. Dec. 132; Brown *v.* Norman, 65 Miss. 369, 7 Am. St. Rep. 663; D. C. Hardy Implement Co. *v.* South Bend Iron Works, 129 Mo. 222; Mudsill Min. Co. *v.* Watrous, 22 U. S. App. 12, 61 Fed. Rep. 163; Findlay *v.* Pertz, 31 U. S. App. 341.

10. Implied Ratification. — Delabigarre *v.* Second Municipality, 3 La. Ann. 230.

That one of a number of connecting railway companies has adopted and ratified the terms of a bill of lading, may be established by its pleading the conditions of such a bill in an action against it for the loss of the goods carried. Fairbank *v.* Cincinnati, etc., R. Co., 66 Fed. Rep. 471.

11. See *infra*, this title, *Waiver;* and see the title ESTOPPEL. Cobb *v.* Hatfield, 46 N. Y. 533. See also Hunt *v.* Johnston, 24 Mo. 509.

If a vendor, having the right to rescind a contract of sale, sues for the price, he thereby affirms the contract. Galloway *v.* Holmes, 1 Dougl. (Mich.) 330.

One who has ratified a contract, though he did not sign it, cannot plead *non est factum*. Bell *v.* Byerson, 11 Iowa 233, 77 Am. Dec. 142.

12. Ratification May Not Be of Part. — Hunter *v.* Stembridge, 17 Ga. 243; Hutchings *v.* Ladd, 16 Mich. 493; Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 16 Am. St. Rep. 695; La Grand Nat. Bank *v.* Blum, 27 Oregon 215; Findlay *v.* Pertz, 31 U. S. App. 341.

A part of a contract cannot be ratified and the rest repudiated. Armstrong *v.* Cache Valley Land, etc., Co., 14 Utah 450.

A book agent, canvassing for a local history to cost ten dollars, had a book for signatures containing a printed contract therefor, a warning to patrons not to be induced to sign unless they expected to pay the price charged, and on a page in plain view of the signer one of its "rules to agents," that "no promise or statement made by an agent, which interferes with the intent of printed contract, shall be valid." A justice of the peace subscribed in this book on condition that his office fees from that time to the date of delivery should be accepted in payment, and he received a written memorandum from the canvasser to that effect. It was held that this must be considered, together with the signature, to show where the minds of the contracting parties met, and that, if the agent's principals ratified the contract they must accept the terms agreed upon,

Want of Consideration. — If the contract is invalid for want of consideration, a ratification that does not supply the consideration cannot make it binding.[1]

Void Contracts. — And if its vice is a vital one so that it is properly termed a void contract, there can be no ratification of it.[2]

2. Contracts Implied by Law. — There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Contracts of this character are denominated implied, constructive, or *quasi* contracts. Such contracts will be fully treated elsewhere in this work.[3]

VI. Methods of Discharge — 1. Agreement of the Parties. — It is entirely competent for the parties to a contract to discharge or annul the same by mutual agreement to that effect. The agreement may assume any one of several forms, such as waiver, rescission, novation, accord and satisfaction, award upon a submission to arbitrators, or release. As all of these forms of discharge constitute separate titles in this work, discussion here would be but repetition.[4]

2. Operation of Law — Alteration of Instrument. — A material alteration of a written instrument may, under certain circumstances, invalidate the instrument so that no recovery may be had on its executory provisions in either its altered or original form.[5]

Merger. — Oral agreements between the parties to a written contract, made before or at the time of the contract, are merged therein. And when an undertaking by simple contract is continued or confirmed by a specialty, the former is merged in the latter. Again, a cause of action, whatever its nature, is merged in and superseded by a judgment rendered upon it.[6]

Bankruptcy. — A discharge in bankruptcy, if duly granted, released the bankrupt from all debts that were provable.[7]

3. Performance. —-Where the performance of one's duties by the terms of the contract is made a condition precedent, either expressly or by implication, he can only recover by pleading and proving that he has faithfully discharged those duties or that the other party has waived the performance of them.[8]

Substantial Performance. — It is the general rule that where performance is required, the law is satisfied with a substantial performance.[9]

while, if they repudiated it, they could decline to deliver the book. But they could not repudiate the actual agreement and hold the subscriber. Eberts *v.* Selover, 44 Mich. 519, 38 Am. Rep. 278.

1. Want of Consideration. — Tucker *v.* Mowrey, 12 Mich. 378; Winfield *v.* Dodge, 45 Mich. 355, 40 Am. Rep. 476; Dickinson *v.* Wright, 56 Mich. 42; Pearsoll *v.* Chapin, 44 Pa. St. 9.

2. Void Contracts. — Thus, only a contract which could have been entered into lawfully in the first instance can be ratified. Taymouth Tp. *v.* Koehler, 35 Mich. 22; Highway Com'rs *v.* Van Dusan, 40 Mich. 429; Davis *v.* Jackson, 61 Mich. 530; Wrought Iron Bridge Co. *v.* Jasper Tp., 68 Mich. 441.

3. See the title Implied Contracts. And see *supra*, this title, *Contracts Classified — Express and Implied Contracts.*

4. Reference is made to the titles Waiver; Rescission; Novation; Accord and Satisfaction, vol. 1, p. 408; Arbitration and Award, vol. 2, p. 533; Release.

5. This subject is fully treated under the title Alteration of Instruments, vol. 2, p. 185.

6. This branch of the subject will be found treated under the title Merger.

7. See the title Insolvency and Bankruptcy, for a full treatment.

8. See *supra*, this title, *Conditions — Precedent;* and *infra*, this subdivision, *Waiver.* Omaha Consol. Vinegar Co. *v.* Burns, 44 Neb. 21; Jones *v.* U. S., 96 U. S. 24.

9. General Rule — Substantial Performance Enough. — Finegan *v.* L'Engle, 8 Fla. 413; Peer *v.* Kean, 14 Mich. 354; Hovey *v.* Pitcher, 13 Mo. 191; Rees *v.* Smith, 1 Ohio 124, 13 Am. Dec. 599; Chambers *v.* Jaynes, 4 Pa. St. 39; Meincke *v.* Falk, 61 Wis. 623, 50 Am. Rep. 157.

What Is Sufficient Performance — Instances. — A contract to furnish "a six-ton scale," equal in every respect to another scale which is named, requires the promisor to furnish a scale equal in all material respects, for the purpose of weighing six tons, to the one referred to; and he need not furnish a scale equal to the sample, if the latter has a greater strength than is needed for that purpose. Lothrop *v.* Otis, 7 Allen (Mass.) 435.

A provision that the builder shall use "the best French plate double-thick glass, similar

Tender — Readiness to Perform. — Whether made a condition precedent or not, it demands as a prerequisite to a recovery that the complainant show either a

to that used" in a certain other building, requires him to use a fair sample of the quality of glass specified, and not that each plate should be the best possible specimen of its kind. South Cong. Meeting-house *v.* Hilton, 11 Gray (Mass.) 407.

It is sufficient discharge of a contract to deliver a deed within six months if the deed is delivered to one authorized by the grantee to receive it, or to one who, although not then so authorized, is afterwards authorized to retain it for his use. Turner *v.* Whidden, 22 Me. 121.

Where, by promissory note, one agrees to deliver a certain quantity of hay, of a stipulated quality, at a place and time named, the promise is performed if hay of the proper kind and quantity is deposited at the place within the time agreed on, and set apart and appropriated to the payment of the note. In such case it is unnecessary that the hay "should be weighed and specially turned out." The quantity may be ascertained in some other way at the risk of the person making the payment; and no turning out or change of position is necessary, further than to separate or set it apart, so that the owner may identify and remove it. Leballister *v.* Nash, 24 Me. 316.

It is sufficient discharge of a contract to deliver "all my crop," "to be in good merchantable order," if the contractor deliver such part as is well ripened, though it be but a few bushels. But the contract is not satisfied by a tender of the whole crop, good and bad together. Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204.

A contract that work shall be performed "under his own personal and immediate superintendence, and not by sub-contract," calls for the personal attention of the contractor, but does not require his constant presence, nor preclude his employing assistants. Reed *v.* Conway, 26 Mo. 13.

A substantial performance authorizes recovery of the contract price less the amount required to complete the contract according to its terms. Hamburger *v.* Rottenberg, 9 Misc. Rep. (N. Y. C. Pl.) 477; Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. Rep. 24; Danley *v.* Williams, 16 Wis. 581.

But it has been held that a building contract is not substantially completed, so as to entitle the builder to the contract price upon the owner's completing the work, where the cost of completion is more than one thousand dollars according to the builder's theory, and more than six thousand dollars according to the owner's theory. Zimmermann *v.* Jourgensen, 70 Hun (N. Y.) 222. See the title WORKING CONTRACTS.

For Further Illustrations see:

United States. — U. S. *v.* Robeson, 9 Pet. (U. S.) 328; Gibbons's Case, 5 Ct. of Cl. 416.

California. — Shoemaker *v.* Acker, 116 Cal. 239; Congdon *v.* Chapman, 63 Cal. 357.

Connecticut. — Zalenski *v.* Clark, 44 Conn. 218, 26 Am. Rep. 446.

Illinois. — Keeler *v.* Clifford, 165 Ill. 544; Ellinger *v.* Hogan, 53 Ill. App. 527.

Indiana. — Shipp *v.* Bowen, 25 Ind. 44.

Kentucky. — Elizabethtown *v.* Chesapeake, etc., R. Co., 94 Ky. 377.

Massachusetts. — Cabot *v.* Winsor, 1 Allen (Mass.) 546; Worthy *v.* Jones, 11 Gray (Mass.) 168, 71 Am. Dec. 696; Schramm *v.* Boston Sugar Refining Co., 146 Mass. 211.

Michigan. — Port Huron, etc., R. Co. *v.* Richards, 90 Mich. 577.

New York. — Doll *v.* Noble, 116 N. Y. 230, 15 Am. St. Rep. 398; Smith *v.* Brady 17 N. Y. 176, 72 Am. Dec. 442; Thomas *v.* Fleury, 26 N. Y. 26; Wyckoff *v.* Meyers, 44 N. Y. 143; Nolan *v.* Whitney, 88 N. Y. 648; Smith *v.* Wright, 4 Hun (N. Y.) 652; Whiteman *v.* New York, 21 Hun (N. Y.) 117; Dalzell *v.* Fahys Watch Case Co., 138 N. Y. 285.

North Carolina. — Meadows *v.* Smith, Busb. L. (44 N. Car.) 327.

Pennsylvania. — Noble *v.* James, 2 Grant's Cas. (Pa.) 278; Preston *v.* Finney, 2 W. & S. (Pa.) 53.

South Dakota. — Aldrich *v.* Wilmarth, 3 S. Dak. 523.

Vermont. — McClure *v.* Briggs, 58 Vt. 82, 56 Am. Rep. 557.

What Is Not Substantial Performance — Instances. — Where the contract is to deliver a designated number of a particular lot of hogs, it cannot be discharged by delivering the like number of any other hogs although of equal quality and weight, unless performance in this respect is waived by the parties. Lowry *v.* Cooper, 21 Ind. 269.

It is not substantial performance of a building contract if defects and omissions pervade the entire work and there are variations from the requirements of the contract, the remedying of which would require the demolition of the structure. Anderson *v.* Petereit, 86 Hun (N. Y.) 600.

Where the contract requires the furnishing of a water-works system with a capacity of two hundred and fifty thousand gallons of water a day, one that furnishes one-fifth that many gallons is not a substantial performance. Sherman *v.* Connor, 88 Tex. 35.

Where a contract for supplying lumber described particularly the quality of lumber to be delivered, a delivery of "merchantable" lumber was held not to be a compliance with the contract. McDonald *v.* Gardner, 56 Wis. 35.

For Further Illustrations, see:

United States. — Allen *v.* Pierpont, 22 Fed. Rep. 582.

Indiana. — Indianapolis, etc., R. Co. *v.* Holmes, 101 Ind. 348.

Iowa. — Jackson *v.* Creswell, 94 Iowa 713; Smyth *v.* Ward, 46 Iowa 339.

Massachusetts. — Rommel *v.* Wingate, 103 Mass. 327.

Michigan. — Button *v.* Russell, 55 Mich. 478; Martus *v.* Houck, 39 Mich. 431, 33 Am. Rep. 409.

Missouri. — Teats *v.* Flanders, 118 Mo. 660; Fenton *v.* Perkins, 3 Mo. 23; Sheffield *v.* Balmer, 1 Mo. App. 176.

New Hampshire. — Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

tender of performance,[1] or a readiness or willingness to perform,[2] or that this willingness was rendered ineffectual by conduct of the other party which makes compliance either unnecessary or impossible.[3]

4. Impossibility of Performance. — **Act of God.** — Executory agreements ordinarily are made on the implied condition that the performance of the agreement shall not be rendered impossible by the intervention of some accidental and uncontrollable superior agency.[4] In the civil law this agency is termed *vis major;* in the common law, act of God; and means an inevitable accident produced by an irresistible physical cause which human skill could not have prevented or human judgment foreseen. The intervention of such an agency may excuse performance.[5]

Personal Services — Promisor Physically Disabled. — This is illustrated in the case of contracts calling for the performance of some personal act which only the promisor could satisfactorily do, where the promisor is physically disabled, or dies before the day set for performance.[6]

New York. — Dauchey *v.* Drake, 85 N. Y. 407; Downer *v.* Thompson, 2 Hill (N. Y.) 137; Pullman *v.* Corning, 9 N. Y. 93; Davenport *v.* Wheeler, 7 Cow. (N. Y.) 231.

Pennsylvania. — Stevenson *v.* Burgin, 49 Pa. St. 36.

Texas. — Fisk *v.* Holden, 17 Tex. 408.

Vermont. — Viall *v.* Hubbard, 37 Vt. 114; Bugbee *v.* Haynes, 43 Vt. 476.

1. Tender. — See the title TENDER; also this title, *supra, Conditions — Precedent.* Taylor *v.* Beck, 13 Ill. 376; Harshman *v.* Heavilon, 95 Ind. 147; Veazie *v.* Bangor, 51 Me. 509; Taylor *v.* Marcum, 60 Minn. 292; Rice *v.* Churchill, 2 Den. (N. Y.) 145; Noble *v.* James, 2 Grant's Cas. (Pa.) 278.

2. Willingness to Perform. — Goldsborough *v.* Orr, 8 Wheat. (U. S.) 224; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 338; Neis *v.* Yocum, 9 Sawy. (U. S.) 24, 16 Fed. Rep. 168; Hapgood *v.* Shaw, 105 Mass. 276; Carpenter *v.* Holcomb, 105 Mass. 280; Coonley *v.* Anderson, 1 Hill (N. Y.) 519; Dunham *v.* Pettee, 8 N. Y. 508; Lester *v.* Jewett, 11 N. Y. 453; Nelson *v.* Plimpton Fire-proof Elevating Co., 55 N. Y. 480.

Where the acts to be done by the two parties to a contract are concurrent, those on one side being the consideration for those on the other, one party in order to secure a right of action against the other need not make a formal and express tender of performance on his part so long as he is able to show that he was not in default himself, that he was ready and willing to perform his part of the contract, and that this was well understood by the other party, who, notwithstanding, refused to perform on his side. Cobb *v.* Hall, 33 Vt. 233.

See the title CONTRACTS, 4 ENCYC. OF PL. AND PR. 913.

3. See the title WAIVER; and *supra, Waiver of Conditions.*

4. The Eliza, Davies (U. S.) 316, 2 Ware (U. S.) 318, 8 Fed. Cas. No. 4348; Reed *v.* U. S., 11 Wall. (U. S.) 606.

5. Act of God. — Brousseau *v.* Hudson, 11 La. Ann. 427.

The act of God which will release one from the obligation of a contract is one which renders its performance impossible. Dewey *v.* Union School Dist., 43 Mich. 480, 38 Am. Rep. 206.

See the title ACT OF GOD, vol. 1, p. 584.

6. Contract for Personal Services — Promisor Disabled. — *England.* — Robinson *v.* Davison, L. R. 6 Exch. 269; Poussard *v.* Spiers, 1 Q. B. Div. 410; Marshall *v.* Broadhurst, 1 Cromp. & J. 403, 1 Tyrw. 348; Collinson *v.* Lister, 20 Beav. 356; Farrow *v.* Wilson, L. R. 4 C. P. 744.

United States. — Howe Sewing Mach. Co. *v.* Rosensteel, 24 Fed. Rep. 583.

Connecticut. — School Dist. No. 1 *v.* Dauchy, 25 Conn. 530, 68 Am. Dec. 371.

Illinois. — Smith *v.* Wilmington Coal Min., etc., Co., 83 Ill. 498.

Kentucky. — Shultz *v.* Johnson, 5 B. Mon. (Ky.) 497; McGill *v.* McGill, 2 Metc. (Ky.) 258.

Maine. — Dickey *v.* Linscott, 20 Me. 453, 37 Am. Dec. 66; Lakeman *v.* Pollard, 43 Me. 463, 69 Am. Dec. 77.

Massachusetts. — Stewart *v.* Loring, 5 Allen (Mass.) 306, 81 Am. Dec. 747; Harrison *v.* Conlan, 10 Allen (Mass.) 85; Wells *v.* Calnan, 107 Mass. 514, 9 Am. Rep. 65; Eliot Nat. Bank *v.* Beal, 141 Mass. 570; Butterfield *v.* Byron, 153 Mass. 517, 25 Am. St. Rep. 654.

Minnesota. — Powell *v.* Newell, 59 Minn. 406.

New Hampshire. — Blake *v.* Niles, 13 N. H. 459, 38 Am. Dec. 506.

New York. — Spalding *v.* Rosa, 71 N. Y. 40, 27 Am. Rep. 7; People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174; Kernochan *v.* Murray, 111 N. Y. 306, 7 Am. St. Rep. 744; Dolan *v.* Rodgers, 149 N. Y. 489.

Pennsylvania. — Dickinson *v.* Calahan, 19 Pa. St. 227; White *v.* Com., 39 Pa. St. 167; Stumpf's Appeal, 116 Pa. St. 33.

Rhode Island. — Yerrington *v.* Greene, 7 R. I. 589, 84 Am. Dec. 578.

The death of one party to a contract does not operate as a revocation or discharge of his part of the agreement, where his obligation thereunder is such that it can be performed by his personal representative. Hawkins *v.* Ball, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 755.

If the contract is for the performance of personal services requiring particular ability and skill, there is a condition implied that the contractor shall be alive and physically able to perform them. Marvel *v.* Phillips, 162 Mass. 399, 44 Am. St. Rep. 370.

A contract for the hire of labor, without dis-

Destruction of Subject-Matter. — And akin to this is the case of contracts relating to some specific article which the act of God destroys. Here there is an implied condition in the promise that the preventing contingency shall not arise.[1]

Where Substantial Performance Possible. — The rule that the intervention of the act of God will excuse performance does not apply where the essential purpose of the contract is capable of substantial accomplishment, although a literal performance has become physically impossible.[2]

Absolute Undertaking. — Where a party by his own contract creates an absolute duty or charge upon himself he is bound to make it good, notwithstanding any accident or delay by inevitable accident, because he might have provided against it by contract. This rule has been uniformly followed, and that, too, even in cases in which its application has been considered by the court as attended with great hardship.[3]

tinction as to whether it can be performed by any one else as well as by the obligor, is not terminated by the death of the person for whom the work is to be done. The obligor is entitled to recover from the personal representatives of the obligee his salary for the full term. Tete *v.* Lanaux, 45 La. Ann. 1343.

Nor does the death of the promisor terminate an explicit engagement to take and pay for a certain amount of water annually for ten years, although the other party knew that the water was wanted for milling under a lease rightfully terminable when the death occurred. Drummond *v.* Crane, 159 Mass. 577, 38 Am. St. Rep. 460.

If a contract of service is terminable upon so many days' notice, if *vis major* incapacitates the servant from performing the contract, it dispenses with the necessity for notice. Fuller *v.* Brown, 11 Met. (Mass.) 440; Hughes *v.* Wamsutta Mills, 11 Allen (Mass.) 201.

The mere fact of a contemplated marriage, or of the marriage itself on the part of one engaged as housekeeper to render personal services, would not of itself excuse her discharge, as a matter of law, so long as she was willing to fulfil the duties contracted for. And the employer could not justify his breach by claiming that he had contracted for the services of an unmarried woman merely because she happened to be unmarried at the time. Edgecomb *v.* Buckhout, 146 N. Y. 339, *reversing* 83 Hun (N. Y.) 168.

1. For a Treatment of breach of promise to marry, see the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 892. See the titles ACT OF GOD, vol. 1, p. 588; IMPOSSIBLE CONTRACTS; also *supra*, this title, *The Elements of a Contract — Subject-matter — Its Constituents — Continued Existence of Thing Contracted for.* See also The Tornado, 108 U. S. 351.

Thus the performance of a contract to pay a debt by furnishing services of a particular animal for breeding purposes is excused by the death of the animal. Shear *v.* Wright, 60 Mich. 159.

2. Rule Where Substantial Performance Possible. — White *v.* Mann, 26 Me. 361; Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

3. Undertaking Absolute — *England.* — Lloyd *v.* Crispe, 5 Taunt. 249; Thiis *v.* Byers, 1 Q. B. Div. 244; Hills *v.* Sughrue, 15 M. & W. 253; Ford *v.* Cotesworth, L. R. 4 Q. B. 134; Gillespie & Co. *v.* Howden & Co., 12 C. of S. Cas. (Sc.) 800.

Illinois. — Bunn *v.* Prather, 21 Ill. 217; Bacon *v.* Cobb, 45 Ill. 47; Dehler *v.* Held, 50 Ill. 491; Steele *v.* Buck, 61 Ill. 343, 14 Am. Rep. 60; Summers *v.* Hibbard, 153 Ill. 102, 46 Am. St. Rep. 872.

Minnesota. — Anderson *v.* May, 50 Minn. 280, 36 Am. St. Rep. 642.

New Jersey. — Trenton Public Schools *v.* Bennett, 27 N. J. L. 513.

New York. — Harmony *v.* Bingham, 12 N. Y. 106, 62 Am. Dec. 142; Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Delaware, etc., R. Co. *v.* Bowns, 58 N. Y. 573.

Pennsylvania. — Myers *v.* Drake, 10 Watts (Pa.) 110; Miller *v.* Phillips, 31 Pa. St. 218.

In School Dist. No. 1 *v.* Dauchy, 25 Conn. 530, 68 Am. Dec. 371, the court said: "We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and if the thing to be done or the event is neither impossible or unlawful at the time of the promise, he is bound by his promise, unless the performance before that time becomes unlawful. Any seeming departure from this principle of law * * * will be found, we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the nature of the subject or from the situation of the parties, rather than from a denial of the principle itself. Such, for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive; or a promise to deliver a certain horse at a future time, and before the day arrives the horse dies, in which case the parties are held to have contracted in view of that contingency. In these and like cases the court will hold that the parties did not understand that the thing was to be done unless the life of the persons or of the horse was continued, so that there would be an object and an interest in the execution of the contract. These and a few other exceptions of a similar character are to be found in the books, but they are not so much exceptions after all as cases where the intention of the parties is presumed or inferred, though not expressed, from their peculiar situation, or from the subject-matter

Legal Impossibility. — If, subsequently to the making of the contract, performance is rendered impossible by the law, the promisor is released.[1]

Duty Imposed by Law. — It is a well-settled rule that where the law creates a duty or charge and the party is disabled from performance without fault of his own, and has no remedy over, then the law will excuse him.[2]

Act of the Parties. — If one of the parties to a contract makes performance impossible he may not take advantage of the nonperformance, but the other party is released, and may have his action for the breach.[3]

If the Promise Is in the Alternative, to do one of two things, and one becomes impossible, this does not excuse the doing of the other.[4]

Where Contingency Could Have Been Provided Against. — No contingency rendering the performance of a contractual duty impossible will excuse the promisor from performance if its occurrence could have been foreseen and provided against by a man of reasonable prudence. It takes more than difficulty and inconvenience to excuse performance under these circumstances; performance must be impossible.[5]

5. Breach. — A breach of contract may arise in any one of three ways, namely: By renunciation of liability under the contract; by failure to perform

itself." To this the court *cites:* Paradine *v.* Jane, Aleyn 26; Barrett *v.* Dutton, 4 Campb. 333; Barker *v.* Hodgson, 3 M. & S. 267; Shubrick *v.* Salmond, 3 Burr. 1637; Harmony *v.* Bingham, 12 N. Y. 106, 62 Am. Dec. 142.

For a Full Treatment of this question see the title ACT OF GOD, vol. 1, p. 588.

1. This matter is treated under the title IMPOSSIBLE CONTRACTS.

2. Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

For a Full Collection of Authorities on this point see the title ACT OF GOD, vol. 1, p. 592.

3. See the title IMPOSSIBLE CONTRACTS, where this topic is treated.

4. Promise in Alternative. — Jacquinet *v.* Boutron, 19 La. Ann. 30; Barkworth *v.* Young, 4 Drew. 1; Da Costa *v.* Davis, 1 B. & P. 242. But see Smith *v.* Durell, 16 N. H. 344, 41 Am. Dec. 732. See generally the title IMPOSSIBLE CONTRACTS.

5. Where Contingency Might Have Been Foreseen. — The Bark Ethel, 5 Ben. (U. S.) 154, 8 Fed. Cas. No. 4540; Huling *v.* Craig, Add. (Pa.) 342; Bryan *v.* Spurgin, 5 Sneed (Tenn.) 681; Jennings *v.* Lyons, 39 Wis. 553, 20 Am. Rep. 57.

Inability to perform a contract does not release a party to it from his obligation if he was disabled by his own default. McCreery *v.* Green, 38 Mich. 172.

Where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. Mr. Justice Jackson, in Chicago, etc., R. Co. *v.* Hoyt, 149 U. S. 1.

The Contract Should Provide Against It. — One who by his own contract creates a duty or charge on himself must make it good if he may, notwithstanding he was prevented by unavoidable accident; for he could have provided against that in his contract. West *v.* Steamer Uncle Sam, 1 McAll. (U. S.) 505, 29 Fed. Cas. No. 17427; Jemison *v.* McDaniel, 25 Miss. 83. See also Keystone Lumber, etc., Co. *v.* Dole, 43 Mich. 370; Harmony *v.* Bingham, 12 N. Y. 106, 62 Am. Dec. 142; Van Buskirk *v.* Roberts, 31 N. Y. 661.

Under an agreement to manufacture and deliver a certain article within a time fixed, accident will not excuse a failure to perform, even if it prevent performance. If protection is sought from such a contingency, the contract should provide for it. Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487.

It is no excuse for failing to perform an agreement to deliver goods of a certain quality, that such goods were not to be had at the particular season when the contract was to be executed. Gilpins *v.* Consequa, Pet. (C. C.) 85, 10 Fed. Cas. No. 5452, 3 Wash. (U. S.) 184; Youqua *v.* Nixon, Pet. (C. C.) 221, 30 Fed. Cas. No. 18189.

In Dolan *v.* Rodgers, 149 N. Y 489, the court said, on page 491: "Impossibility of performance is, in general, no answer to an action for damages for nonperformance of a contract, provided the contingency was such as the promisor should have foreseen and provided against when he made the promise, nor will it permit a recovery for part performance of an entire contract. * * * If, however, the impossibility arises, even indirectly, from the acts of the promisee — as, for instance, where one of the contracting parties so conducts himself as to subject the other to an action by some third person if he duly performs the contract — it is a sufficient excuse for nonperformance. U. S. *v.* Peck, 102 U. S. 64; Gallagher *v.* Nichols, 60 N. Y. 438; European, etc., Royal Mail Co. *v.* Royal Mail Steam Packet Co., 30 L. J. C. P. 247. * * * This is upon the principle that he who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him, in effect: 'This is your own act, and, therefore, you are not damnified.' West *v.* Blakeway, 2 M. & G. 751, 40 E. C. L. 609."

For further treatment, see the titles ACT OF GOD, vol. 1, p. 584; IMPOSSIBLE CONTRACTS.

the engagement; or by doing something which renders performance impossible.

The Effect of a Breach upon the rights, remedies, and liabilities of the contractors depends upon the nature of the agreement. If the contract is entire, a breach as to a single material point discharges the whole, relieving the other party from performance and affording him an immediate right of action to enforce the whole obligation; if severable, the remedy is apportioned to the extent to which the contract was performed before breach occurred.[1]

Severable Contract. — Whether one who has been injured by the breach of a severable contract is entitled to abandon the contract and refuse further performance under it, or must fulfil his obligations and hold the other party for damages for the breach, is a question the solution of which is not to be found in any general rule. It depends upon the particular facts and circumstances of the case and on a reasonable interpretation of the contract. If strict performance is a condition precedent, then a failure to perform discharges the contract.[2] English authorities have held that recovery may be had upon such a breach, but that no discharge as to further performance takes place [3] unless the breach in question be equivalent to a refusal to perform the balance of the contract, or be such as to defeat the purpose of the contract.[4]

Demand — Tender — Immediate Right of Action. — The failure or refusal to perform an obligation assumed expressly or by implication, or the voluntary abandonment of the contract, releases the obligee from the duty of making demand,[5] and performance or tender, and justifies him in abandoning the contract without waiting until the contract period expires, and gives him an immediate right of action for the breach and to rescind.[6]

1. See *supra*, this title, *Contracts Classified — Entire and Divisible Contracts.* Haskell *v.* McHenry, 4 Cal. 411; Textor *v.* Hutchings, 62 Md. 150.

2. **When Contract Severable.** — See *supra*, this title, *The Elements of a Contract — Subject-matter — Conditions — Precedent.*

Where one contract covers a number of distinct matters, a breach in respect to one does not relieve a party from performance as to the rest. Tucker *v.* Billing, 3 Utah 82.

3. Simpson *v.* Crippen, L. R. 8 Q. B. 14; Freeth *v.* Burr, L. R. 9 C. P. 208.

4. See *supra*, this title, *The Elements of a Contract — Subject-matter — Conditions — Concurrent or Dependent.*

5. **When Demand Dispensed With.** — Somers *v.* Tayloe, 2 Cranch (C. C.) 138, 22 Fed. Cas. No. 13170; McNaughter *v.* Cassally, 4 McLean (U. S.) 530, 16 Fed. Cas. No. 8911; Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59; Boyle *v.* Guysinger, 12 Ind. 273; Shepherd *v.* Milwaukee Gas Light Co., 11 Wis. 234; Racine County Bank *v.* Keep, 13 Wis. 209; Corbitt *v.* Stonemetz, 15 Wis. 170; Cunningham *v.* Brown, 44 Wis. 78.

A promisor who declares that he has determined not to pay the amount in any manner, it having been demanded in money, thereby waives a demand to pay in specified articles, and is liable to an action for the amount in money. Corbitt *v.* Stonemetz, 15 Wis. 170.

6. **Immediate Cause of Action.** — Hochster *v.* De La Tour, 2 El. & Bl. 678, 75 E. C. L. 678; Chapin *v.* Norton, 6 McLean (U. S.) 500, 5 Fed. Cas. No. 2599; Biggers *v.* Pace, 5 Ga. 171; Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Thompson *v.* Laing, 8 Bosw. (N. Y.) 482; Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Tinsley *v.* Foster, (Tex. Civ. App. 1893) 25 S. W. Rep. 298; Zuck *v.* McClure, 98 Pa. St. 541; Cobb *v.* Hall, 33 Vt. 233; Nilson *v.* Morse, 52 Wis. 240; Potter *v.* Taggart, 54 Wis. 395. *Contra*, Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384.

Illustrations. — Where the maker of a note, payable at his option in specific articles or in money, is ready to deliver the articles, and so notifies the payee, and the payee refuses to receive the articles, the latter cannot recover upon the obligation as a money demand, or enforce its payment as such without a subsequent demand upon the maker for the property, as such refusal to receive dispenses with the necessity for further tender or delivery. Williams *v.* Triplett, 3 Iowa 518.

Where an order for the manufacture of an article is countermanded before its completion, the manufacturer will not be compelled to go on after such countermand and complete the article ordered before he can recover pay for what he has done, but he may treat the countermand and refusal to take the article ordered as a prevention of performance on his part, and sue upon the contract on that ground. Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716, by Christiancy, J., *citing* Clark *v.* Marsiglia, 1 Den. (N.Y.) 317, 43 Am. Dec. 670; Derby *v.* Johnson, 21 Vt. 21; Cort *v.* Ambergate, etc., R. Co., 6 Eng. L. & Eq. 230.

If the hirer of a vessel fail to fulfil his part of the agreement, the owner is at liberty to disregard the agreement and seek other employment. Ferris *v.* The Alida, 14 Phila. (Pa.) 602.

In Cherry Valley Iron Works *v.* Florence Iron River Co., 22 U. S. App. 662, the court said: "It may be that a downright refusal to make payment, or other equivalent conduct

Voluntarily Disabling One's Self to Perform. — And voluntarily putting it beyond one's power to perform has the same effect.[1]

Other Party Preventing Performance. — So with conduct preventing performance by the other party or dispensing with it.[2]

evincing a purpose to renounce the contract, would entitle the other party to treat the contract as abandoned, and relieve him from the obligation to proceed further in its execution." *Citing* Winchester *v.* Newton, 2 Allen (Mass.) 492.

Where, under a contract binding a party to deliver a certain quantity of grain, the party seeks to do so and tenders a part of it, but is met by repeated refusals to receive any of it, he is not bound to make a formal tender of the whole. Saylor's Case, 14 Ct. of Cl. 453.

The parties having entered into an engagement to marry "in the fall," the defendant announced to the plaintiff in October that he would not perform the contract. It was held that an action commenced at once was not premature. Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516. See the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882.

Where a contract has been entered into for future employment and, upon the arrival of the time named for the service to commence, the employee being ready and willing to perform, the employer repudiates the contract, this is a breach and no tender of services or readiness to serve thereafter is necessary. Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285.

1. Voluntarily Disabling One's Self to Perform. — Shaffner *v.* Killian, 7 Ill. App. 620; Boyle *v.* Guysinger, 12 Ind. 273; Newcomb *v.* Brackett, 16 Mass. 161; Hart *v.* Summers, 38 Mich. 399; Woolner *v.* Hill, 93 N. Y. 576, *reversing* 47 N. Y. Super. Ct. 470; Branson *v.* Oregonian R. Co., 10 Oregon 278; Synge *v.* Synge, (1894) 1 Q. B. 466.

As where a bailee, bound to surrender a watch upon demand, has given it to a third person. Delamater *v.* Miller, 1 Cow. (N. Y.) 75, 13 Am. Dec. 512.

Under a contract for the entire output of a dairy for the year, the seller delivered a part, and then informed the purchaser that he had sold the output for the rest of the year to another, and had delivered part of it. It was held that the seller had disabled himself to perform his contract, and therefore the buyer might recover damages without any offer of performance on his part. Crist *v.* Armour, 34 Barb. (N. Y.) 378.

2. Performance Prevented or Dispensed With — *United States.* — Anvil Min. Co. *v.* Humble, 153 U. S. 540; McElwee *v.* Bridgeport Land, etc., Co., 54 Fed. Rep. 627.

Colorado. — Smith *v.* Roe, 7 Colo. 95.

Illinois. — Demme, etc., Furniture Co. *v.* McCabe, 49 Ill. App. 453; Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, Hopk. Sel. Cas. Contr. 578.

Indiana. — Grand Lodge, etc. *v.* King, 10 Ind. App. 639.

Michigan. — Barton *v.* Gray, 57 Mich. 623.

Missouri. — Halpin *v.* Manny, 57 Mo. App. 59.

New York. — Tone *v.* Doelger, 6 Robt. (N. Y.) 251; Nelson *v.* Plimpton Fire-proof Elevating Co., 55 N. Y. 480.

Pennsylvania. — Wilhelm *v.* Caul, 2 W. & S. (Pa.) 26; North American Oil Co. *v.* Forsyth, 48 Pa. St. 291.

Texas. — Freedman *v.* Lombard Invest. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 370.

See also *supra*, this title, *Impossibility of Performance;* and the title IMPOSSIBLE CONTRACTS.

In Young *v.* Hunter, 6 N. Y. 207, the court said: "Independent of the question of waiver, if the defendants by their acts prevented the performance by the plaintiff of the conditions of his contract, he was excused from such performance. It is a well-settled and salutary rule that a party cannot insist upon a condition precedent when its nonperformance has been caused by himself."

Illustrations. — A manufacturer undertook for two partners to make an engine, the same to be of certain dimensions and of the best quality. One of the two afterwards directed an alteration in the patterns about to be used for the engine. The castings were made according to the altered patterns. It was held that the undertaker was not responsible for the sufficiency of the engine. Dare *v.* Spencer, 5 Blackf. (Ind.) 491.

If one party offers to perform, but is prevented by the other, the offer will be treated as performance, or as excusing performance, by the party so offering, and he may recover the whole compensation agreed to be given or the damages sustained in consequence of his not being allowed to perform his part. Wheatly *v.* Covington, 11 Bush (Ky.) 18.

A stipulation by A with B that C shall do a certain thing, binds A to do nothing that may impede C in doing the thing agreed. Gay *v.* Blanchard, 32 La. Ann. 497.

One who is prevented from performing a contract with a city by the acts of its officers in the line of their duty is justified in abandoning his contract and suing for damages. Mahon *v.* New York, 10 Misc. Rep. (N. Y. C. Pl.) 664, 1 N. Y. Ann. Cas. 361.

Where one has contracted with a county to do work and receive pay therefor as the work progresses, and during the progress of the work the county refuses to pay, the contractor may recover for work already done. Monteverde *v.* Queens County, 78 Hun (N. Y.) 267.

Where an order issued by the chief of the cavalry bureau had the effect of preventing the performance of an earlier contract for the sale of horses, and the contractor proceeded to the place of performance, and was ready and willing to perform, but did not tender the horses, it was held that he might still recover for the breach, upon showing that the order was rigidly enforced at that place, that no horses were accepted by quartermasters in pursuance of similar earlier contracts, and that the chief of the bureau gave notice to a committee of horse dealers that he would suspend the order in no case, which decision the committee communicated to the claimant. Smoot's Case, 5 Ct. of Cl. 490.

Part payment of a debt was to be made in

Such Conduct Is Equivalent to a Waiver of the right to require performance, for one who has violated his obligations under a contract is in no position either to compel the other party to fulfil his duties or to complain because the latter is unwilling to do so.[1]

Accepting Benefits — Knowledge of Breach. — But if the work he has done under the contract, so broken, is accepted with knowledge of the breach, and substantial benefit is derived from it by the one so accepting, a recovery may be had upon a *quantum meruit*, not on the original contract, but upon a new, implied contract; the recovery in no case to exceed the contract sum.[2]

Election of Remedies. — The one who has been injured has an election to pursue any one of three remedies.[3] He may treat the contract as rescinded and recover upon *quantum meruit* so far as he has performed;[4] or he may keep the

so much sawing annually. It was held that the payee was in default if he did not produce his lumber to be sawed during the year, and that he was not entitled to a recovery. Fredenburg *v.* Turner, 37 Mich. 402; Stimpson *v.* Freeman, 38 Mich. 314.

The owner who prevents the completion of a building by the time named in the contract cannot set up such delay as a defense to a suit against him upon the contract. Murphy *v.* Stickley-Simonds Co., 82 Hun (N. Y.) 158.

One who agrees with a mortgagee to pay a mortgage if the mortgagee will assign it to him is released from his promise by a foreclosure and sale by the mortgagee. Union Sav. Inst. *v.* Hill, 139 Mass. 47.

It is a breach of a contract to allow a purchaser to use a patented improvement if the contractor afterwards sues out and serves an injunction forbidding such use. Sullings *v.* Goodyear Dental Vulcanite Co., 36 Mich. 313.

Where the party for whom work was to be done suspends the work until after the time when the work was to be complete, this conduct releases the other parties from any obligation to complete the work under the contract, and puts an end thereto; but the party thus suspending the contract is liable for breach. Kugler *v.* Wiseman, 20 Ohio 361. See also Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Stewart *v.* Keteltas, 36 N. Y. 388.

1. Waiver. — Shaeffer *v.* Blair, 149 U. S. 248; Pittsburgh Bessemer Steel Rail Co. *v.* Hinckley, 17 Fed. Rep. 584; Allen *v.* McKibbin, 5 Mich. 449; DePeyster *v.* Pulver, 3 Barb. (N. Y.) 284; Skinner *v.* Tinker, 34 Barb. (N. Y.) 333.

See the title WAIVER.

Illustrations. — A mere declaration made by one bound to perform a future act, before the time for doing it, that he will not do it, is of itself no breach of contract; but if this declaration is not withdrawn when the time arrives for the act to be done, this is a sufficient excuse for the default of the other party. McPherson *v.* Walker, 40 Ill. 371; Carstens *v.* McDonald, 38 Neb. 858.

Before a party to a contract may sue for a breach before the arrival of the time designated for performance, on the ground that the defendant has refused to perform, he is bound to show, unless the refusal has been acted on, that such refusal was positive and was persisted in down to the time set for performance, or that the defendant has rendered himself unable to perform the contract on his part. Gray *v.* Green, 9 Hun (N. Y.) 334.

Where the assignment of a lease by the plaintiff, with the assent of the landlord, was made a condition precedent by a contract between the parties, it was held that an offer of performance by the plaintiff and an absolute refusal to accept upon the part of the defendant rendered unnecessary any formal tender by the former of an assignment executed by him, with the written assent of the landlord thereto. Blewett *v.* Baker, 58 N. Y. 611.

If on the day fixed for the contract to be performed one of the parties refuses to perform unless conditions unreasonable are acceded to, there is a breach which the party cannot cure by changing his mind four hours afterwards and offering to perform. Bell *v.* Hoffman, 92 N. Car. 273.

Refusal to perform the contract on the part of a firm was held to be established by proof that one partner, when asked by R. what he would do about fulfilling the firm's contract to purchase a patent right replied, that he would try to get another member to "help R. out of it," and that afterwards the other member, when applied to, answered that he could do nothing about the repurchase, as he was "too poor to raise the money." Rider *v.* Pease, 119 Mass. 492.

2. Allen *v.* McKibbin, 5 Mich. 454.

3. Election of Remedies. — Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, Hopk. Sel. Cas. Contr. 578, 584, the court, by Shope, J., giving the three remedies as stated in the text.

4. May Consider Contract as Rescinded — Quantum Meruit. — Adams *v.* Burbank, 103 Cal. 646; Draper *v.* Randolph, 4 Harr. (Del.) 454; Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, Hopk. Sel. Cas. Contr. 578; Belshaw *v.* Colie, 1 E. D. Smith (N. Y.) 213; Jones *v.* Judd, 4 N. Y. 411; Dillon *v.* Anderson, 43 N. Y. 237; Wright *v.* Reusens, 133 N. Y. 305; Kokomo Strawboard Co. *v.* Inman, 134 N. Y. 92; Purdy *v.* Nova Scotia Midland R., etc., Co., 11 Misc. Rep. (N. Y. C. Pl.) 406; Blood *v.* Enos, 12 Vt. 625, 36 Am. Dec. 363; Danley *v.* Williams, 16 Wis. 581.

The true rule is not that when the acts of one party prevent performance by the other, the latter can be fairly held to compensate in damages, under all circumstances, to the extent of the price agreed to be paid on full performance. The true rule seems to be that, when the contract has been performed in part, the just claims of the party employed are

contract alive for the benefit of both parties, being at all times himself ready and able to perform, at the same time giving the other an opportunity to reconsider and comply, and, at the end of the time specified in the contract for performance, sue and recover under the contract;[1] or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case the contract would be continued in force for that purpose.[2]

Continuing with Performance — Increasing Damages. — Having been explicitly forbidden to complete the contract, he may recover pay for part performance and damages for the breach so made, but he has no right to continue with the performance of his contract and so increase the amount of damages.[3] So, too, where one party has broken the contract, the other cannot go on and, performing only so much of it as he sees fit and no more, recover the value of the work done.[4]

A Breach in Any Vital Part of the Contract discharges the promisee from performing his obligations under it.[5] Thus, where time is of the essence of the agreement, a breach in this regard will bar a recovery by the one in default and entitle the other to abandon the contract.[6]

Default in Part Not Vital. — But where the default is in something that is not vital, and that is susceptible of compensation in damages, the contract is not discharged, although an offset will be allowed for the extent of injury occasioned by the breach.[7]

satisfied when he is paid for the part performed and indemnified for his loss in respect to the part which he has not performed. Friedlander *v.* Pugh, 43 Miss. 111, 5 Am. Rep. 478.

B sold A a yoke of oxen subject to the condition that they should remain the property of B till paid for. A was to pay by cutting and drawing cordwood. Before this was completed, he allowed the oxen to go back into the hands of B, who refused to return them without additional security for the price. It was held that the refusal to redeliver was a disaffirmance of the contract, and that A was entitled to recover for his work. Martin *v.* Eames, 26 Vt. 476.

1. Keeping Contract Alive — Suit on Contract. — Frost *v.* Knight, L. R. 7 Exch. 114; Kadish *v.* Young, 108 Ill. 170, 48 Am. Rep. 548; Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, Hopk. Sel. Cas. Contr. 578, 584; Zuck *v.* McClure, 98 Pa. St. 541.

Where the vendor in his contract reserves the right to declare a forfeiture, his failure to claim it is a waiver. Until forfeiture is declared, the contract continues mutually binding on the parties. Heald *v.* Wright, 75 Ill. 17.

2. May Treat Contract as Ended — Suit for Lost Profits. — Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, Hopk. Sel. Cas. Contr. 578.

In this last case he must allege and prove performance upon his part or a legal excuse for nonperformance. Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, Hopk. Sel. Cas. Contr. 578, 584.

3. May Not Continue Performance and So Increase Damages — *Iowa.* — Moline Scale Co. *v.* Beed, 52 Iowa 307, 35 Am. Rep. 272.

Maryland. — Black *v.* Woodrow, 39 Md. 217; Heaver *v.* Lanahan, 74 Md. 493.

Massachusetts. — Collins *v.* Delaporte, 115 Mass. 159.

Michigan. — Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

Minnesota. — Gibbons *v.* Bente, 51 Minn. 499.

Nebraska. — Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Neb. 339.

New York. — Clark *v.* Marsiglia, 1 Den. (N. Y.) 317, 43 Am. Dec. 670; Butler *v.* Butler, 77 N. Y. 472, 33 Am. Rep. 648; Lord *v.* Thomas, 64 N. Y. 107.

North Dakota. — Davis *v.* Bronson, 2 N. Dak. 300, 33 Am. St. Rep. 783.

Vermont. — Danforth *v.* Walker, 37 Vt. 239.

4. McGregor *v.* Ross, 96 Mich. 103.

5. Breach in Vital Part of Contract. — See *supra*, this title, *Conditions — Precedent;* also *supra*, *Entire and Divisible Contracts.*

Whether the matter involved in the breach is vital or essential is to be determined from a reasonable construction of the entire contract indicating the intention of the parties. "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance, and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention it will not be a condition precedent." Bettini *v.* Gye, 1 Q. B. Div. 187.

B purchased a milk route of A, and subsequently declined to take it, upon learning that A had bargained for another milk route over the same territory, although A claimed that he intended to sell to none of the customers to whom he had formerly sold. This was held to have justified B in refusing to take the route. Munsey *v.* Butterfield, 133 Mass. 492.

6. See the title INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

7. Bettini *v.* Gye, 1 Q. B. Div. 187; MacAndrew *v.* Chapple, L. R. 1 C. P. 643; Weintz *v.* Hafner, 78 Ill. 27. See also Romel *v.* Alex-

A Breach Which Is Purely Technical, and from which one has suffered no damage, does not excuse him from carrying out all the covenants on his part to be performed.[1]

Matters Subsequent to Breach — Justification. — Nor will a breach be justified by anything the other party subsequently does or omits to do.[2]

Breach of a Contract May Be Waived.[3] — Thus where a breach by one party occasions an injury to the other which is susceptible of compensation in damages, it does not relieve the latter from liability under the contract where both parties have gone on and performed it for some time thereafter.[4] And if he is entitled to the strict enforcement of his contract, but has led the other party to believe that he will not exact it, he thereby waives his right to strict performance. So, too, by accepting work that is finished after the time agreed upon, or in a different way from that contracted for, and by assenting to such default, he waives strict performance[5] and forfeits all remedies but damages for the faulty workmanship and for his own consequent loss,[6] and the right to

ander, (Ind. App. 1897) 46 N. E. Rep. 595; Pickens *v.* Bozell, 11 Ind. 275; Boyle *v.* Guysinger, 12 Ind. 273.

1. Lassing *v.* James, 107 Cal. 348.

2. Barrett *v.* Verdery, 93 Ga. 526.

3. **For a Full Discussion** of this topic see the title WAIVER. It is intended to present here a few general principles, reserving the complete treatment for the title just mentioned.

4. Robinson *v.* Lake Shore, etc., R. Co., 103 Mich. 610.

5. **Acceptance of Work or Assent to Default** is waiver.

Alabama. — Casey *v.* Holmes, 10 Ala. 776. Aikin *v.* Bloodgood, 12 Ala. 221.

Delaware. — Hall *v.* Cannon, 4 Harr. (Del.) 360.

Florida. — Finegan *v.* L'Engle, 8 Fla. 413.

Illinois. — Strawn *v.* Cogswell, 28 Ill. 457; Nibbe *v.* Brauhn, 24 Ill. 268.

Indiana. — Cummings *v.* Pence, 1 Ind. App. 320.

Louisiana. — Municipality No. 2 *v.* Guillotte, 14 La. Ann. 295.

Maine. — Norris *v.* School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182; Barry *v.* Palmer, 19 Me. 303.

Michigan. — Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Button *v.* Russell, 55 Mich. 478; McFadden *v.* Wetherbee, 63 Mich. 390.

Missouri. — Lee *v.* Ashbrook, 14 Mo. 378, 55 Am. Dec. 110; Marsh *v.* Richards, 29 Mo. 99; State *v.* Holladay, 61 Mo. 319.

New York. — Hollinsead *v.* Mactier, 13 Wend. (N. Y.) 276; Neville *v.* Frost, 2 E. D. Smith (N. Y.) 62; Ely *v.* O'Leary, 2 E. D. Smith (N. Y.) 355; Francois *v.* Ocks, 2 E. D. Smith (N. Y.) 417; Edminster *v.* Cochrane, 8 Daly (N. Y.) 138; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614.

Pennsylvania. — Preston *v.* Finney, 2 W. & S. (Pa.) 53.

Illustrations. — Where one contracted to deliver to another an article of machinery at an agreed time and place, but delivered it at another time and place, and it was then and there received without objection, his right to exact strict performance must be considered as waived. Baldwin *v.* Farnsworth, 10 Me. 414, 25 Am. Dec. 252.

In Giles Lithographic, etc., Co. *v.* Chase, 149 Mass. 459, 14 Am. St. Rep. 439, it was held that the defendants were liable for the price of printing done upon their order and subject to their "acceptance of a finished proof" where the printer had submitted a proof which they had examined and approved with directions to print, and subsequently, after the work was all done, a material misprint was discovered which both had overlooked in the proof. Their acceptance of the proof bound them to pay for work done in accordance with it.

One who is induced by the other party's conduct to believe that the latter has withdrawn from the contract subsisting between them need not wait until the day of performance before making new arrangements, nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency. Chamber of Commerce *v.* Sollitt, 43 Ill. 519.

One who sells a machine under a contract entitling him to demand notice in writing of defects waives his right by responding to a notice by telegraph, and by sending a man to repair the machine. Davis *v.* Robinson, 67 Iowa 355.

Although both parties repeatedly violate a contract, yet if neither elect to consider it broken, and the two proceed under it, neither can be considered as having been in default. McCord *v.* West Feliciana R. Co., 3 La. Ann. 285.

Where the inundation of quarries disables one from furnishing marble within the time stipulated in his contract, the other party, who allows it to be furnished afterwards, must pay for it. Lagrave *v.* Fowler, 4 La. Ann. 243.

A bought coal of B for future delivery, depositing fifty cents per ton, the amount paid to be forfeited if the coal was not taken as agreed. The coal was not all taken at the time agreed upon, but B delivered coal afterwards as called for, A paying for it as he took it. Finally A demanded the balance of the coal and his deposit. B refused delivery and payment, and A brought suit. B, by his conduct, was held to have waived his right to claim a forfeiture. Gray *v.* Delaware, etc., R. Co., 48 N. Y. Super. Ct. 121.

6. Accepting an article after the day agreed upon for delivery does not of itself waive a

deduction for any defectiveness in the work.[1]

Question of Fact. — Whether or not there has been a waiver is a question of fact which should go to the jury for determination.[2]

How Waiver Established. — The fact that there has been a waiver is one to be proved by significant speech or conduct, and not to be implied from the mere silence of one not bound to speak, nor in any doubtful case.[3]

Waiver Implies Knowledge, and one cannot be held to have forfeited any rights by reason of acts done in ignorance of the extent of those rights. Thus if workmanship contracted for has been inadequately performed, one who accepts it in ignorance of the deficiency does not waive his right to insist upon the defect.[4] So, too, if he has been put off his guard or misled by the conduct of the other party, a waiver induced by such deception will not be charged against him.[5]

claim for damages arising from the delay but is evidence for the jury in considering the question of waiver. Hansen *v.* Kirtley, 11 Iowa 565.

A landowner, upon whose lot a contractor builds a house, by accepting the house is not deprived of his action against the contractor for damages for his noncompliance with the contract, and this whether cognizant or not of such noncompliance at the time of the acceptance. Stewart *v.* Fulton, 31 Mo. 59. See Draper *v.* Randolph, 4 Harr. (Del.) 454. See the title WAIVER.

1. Hall *v.* Cannon, 4 Harr. (Del.) 360; Norris *v.* School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182; Lee *v.* Ashbrook, 14 Mo. 378, 55 Am. Dec. 110; Hollinsead *v.* Mactier, 13 Wend. (N. Y.) 276.

2. Marlborough Gas Light Co. *v.* Neal, 166 Mass. 217. See the title WAIVER.

3. **How Waiver Proved.** — Thus in Texas, etc., R. Co. *v.* Rust, 19 Fed. Rep. 245, the court said: "A waiver is not to be implied from the plaintiff's silence, because there was no obligation on the plaintiff to say anything on the subject. The intention to waive a right must be established by language or conduct, and not by mere conjecture or speculation."

Although where the conduct is significant the waiver may be tacit. Shaw *v.* Lewistown, etc., Turnpike Co., 2 P. & W. (Pa.) 454; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614.

The doctrine of waiver cannot deprive one of his defense merely because negligently or incautiously, when a claim is first presented to him, he omits to disclose the ground of his defense, while denying liability, or states another ground than that upon which he finally relies. Woolner *v.* Hill, 47 N. Y. Super. Ct. 470. See the titles WAIVER; ESTOPPEL.

4. **Knowledge Essential.** — Starr *v.* Galgate Ship Co., 29 U. S. App. 615; State *v.* Churchill, 48 Ark. 426; Monroe Female University *v.* Broadfield, 30 Ga. 1; Van Buskirk *v.* Murden, 22 Ill. 446, 74 Am. Dec. 163; Mitchell *v.* Wiscotta Land Co., 3 Iowa 209; Veazie *v.* Bangor, 51 Me. 509; Bryant *v.* Stilwell, 24 Pa. St. 314. See the title WAIVER.

Accepting a bridge and paying for it by the county court do not amount to a waiver by the county of any defects in the bridge of which its agents were ignorant at the time such acceptance and payment occurred. Johnson County *v.* Lowe, 72 Mo. 637.

5. Leslie *v.* Knickerbocker L. Ins. Co., 63 N. Y. 33.

CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES.

By Alexander Stronach.

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CROSS-REFERENCES.

For matters of Procedure, see the following titles in the Encyclopædia of Pleading and Practice: *ADMIRALTY*, vol. 1, p. 249; *CARRIERS*, vol. 3, p. 812.
For other matters of Substantive Law and Evidence related to this subject, see the following titles in this work: ABANDONMENT AND TOTAL LOSS, vol. 1, p. 4; *ADMIRALTY JURISDICTION*, vol. 1, p. 645; *BARRATRY*, vol. 3, p. 859; *BILLS OF LADING*, vol. 4, p. 507; *BOTTOMRY AND RESPONDENTIA*, vol. 4, p. 736; *CARRIERS OF GOODS*, vol. 5, p. 154, *and the cross-references there given; DEMURRAGE; DEVIATION (IN MARINE INSURANCE); GENERAL AVERAGE; INTERNATIONAL LAW; INTERPRETATION AND CONSTRUCTION OF CONTRACTS; JETTISON; MASTERS OF VESSELS; MARINE INSURANCE; MARITIME LIENS; NAVIGATION; PRIVATE INTERNATIONAL LAW; SALVAGE; SEAMEN; SHIPS AND SHIPPING; USAGES AND CUSTOMS; WAREHOUSEMEN.*

I. Scope of the Title. — In this article only charter-parties have been discussed in detail as to form, execution, and construction, these matters when relating to other contracts of affreightment being treated elsewhere.[1] Discussions of general principles applicable to all carriers have also been omitted and may be found under appropriate titles.[2]

II. Contracts of Affreightment Defined. — Contracts of affreightment are contracts for the carriage of goods in vessels.[3]

III. Kinds of Contracts of Affreightment. — Contracts of affreightment are of two kinds.

1. Contracts for Conveyance in a General Ship — Bills of Lading. — In the first class are contracts for the conveyance of goods in a general ship; and while any valid agreement, however informal, will suffice to constitute such a contract, it is usual to incorporate the terms of such contract in a written instrument called a bill of lading, which has been defined and fully discussed in a separate article.[4]

2. Contracts by Charter-party. — In the second class are contracts by charter-party.[5]

IV. Charter-parties — 1. Definition. — A charter-party is a contract whereby the owner of a ship or other vessel lets the whole or a part of her to another for the conveyance of goods, in consideration of the payment of freight.[6]

1. See the title Bills of Lading, vol. 4, p. 507.
2. See the title Carriers of Goods, vol. 5, p. 154, and the table of cross-references there given.
3. 1 Rapalje & Lawrence L. Dict. 38; Smith on Mercantile Law, § 364.
4. 1 Rapalje & Lawrence Law Dict. 38; Smith on Mercantile Law, § 364. See the title Bills of Lading, vol. 4, p. 507.
5. 1 Rapalje & Lawrence L. Dict. 38; Smith on Mercantile Law, § 364.
6. **Definition of Charter-party.** — 1 Bouvier's Law Dict. (5th ed.), p. 304; 3 Kent's Com. 200;

2. Kinds of Charter-parties — *a.* In General. — Every charter-party belongs to one of two general classes, being either a demise of the vessel or a simple contract of affreightment.[1] In addition to this classification, it has been thought well to discuss separately a few of those agreements which differ in some respects from the ordinary charter-party entered into between the owner and the charterer.

b. Demise — **Charterer Owner for Voyage.** — Where a vessel is let or hired, and the exclusive possession, control, and management are transferred to the charterer, and he sails her at his own expense and receives the profits, the charter-party amounts to a demise of the vessel, and the charterer is to be deemed the owner for the time being, with the rights and liabilities of the

Rein *v.* Lane, L. R. 2 Q. B. 144; Spring *v.* Gray, 6 Pet. (U. S.) 151; Ashley *v.* Cornwell, 2 Munf. (Va.) 268. See also Clarkson *v.* Edes, 4 Cow. (N. Y.) 470.

A charter-party is an agreement in writing made by the owner of a ship, or his agent, whereby the shipowner agrees for a consideration, to be paid to him at the time and in the manner stipulated in such agreement, to let the whole or principal part of his ship to another for the conveyance of goods or merchandise, for a particular voyage or for a specified time. Leggett on Charter Parties, p. 2.

Not Confined to Written Contracts. — "When a ship, or a specified portion of it, is hired out in mass for a voyage, or a portion of a voyage, for a gross sum, or so much a ton, a voyage, a month, or the like, the contract is usually called a chartering of the vessel. A charter-party, strictly, is a deed in two parts divided, *charta partita*. When not under seal, it is called a memorandum of a charter. When not in writing, it is not properly a *charta*, but is, nevertheless, usually spoken of as a charter." Benedict's Admiralty, § 287.

For Merchandise or Passengers. — "A charter-party is the hiring of the whole or a part of a vessel for the transportation of merchandise or passengers." Vandewater *v.* Steamship Yankee Blade, 1 McAll. (U. S.) 9. See also Weston *v.* Train, 2 Curt. (U. S.) 49.

Charter-party and Bill of Lading Compared. — "A charter-party is for the whole or a large or specified part of the vessel; a bill of lading is usually for a smaller and an indeterminate portion of the vessel's capacity. Both contracts, in one aspect, are the hire of the whole or a part of a vessel; both, in another, are contracts for the transportation of merchandise. In both cases the owner is the carrier, and he has a lien on the merchandise for the transportation." Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149.

Agreement to Divide Profits. — An agreement between the owners of vessels, when embarked in a common enterprise, to divide the profits in the mode agreed upon, resembles more a consortship than a charter-party. Vandewater *v.* Steamship Yankee Blade, 1 McAll. (U. S.) 9.

An agreement made by certain persons with the owners of a vessel to furnish funds to fill eleven-twelfths of the vessel with freight, on a joint adventure, is not a charter-party. Brown *v.* Putnam, 2 Met. (Mass.) 275.

A Preliminary Negotiation Between the Parties as to the transportation of certain coal does not constitute a charter-party, and a bill of lading made thereafter supersedes such preliminary negotiation. Brown *v.* Certain Tons of Coal, 34 Fed. Rep. 913.

Writing Altering a Charter-party. — In Ashley *v.* Cornwell, 2 Munf. (Va.) 268, it was held that a writing altering and explaining a charter-party was not a charter-party within the meaning of the Act of Congress passed July 6, 1797, imposing a stamp duty on charter-parties.

"Charterer" Defined. — A charterer is one who by contract acquires the right to use a vessel belonging to another. Turner *v.* Cross, 83 Tex. 218.

1. General Classification. — Reed *v.* U. S., 11 Wall. (U. S.) 591; Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149; Leary *v.* U. S., 14 Wall. (U. S.) 607; U. S. *v.* Shea, 152 U. S. 178; Eames *v.* Cavaroc, Newb. Adm. 528; Fish *v.* Sullivan, 40 La. Ann. 193; White *v.* Norfolk, etc., R. Co., 115 N. Car. 631, 44 Am. St. Rep. 489, *citing* 3 Am. and Eng. Encyc. of Law (1st ed.) 144; Ross *v.* Charleston, etc., Transp. Co., 42 S. Car. 447.

Distinction Between Two Classes.—In M'Intyre *v.* Bowne, 1 Johns. (N. Y.) 229, Thompson, J., said: "I apprehend the distinction to be that where, by the terms of the charter, the shipowner appoints the master and mariners and retains the management and control of the vessel, the charter is rather to be considered as a covenant to carry goods; but where the whole management is given over to the freighter, it is more properly a hiring of the vessel for the voyage, and in such case the hirer would be deemed owner *pro hac vice*."

Division into Three Classes. — By subdividing the class of charter-parties amounting to a demise of the ship, a division into three classes has sometimes been made: First, *locatio navis*, a demise of the ship itself with its furniture and apparel. Second, *locatio navis et operarum magistri et nauticorum*, a demise of the ship in a state fit for mercantile adventure. And, third, *locatio operis vehendarum mercium*, a contract for the carriage of the merchant's goods in the owner's ship and by his servants, where the owner has all the responsibility of a carrier of goods. Leggett on Charter Parties 5; Schuster *v.* McKellar, 7 El. & Bl. 704, 90 E. C. L. 704.

Class Intermediate Between First and Second. — And some charter-parties have been treated as belonging to a class coming between the first and second of those above mentioned. Abbott on Shipping 60; Leggett on Charter Parties 11. See also Belcher *v.* Capper, 11 L. J. C. P. 274; The Beeswing, 5 Asp. M. L. C. 484.

general owner so far as third persons are concerned.[1]

Master "On Shares" as Owner. — Where a master hires a vessel "on shares," under an agreement to victual and man the vessel, and employ her in such voyages as he thinks best, having thereby the entire possession, command, and navigation of the vessel, and the relation of principal and agent not existing between the master and owner, the master thereby becomes the owner *pro*

1. Demise — *England.* — Reeve *v.* Davis, 1 Ad. & El. 312, 28 E. C. L. 95; Meiklereid *v.* West, 1 Q. B. Div. 428; Vallejo *v.* Wheeler, 1 Cowp. 143; Frazer *v.* Marsh, 13 East 238; Omoa, etc., Coal, etc., Co. *v.* Huntley, 2 C. P. Div. 464; Sandeman *v.* Scurr, L. R. 2 Q. B. 86; James *v.* Jones, 3 Esp. N. P. 27; Belcher *v.* Capper, 4 M. & G. 502, 43 E. C. L. 262; Trinity-House *v.* Clark, 4 M. & S. 288; Hutton *v.* Bragg, 7 Taunt. 14; Soares *v.* Thornton, 7 Taunt. 627, 2 E. C. L. 627; Tate *v.* Meek, 8 Taunt. 280, 4 E. C. L. 105; Colvin *v.* Newberry, 1 Cl. & F. 283, *affirming* Newberry *v.* Colvin, 7 Bing. 190, 20 E. C. L. 95, 1 Cromp. & J. 192, 1 Tyrw. 55. See also Paul *v.* Birch, 2 Atk. 621; The Lemington, 2 Asp. N. S. 475; Mackenzie *v.* Rowe, 2 Campb. 482; Fowler *v.* Kymer, *cited* in 3 East 396; Marquand *v.* Banner, 36 Eng. L. & Eq. 139.

United States. — Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149; Hill *v.* Steamer Golden Gate, Newb. Adm. 308; Winter *v.* Simonton, 3 Cranch (C. C.) 104; Marcardier *v.* Chesapeake Ins. Co., 8 Cranch (U. S.) 39; Perkins *v.* Hill, 2 Woodb. & M. (U. S.) 158; Mott *v.* Ruckman, 3 Blatchf. (U. S.) 71. See also The Euripides, 52 Fed. Rep. 161.

Alabama. — Finnegan *v.* Frank, 67 Ala. 21.

California. — Oakland Cotton Mfg. Co. *v.* Jennings, 46 Cal. 176.

Connecticut. — Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79.

Louisiana. — Pontchartrain R. Co. *v.* Heirne, 2 La. Ann. 131; Fish *v.* Sullivan, 40 La. Ann. 193.

Massachusetts. — Pickman *v.* Woods, 6 Pick. (Mass.) 248; Cutler *v.* Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385; Spafford *v.* Dodge, 14 Mass. 66; Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140.

Michigan. — Marquette First Nat. Bank *v.* Stewart, 26 Mich. 83.

New York. — Lander *v.* Clark, 1 Hall (N. Y.) 355; M'Intyre *v.* Bowne, 1 Johns. (N. Y.) 229; Hallet *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272; Clarkson *v.* Edes, 4 Cow. (N. Y.) 478; Sherman *v.* Fream, 30 Barb. (N. Y.) 478; Hagar *v.* Clark, 78 N. Y. 45; Brown *v.* Gray, 70 Hun (N. Y.) 261.

North Carolina. — White *v.* Norfolk, etc., R. Co., 115 N. Car. 631, 44 Am. St. Rep. 489, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 144.

South Carolina. — Ross *v.* Charleston, etc., Transp. Co., 42 S. Car. 447. See also Purvis *v.* Tunno, 1 Brev. (S. Car.) 260, 2 Am. Dec. 664.

Wisconsin. — Sheriffs *v.* Pugh, 22 Wis. 273, 94 Am. Dec. 600.

See also Husten *v.* Richards, 44 Me. 182; Burpee *v.* Carvill, 16 New Bruns. 141. See *infra*, this title, *Rights and Liabilities under the Charter-party.*

Illustrations — Tests — *Ownership to be Gathered from the Whole Instrument.* — In Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, Story, J., said: "I agree that it is not indispensable, to constitute the charterer the owner for the voyage, that express terms of demise and letting of the whole ship should appear on the face of the charter-party; but that it may be gathered, as a result, from the whole stipulations in the instrument. I also agree that the clause that the absolute owner shall appoint the master and crew, and victual and provision and equip the ship during the voyage, is not of itself necessarily conclusive that he retains the ownership during the voyage; and that the provision is controllable by other stipulations, showing a clear intention that the charterer shall be owner for the voyage."

In Urann *v.* Fletcher, 1 Gray (Mass.) 125, the court said: "It is only necessary to look at the charter-party in this case to ascertain whether the charterers had become owners for the voyage. We think all the circumstances concur, which are relied on as tests, to show that this charter was a complete transfer of the possession and control of the vessel for the time being. The entire vessel was let to the charterers, for a particular voyage, at a pecuniary rent per month. The charterers were to victual and man the vessel, and therefore to appoint the master and officers and engage the crew, these were all employed and paid by them, were in their service and subject to their orders. One of the charterers was himself master, and actually ordered the articles from the plaintiff."

Possession as Well as Right to Profits. — A charter-party, in order to amount to a demise of the ship and clothe the charterers with all the rights and liabilities of owners, must transfer the possession of the ship as well as a right to the profits of her employment. The Erie, 3 Ware (U. S.) 225.

Owner Without Right to Interfere. — To constitute the hirer owner *pro hac vice*, he should have the possession and the entire control and direction of the vessel, so that the general owner for the time being would have no right to interfere with her management. Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268. See also The Phebe, 1 Ware (U. S.) 265.

Master and Crew Appointed by the Charterers. — When, by the terms of the charter-party, the vessel was let by the owner and hired by the charterers for a term at a lump sum, to be paid month by month during that term; when the use to which the vessel was to be put during that term rested entirely with the charterers, who might send her on such voyages as they pleased; and when the master of the vessel and the crew were appointed as well as paid by the charterers, it was held that the charterers were the owners for the period covered by the charter-party. Baumwoll Manufactur, etc., *v.* Furness, (1893) App. 8, *affirming* (1892) 1 Q. B. 253, *reversing* (1891) 2 Q. B. 310.

Captain under Orders of Charterer. — When a

hac vice during such time as the contract exists.[1] But in some jurisdictions it has been held that such an agreement does not amount to a demise of the vessel, nor render the master the owner *pro hac vice*.[2]

c. AFFREIGHTMENT. — When the general owner retains the possession, command, and navigation of a ship, and contracts to convey a cargo as freight for the voyage, the charter-party is considered a mere contract of affreightment and the charterer or freighter is not clothed with the character or legal responsibility of ownership.[3]

charter-party contains, among other things, a stipulation that the captain, though appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other matters, the charterer is owner of the vessel *pro hac vice*. The India, 14 Fed. Rep. 476; The Bombay, 38 Fed. Rep. 512.

Technical Words Unnecessary. — In U. S. *v.* Shea, 152 U. S. 178, the court said: "No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control." To the same effect is Baumwoll Manufactur, etc., *v.* Furness, (1893) App. 8, *affirming* (1892) 1 Q. B. 253, *reviewing* (1891) 2 Q. B. 310.

Charterer Not Owner in Contest with Actual Owners. — "The charterer, when he has complete control of the vessel, is *pro hac vice* owner as to parties dealing with him in such capacity, but he is not such in a contest with the actual owners for the value of the vessel under the terms of the charter-party." Wilkinson *v.* Dalferes, 27 La. Ann. 379.

1. Master as Owner — *United States.* — Webb *v.* Peirce, 1 Curt. (U. S.) 104; Skolfield *v.* Potter, 2 Ware (U. S.) 394; Thomas *v.* Osborn, 19 How. (U. S.) 22; Thorp *v.* Hammond, 12 Wall. (U. S.) 408.

Maine. — Thompson *v.* Snow, 4 Me. 265, 16 Am. Dec. 263; Houston *v.* Darling, 16 Me. 413; Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103; McLellan *v.* Reed, 35 Me. 172; Swanton *v.* Reed, 35 Me. 176; Giles *v.* Vigoreux, 35 Me. 300, 58 Am. Dec. 704; Bonzey *v.* Hodgkins, 55 Me. 98; Bridges *v.* Sprague, etc., Iron Co., 57 Me. 543, 99 Am. Dec. 788; Somes *v.* White, 65 Me. 542, 20 Am. Rep. 718; Marshall *v.* Boardman, 89 Me. 87.

Massachusetts. — Reynolds *v.* Toppan, 15 Mass. 370; Perry *v.* Osborne, 5 Pick. (Mass.) 422; Cutler *v.* Winsor, 6 Pick. (Mass.) 339, 17 Am. Dec. 385; Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; Manter *v.* Holmes, 10 Met. (Mass.) 402; Baker *v.* Huckins, 5 Gray (Mass.) 596; Tucker *v.* Stimson, 12 Gray (Mass.) 487.

2. Steel *v.* Lester, 3 C. P. Div. 121; Kenzel *v.* Kirk, 37 Barb. (N. Y.) 113; Vose *v.* Cockroft, 45 Barb. (N. Y.) 58, *affirmed* in 44 N. Y. 415; McCready *v.* Thorne, 49 Barb. (N. Y.) 438; Scarff *v.* Metcalf, 107 N. Y. 211, 1 Am. St. Rep. 807. *Compare* Hallett *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272.

Part Owner Taking Vessel on Shares. — Where one of several joint owners of a vessel by contract with the others takes the vessel to sail it on shares, he to man her, to pay the crew, furnish supplies, and have the absolute control and management thereof, he is in no sense the agent of his co-owners, but is the owner of the vessel *pro hac vice*. Williams *v.* Hays, 143 N. Y. 442, 42 Am. St. Rep. 743. To the same effect is Fox *v.* Holt, 4 Ben. (U. S.) 278.

3. Charter-party Not Amounting to Demise — *England.* — Fletcher *v.* Braddick, 2 B. & P. N. R. 182; Sandeman *v.* Scurr, L. R. 2 Q. B. 86; Parish *v.* Crawford, 2 Stra. 1251; Fenton *v.* Dublin Steam Packet Co., 8 Ad. & El. 835, 35 E. C. L. 541. See also Bohtlingk *v.* Inglis, 3 East 381; Schuster *v.* McKellar, 7 El. & Bl. 704, 90 E. C. L. 704; The Great Eastern, 17 L. T. N. S. 667.

Canada. — Thompson *v.* Fowler, 23 Ont. Rep. 644.

United States. — Shaw *v.* Thompson, Olc. Adm. 144; Eames *v.* Cavaroc, Newb. Adm. 528; The Casco, 2 Ware (U. S.) 188; Pierce *v.* Winsor, 2 Cliff. (U. S.) 18; Richardson *v.* Winsor, 3 Cliff. (U. S.) 395; The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 577; Reed *v.* U. S., 11 Wall. (U. S.) 591; Leary *v.* U. S., 14 Wall. (U. S.) 607; The Craigallion, 20 Fed. Rep. 747; Shaw *v.* U. S., 93 U. S. 235; Bramble *v.* Culmer, 78 Fed. Rep. 497. See also The Martin Kalbfleisch, 55 Fed. Rep. 336; The Port Adelaide, 59 Fed. Rep. 174.

Louisiana. — Slark *v.* Broom, 7 La. Ann. 337.

Maine. — Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268.

New York. — Mactaggert *v.* Henry, 3 E. D. Smith (N. Y.) 390; Holmes *v.* Pavenstedt, 5 Sandf. (N. Y.) 97; Brown *v.* Gray, 70 Hun (N. Y.) 261; Campbell *v.* Perkins, 8 N. Y. 430; Hagar *v.* Clark, 78 N. Y. 45. See also Cheriot *v.* Barker, 2 Johns. (N. Y.) 346, 3 Am. Dec. 437.

Hawaii. — Fessenden *v.* Ship Charles, 1 Hawaiian 94.

See also Abbott on Shipping 335. See *infra*, this title, *Rights and Liabilities under the Charter-party*.

Illustrations. — Where a charter-party contained agreements on the part of the owner that the vessel was fit for the voyage, that she should take in a cargo to be furnished by the charterer, reserving her cabin and room for her crew, water, provisions, etc., that the privilege of putting on board steerage passengers should belong solely to the charterer, and that if the ship should be unable to carry cargo and passengers to the stipulated amount, there should be a reduction of freight; and where it was agreed on the part of the charterer that he should furnish the cargo, should pay a stipulated freight and demurrage in case of delay in loading, it was held that such charter-party was but an affreightment for the voyage and not a letting of the entire ship. The Aberfoyle. Abb. Adm. 242.

Master Appointed by Owner. — In Adams *v.*

Presumption that Charter-party Is a Contract of Affreightment. — The presumption is that the ownership of the vessel, even during the period covered by the charter-party, continues in the general owner;[1] and unless the intention to transfer the possession and ownership to the charterer is unequivocally manifested by the contract, a charter-party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment.[2]

d. FOR TIME OR VOYAGE. — Charter-parties are often made for a certain length of time.[3] But they are usually made to cover the period necessary for

Homeyer, 45 Mo. 545, 100 Am. Dec. 391, the court said: "The general owner of a vessel may let his ship with a master and crew of his own choosing, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint a master to control and navigate clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agent for the use of the charterers. Cases seldom turn upon this provision alone, but it must always have great weight in arriving at the intention of the parties in regard to the constructive possession."

So where This Provision Is Joined with Others by which the crew is hired and paid by the owner, the victualing is at his expense, and where he also retains the exclusive possession of a part of the vessel and the control and navigation of her during the voyage, the charter-party is a contract of affreightment, and the charterer does not become the owner for the voyage. The Schooner Volunteer, 1 Sumn. (U. S.) 551. To the same effect, see Ruggles *v.* Bucknor, 1 Paine (U. S.) 358; The Terrier, 73 Fed. Rep. 265; Flushing Ferry Co.'s Case, 6 Ct. of Cl. 1.

Where, by a charter-party, it was covenanted that the owner should receive on board all such goods as the freighter thought fit to load, and should proceed therewith to M., and there, after delivering her outward cargo, receive from the freighter's agent a homeward cargo and deliver the same in L.; and that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo to superintend the stowage of the goods; that freight should be paid at so much per ton on the registered tonnage of the ship, and that the captain and crew were to be employed and paid by the owner; it was held that there being no express words of demise of the ship itself in the charter-party, the freighter did not thereby become the owner for the voyage. Saville *v.* Campion, 2 B. & Ald. 503.

General Intent Thus Determined. — The appointment of the master and crew by the owner is not always conclusive, though the master and crew may also be paid by the owner. Such a provision is not sufficient to control the general tenor and whole apparent intent of the charter-party, although if the intention as collected from the operative parts of the instrument is doubtful, such a clause would be entitled to consideration. Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149.

Owner's Captain in Control. — When the defendant hired a steamboat for an excursion to Richmond, the owner's captain navigating the vessel, it was held that the defendant had not such a possession as to justify him in forcibly turning out a stranger whom the captain had allowed to come on board. Dean *v.* Hogg, 10 Bing. 345, 25 E. C. L. 160.

Management at Expense of Owners. — Where the charter-party provided among other things that the vessel was to be navigated at the expense of the general owners, and also that the vessel should be tight, strong, and well manned, victualed, and appareled during the voyage, it was held that the contract was one of affreightment and not a demise. Clarkson *v.* Edes, 4 Cow. (N. Y.) 470; Robinson *v.* Chittenden, 69 N. Y. 525.

Whole Tonnage Not Let. — If, by the terms of the charter-party, the ship is to be navigated at the charge and expense of the owner, and especially if the whole tonnage of the ship is not let to hire, the charterer is not owner for the voyage. Kleine *v.* Catara, 2 Gall. (U. S.) 61. See also Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135.

Reservation of Space by the Owner. — A reservation of space in the ship by the owner is an indication that his ownership continues notwithstanding the charter-party. Swift *v.* Tatner, 89 Ga. 660, 32 Am. St. Rep. 101.

"To Freight Let." — The use of the words "to freight let" in a charter-party will not necessarily operate as a demise of the vessel. Christie *v.* Lewis, 2 Brod. & B. 410, 6 E. C. L. 206; Hooe *v.* Groverman, 1 Cranch (U. S.) 214; The Schooner Volunteer, 1 Sumn. (U. S.) 551.

1. Presumption Against Demise. — Urann *v.* Fletcher, 1 Gray (Mass.) 125; Ross *v.* Charleston, etc., Transp. Co., 42 S. Car. 447.

2. Certain Logs of Mahogany, 2 Sumn. (U. S.) 589; Reed *v.* U. S., 11 Wall. (U. S.) 591; The Aberfoyle, Abb. Adm. 255; Swift *v.* Tatner, 89 Ga. 660, 32 Am. St. Rep. 101; Hagar *v.* Clark, 78 N. Y. 45.

If the end sought to be accomplished by the charter-party can conveniently be accomplished without the transfer of the vessel to the charterer, courts of justice are not inclined to regard the contract as a demise of the ship, although there may be express words of grant in the formal part of the instrument. Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135. To the same effect is Richardson *v.* Winsor, 3 Cliff. (U. S.) 395.

3. Time Charters — *England.* — Meiklereid *v.* West, 1 Q. B. Div. 428; Omoa, etc., Coal, etc., Co. *v.* Huntley, 2 C. P. Div. 464; Baumwoll Manufactur, etc., *v.* Furness, (1893) App. 8; Reeve *v.* Davis, 1 Ad. & El. 312, 28 E. C. L. 95; Fenton *v.* Dublin Steam Packet Co., 8 Ad. & El. 835, 35 E. C. L. 541; The Beeswing, 5 Asp. M. L. C. 484; Belcher *v.* Capper, 11 L. J. C. P. 274.

the vessel chartered to make a certain voyage or voyages.[1]

e. LETTING ON SHARES. — Vessels are often let on shares by the owner to some person, generally the master, who directs the employment, hires the crew, and divides the earnings between himself and the owner; and under such contracts, in some jurisdictions, the charterer is held to be the owner *pro hac vice*, while in others the ownership of the vessel is held to continue to be in the general owner.[2]

f. CHARTER TO GOVERNMENT. — Vessels are frequently chartered to the government, and generally the government, as charterer, has the same rights and is subject to the same liabilities as any other charterer, and a charter-party to which the government is a party is construed by the usual rules applicable to such contracts.[3]

United States. — Winter *v.* Simonton, 3 Cranch (C. C.) 104.

Georgia. — Swift *v.* Tatner, 89 Ga. 660, 32 Am. St. Rep. 101.

Maine. — Brewer *v.* Churchill, 45 Me. 64.

Massachusetts. — Muggridge *v.* Eveleth, 9 Met. (Mass.) 233; Manter *v.* Holmes, 10 Met. (Mass.) 402; Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140.

By the terms of a charter-party the vessel was hired "for and during the term of twelve months," absolutely, and for such further time as the defendants might elect, "not exceeding eight months or twenty months in all," unless at the expiration of the twenty months the vessel should be "on a voyage, in which case the charter is to continue until the voyage shall be completed by a return to an Atlantic port in the United States." It was held that this was a hiring of the vessel for a specified time. McGilvery *v.* Capen, 7 Gray (Mass.) 525. See also Cook *v.* Gowan, 15 Gray (Mass.) 237.

When a charter-party for the term of six months at the monthly rate of one hundred dollars contained this clause: "Vessel, if kept over the charter time, the same rate as the charter, with the privilege of six months over the charter, if wanted," it was held that the intention of the parties was that the charterers should have the right to keep the vessel for such time as they wished over the six months, paying therefor at the charter rate, not exceeding six months additional in all. Hunt *v.* Metcalf, 47 Fed. Rep. 73.

Months Defined. — Where a vessel was chartered at so much a month, it was held that the months were calendar and not lunar ones. Jolly *v.* Young, 1 Esp. N. P. 186.

1. Charter for Voyage — *United States.* — The Bombay, 38 Fed. Rep. 512; Sorensen *v.* Keyser, 52 Fed. Rep. 163; Vandewater *v.* Steamship Yankee Blade, 1 McAll. (U. S.) 9; The Salem's Cargo, 1 Sprague (U. S.) 389; Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135; Bangs *v.* Lowber, 2 Cliff. (U. S.) 157; Richardson *v.* Winsor, 3 Cliff. (U. S.) 395; Leary *v.* U. S., 14 Wall. (U. S.) 607; The Schooner Volunteer, 1 Sumn. (U. S.) 551; The Schooner Tribune, 3 Sumn. (U. S.) 144; Reed *v.* U. S., 11 Wall. (U. S.) 591; Bowley's Case, 8 Ct. of Cl. 189.

Maine. — Stewart *v.* Reed, 46 Me. 321.

Maryland. — Mactier *v.* Wirgman, 4 Har. & J. (Md.) 568.

Massachusetts. — Baker *v.* Pratt, 4 Allen (Mass.) 158; Cutler *v.* Lennox, 137 Mass. 506; Rennell *v.* Kimball, 5 Allen (Mass.) 356.

New York. — Robinson *v.* Chittenden, 69 N. Y. 525; McPherson *v.* Cox, 86 N. Y. 472.

Charter Without Time Limit. — Where a vessel is chartered without any limitation of time, it is an indefeasible hiring for every voyage which she shall have undertaken before notice from the owner of his intention to put an end to the contract. Cutler *v.* Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385, *followed with approval* in Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103.

2. The Larch, 2 Curt. (U. S.) 427. See also *supra*, this section, *Demise*.

3. Vessels Chartered to Government. — Fletcher *v.* Braddick, 2 B. & P. N. R. 182; Hodgkinson *v.* Fernie, 3 Jur. N. S. 818; Trinity-House *v.* Clark, 4 M. & S. 288; Clyde's Case, 9 Ct. of Cl. 184; Reed *v.* U. S., 11 Wall. (U. S.) 591; Mitchell *v.* U. S., 96 U. S. 162; White *v.* U. S., 154 U. S. 661; Hill *v.* Stetson, 39 N. J. L. 84. See also *infra*, this section, *Execution; Contents;* and the section *Rights and Liabilities under the Charter-party*.

Munitions of War Held to Be Stores. — When a vessel was chartered to the government during the progress of war, it was held that munitions of war were stores, and soldiers passengers, within the meaning of the charter-party. Strong *v.* U. S., 154 U. S. 632.

Compensation for Time Employed. — The United States chartered a vessel for a "voyage or voyages" at a stipulated price *per diem* for every day when so employed. The owner claimed that the contract was to pay the *per diem* compensation until the steamer was returned to him, and that she was not so returned until notice of her delivery was given to him. It was held that under the contract the owner could recover only for the time when the vessel was actually employed, and not for the period of time elapsing between the two voyages made for the government. Mitchell *v.* U. S., 96 U. S. 162. See also Freeman's Case, 3 Ct. of Cl. 272.

To be Paid for Until Returned. — Three barges were impressed for military purposes by officers of the government. After the impressment it was agreed between the owners of the barges and the government that said owners should be paid six dollars a day for each barge until returned or accounted for. It was held that by these terms the government was expressly charged with the duty of notifying the owners of the loss of the barges, and subjected to the payment of hire until notice of such loss was given by the government, or the fact of

g. SUB-CHARTER. — It is sometimes provided by the terms of the charter-party that the charterer may relet the vessel in whole or in part, and when this is so the charterer may make sub-contracts of affreightment binding upon the vessel.[1]

3. Form — *a.* GENERALLY WRITTEN. — Charter-parties are, strictly speaking, written instruments, and the terms of such agreements are generally reduced to writing;[2] but it is not necessary to employ any particular words or form.[3]

b. SOMETIMES VERBAL. — It has been decided that valid and binding contracts in the nature of charter-parties may be made by parol.[4]

c. NOT GENERALLY UNDER SEAL. — Charter-parties are not, even when in writing, usually under seal,[5] though if they be under seal the usual rules relating to sealed instruments probably apply.[6]

d. NOT NECESSARY TO RECORD. — An Act of Congress providing for recording the conveyances of vessels does not extend to charter-parties.[7]

4. Execution — *a.* WHO MAY MAKE — (1) *In General.* — A charter-party

the loss was in some way known to the owners. Smith's Case, 9 Ct. of Cl. 237. See also Fogg's Case, 5 Ct. of Cl. 264; Terry's Case, 9 Ct. of Cl. 233.

1. Sub-contracts of Affreightment. — The T. A. Goddard, 12 Fed. Rep. 174. See also Tharsis Sulphur, etc., Min. Co. *v.* Culliford, 22 W. R. 46; The Emilien Marie, 44 L. J. Adm. 9; The Euripides, 52 Fed. Rep. 161; Donkin *v.* Herbst, 55 Fed. Rep. 1002.

2. Usually in Writing. — 3 Kent's Com. 200; 1 Parsons on Shipping and Admiralty 274; Leggett on Charter Parties 2; Adamson *v.* Newcastle Steamship Freight Ins. Assoc., 4 Q. B. Div. 462. See also Rein *v.* Lane, L. R. 2 Q. B. 144; Purvis *v.* Tunno, 1 Brev. (S. Car.) 260, 2 Am. Dec. 664.

3. No Technical Form Essential. — Leggett on Charter Parties 4; 1 Parsons on Shipping and Admiralty 274; Raymond *v.* Tyson, 17 How. (U. S.) 53; Gracie *v.* Palmer, 8 Wheat. (U. S.) 605; Ruggles *v.* Bucknor, 1 Paine (U. S.) 358.

An Informal Agreement in the nature of a charter-party, containing the substantial provisions of such an instrument and acted upon by the parties, may be treated as equivalent to a charter-party. The Schooner Tribune, 3 Sumn. (U. S.) 144.

A Rough Memorandum may constitute a valid and binding charter-party. Rotherfield S.S. Co. *v.* Tweddie, (1897) 13 T. L. R. 183.

Marginal Notes containing stipulations as to cargo, etc., are sometimes added to a charter-party by consent of the parties, and whether they are to be regarded as part of the charter-party or not, they amount to representations. Mackill *v.* Wright, L. R. 14 App. 106; Parker *v.* Winlow, 27 L. J. Q. B. 49.

Not Signed by the Owners. — A charter-party in writing, though not signed in behalf of the ship or her owners, is valid and binding when delivered to and accepted by such owners, and when their ship has entered upon its performance. James *v.* Brophy, 71 Fed. Rep. 310.

4. Verbal Charter-parties — *England.* — Lidgett *v.* Williams, 4 Hare 462; Bidduiph *v.* Bingham, 20 L. T. N. S. 30.

United States. — Skolfield *v.* Potter, 2 Ware (U. S.) 394; Thomas *v.* Osborn, 19 How. (U. S.) 22; James *v.* Brophy, 71 Fed. Rep. 310.

Louisiana. — Fish *v.* Sullivan, 40 La. Ann. 193.

Maine — McLellan *v.* Reed, 35 Me. 172; Swanton *v.* Reed, 35 Me. 176.

Massachusetts. — Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140; Muggridge *v.* Eveleth, 9 Met. (Mass.) 233; Coggeshall *v.* Read, 5 Pick. (Mass.) 454; Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; Vinal *v.* Burrill, 16 Pick. (Mass.) 401.

See also Roberts *v.* Riley, 15 La. Ann. 103.

Parol Charter-party Not Released by a Written One. — A subsequent written charter-party between the plaintiffs and the real owner of a vessel will not, unless so stated, release from liability under a prior parol charter-party one who, though not the owner, has entered into such a contract. Webster *v.* Vogel, 62 Ill. 184.

5. 1 Parsons on Shipping and Admiralty 276; Coe *v.* Cook, 3 Whart. (Pa.) 569. See also Brown *v.* Ralston, 4 Rand. (Va.) 504; Woodhouse *v.* Duncan, 106 N. Y. 527.

6. 1 Parsons on Shipping and Admiralty 276; Kimball *v.* Tucker, 10 Mass. 192. See also White *v.* Parkin, 12 East 578; Thompson *v.* Brown, 7 Taunt. 656, 2 E. C. L. 655.

Execution by Agent — Authorization under Seal. — In Horsley *v.* Rush, (Michaelmas Term, 1788), stated by counsel in Harrison *v.* Jackson, 7 T. R. 205, it was held that an action of covenant could not be maintained against the owner of a vessel upon a charter-party under seal executed by an agent who had only verbal authority. To the same effect is Pickering *v.* Holt, 6 Me. 160. See also Abbott on Shipping 164; and the title AGENCY, vol. 1, p. 952.

In Whose Name Action Brought. — An action upon a charter-party under seal, made by the master in his own name, can only be brought in the name of the master, and the owner cannot sue in his own name although such charter-party was made for his benefit. Bristow *v.* Whitmore, 4 DeG. & J. 325. See the title CONTRACTS, subdiv. *Privity — Persons Affected by Contract, ante*, p. 104.

7. Recording Act of Congress Inapplicable. — Act of Congress, July 29, 1850; Hill *v.* Steamer Golden Gate, Newb. Adm. 309; Mott *v.* Ruckman, 3 Blatchf. (U. S.) 71.

may be executed by the parties themselves or by some duly authorized agent acting for them.[1]

Necessity for Agreement. — As in the case of other contracts, before a charter-party can become a binding and enforceable agreement the minds of the parties must have met as to its terms.[2]

(2) *Managing Owner.* — A charter-party, executed in good faith in the name of the managing owners and ship's husband, is a valid instrument, binding upon all concerned.[3]

(3) *Part Owner.* — A part owner of a vessel is not, from the mere fact of co-ownership, the agent of the other part owners, and cannot make contracts binding upon them without their authority.[4]

A Part Owner Cannot Bind Co-owners by Charter under Seal. — Where two only of several owners of a vessel executed a charter-party under their seals "for themselves and the other owners," it was held that only those signing were bound.[5]

(4) *Ship's Husband.* — A ship's husband, whether he be a stranger or a part owner of the vessel, may properly make these contracts.[6]

(5) *Master of Vessel* — **In Foreign Port.** — The master of a vessel has the power to make a charter-party when in a foreign port where the owners of the vessel have no agent.[7]

In Home Port. — But in the home port the master of a vessel cannot bind the owners personally by a charter-party without authority for that purpose.[8]

1. Leggett on Charter Parties, p. 58; Cowie *v.* Witt, 23 W. R. 76; Lennard *v.* Robinson, 5 El. & Bl. 125, 85 E. C. L. 125. See also The Wilhelm Schmidt, 25 L. T. N. S. 34; Prentice *v.* U. S., etc., Steamship Co., 58 Fed. Rep. 702.

Charter-party Made Between the Owners of the Vessel. — A charter-party made by all the owners jointly with one of their own number cannot be enforced at law. Terry *v.* Brightman, 132 Mass. 318.

2. **Parties Must Agree as to Terms.** — Deshon *v.* Fosdick, 1 Wood (U. S.) 286; Compania Bilbaina, etc., *v.* Spanish-American Light, etc., Co., 146 U. S. 483; Wilfred *v.* Myers, 40 Fed. Rep. 170; Starr *v.* Galgate Ship Co., 68 Fed. Rep. 234. See also Smidt *v.* Tiden, 43 L. J. Q. B. 199, L. R. 9 Q. B. 446. See generally the title CONTRACTS, *ante*, p. 88.

3. Bangs *v.* Lowber, 2 Cliff. (U. S.) 157.

Duty to Procure Charters. — It is one of the duties of a managing owner to procure charters for the ship. Williamson *v.* Hine, (1891) 1 Ch. 390.

4. **Part Owner Not Agent of Co-owners.** — Leggett on Charter Parties, p. 94. See also Brodie *v.* Howard, 17 C. B. 109, 84 E. C. L. 109; Frazer *v.* Cuthbertson, 6 Q. B. Div. 93. See also the title SHIPS AND SHIPPING.

Fraud upon the Other Part Owners. — A charter-party entered into by certain part owners of a vessel acting as agents for the purpose of chartering her, by which it is agreed that the freight to be received under such charter-party shall go in liquidation of debts owing by such part owners to the charterers, is a fraud upon the other part owners of such vessel, and void as against all the owners of the vessel except those who entered into such contract. The A. M. Bliss, 2 Lowell (U. S.) 103.

5. Kimball *v.* Tucker, 10 Mass. 192. *Compare* Leslie *v.* Wilson, 3 Brod. & B. 171, 7 E. C. L. 395. And see the title AGENCY, vol. 1, p. 952.

6. **Ship's Husband.** — Leggett on Charter Parties, p. 66; Darby *v.* Baines, 21 L. J. N. S. Ch. 801. See also Wall *v.* Ninety-Five Thousand Feet of Lumber, 26 Fed. Rep. 716.

7. **Masters — In Foreign Ports.** — Leggett on Charter Parties, p. 71; Hurry *v.* Hurry, 2 Wash. (U. S.) 145; Ward *v.* Green, 6 Cow. (N. Y.) 173, 16 Am. Dec. 437. See also Bristow *v.* Whitmore, 9 H. L. Cas. 391; The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 191; Allen *v.* Bareda, 7 Bosw. (N. Y.) 204; and generally the title MASTERS OF VESSELS.

The master of a vessel has no power to enter into a charter-party in a foreign port for the purpose of giving the creditor of the owner of the vessel a security for the debt due to him. Hurry *v.* Hurry, 2 Wash. (U. S.) 145.

The master of a vessel cannot be made personally liable for a breach of the charter-party made by his predecessor, and he cannot be held liable for a breach of his verbal promise to execute the charter-party if no consideration is shown for such promise. Chiesa *v.* Conover, 40 Fed. Rep. 496.

8. **Masters in Home Ports.** — The Schooner Tribune, 3 Sumn. (U. S.) 144; Swan *v.* Ruckman, 25 How. Pr. (N. Y. Supreme Ct.) 468.

A master has no authority to bind his owners by writing forward to a broker in a foreign port prior to the ship's arrival therein, authorizing the broker to charter his ship. The authority of the master to bind his owners by charter-party arises when he is in a foreign port and his owners are not there, and there is difficulty in communicating with them. The master is not the agent for his owners to hold out a person as authorized to charter his ship so as to bind the owners. The Fanny, 5 Asp. M. C. 75, 48 L. T. 771.

Ship Broker in the Home Port. — A charter-party is not valid if made by a ship broker in the home port of the vessel where her managing owner resides, upon the authority of a telegram from the master of the vessel, without

(6) *Brokers* — Charter-parties are usually effected through the agency of brokers, who are generally employed by the shipowners and are paid a commission by them.[1]

General Rules of Agency Applicable. — When charter-parties are executed by brokers or other agents, the general doctrines of agency are applicable.[2]

Instructions Exceeded. — If a broker exceeds his instructions, and this fact is

the ratification of such managing owner. Craig *v.* Magee, 11 Fed. Rep. 175.

1. Leggett on Charter Parties 66. See also The Nuova Raffaelina, L. R. 3 Adm. & Eccl. 483; Cross *v.* Pagliano, L. R. 6 Exch. 9; Wagstaff *v.* Anderson, 5 C. P. Div. 171; Carroll *v.* Walton, 48 Fed. Rep. 123. See also the title SHIP BROKERS.

Commission. — As to commission, see The Nuova Raffaelina, L. R. 3 Adm. & Eccl. 483; Gibson *v.* Crick, 31 L. J. Exch. 304; Allan *v.* Sundius, 31 L. J. Exch. 307; Blue Star Steamship Co. *v.* Keyser, 81 Fed. Rep. 507.

Government Contract. — In Howland *v.* Coffin, 47 Barb. (N. Y.) 653, it was held that a contract by which the owners of a steamship agreed to pay a broker a specified commission for obtaining a charter of their vessel from the United States government was not void on the ground that it contravened public policy.

Ship Broker's Duty. — A ship broker, when representing the shipowner alone and looking to him for compensation, is bound to obtain the best bargain for the benefit of the shipowner which can be honestly procured. Hendricksson *v.* Wright, 14 Phila. (Pa.) 590.

2. **For a Full Discussion** of these doctrines, see the title AGENCY, vol. 1, p. 930.

Liability of Agent Signing in His Own Name. — Where a charter-party was made by A B, who was described in the body of the instrument as "A B, agent of C B," but signed simply "A B," it was held that A B was liable as a principal. Parker *v.* Winlow, 7 El. & Bl. 942, 90 E. C. L. 942; Hough *v.* Manzanos, 4 Exch. Div. 104. *Compare* Wagstaff *v.* Anderson, 5 C. P. Div. 171.

And an action cannot be sustained thereon in the name of the alleged principal. Clark *v.* Wilson, 3 Wash. (U. S.) 560.

Acting Without Authority. — In Jenkins *v.* Hutchinson, 13 Q. B. 744, 66 E. C. L. 744, where it appeared that the defendant made a memorandum of charter-party in B.'s name, purporting to be signed by the defendant as agent for B., that the defendant had no authority to contract for B., and knew he had none, and that B. refused to adopt the contract, it was held that the defendant was not liable as principal in an action on the contract itself. See also Smith *v.* M'Guire, 27 L. J. Exch. 465; Carr *v.* Jackson, 7 Exch. 382; Cooke *v.* Wilson, 1 C. B N. S. 153, 87 E. C. L. 153. See generally the title AGENCY, vol. 1, p. 1124 *et seq.*

By Telegraphic Authority. — In Lilly *v.* Smales, (1892) 1 Q. B. 456, it was held that a firm of ship brokers who received their instructions by telegraph, and who signed a charter-party in the form "by telegraphic authority" of A B, the charterer, "as agent," were not personally liable upon the contract. See also Rotherfield S. S. Co. *v.* Tweedie, (1897) 13 T. L. R. 183.

Signing as Agents. — A charter-party made in London, between plaintiff, shipowner, and defendants "as agents" to S. F., "merchants and charterers," was signed "for D. [plaintiff], owner, H. G. as agent. For S. F., G. Brothers [defendants], as agents." The charter-party was partly written and partly printed, the words "merchants" and "charterers" being printed, and in the plural, throughout it. It was held that defendants were not personally liable, as principals, on the charter-party. Deslandes *v.* Gregory, 2 El. & El. 602, 105 E. C. L. 602. *Compare* Lennard *v.* Robinson, 5 El. & Bl. 125, 85 E. C. L. 125.

Foreign Principal. — A charter-party was executed by an agent for a foreign principal. It was held that such agent was not personally liable if it was shown that really his principal was the person to whom credit was exclusively given. Bray *v.* Kettell, 1 Allen (Mass.) 80. See the title AGENCY, vol. 1, p. 1121.

Warranty of Authority. — In Mitchell *v.* Kahl, 2 F. & F. 709, it was held that an action would lie against a broker for breach of warranty of authority when he had professed on behalf of the owner of a ship to charter her to the plaintiff, not having authority so to do.

Rights of Undisclosed Principal. — In Brooks *v.* Minturn, 1 Cal. 481, it was held that the owner of a ship chartered by, and in the name of, his agent, might, although he was not mentioned in the charter-party, be shown by extrinsic evidence to be the principal in the contract, and would be allowed to avail himself of its provisions. See also Schmaltz *v.* Avery, 20 L. J. Q. B. 228; Humble *v.* Hunter, 12 Q. B. 310, 64 E. C. L. 310.

Evidence Is Admissible to Show a Custom that the agent shall be held personally liable unless he discloses his principal within a reasonable time. Hutchinson *v.* Tatham, L. R. 8 C. P. 482. See also Humfrey *v.* Dale, 26 L. J. Q. B. 137.

Letters Admissible in Evidence. — In the body of a charter-party, the defendants in an action thereon were described as "Messrs. J. H. & Co. of N., for owners of the good ship R.," and signed the charter-party at its foot as follows: "For owners, J. H. & Co." It was held that some letters between the parties were admissible in evidence in explanation of the charter-party and to show that the defendants were the real principals. Adams *v.* Hall, 37 L. T. N. S. 70.

Agent of the Government. — A person entering into a charter-party in his own name on behalf of the government is personally liable. Cunningham *v.* Collier, 4 Doug. 233, 26 E. C. L. 333.

Void Because of Expiration of Agency. — A charter-party not executed by an agent until after his agency has expired is void. Richardson's Case, 2 Ct. of Cl. 483.

communicated to the other party or his broker, the principal is not liable unless the agreement made is ratified.[1]

Delegation of Authority. — A broker or other agent has in general no implied power to delegate his authority.[2]

b. MODIFICATION AND ALTERATION — **In General.** — A charter-party is the creature of the will of the contracting parties, and may be modified or altered in whole or in part by a subsequent agreement between them.[3]

All Parties Must Assent to Alteration. — But there can be no alteration, change, or modification of a charter-party by one party thereto without the assent of the other, express or implied;[4] and any material alteration of the instrument by

1. **Broker Must Follow Instructions.** — La Compania Bilbaina Co. *v.* Spanish-American Light, etc., Co., 31 Fed. Rep. 492, 146 U. S. 483; Starr *v.* Galgate Ship Co., 68 Fed. Rep. 234; Loomer *v.* Starr, 9 Nova Scotia 439. See also Spaight *v.* Beyerlieb, 9 L. T. 31; Sickens *v.* Irving, 29 L. J. C. P. 25; Smith *v.* M'Guire, 27 L. J. Exch. 465. See the title AGENCY.

Effect of Using Vessel. — In La Compania Bilbaina Co. *v.* Spanish-American Light, etc., Co., 31 Fed. Rep. 492, it was held that when the parties could not agree to certain stipulations in the charter-party, but the charterers, nevertheless, used the vessel for a voyage under that state of things, the terms of the charter must be deemed to constitute the implied agreement of the parties in the actual use made of the ship, in all except as to the deposit clauses, and that neither party could found any claim against the other upon the clauses that the other party did not accept, but always and consistently refused to accept.

2. **Employment of Sub-agent.** — Leggett on Charter Parties, p. 66. See also De Bussche *v.* Alt, 8 Ch. Div. 286; and the title AGENCY, vol. 1, p. 972 *et seq.*, where the rule and its limitations are fully explained.

3. **Modification by Agreement.** — Hall *v.* Brown, 2 Dow. 367; Gracie *v.* Palmer, 8 Wheat. (U. S.) 605; Mactier *v.* Wirgman, 4 Har. & J. (Md.) 568. See also Swain *v.* U. S., Dev. Ct. of Cl. 35; Cutler *v.* Lennox, 137 Mass. 506. And see generally the titles ALTERATION OF INSTRUMENTS, vol. 2, p. 205; NOVATION.

Express Stipulation as to Alteration. — Where it is expressly agreed in the instrument itself that the agent of the parties thereto may make necessary alterations, there can be no question of the right to alter the charter-party. Wiggins *v.* Johnston, 14 M. & W. 609, 15 L. J. Exch. 202.

Effect of Modification in One Particular. — An agreement to modify in one particular, as, for instance, to deviate from the original course of the voyage, is not an abandonment of the charter-party, and the rights of the parties, except as modified by the change agreed upon, remain unimpaired. Baker *v.* Pratt, 4 Allen (Mass.) 158.

Party Alleging Agreement to Alter Must Prove. — When one of the parties to a charter-party alleges that a verbal agreement has been substituted for the written charter-party originally entered into, the burden of proof is upon the party alleging the substitution. Wheelwright *v.* Walsh, 42 Fed. Rep. 862.

Additional Compensation When Destination Changed. — Where the owner of a vessel, in accordance with a subsequent agreement, delivered the cargo of the charterer at a destination further from the point of starting than that designated in the charter-party, he is entitled to additional compensation for that service. Swain *v.* U. S., Dev. Ct. of Cl. 35.

4. **Assent Required.** — Martin's Case, 5 Ct. of Cl. 215; Chamberlaine *v.* Pettit, 49 Fed. Rep. 109; The Progress, 50 Fed. Rep. 835; U. S. *v.* Kimbal, 13 Wall. (U. S.) 636. See also Dixon *v.* Heriot, 2 F. & F. 760.

Charterer Cannot Reduce Compensation Except by Consent. — Where a charter-party made by the owner of the vessel and the government provides a fixed compensation *per diem*, the quartermaster-general, in time of war, has no arbitrary power to reduce it while the vessel is compelled to remain in service against the wishes of her owner. Pratt's Case, 3 Ct. of Cl. 105; Clyde's Case, 5 Ct. of Cl. 134; Thorne's Case, 5 Ct. of Cl. 242.

Allowing to Remain in Service Is Consent. — Where a party allows his vessel, which is chartered to the government, to remain in the service after the charter-party has been disapproved by the quartermaster-general and a reduction of her compensation ordered, he can recover only at the reduced rate. Emery's Case, 4 Ct. of Cl. 401; Clyde's Case, 5 Ct. of Cl. 134; Crary's Case, 5 Ct. of Cl. 231; Martin's Case, 5 Ct. of Cl. 215; Thorne's Case, 5 Ct. of Cl. 242.

When the government chartered a vessel, reserving the right to discharge her at any time, and subsequently gave notice to the master that the charter rate was reduced, with the request to send the charter that the reduction might be indorsed thereon, it was not sufficient for him to protest to the messenger and withhold the charter-party. If the master allowed the vessel to continue in the service and accepted and receipted for her wages at the reduced rates, the owners will be estopped from seeking tthe charter rate. Field's Case, 12 Ct. of Cl. 355. To the same effect in Clarke's Case, 9 Ct. of Cl. 377.

Demand for Discharge Must Be Unequivocal. — If a party applies to a public officer for his vessel's discharge from the military service because of a reduction in her charter rate, the demand for discharge must be clear, positive, and unequivocal. Cobb's Case, 5 Ct. of Cl. 176.

Threats to Withhold Compensation Not Duress. — When the officers of the government to which a vessel was chartered threatened to withhold the compensation of the vessel which she had already earned, unless a new charter-party was executed reducing the rate of com-

either party or his agent, without the consent of the other party, although made without any fraudulent intent, will render the charter-party void, and if the alteration is made by a stranger the rule would seem to be the same.[1]

Power of Agent as to Modification. — Neither the master of the vessel, even when in a foreign port, nor any other agent of either the shipowner or the charterer can modify or cancel a charter-party made by his principal.[2]

c. MISTAKE — **Equitable Relief.** — When a charter-party is made under a mutual mistake as to material facts, a court of equity will relieve against its enforcement.[3]

Equitable Reformation. — And when charter-parties, through a mistake of fact, fail to contain what the parties intended, equity has the same power to perform them that it has in regard to other written instruments.[4]

pensation, and the owners, to avoid litigation, did agree to the execution of a new charter-party, it was held that the new agreement was voluntary and could not be avoided on the plea of duress. Silliman's Case, 12 Ct. of Cl. 433.

1. Unauthorized Alteration. — 1 Parsons on Shipping and Admiralty 274; Leggett on Charter Parties 34; Croockewit *v.* Fletcher, 26 L. J. Exch. 153, 1 H. & N. 893, 40 Eng. L. & Eq. 415; The Hero, 6 Fed. Rep. 526; Pew *v.* Laughlin, 3 Fed. Rep. 39. See also Chamberlain *v.* Pettit, 49 Fed. Rep. 109.

See generally the title ALTERATION OF INSTRUMENTS, vol. 2, p. 187.

2. Agent Cannot Alter Charter-party Made by His Principal. — Grant *v.* Norway, 10 C. B. 665, 70 E. C. L. 665; Thomson *v.* Brown, 1 Moo. 358; Thomas *v.* Lewis, 4 Exch. Div. 18; Gracie *v.* Palmer, 8 Wheat (U. S.) 605; Cargo of Salt, 4 Blatchf. (U. S.) 224; Ye Seng Co. *v.* Corbitt, 9 Fed. Rep. 423; The T. A. Goddard, 12 Fed. Rep. 174; Guerard *v.* Lovspring, 42 Fed. Rep. 853; Balcarres Brook Steamship Co. *v.* Grace, 75 Fed. Rep. 1017; Wilkie *v.* Schultz, 35 La. Ann. 491.

Agreement Expressly Refused. — The master of a vessel, even when in a foreign port, cannot make an agreement which the charter-party shows the owners of the vessel have expressly refused to make. La Scala *v.* Boughton, 37 Fed. Rep. 62.

Destination Cannot Be Changed. — The captain of a ship has no authority as such to agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters of the ship in England, and on which he has sailed to a foreign country. Burgon *v.* Sharpe, 2 Campb. 529. To the same effect is Capper *v.* Wallace, 5 Q. B. Div. 163. See also The Maggie Moore, 5 Hughes (U. S.) 287.

Nor can an agent at a foreign port vary a charter-party by substituting another and a distant point of loading, or a different quality or description of cargo. Sickens *v.* Irving, 7 C. B. N. S. 165, 97 E. C. L. 165, 6 Jur. N. S. 200.

Cannot Agree to a Submission. — The master of a vessel cannot agree to a submission for the purpose of having a clause in a charter-party, made by the owners of the vessel, interpreted. McPherson *v.* Cox, 86 N. Y. 472.

Cannot Exempt from Freight Lien. — The master cannot change the contract made by his employers with the charterers. He cannot, therefore, make any agreement by which the goods of the charterer are to be shipped and not be subject to the lien for freight under the charter-party; and such agreement, if made by him, will give no rights to a person who enters into it with the knowledge of the charter-party. The Salem's Cargo, 1 Sprague (U. S.) 389. To the same effect is The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182. See *infra*, this title, *Liens — Lien of the Shipowner.*

Agreement as to Freight. — A master of a vessel cannot alter the agreement in a charter-party as to the amount of freight to be paid or the manner of paying it. Pearson *v.* Goschen, 33 L. J. C. P. 265, 10 Jur. N. S. 903, 17 C. B. N. S. 352, 112 E. C. L. 352; Reynolds *v.* Jex, 34 L. J. Q. B. 251, 7 B. & S. 86. See *infra*, this title, *Freight.*

Agent Cannot Waive Stipulations. — One who, under a charter-party, is simply employed to furnish a cargo cannot make an agreement as to the manner in which the vessel shall be loaded or ballasted which differs from the agreement in the charter-party, where it does not appear that he is authorized to waive or change any of the stipulations thereof. Rich *v.* Parrott, 1 Sprague (U. S.) 358.

Agent Cannot Waive Breach of Condition. — An agent of a nonresident shipowner who is authorized to attend to all general and ordinary matters connected with such shipowner's business, and who has no authority to act in extraordinary matters, except by special instructions in the particular instance, cannot waive a breach of stipulation in a charter-party without express authority to do so. Olsen *v.* Hunter-Benn, 54 Fed. Rep. 530.

3. Mistake of Material Fact a Ground for Equitable Relief. — When it was a material fact for the charterers to know when the vessel would sail from the port where she then was, as they wished to ship grain at a certain time, and when by mistake the agents of the owners of the vessel, supposing that they had telegraphed and received an answer, stated that the vessel sailed at a certain date, when in fact she did not sail till some time thereafter, it was held that equity would prevent the enforcement of the contract entered into in consequence of this mistaken statement. Funch *v.* Abenheim, 20 Hun (N. Y.) 1. See also the title MISTAKE.

4. Equity — Reformation. — Story's Eq. Jurisprudence, §§ 152, 155; Leggett on Charter Parties 34; Wake *v.* Harrop, 31 L. J.

d. EXECUTION SUBSEQUENT TO DATE. — It may be shown that a charter-party was executed after the day on which it bears date;[1] but that fact is immaterial if the services of the vessel began on the day of the date.[2]

5. Contents. — Since charter-parties may contain any statement or agreement which the parties thereto, having in mind the particular service or voyage contemplated, choose to insert therein, it would be impossible to enumerate all the statements and stipulations to be found in such contracts, but the following are the most usual:

a. NAMES OF PARTIES AND DATE. — The names of the parties to a charter-party and the date of its execution are among its usual and necessary contents.[3]

b. DESCRIPTION OF VESSEL. — In a charter-party it is usual to give the name of the vessel,[4] her nationality,[5] her classification,[6] and her kind, whether a steamship or a sailing vessel,[7] and these statements are material.

c. SITUATION, AND TIME OF LOADING, SAILING, AND COMPLETING VOYAGE. — The stipulations usually found in a charter-party as to the situation of the vessel, the time when she shall be ready to receive cargo, and the time when she shall begin and complete her voyage, are materially essential parts thereof.[8]

Construction of Such Stipulations. — No exact form of words being necessary or sufficient, under the varying circumstances with regard to which parties con-

Exch. 451. See also Breslauer *v.* Barwick, 3 Asp. M. L. C. N. S. 355, 36 L. T. N. S. 52. See generally the titles MISTAKE; REFORMATION OF INSTRUMENTS.

1. Hall *v.* Cazenove, 4 East 477.

2. Bowley's Case, 8 Ct. of Cl. 187.

3. **Names of Parties and Date** — *England.* — Hayn *v.* Culliford, 4 C. P. Div. 182; Havelock *v.* Geddes, 10 East 555; Saville *v.* Campion, 2 B. & Ald. 503; Potter *v.* Burrell, (1897) 1 Q. B. 97.

United States. — Vandewater *v.* Steamship Yankee Blade, 1 McAll. (U. S.) 9; Gill *v.* Browne, 53 Fed. Rep. 394.

Massachusetts. — McGilvery *v.* Capen, 7 Gray (Mass.) 525.

New York. — Funch *v.* Abenheim, 20 Hun (N. Y.) 1; Allen *v.* Bareda, 7 Bosw. (N. Y.) 204; McPherson *v.* Cox, 86 N. Y. 472.

4. **Name of Vessel.** — Leggett on Charter Parties 152, *citing* De Mattos *v.* Gibson, 28 L. J. Ch. 498. See Routh *v.* MacMillan, 9 L. T. 541.

5. **Nationality.** — Lothian *v.* Henderson, 3 B. & P. 499. See *infra*, this title, *Dissolution and Excuses for Nonperformance — Description — Nationality.*

6. **Classification.** — Ollive *v.* Booker, 17 L. J. Exch. 21; Baetjer *v.* Bors, 7 Ben. (U. S.) 280. See *infra*, *Dissolution and Excuses for Nonperformance — Description — Classification.*

7. **Kind of Vessel.** — Fraser *v.* Telegraph Constr., etc., Co., L. R. 7 Q. B. 566.

8. **Time and Situation Are Material.** — Lowber *v.* Bangs, 2 Wall. (U. S.) 732; Davison *v.* Von Lingen, 113 U. S. 50; Gray *v.* Moore, 37 Fed. Rep. 266; Funch *v.* Abenheim, 20 Hun (N. Y.) 1. See also Groves *v.* Volkart, 1 Cababé & E. 309; Noorington *v.* Wright, 115 U. S. 188; Filley *v.* Pope, 115 U. S. 213; Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255. See *infra*, this title, *Dissolution and Excuses for Nonperformance — Situation and Time of Loading and Sailing — Stipulation.*

Use of "About" Does Not Make Time Immaterial. — A charter-party provided that the vessel was to be chartered "from the time of delivery at Santa Marta, about April 10th, for a period of four months." It was perfectly understood, while negotiations for the charter were pending, that the charterer insisted upon the delivery of the vessel to him at Santa Marta not later than April 15, but was willing to accept delivery as early as April 10. It was held that the use of the word "about" did not signify that the time was immaterial, but that the recital in the contract was in the nature of a warranty or condition precedent, and a breach of the promise to deliver the vessel at the time specified entitled the charterer to indemnity commensurate with the loss naturally accruing; and that the difference between the charter hire and the reasonable cost of procuring such a vessel as the one chartered furnished the most direct and obvious measure of damages. Sanders *v.* Munson, 74 Fed. Rep. 649, *affirming* 61 Fed. Rep. 504.

Knowledge of the Falsity of the Stipulation as to Situation. — In Lovell *v.* Davis, 101 U. S. 541, it was held that if the charterer knew at the time of the execution of the charter-party that as a matter of fact the vessel was at sea instead of "now lying in the harbor of New Orleans" as stated, it was not erroneous to instruct the jury that the clause "now lying in the harbor" was merely a representation, and should be regarded as having no significance.

Situation — "Lying in the Harbor of B." — In a charter-party the vessel was stated to be lying in the harbor of Boston. It appeared by the evidence that she was in fact at Searsport, undergoing repairs, and was detained for that purpose some twelve days. It was held that from this representation in the charter-party the charterer had a right to believe that the vessel would proceed from Boston to the port of loading without any unreasonable and unusual delay, and if she did not do so it was a violation of her duty under the contract; and that the charterer was entitled to be placed in as good a condition as he would have been if

tract, to express such stipulations, controversies have frequently arisen as to the meaning of the expressions used, which the courts have been called upon to settle.[1]

d. SEAWORTHINESS. — The seaworthiness of the vessel, in which term is included her fitness for the cargo which is to be transported, is generally expressly stipulated for. The materiality and effect of such stipulations will be discussed hereafter.[2]

e. CAPACITY. — The capacity of the vessel is generally stated in the charter-

the vessel had performed her duty and arrived at that time. Nichols *v.* Tremlett, 1 Sprague (U. S.) 361.

1. Time of Sailing. — A stipulation to sail by a certain date is not complied with by the vessel's raising her anchor, getting under sail, and leaving her moorings, or even the harbor, unless at the time of the performance of these acts she has everything ready for the performance of the voyage, and such acts are done as the commencement of the voyage, nothing remaining to be done afterwards. Lang *v.* Anderson, 3 B. & C. 495, 10 E. C. L. 163; Thompson *v.* Gillespy, 24 L. J. Q. B. 340; Hudson *v.* Bilton, 26 L. J. Q. B. 27. See also Ridsdale *v.* Newnham, 3 M. & S. 456.

To have sailed or departed finally, the vessel must have got out of port ready for her voyage, and for the purpose of proceeding on her voyage. Price *v.* Livingstone, 9 Q. B. Div. 679. See also Moir *v.* Royal Exch. Assur. Co., 3 M. & S. 461; Roelandts *v.* Harrison, 23 L. J. Exch. 169.

"Forthwith" means with reasonable and proper diligence, and without unreasonable delay. Hudson *v.* Hill, 43 L. J. C. P. 273.

And parol evidence is not admissible to show that the parties agreed that the vessel should be ready in two days. Simpson *v.* Henderson, M. & M. 300, 22 E. C. L. 313.

Proceeding "Direct" from Certain Port. — A charter-party contained this language: "It is understood that the vessel is now loading for Key West or the Tortugas, and is to proceed thence direct, to load on this charter." In construing the meaning of the word "direct" the court said: "It did not mean that the vessel should depart from the Tortugas instantly or immediately, but that she should, at that place, enter upon the voyage provided for in the charter, and proceed in a direct course to the place of loading in Florida. The degree of diligence and dispatch, according to this interpretation, is a question of law, under the particular circumstances of the case." The Onrust, 6 Blatchf. (U. S.) 533.

"With All Convenient Speed"— Other Provisions to Be Considered. — In Gill *v.* Browne, 53 Fed. Rep. 394, *affirming* 50 Fed. Rep. 941, it was held that a stipulation that the ship shall, "with all convenient speed, sail and proceed to P.," was to be read in connection with the other provisions of the charter-party, and that "with all convenient speed" in that case meant reasonable diligence with reference to the trading voyage which the ship had already undertaken.

A charter-party by which it is agreed that a ship, after delivering her outward cargo at M., shall with all convenient speed sail to one of the several ports which shall be ordered at M., contains an implied promise on the part of the charterer that the ship shall be ordered at M. to sail to such port within a reasonable time after her arrival at M. Woolley *v.* Reddelien, 5 M. & G. 316, 44 E. C. L. 171.

To "Leave A." Not Later than Certain Date. — A ship was chartered to "sail and proceed from A., with all convenient speed, to L., to leave A. not later than all March." On the 30th of March the ship, having a portion of her ballast on board, left the docks at A. On the 31st of March she proceeded to B., where she remained during the 1st and 2d of April, taking in the remainder of her ballast. On the 3d of April she proceeded on her voyage and quitted C., and arrived at L. on the 17th. It was held that the term "leave A." did not mean "sail on her voyage from A.;" and consequently the stipulation in the charter-party had been complied with. Van Baggen *v.* Baines, 9 Exch. 523, 23 L. J. Exch. 218.

"At S. or Sailed." — A stipulation in a charter-party, "at Santos, or sailed," conveys the idea that if the vessel had not already sailed, she was at Santos and would soon sail. Olsen *v.* Hunter-Benn, 54 Fed. Rep. 530.

"About the Middle of September." — A steamer was chartered to transport certain cattle. The contract, when designating the steamer in which the cattle were to be transported, added to the steamer's name the words "sailing from New York about the middle of September." The court, in construing this phrase, said: "The phrase in the contract, 'about the middle of September,' is indefinite. It has no definite meaning in the trade. In this instance it was construed by the ship to cover a day as late as September 27th. This construction was made known to the defendant on September 14th, and he then made no objection to that construction. After this interpretation of the indefinite phrase, 'about the middle of September,' acquiesced in by the defendant, and that, too, on the day before the middle of September, it was not open to the defendant to say that a tender of the ship on the twenty-ninth of September was not a compliance with the contract. The defendant's refusal to ship cattle on the steamship was therefore a breach of the contract on his part, and he is liable for the damages resulting therefrom." Bennett *v.* Lingham, 31 Fed. Rep. 85.

Ship Not Ready When Cannot Communicate with the Shore. — A ship that has not obtained pratique, and is prohibited by regulations of the port from communicating with the shore, is not "ready to load." The Austen Friars, 71 L. T. 27.

2. See *infra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Seaworthiness; Dissolution and Excuses for Nonperformance — Conditions Precedent.*

party, and a misstatement as to it may entitle the charterer to damages, or in some cases, as will be hereinafter seen, to consider the charter-party as dissolved.[1]

Such Stipulations Usually Guarantee the Cargo Capacity Only, and not that the vessel shall load a specified amount of such particular kind or condition of cargo as the charterer may elect to put on board.[2]

For Certain Cargo. — But when it appears that the precise nature of the cargo which the charterers had in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, such stipulation may be construed as a guaranty on the part of the shipowner to furnish the charterers with a vessel capable of carrying the specified quantity of cargo of the kind they proposed to ship.[3]

f. CARGO SPACE; QUANTITY AND KIND OF CARGO. — It is usual for the shipowner to agree expressly that the whole ship, generally with the exception of such a part thereof as is necessary for quarters for the officers and crew, and for storing the necessary tackle, provisions, and ballast, or a certain part thereof,

1. Statements of Capacity. — Barker *v.* Windle, 6 El. & Bl. 675, 88 E. C. L. 675; Gomila *v.* Culliford, 20 Fed. Rep. 734; Watts *v.* Camors, 115 U. S. 353. See *infra*, this title, *Dissolution and Excuses for Nonperformance — Conditions Precedent — Capacity.*

Illustrations. — By a charter-party the owner agreed to furnish a vessel of 1,250 tons, warranted to carry a full outward cargo of petroleum, and a homeward cargo of 600 tons of marble with sufficient rags for dunnage. It was held that there was no warranty as to the capacity of the vessel for the return trip, and that as she carried the 600 tons of marble as agreed, the charterer could not recover a rebate on the return freight for the deficit of the tonnage of the vessel. Ruger *v.* Reck, 14 Phila. (Pa.) 542.

A clause in a charter-party provided that the ship was to carry out 700 tons measurement of assorted cargo, or more, if that did not make her draw over fourteen feet of water. On being laden with 360 tons of assorted cargo for the outward trip she drew fourteen feet of water, and the owner refused to permit the charterer to load her further. It was held that such a refusal was no violation of the clause aforesaid, and the owner was entitled, upon performing the voyage, to recover the money payable by the terms of the charter-party. Roberts *v.* Opdyke, 40 N. Y. 259.

Statement of Capacity Held Implied Warranty. — A warranty or guaranty may enter into a contract without any express words to that effect, or even the intention of the person who makes the representation which constitutes it; and so, when brokers who were employed to make a charter for a ship stated that it was of a certain cubical capacity, it was held that such statement of capacity was a warranty, although said brokers contracted on the basis that the capacity was not guaranteed. Wilfred *v.* Myers, 40 Fed. Rep. 170.

Not a Ground for an Action In Rem. — In The Eli Whitney, 1 Blatchf. (U. S.) 360, it was held that in the case of a charter-party, a suit *in rem* was not maintainable for the misrepresentation or concealment of facts by the master or owner of a vessel in respect to her tonnage or capacity.

Applicable to Both Fresh and Salt Water. — A charter-party contained a guaranty that a vessel should carry 3,000 tons dead weight upon a draught of twenty-six feet of water. It was held that both parties to the charter must have contemplated loading a cargo in a river, and that, consequently, the guaranty would apply to fresh as well as to salt water. The Norway, 11 Jur. N. S. 892.

2. Meaning of Guaranty Dependent upon Kind of Cargo. — See The Balcarres Brook, 66 Fed. Rep. 358, 75 Fed. Rep. 1017.

A charter-party provided that the ship should load a cargo of creosoted sleepers and timbers, and contained the following clause: "Owners guarantee ship to carry at least about 90,000 cubic feet or 1,500 tons dead weight of cargo." It was held that this clause did not amount to a warranty that the ship should be able to carry that number of cubic feet of the description of cargo which the charterer was under the provisions of the charter entitled to tender, but was merely a warranty of the carrying capacity of the ship. Carnegie *v.* Conner, 24 Q. B. Div. 45, *distinguishing* Morris *v.* Levison, 1 C. P. Div. 155.

3. Capacity with Reference to Kind of Cargo. — Mackill *v.* Wright, L. R. 14 App. 106.

Illustrations. — A charter-party for a voyage from the port of New York to certain west coast South American ports contained the following clause: "Owners guarantee that steamer will carry under deck at least 3,000 measurement tons of forty cubic feet." The contract did not stipulate that any particular kind of cargo was to be carried, but it appeared that the parties contemplated that the vessel was to be employed to transport the kind of cargo usually carried between the port of loading and the ports of destination. It was held that by this clause it was intended to guarantee the charterers a vessel in which they could ship, if they chose, 3,000 measurement tons of ordinary West Coast South American cargo. Balcarres Brook Steamship Co. *v.* Grace, 75 Fed. Rep. 1017, *reversing* 66 Fed. Rep. 358.

The charter of a ship provided for a cargo of deal ends firewood and fifty standards of broom handles, and stated that the ship had carried 540 standards. It was held that this was a guaranty that she could carry 540 stand-

shall be at the disposal of the charterer; and for the charterer to agree that he will load sufficient cargo, generally of a kind or kinds specified, to fill completely the space furnished by the shipowner.[1]

Effect of Statement of Capacity. — When it is stipulated that the charterer shall load a full and complete cargo, and there is also in the charter-party a statement of the capacity of the ship, such statement has no effect on the agreement to load a full and complete cargo, and however much the actual capacity of the ship exceeds the capacity stated, the charterer is bound to fill completely the cargo space.[2]

Kind Agreed Upon. — The cargo furnished by the charterer must be of the kind agreed upon.[3]

Mixed Cargo. — When it is agreed that the charterer shall supply a full cargo consisting of one or more of several articles, the charterer has the right to supply a full cargo of any one or more of the articles enumerated in the charter-party if he chooses so to do.[4]

Liberty to Fill "with Other Lawful Merchandises." — It has been decided that a provision that the charterer shall be at liberty "to fill up with other lawful merchandises" means other lawful merchandises *ejusdem generis*, at least so far as the calculation of freight is concerned.[5]

Cargo at Charterers' Option — Notice to Ship. — When the character of the cargo is at the option of the charterers, it would seem that it is the duty of the charterers to give reasonable notice to the ship of the kind of cargo intended to be shipped, if the cargo intended is such as to require special preparation in order that the ship shall be ready to receive it.[6]

Fitness of Cargo. — The cargo furnished must not only be of the kind specified, but must be reasonably fit for transportation in the vessel chartered; and while changes of a temporary character in the interior of the vessel, such as are usual and customary in the trade for the accommodation of the cargo, may be

ards of the agreed cargo. Wood *v.* Allen, *cited* in Carver on Carriage by Sea, § 141, note *a*.

1. Thomas *v.* Clarke, 2 Stark. 450, 3 E. C. L. 484; Kirk *v.* Gibbs, 1 H. & N. 810, 26 L. J. Exch. 209; Warren *v.* Peabody, 8 C. B. 800, 65 E. C. L. 800; Alcock *v.* Leeuw, 1 Cababé & E. 98; Hovill *v.* Stephenson, 4 C. & P. 469, 19 E. C. L. 477; Potter *v.* New Zealand Shipping Co., 64 L. J. Q. B. 689; Beecher *v.* Bechtel, 3 Blatchf. (U. S.) 40; The Lloyd, 21 Fed. Rep. 420; Manchisa *v.* Card, 39 Fed. Rep. 492; McQuade *v.* McNaughton, 49 Fed. Rep. 284; Bush *v.* Thompson, 65 Fed. Rep. 812, *affirming* 60 Fed. Rep. 631. And see *infra*, this title, *Measure of Damages*.

What Variation Allowed. — A charter-party provided that the ship should proceed to the port of loading and there load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons. It was held that the words "say about 1100 tons" were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity, but that three per cent. was a fair amount of excess over 1100 tons to allow in estimating what was a full and complete cargo of about 1100 tons, and consequently the cargo actually provided fell short of the charterer's obligation by fifty-three tons. Morris *v.* Levison, 1 C. P. Div. 155.

2. Thomas *v.* Clarke, 2 Stark. 450, 3 E. C. L. 484.

Illustration. — By a charter-party a ship was described to be of the burden of 261 tons, and the freighter covenanted to load a full and complete cargo. It was held that the loading of goods equal in number of tons to the tonnage described in the charter-party was not a performance of this covenant; but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety. Hunter *v.* Fry, 2 B. & Ald. 421.

3. Stanton *v.* Richardson, 45 L. J. C. P. Div. 78.

4. **Full Cargo of One or More Specified Articles.** — Stanton *v.* Richardson, 45 L. J. C. P. Div. 78; Irving *v.* Clegg, 1 Bing. N. Cas. 53, 27 E. C. L. 308; Towse *v.* Henderson, 4 Exch. 890; Southampton Steam Colliery Co. *v.* Clarke, L. R. 6 Exch. 53.

Illustration. — Where by a charter-party the freighter covenanted to provide for the ship a full and complete cargo consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid, it was held that, having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done. Moorsom *v.* Page, 4 Campb. 103.

5. Capper *v.* Forster, 3 Bing. N. Cas. 938, 32 E. C. L. 391. See also Cockburn *v.* Alexander, 6 C. B. 791, 60 E. C. L. 791.

6. Greenwell *v.* Ross, 34 Fed. Rep. 656.

proper and within the duty of the shipowner, changes affecting the safety and seaworthiness of the vessel, and thereby permanently lessening her value, need not be made.[1]

Condition of Articles Composing a Mixed Cargo. — When the cargo is to consist of several different articles, these articles must be in such condition and be put up in such form that they can be stowed and carried without one part of the cargo damaging the other; otherwise, the master may refuse to receive them.[2]

Right to Prevent Overloading. — Although the charter-party obliges the shipowner to take a full cargo and entitles the charterer to put such cargo on board,[3] it gives no right to overload, nor compels the receipt of so much cargo as would endanger the safety of the vessel or exceed her proper carrying capacity.[4]

What Is a Full Cargo for a Ship to Carry with Safety, is not a fact which can be settled by any rule of law or mathematical computation, but is to be ascertained from the opinion of such persons as have experience, skill, and judgment in such matters;[5] and the judgment of the master of the vessel, who is well acquainted with her, fairly and deliberately exercised, should go far in determining the matter.[6]

g. Loading and Unloading. — A clause as to the time, place, and manner of loading and unloading is generally found in charter-parties and sometimes in other forms of contracts of affreightment.[7]

Loading and Delivering "in Regular Turn." — The stipulation in the charter-party in some branches of trade is usually that the vessel shall load "in regular turn," and a similar provision with regard to unloading is "in turn to deliver." The consideration of the meaning of these phrases will be found under another title.[8]

Place of Loading or Discharge. — The provision that the vessel shall proceed to a certain port or dock, or to a safe port or as near thereto as she can get with

1. Stanton *v.* Richardson, L. R. 9 C. P. 390, *affirming* L. R. 7 C. P. 421.

Transportation of Lumber — Alteration of Vessel. — By a charter-party it was agreed that the charterer was to furnish a full and complete cargo of lumber. The charterer contended that the owner of the vessel should enlarge her port holes in order that certain unusually large pieces of lumber might be loaded upon the vessel. It was held that the shipowner was not obliged to make such alteration. Beecher *v.* Bechtel, 3 Blatchf. (U. S.) 40; Husten *v.* Richards, 44 Me. 182. See also Thorndike *v.* Rokes, 76 Me. 396.

2. Boyd *v.* Moses, 7 Wall. (U. S.) 316.

3. Schmidt *v.* Smith, 7 Ben. (U. S.) 361; The Starlight, 42 Fed. Rep. 167.

4. Vessel Must Not Be Overloaded. — Hunter *v.* Fry, 2 B. & Ald. 421; Reynolds *v.* The Joseph, 2 Hughes (U. S.) 58; The Giles Loring, 48 Fed. Rep. 463.

Dependent upon Character of the Cargo. — A provision in a charter-party that the vessel shall carry all lawful goods placed on board, to the entire capacity of the vessel, means, of course, her entire capacity without danger to her safety. This construction, in case of light goods, might fill her entirely without such danger and without making her too deep; whereas, in case of very compact and heavy goods, if filled entirely, she might be so deep as probably to sink in the first gale or strong swell. Weston *v.* Minot, 3 Woodb. & M. (U. S.) 436.

5. Opinion of Experienced Persons. — Ogden *v.* Parsons, 23 How. (U. S.) 167.

6. Opinion of the Master. — Weston *v.* Foster, 2 Curt. (U. S.) 119; The Giles Loring, 48 Fed. Rep. 463. See also Reynolds *v.* The Joseph, 2 Hughes (U. S.) 58.

7. Stipulations as to Loading and Unloading. — The Ocean Prince, 50 Fed. Rep. 115; Smith *v.* Lee, 66 Fed. Rep. 344; Egan *v.* Barclay Fibre Co., 61 Fed. Rep. 527. See *infra*, this title. *Rights and Liabilities Common to All Contracts of Affreightment — Termination of Liability.*

Liability for Appliances and Tackle. — When, under an agreement in the charter-party, the owners of the vessel furnished the appliances and tackle used in loading the vessel, they are bound to furnish machinery and tackle fit for use and to use proper care to keep the same in order. Anderson *v.* The Ashebrooke, 44 Fed. Rep. 124.

Depth of Water at Place of Loading. — A guaranty of a certain depth of water at the place of loading upon a river must be construed as a guaranty of that depth both at the place of loading and thence to the sea. Shaw *v.* Hart, 1 Sprague (U. S.) 567.

Compressing Cotton. — By a charter-party it was stipulated that a vessel chartered to carry cotton was to pay for loading and compressing the same. It was held that by this stipulation the vessel was bound to pay for compressing done at places other than the port of loading. Baxter *v.* Card, 59 Fed. Rep. 165.

8. See the title Demurrage.

safety, has been passed upon by the courts in a number of cases.[1]

Duty of the Charterer as to Naming the Port. — If the port of loading or discharge is not named in the charter-party, but remains to be determined by the charterer, he must name it before he can require the ship to commence her voyage.[2]

1. Provisions as to Place of Loading and Unloading Construed. — By the terms of a charter-party the ship was to take in a full cargo at Bombay, and proceed therewith to a safe port on the Continent, between Havre and Hamburg, as ordered, "or as near thereto as she can safely get." The cargo was to be brought to and taken from alongside at the merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder in Holland, which is some distance up a canal, and the vessel with her full cargo drew too much water to proceed up this canal. No arrangement had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. The master discharged into lighters a sufficient portion of the cargo to enable the ship to proceed with the residue. It was held that under the circumstances the voyage under the charter-party ended at the mouth of the canal, and that the charterers ought to pay what it would have cost to have lightered the whole cargo from the mouth of the canal to Koogerpolder. Capper *v.* Wallace, 5 Q. B. Div. 163.

It was provided in a charter-party that the vessel was to proceed to a certain specified dock for the purpose of discharging her cargo, "or so near thereunto as she can safely get." The dockmaster, upon her arrival, refused to allow her to discharge there. It was held that the vessel was authorized to go to the place nearest the dock specified where she could fulfil the obligation of the charter-party and make delivery of her cargo at some "proper discharging berth." Carsanego *v.* Wheeler, 16 Fed. Rep. 248.

It was provided in a charter-party that the vessel was to go to London, Surrey Commercial Dock, or as near thereto as she could safely get and lie always afloat. It was held that the ship did not fulfil the engagement in the charter-party by merely going to the gates of the dock specified; but when it had fulfilled the alternative, to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense, and the shipowner was not bound to wait for an unreasonable period until the dock authorities should be able to assign the ship a discharging berth in the dock specified. Dahl *v.* Nelson, L. R. 6 App. 38. *Distinguishing* Schilizzi *v.* Derry, 4 El. & Bl. 873, 82 E. C. L. 873; Metcalfe *v.* Britannia Iron Works Co., 2 Q. B. Div. 423.

"Always Afloat." — In Graham *v.* Merwanji Nusserwanji, I. L. R. 5 Bombay 539, it was held that where a vessel was chartered to load a full and complete cargo, and being so loaded to proceed therewith to a "safe port, or so near thereunto as she may safely get and deliver the same always afloat," the master was not bound to sail to a port where the vessel could not by reason of her draught of water lie and discharge "always afloat," without being previously lightened, even if the cost of the requisite lightening would by the charter-party fall on the charterers.

Safe Departure After Loading. — A stipulation that a ship shall proceed to a certain place, or as near thereto as she can safely get, and there load a full cargo, means a place to which she can safely get and from which, when loaded, she can safely get away. Shield *v.* Wilkins, 5 Exch. 304.

Custom as to Inadmissible. — Where a vessel was chartered to proceed with a cargo to a "safe port * * * as ordered, or as near thereunto as she can safely get and always lay and discharge afloat," it was held that the master was not bound to discharge at a port where she could not by reason of her draught of water always lie and discharge afloat without being lightened, even if she could be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself; and that evidence that it was the custom of the port of L. for vessels to be lightened in the roads before proceeding in the harbor was inadmissible. The Alhambra, 6 Prob. Div. 68, *distinguishing* Nielson *v.* Wait, 16 Q. B. Div. 67. To the same effect are Hayton *v.* Irwin, 5 C. P. Div. 130; Reynolds *v.* Tomlinson, (1896) 1 Q. B. 586. See *infra*, this section, *Construction — Admissibility of Usage.*

Other Cases wherein provisions as to place of loading and unloading are construed are Hayton *v.* Irwin, 5 C. P. Div. 130; Parker *v.* Winlow, 7 El. & Bl. 942, 90 E. C. L. 942; Bastifell *v.* Lloyd, 1 H. & C. 388; Ford *v.* Cotesworth, L. R. 5 Q. B. 544; Hillstrom *v.* Gibson, 8 Sc. Sess. Cas. (3d ser.) 463; The Gazelle, 128 U. S. 474. See also Smith *v.* Dart, 14 Q. B. Div. 105.

2. Leggett on Charter Parties 224; Rae *v.* Hackett, 12 M. & W. 724; Woolley *v.* Reddeljen, 12 L. J. C. P. 152; French *v.* Gerber, 2 C. P. Div. 247; Ohlsen *v.* Drummond, 4 Doug. 356, 26 E. C. L. 402; Bradford *v.* Williams, L. R. 7 Exch. 259; Charpentier *v.* Dunn, 15 Sc. L. R. 726. See also Brown *v.* Johnson, 1 C. & M. 440, 41 E. C. L. 242.

Meaning of "Port." — A port is a place of safety for the ship and the goods whilst the goods are being loaded or unloaded. There will never be a port, in the ordinary business sense of the word, unless there is some element of safety in it for the ship and goods. Hunter *v.* Northern Marine Ins. Co., L. R. 13 App. 717, *citing* and *approving* Sailing-ship Garston Co. *v.* Hickie, 15 Q. B. Div. 580.

Charterer Need Not Be Communicated With. — The master of a ship under a charter-party to load at a foreign port, and thence proceed to a port in Great Britain as ordered, is not bound, in default of orders, to wait at the foreign port until he has communicated with the charterer. Sieveking *v.* Maas, 25 L. J. Q. B. 275, *affirmed* 6 El. & Bl. 670, 88 E. C. L. 670.

Risk of Capture Excuses from Proceeding to the Port Named. — Although the charterer has a right to determine at what port the vessel shall load, she need not proceed to the port

At Expense and Risk of the Shipper. — It is often agreed that the cargo of a vessel shall be loaded and unloaded at the risk and expense of the owner of such cargo.[1]

named, if by so doing she would run the risk of being captured by the vessels of a hostile power. Pole *v.* Cetcovich, 9 C. B. N. S. 430, 99 E. C. L. 430; Ogden *v.* Graham, 1 B. & S. 773, 101 E. C. L. 773, 31 L. J. Q. B. 26.

"A Second Safe Port" Explained. — When a charter-party provided that if the charterers did not have a sufficient cargo to load the vessel at the port designated in the charter-party, they were to have the privilege of sending her "to a second safe port," it was held that the words "a second safe port" implied a port which the vessel could enter and depart from without legal restraint and without incurring more than the ordinary perils of the seas. Atkins *v.* Fibre Disintegrating Co., 2 Ben. (U. S.) 381.

Responsibility for Readiness of the Berth Designated. — The responsibility rests with the charterer if the berth specified in the charter-party, or designated by him, is not in a fit state to receive the vessel upon her arrival at the appointed time. Davies *v.* McVeagh, 4 Exch. Div. 265.

By a charter-party it was agreed that the plaintiff's vessel, after loading a certain cargo, should proceed "to London or Tyne dock, to such ready quay berth as ordered by the charterers." It was held that by this provision the charterers undertook to order the ship to go to such dock and to such quay berth there as they might wish, but with this stipulation in favor of the shipowners, that it should be to a quay berth which was ready; and consequently that the charterers were bound to name a quay berth which was ready. Harris *v.* Jacobs, 15 Q. B. Div. 247.

Designated or Customary Place. — The vessel does not fulfil its contract by stopping at the entrance of the port of discharge, but must proceed to the very berth or dock designated, if one is named in the contract; but if not, to the place customarily used for discharge by vessels loaded with similar cargoes. Brereton *v.* Chapman, 5 Moo. & P. 526; Bremner *v.* Burrell, 4 Sc. Sess. Cas. (4th ser.) 934; Murphy *v.* Coffin, 12 Q. B. Div. 91, *disapproving* Davies *v.* McVeagh, 4 Exch. Div. 265; Tharsis Sulphur, etc., Co. *v.* Morel, (1891) 2 Q. B. 647, *overruling* The Carisbrook, 15 Prob. Div. 98; Sanders *v.* Jenkins, (1897) 1 Q. B. 93.

General Ship — Convenience of the Shipper to Be Considered. — When there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at that most convenient to the shipper, at least if he be duly and seasonably notified of such preference; and a single shipper owning the whole cargo has the same right that a charterer would have to say where the vessel is to discharge, provided it be a suitable place and within the limits of the port. The Boston, 1 Lowell (U. S.) 464. To the same effect are The E. H. Fittler, 1 Lowell (U. S.) 114; The Mascotte, 51 Fed. Rep. 605, *reversing* 48 Fed. Rep. 119.

Ship Must Find Her Own Berth. — In the absence of any custom or express contract, it is the ship's business to find a berth in the port of discharge. Smith *v.* New York, etc., Granite Paving Block Co., 56 Fed. Rep. 527, *affirming* 56 Fed. Rep. 525.

1. Illustrations. — The defendants executed a charter-party under which the cargo was to be sent alongside the ship at the merchant's expense, the captain rendering the usual and customary assistance with his boats and crew. Some of the cargo was lying about thirty yards from the edge of the wharf, and the captain applied to the defendant's agent for laborers to remove it into the boat. As the agent refused, the captain hired laborers for that purpose. It was held that the shipowner might recover for the expense so incurred. Fletcher *v.* Gillespie, 3 Bing. 635, 13 E. C. L. 84. *Compare* Holman *v.* Dasnières, 2 Times L. R. 607.

When it is agreed in a charter-party that the cargo is to be brought alongside and taken from alongside free from expense and risk to the ship, and it becomes necessary in loading the ship to use lighters, these lighters must be tight, stanch, and seaworthy in all respects, and must remain so as long as they are so used. If a part of the cargo is lost because of a defect in a lighter in which it was being transported, the shipowner is not liable. Guerard *v.* Lovspring, 42 Fed. Rep. 853.

When by the terms of the charter-party the cargo is to be loaded and unloaded at the merchant's risk and expense, and the loading and unloading is also to be done according to the custom of the port, the words "according to the custom" do not modify the clause "at merchant's risk and expense," but may control the time and manner of loading and unloading; and evidence of the custom of the port that the shipowner is to pay certain expenses is inadmissible. The Nifa, (1892) Prob. 211; Lishman *v.* Christie, 19 Q. B. Div. 333; Holman *v.* Wade, Times, 11th May, 1877. *Compare* Scrutton *v.* Childs, 36 L. T. N. S. 212. And see *infra*, this title, *Construction — Admissibility of Usage*.

Lighterage Included in Expense. — If it is necessary to employ lighters in loading the vessel, the cost of lightering must be paid by the shipper, though the vessel may not be able to load at the usual loading place. Trindade *v.* Levy, 2 F. & F. 441.

Lighterage Specified. — Necessary lighterage is sometimes specifically named as one of the items of expense. The Curfew, (1891) Prob. 131; Johnson *v.* Baugh, 58 Fed. Rep. 424.

A charter-party provided that the cargo "is to be brought to and taken from alongside at merchant's risk and expense, and free of lighterage to the ship." It was held that the owners of the cargo were required to furnish lighterage if necessary at the port of destination as well as at the port of loading. Carr *v.* Austin, etc., R. Co., 14 Fed. Rep. 419. See also Johnson *v.* Baugh, 58 Fed. Rep. 424.

To Pay For Does Not Mean to Furnish. — An agreement by the charterers of a vessel to pay

At Expense and Risk of the Ship. — And it may be agreed that the loading or unloading shall be at the expense and risk of the ship.[1]

Stevedore Clause. — The cargo of a vessel is generally loaded and unloaded by persons called stevedores, who, in the absence of any agreement, are selected by the shipowner and are to be regarded as his agents; but in charter-parties there is frequently inserted a stevedore clause, and when this is done the right to appoint the stevedore and the responsibility for his acts depend upon the express agreement contained in such clause.[2]

h. LAY DAYS AND DEMURRAGE. — It is customary in a charter-party to stipulate that a certain number of days called lay days shall be allowed for loading and unloading the vessel, and that for any detention beyond that period a certain sum *per diem*, called demurrage, shall be paid the shipowner by the charterer.[3]

Express Stipulation Unnecessary. — But an express stipulation for demurrage in the contract is not necessary to entitle the owner of the vessel to compensation for her unnecessary or improper detention in loading or unloading. Reasonable promptitude in delivering a cargo at its point of shipment, or receiving it at its destination, is a duty implied in such contracts, and for its violation damages in the nature of demurrage are recoverable.[4]

for lighterage does not include the physical act of furnishing or providing the same. Barrett *v.* Oregon R., etc., Co., 22 Fed. Rep. 452.

For other cases in which this clause has been construed, see Peterson *v.* Freebody, (1895) 2 Q. B. 294; The Ira B. Ellems, 2 U. S. App. 242.

1. "At Ship's Risk." — By a charter-party a vessel was to proceed to a port, and there to load a cargo from the shore by the ship's boats and crew at ship's risk and expense. A part of the cargo was lost, after delivery from the shore and before it was loaded on board, through one of the perils enumerated in the exceptions in the charter-party. In an action by the charterer for the nondelivery of this part of the cargo it was held that the expression "at ship's risk" did not mean at the absolute risk of the shipowner, but at such risk as would attach if the goods were loaded on board, and that consequently the exceptions applied, and the shipowner was not liable for the nondelivery. Nottebohn *v.* Richter, 18 Q. B. Div. 63.

2. Stevedore Clause — *England.* — Ohrloff *v.* Briscall, L. R. 1 P. C. 231; Swainston *v.* Garrick, 2 L. J. N. S. Exch. 255; Eastman *v.* Harry, 3 Asp. M. L. C. N. S. 117; Harris *v.* Best-Ryley, 7 Asp. M. C. 272; Quarman *v.* Burnett, 6 M. & W. 499; Roberts *v.* Shaw, 8 L. T. N. S. 634; Blaikie *v.* Stembridge, 6 C. B. N. S. 894, 95 E. C. L. 894; Sack *v.* Ford, 32 L. J. C. P. 12, *distinguishing* Blaikie *v.* Stembridge, 6 C. B. N. S. 894, 95 E. C. L. 894; The Catharine Chalmers, 32 L. T. N. S. 847.

United States. — Campbell *v.* The Sunlight, 2 Hughes (U. S.) 9; The Miletus, 5 Blatchf. (U. S.) 335; The Boskenna Bay, etc., 22 Fed. Rep. 662; The Keystone, 31 Fed. Rep. 412; Manchisa *v.* Card, 39 Fed. Rep. 492; Guerard *v.* Lovspring, 42 Fed. Rep. 853, *approving* Blaikie *v.* Stembridge, 6 C. B. N. S. 894, 95 E. C. L. 894; Muller *v.* Spreckels, 48 Fed. Rep. 574. See *infra, Rights and Liabilities Common to All Contracts of Affreightment — Stowage.*

Charterer's Stevedore to Be Appointed. — A provision that the charterer's stevedore shall be employed gives the charterer the right to select the stevedore, but does not relieve the shipowner from liability for his acts. Anglo-African Co. *v.* Lamzed, L. R. 1 C. P. 226; Richardson *v.* Winsor, 3 Cliff. (U. S.) 407; Culliford *v.* Gomila, 128 U. S. 135; The T. A. Goddard, 12 Fed. Rep. 174; Bush *v.* Thompson, 65 Fed. Rep. 812, *affirming* 60 Fed. Rep. 631.

Stevedore Satisfactory to the Charterers. — In a charter-party it was provided as follows: "The vessel to employ stevedore satisfactory to charterers, but (if appointed by them) the charge not to exceed that current at the time." It was held that the charterer had not only the right to confirm the selection of the master of the vessel, but had the right to appoint one himself should the one appointed by the master be unsatisfactory, and that he need give no reason for refusing to confirm the selection of the master. The Alexander Gibson *v.* Portland Shipping Co., 56 Fed. Rep. 603.

Objectionable Stevedore. — Where the charterers have failed to have inserted in the charter-party a stipulation that the stevedore shall be satisfactory to them, they cannot, in the absence of established usage to that effect, refuse to load the vessel because the master employs a stevedore who, although competent and experienced, is personally objectionable to them. Thompson *v.* Bush, 60 Fed. Rep. 631, *affirmed* in 65 Fed. Rep. 812.

3. Lay Days — Demurrage. — Lockhart *v.* Falk, L. R. 10 Exch. 132; Monsen *v.* Macfarlane, (1895) 2 Q. B. 562; Thin *v.* Richards, (1892) 2 Q. B. 141; Davis *v.* Wallace, 3 Cliff. (U. S.) 123.

For a Full Treatment of This Subject, see the title DEMURRAGE.

Dispatch Money. — In connection with the clause providing for demurrage, there is sometimes a provision for the payment of a certain sum called "dispatch money," by the shipowner to the charterers, for loading or unloading the vessel in a shorter time than the period allowed as lay days in the charter-party. The Unionist, 48 Fed. Rep. 315.

4. Unreasonable Delay — Damages in Nature of Demurrage. — Postlethwaite *v.* Freeland, L. R. 5 App. 599; The M. S. Bacon *v.* Erie, etc.,

i. EXCEPTED RISKS. — It is customary for the charterer and shipowner to expressly agree that for breaches of the contract, occasioned by certain enumerated causes, the shipowner shall not be liable.[1]

j. CESSER OF LIABILITY. — It is usual for a charter-party to contain a clause providing that the liability of the parties thereto or the agents executing such contract shall cease after a certain time or after the happening of a certain event, as, for example, that the charterer, or his broker or agent, shall be relieved from liability for demurrage and other charges after the cargo is shipped, or that the shipowner shall be relieved from liability for damage to the cargo after it has been landed.[2]

k. FREIGHT. — A full discussion of the meaning of this term as used in charter-parties, and the liability of the charterer therefor, will be found hereafter.[3]

l. LIENS. — While, as will be seen hereafter, by the general maritime law the ship is bound to the merchandise and the merchandise to the ship for the performance of the contract of affreightment, it is usual for a charter-party to contain an express provision for such liens, and the shipowner is also sometimes

Transp. Co., 3 Fed. Rep. 344; Baldwin *v.* Sullivan Timber Co., (Supreme Ct.) 20 N. Y. Supp. 496, *affirmed* in 142 N. Y. 279. See also the title DEMURRAGE.

1. See *infra*, *Limitation of Liability — By Contract*.

2. **Construction.** — In Clink *v.* Radford, (1891) 1 Q. B. 625 (*criticising* Bannister *v.* Breslauer, L. R. 2 C. P. 497), it was provided that the ship was to load a cargo in the usual and customary manner, and proceed to the port of discharge and there deliver the same "to be unloaded at the average rate of not less than one hundred tons per working day, * * * or charterers to pay demurrage at the rate of fourpence per ton register *per diem*. * * * The charterers' liability under this charter-party to cease on the cargo being loaded; the owners having a lien on the cargo for the freight and demurrage." In an action by the shipowner against the charterers to recover damages for detention at the port of loading, it was held that the word "demurrage" in the lien clause did not cover damages for undue detention at the port of loading, and that therefore the cesser clause did not exempt the charterers from liability for the delay. Lord Esher, M. R., in the opinion delivered by him, said: "It seems to me, without going through the cases that have been referred to, that certain rules have been laid down in them which will enable us to decide this particular case. In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion." *Followed* and *approved* in Hansen *v.* Harrold, (1894) 1 Q. B. 612. See also Cook *v.* McLeod, 9 Nova Scotia 307.

Illustrations.— By a charter-party a cargo was to be loaded in thirteen working days, and to be discharged at not less than thirty tons per working day; ten days' demurrage to be allowed above the said days; the charterer's liability to cease when ship is loaded, the captain or owner having a lien on the cargo for freight and demurrage. It was held that the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading. Kish *v.* Cory, L. R. 10 Q. B. 553, *approving* Francesco *v.* Massey, L. R. 8 Exch. 101.

By a charter-party between the plaintiff and defendant it was agreed that the plaintiff's ship should, with all convenient speed, proceed to S., and that the defendant should there load the ship in regular turn with a full cargo of coal, and the ship should proceed with it to K., and deliver to freighter or assigns, on payment of certain freight; and that, the charter-party being concluded by the defendant on behalf of another party resident abroad, all liability of the defendant should "cease as soon as he had shipped the cargo." It was held that this clause only exempted the defendant from liability accruing after the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo. Christoffersen *v.* Hansen, L. R. 7 Q. B. 509.

Charterer Not Relieved from a General Average Loss. — In a charter-party was the following clause: "It is further agreed that all liability of charterers under the agreement shall cease as soon as the cargo is shipped on board. All questions, whether of demurrage or otherwise, to be settled with the consignees, the owner and captain looking to their lien on cargo for this purpose." It was held that, notwithstanding this clause, the charterer, who was also the owner of the cargo, was liable to contribute to a general average loss. Marwick *v.* Rogers, 163 Mass. 50, 47 Am. St. Rep. 436.

Errors Corrected. — A clause providing that all claims against the charterer were to cease after the settlement between the master of the vessel and the charterer will not prevent the correction of errors in the settlement itself. The Serapis, 37 Fed. Rep. 436.

A Full Treatment of the authorities under this cesser clause will be found under the title DEMURRAGE.

3. See *infra*, this title, *Freight*.

expressly given a lien for dead freight, demurrage, and other charges.[1]

m. BILLS OF LADING. — It is usual in charter-parties to stipulate that the master shall sign bills of lading for the cargo loaded upon the vessel.[2]

Meaning of — Master Not Made the Agent of the Charterer. — The meaning of this stipulation seems to be that the shipowner shall, through the master of the vessel, contract with the shipper for the charterer's benefit, but not that the master shall sign as the agent of the charterer.[3]

"Bills of Lading as Presented." — When it is provided by the charter-party that "the master is to sign bills of lading as presented," the master is not only authorized but obliged to grant or sign bills of lading in whatever form and to whatever effect he may be required to sign them.[4]

"Without Prejudice to the Charter-party." — The provision that the signing shall be "without prejudice to the charter-party" means that the charter-party shall remain unaltered notwithstanding any engagements made by the bills of lading.[5]

1. Liens — The Casco, Davies (U. S.) 184; The Bird of Paradise, 5 Wall. (U. S.) 545; The Kimball, 3 Wall. (U. S.) 37; The Undaunted, 2 Sprague (U. S.) 194; Eames *v.* Cavaroc, Newb. Adm. 528. See *infra*, this title, *Liens.*

2. See *infra*, this section, *Construction—Charter-party Referred to in a Bill of Lading—Conflict Between Charter-party and Bill of Lading.*

3. Carver on Carriage by Sea, § 156. *Citing* Smidt *v.* Tiden, L. R. 9 Q. B. 447; The Emilien Marie, 32 L. T. N. S. 435. See *infra*, this title, *Rights and Liabilities under the Charter-party — Liability for Carriage of Cargo.*

4. Leggett on Charter Parties 354. See also Gabarron *v.* Kreeft, L. R. 10 Exch 274.

Deck Cargo — Clean Bill of Lading. — A charter-party provided among other things that the captain should "sign bills of lading as presented," and that the charterers should indemnify the owners therefrom. It authorized the carriage of goods on deck, but provided that this should be done at the charterer's risk. It was held that this provision did not authorize a clean bill of lading to be given by anybody for a deck cargo. "The charter," said Brown, J., "did not authorize the charterers to sign any bills of lading at all. It provided that they should be signed by the master and 'as presented.' This means as lawfully and rightfully presented, under the charter provisions." The Sprott, 70 Fed. Rep. 327.

Penalty for Not Signing. — By a charter-party it was provided that the master should sign bills of lading as presented, within twenty-four hours after the cargo should be on board, or pay fourpence per ton per day for each day's delay, as damages. The cargo having been loaded, a bill of lading was presented to the master, which he refused to sign without inserting a clause which was objectionable to the shippers. The shippers having declined to accept such a bill of lading, the master sailed with the cargo without signing any bill of lading. The shippers directed their consignee to deduct the penalty under the foregoing clause. It was held that there had been a breach of the charter-party in that the master had not signed the bills of lading as presented to him, but that the shippers were not entitled to deduct the penalty for delay in signing the bills of lading, but were only entitled to nominal damages. Jones *v.* Hough, 5 Exch. Div. 115, *followed* and *approved* in The Princess, 6 Reports 723.

Cargo Must Be Loaded on the Ship. — When the parties stipulate in the charter-party that the master shall sign bills of lading as presented, without prejudice to the charter-party, the master is bound to sign any usual and ordinary bill of lading presented to him, and his refusal to do so is a breach of the charter-party and gives a right to damages if any are shown; but he is not compelled to sign a bill of lading for a specified quantity of cargo unless it is actually measured or counted into the ship. The Tongoy, 55 Fed. Rep. 329.

Ship Owner Not Estopped to Show True Amount of Cargo. — By a charter-party it was stipulated that the master should sign bills of lading for the cargo put on board, "as presented to him by the charterers, without prejudice to the tenor of the charter-party." On arrival at the port of discharge, it was found that the cargo was short, and the owners were called upon by the consignees to pay, and did pay, for the shortage. In an action by the owners against the charterers to recover the amount so paid, it was held that the shipowner was not estopped by the signature of the bill of lading, by the master, from showing that the goods or some of them were never actually put on board. Brown *v.* Powell Duffryn Steam Coal Co., L. R. 10 C. P. 562.

5. Without Prejudice to Charter-Party. — Gledstanes *v.* Allen, 12 C. B. 202, 74 E. C. L. 202; Shand *v.* Sanderson, 4 H. & N. 381, 28 L. J. Exch. 278. See also Gilkison *v.* Middleton, 2 C. B. N. S. 134, 89 E. C. L. 134; Sandeman *v.* Scurr, L. R. 2 Q. B. 86; 406 Hogsheads of Molasses, 4 Blatchf. (U. S.) 319.

In Hansen *v.* Harrold, (1894) 1 Q. B. 612, in commenting on this provision, Lord Esher, M. R., said: "The meaning as settled by the cases of Shand *v.* Sanderson, 28 L. J. Exch. 278, and Gledstanes *v.* Allen, 12 C. B. 202, 74 E. C. L. 202, is that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered. * * * These words do not limit the obligation under the charter-party to sign the bills of lading presented to him; but when he has done so it does not affect the contract contained in the charter-party. If a shipowner puts up a ship as a general ship, he may insist

"Clean Bills of Lading." — It is sometimes provided that clean bills of lading are to be given, but the meaning of this provision seems not to be definitely settled. It probably means that there must be nothing on the face of the bills of lading to denote that the shipowner has any claim against the goods except for freight.[1]

n. PENALTY. — A clause imposing a penalty for a breach of the contract by either party, is sometimes inserted.[2]

o. CANCELLATION CLAUSE — (1) *Charter Voidable* — **Vessel Not Ready to Load by Certain Day.** — Charter-parties frequently expressly provide that the charterer may cancel the charter-party if the vessel shall not arrive at the port of loading and be ready to receive cargo on or before a certain day.[3]

Effect of Breach. — And whether there has been a breach of this condition which would justify the charterer in exercising the option given him of canceling the contract, must depend upon a consideration of the several clauses in the charter-party and the facts and circumstances attending each particular case.[4]

Time and Place of Exercising Option. — When the time for exercising the right to

on a bill of lading in any terms he pleases, or he may refuse to take the goods. Here the shipowner deprives himself of that right, and agrees to sign bills of lading as presented; but that is not to affect the charter-party. Therefore, the captain was bound to sign the bill of lading, which he did." See also Rodocanachi *v.* Milburn, 18 Q. B. Div. 67, where the charter read: "The master to sign bill of lading at any rate of freight and as customary at port of lading, without prejudice to the stipulation of this charter-party."

Refers Only to Rate of Freight. — In a charter-party it was provided as follows: "Bills of lading to be signed as presented, without prejudice to this charter, but any difference of freight to be settled on signing bills of lading if under chartered rate in cash. * * * Vessel to have a lien on the cargo for freight, dead freight, and demurrage." Construing these provisions, Fenner, J., said: "Plaintiffs claim that the prior clause, 'Bills of lading to be signed as presented, without prejudice to the charter-party,' etc., regulated the duties of the owners as to the signing of bills of lading, and was not enlarged by the subsequent clause ["lien for freight, dead freight and demurrage"], which we have been discussing. It is clear to our minds that this clause had no reference to anything but the rate of freight. It simply said to the charterers: 'You are bound, it is true, to pay me the rate of freight agreed upon between ourselves, but you may make contracts with shippers at any rate you please and insert it in their bills of lading, and we will sign them as presented, provided you pay the difference if the freight is less, and we will pay you if it is greater, than that agreed between us.'" Gomila *v.* Adams, 36 La. Ann. 221.

1. Carver on Carriage by Sea, § 161. *Citing* Arrospe *v.* Barr, 8 Sc. Sess. Cas. (4th ser.), 602; Restitution Steamship Co. *v.* Pirie, 61 L. T. 330.

2. **Penalty Clause.** — Harrison *v.* Wright, 13 East 343; Godard *v.* Gray, L. R. 6 Q. B. 139; Staniforth *v.* Lyall, 7 Bing. 169, 20 E. C. L. 88; Watts *v.* Camors, 115 U. S. 353; Higginson *v.* Weld, 14 Gray (Mass.) 165. See *infra*, *Measure of Damages — Penalty.*

3. **Express Provision for Cancellation.** — Hick *v.* Tweedy, 63 L. T. 765; Greenwell *v.* Ross, 34 Fed. Rep. 656; Crow *v.* Myers, 41 Fed. Rep. 806; The Unionist, 48 Fed. Rep. 315; Dalbeattie Steamship Co. *v.* Card, 57 Fed. Rep. 304; Gill *v.* Browne, 53 Fed. Rep. 394, *affirming* 50 Fed. Rep. 941; Wencke *v.* Vaughan, 60 Fed. Rep. 448; Disney *v.* Furness, 79 Fed. Rep. 810.

Contract Cannot Be Canceled in Part Only. — The right to cancel a charter-party if the vessel does not arrive at the port of loading agreed upon before a certain date gives no right to cancel part of the contract and retain a part thereof. So where a charter-party provided that the charterer might cancel the charter-party at a certain port if the vessel did not arrive there on a day specified, and also that the vessel should carry certain cargo freight free to that port, it was held that upon the cancellation of the contract the shipowner had the right to claim freight upon the cargo carried to the port of lading on the basis of a *quantum meruit*. O'Brien *v.* 1614 Bags of Guano, 48 Fed. Rep. 726, *affirming* 5 Hughes (U. S.) 410.

Refusal to Give Orders Is Not a Cancellation. — When the charter-party provides that it may be canceled if the vessel is not ready for loading by a certain date, the demand of the charterers for the execution of the contract, or damages for non-execution, cannot be construed as a cancellation, nor does a refusal to give orders to the vessel after the time for fulfilling the contract has expired amount to such cancellation. Maury *v.* Culliford, 4 Woods (U. S.) 118.

Waiver of Right. — The agent of the charterers advanced to the master of the vessel a small sum of money to pay the port entrance fee and for his individual use, telling him at the same time that he did not know what would be done with him; that owing to the long delay in the arrival of the vessel, the charterers had disposed of the cargo which they had for her, and that he (the master) would have to see the charterers. It was held that this did not amount to a waiver of the charterers' right to cancel the charter-party. Olsen *v.* Hunter-Benn, 54 Fed. Rep. 530.

4. Leggett on Charter Parties 546, *citing* Smith *v.* Dart, 14 Q. B. Div. 105, 54 L. J. Q. B. 121.

cancel is fixed, the charterer must exercise his right at that very time;[1] and this option is to be exercised at the place where the ship is to load, and need not be exercised before the arrival of the ship at that place.[2]

(2) *Charter Void.* — When it was provided in the charter-party that "in the event of war, blockade, or prohibition of export preventing loading, this charter-party to be canceled," it was held that when the vessel was prevented from loading by a prohibition of export, the charter-party came to an end without any election by either party.[3]

p. OTHER STIPULATIONS. — Among other stipulations sometimes found in these contracts are those providing for arbitration in case differences should arise between the parties;[4] for the consignment of the cargo to certain persons, generally the agents of the charterer, who for their services are entitled to a commission;[5] for towing other vessels;[6] for the ventilation of the cargo and fumigation of the vessel;[7] and for the insurance of the cargo.[8]

6. Construction — *a.* IN GENERAL. — Charter-parties are to be construed in accordance with the well-established rules which obtain in the construction of contracts generally.[9]

1. Time of Exercising Option. — Sage *v.* Hazard, 6 Barb. (N. Y.) 179.

2. Place of Exercising Option. — Shubrick *v.* Salmond, 3 Burr. 1637; The Samuel W. Hall, 49 Fed. Rep. 281; The Progreso, 50 Fed. Rep. 835.

3. Adamson *v.* Newcastle Steam-Ship Freight Ins. Assoc., 4 Q. B. Div. 462. See *infra*, this title, *Dissolution and Excuses for Nonperformance — Conditions Precedent — By Express Contract.*

4. Arbitration. — Leggett on Charter Parties 547; Russell *v.* Pellegrim, 6 El. & Bl. 1020, 88 E. C. L. 1020, 26 L. J. Q. B. 75; Seligmann *v.* Le Boutillier, L. R. 1 C. P. 681; Ross *v.* Compagnie Commerciale Transp., etc., 45 Fed. Rep. 207. See generally the title ARBITRATION AND AWARD, vol. 2, p. 570.

Law as Well as Fact. — When it is provided in a charter-party that if any difference should arise between the parties, "either in principle or detail, the same shall be referred for arbitration," a difference having arisen, it should be referred to arbitration, although the difference is one of law as to the construction of the instrument. Randegger *v.* Holmes, L. R. 1 C. P. 679.

5. Consignment of Cargo. — Robertson *v.* Wait, 22 L. J. Exch. 209; Phillips *v.* Briard, 25 L. J. Exch. 233; Russell *v.* Griffith, 2 F. & F. 118; Welch *v.* McClintock, 10 Gray (Mass.) 215.

In a charter-party it was provided, among other things, that the ship should proceed with a cargo to A, "where the ship shall be consigned to the charterers' agents inwards and outwards, paying the usual commissions," and deliver the same and so end the voyage; and that, "on her return to her port of discharge in the United Kingdom," she should be reported at the custom house by G. & Co. It was held that these provisions did not impose on the shipowner an obligation to accept a homeward cargo for the United Kingdom from the charterers' agents at A, but merely bound them, if they had determined upon taking a return cargo on board, to employ such agents to procure and ship it. Cross *v.* Pagliano, L. R. 6 Exch. 9.

Reporting at the Custom House. — In a charter-party it was provided that the vessel was to be reported at the custom-house by the charterers' agents, or by whom they might appoint. It was held that this clause was not equivalent to a consignment of the vessel to such agents. Mignano *v.* MacAndrews, 53 Fed. Rep. 958, *affirming* 49 Fed. Rep. 376.

Freights — Commission Upon. — It has been held that where a ship was consigned to the agent of the charterers at the port of discharge he might collect the freight due and earn a commission for so doing. Bradley *v.* Goddard, 3 F. & F. 638; Hibbert *v.* Owen, 2 F. & F. 502; Meibuhr *v.* Prichard, *cited* in McLach. on Shipping 181; Broadhead *v.* Yule, 9 Sc. Sess. Cas. (3d ser.) 921.

6. Towing. — 3 Kent's Com. 424; The Thetis, 2 L. R. Adm. 365; Stuart *v.* British, etc., Steam Nav. Co., 32 L. T. N. S. 257; Potter *v.* Burrell, (1897) 1 Q. B. 97, 75 L. T 491, 66 L. J. Q. B. N. S. 63; Peters *v.* Canada Sugar Refining Co., 2 Montreal L. Rep. 420; The Wells City, 61 Fed. Rep. 857, *affirming* 57 Fed. Rep. 317; Schwarzchild *v.* National Steamship Co., 74 Fed. Rep. 257. See *infra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Deviation;* and generally the title TOWAGE.

7. Ventilation. — See *infra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Stowage.*

Fruit Injured for Want of Ventilation. — In the charter of a vessel it was provided that "the hatches should be taken off whenever practicable, as usual for ventilation of green fruit." She was so deeply loaded that in rough weather the hatches could not be opened, and as a consequence her cargo of oranges was badly damaged. It was held that the owners of the vessel were liable. The Regulus, 18 Fed. Rep. 380.

8. Deck Cargo Not Included in a Guaranty as to Insurance. — The usual guaranty of first-class insurance embodied in charter-parties does not include deck cargo, especially cattle, unless express language is employed to that effect. The Unionist, 48 Fed. Rep. 315.

9. Construction of Contracts of Affreightment. — Waterbury *v.* Street, 3 U. S. App. 147. See also the title INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

b. When Meaning Is Clear. — When the language of a charter-party is plain and clear, the courts will consider that the parties meant what they have plainly expressed, and in such cases there is nothing left for construction.[1]

c. Intention of the Parties. — But such contracts are often informally and inaccurately expressed, and it is well settled that when such is the case they must have a liberal construction such as mercantile contracts usually receive, in furtherance of the real intention of the parties and conformable to the usages of trade.[2]

How Determined — From the Contract. — The intention of the parties is usually to be gathered from the language of the contract itself.[3]

From Correspondence. — But when the language of the charter-party is ambiguous, evidence of the previous correspondence between the parties is admissible to show what their intention was in entering into the contract.[4]

From Construction of the Parties. — Ambiguities in the terms of a contract are often dispelled by the construction which the parties themselves have placed upon its terms before the controversy has arisen, and courts frequently give effect to this construction and adopt the meaning which the parties have assumed to be correct.[5]

d. All Provisions Must Be Made Effective. — Another general rule of construction which is applicable to these contracts is that the whole instrument is to be viewed and compared in all its parts, so that all its provisions may be made consistent and effective.[6]

Bills of Lading. — For a full discussion of this question in the case of bills of lading, see the title Bills of Lading, vol. 4, p. 525 *et seq.*

1. Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135; The Hermitage, 4 Blatchf. (U. S.) 474.

Parties Competent to Make Their Own Contracts. — "It is truly said that generally the parties are competent to make their own contracts, and if not choosing to insert proper limitations and restrictions adapted to ordinary events, should not complain if they are required to abide by the consequences of their own neglect." Weston *v.* Minot, 3 Woodb. & M. (U. S.) 436.

Express Terms Govern. — In the absence of any proof of fraud in the inception of the charter-party, both parties must be governed by its express terms or stipulations. The South America, 27 Fed. Rep. 386.

Formal Charter-party Will Not Be Construed as Memorandum. — Where a charter-party is formal in all its terms and without condition, it will not be construed as a memorandum simply, and the parties thereto will be held absolutely bound by it. Chamberlain *v.* Pettit, 49 Fed Rep. 109.

2. Intention Controls Construction — *England.* — Ritchie *v.* Atkinson, 10 East 295; Dimech *v.* Corlett, 12 Moo. P. C. 199; Hogarth *v.* Miller, (1891) App. 48. See also Seeger *v.* Duthie, 8 C. B. N. S. 45, 98 E. C. L. 45; Alsager *v.* St. Katherine's Dock Co., 14 M. & W. 794; Crookewit *v.* Fletcher, 1 H. & N. 893.

United States. — Waterbury *v.* Street, 3 U. S. App. 147; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589; Lowber *v.* Bangs, 2 Wall. (U. S.) 728; Rich *v.* Parrott, 1 Cliff. (U. S.) 55; Richardson *v.* Winsor, 3 Cliff. (U. S.) 395; Balfour *v.* Wilkins, 5 Sawy. (U. S.) 429; Raymond *v.* Tyson, 17 How. (U. S.) 53; Barreda *v.* Silsbee, 21 How. (U. S.) 146; Paterson *v.* Dakin, 31 Fed. Rep. 682; Hunt *v.* Metcalf, 47 Fed. Rep. 73; The B. F. Bruce, 50 Fed. Rep. 118; Baxter *v.* Card, 59 Fed. Rep. 165.

New York. — Russell *v.* Allerton, 108 N. Y. 288.

See also The Schooner Volunteer, 1 Sumn. (U. S.) 551; The Bird of Paradise, 5 Wall. (U. S.) 545.

3. Seeger *v.* Duthie, 8 C. B. N. S. 45, 98 E. C. L. 45. See also the last note, *supra.*

From the Context — Meaning of "Light Laden." — A charter-party contained the following clause: "The owners guarantee the steamer to make an average speed, under steam, of not less than eleven knots per hour, fruit or light laden, in moderate weather and with good American coal." It was held that the term "light laden" had no settled meaning, but that its meaning was to be determined from the context, or by the circumstances under which it was used, and that in the charter-party in question it meant that the ship should make eleven knots laden with the fruit cargo or with its equivalent; that is, one as light laden as with a fruit cargo, or one not more cumbersome or more unfavorable for speed. The Ceres, 72 Fed. Rep. 936.

4. Previous Correspondence Admissible. — The Curfew, (1891) Prob. 131.

Prior Telegrams to Interpret "the Season of 1882." — A charter-party contained the ambiguous phrase "the season of 1882." The court held that in interpreting the meaning of this phrase, prior telegrams passing between the parties to the charter-party were competent evidence and must be taken into consideration. The Calabria, 24 Fed. Rep. 607.

5. Construction of the Parties Adopted. — Sanders *v.* Munson, 74 Fed. Rep. 649; Woolsey *v.* Funke, 121 N. Y. 87.

6. Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135.

c. EXCEPTIONS — CONSTRUCTION AGAINST PARTY TO BE BENEFITED. — The rule of construction as to exceptions in charter-parties is that they are to be taken most strongly against the party for whose benefit they are introduced.[1]

f. CONDITIONS PRECEDENT — **General Rule.** — The question often arises whether a descriptive statement in a charter-party is a mere representation, or whether it is a substantive part of such contract. With respect to statements in a contract descriptive of the subject-matter of it or of some material incident thereof, the general doctrine, which is equally as applicable to the contracts under discussion as to other contracts, appears to be that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition, on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement for the breach of which a compensation must be sought in damages.[2]

g. PRINTED FORM USED — (1) *Inapplicable Clause.* — When a printed form is used, with special written provisions to suit the particular case, it is proper to bear in mind that a portion of the contract is on a printed form applicable to many voyages, and not specially agreed upon in relation to the particular voyage; and if it appears that a printed clause does not apply to the case, or is in conflict with the intention of the parties as is evidenced by the other provisions of the instrument, it is not necessary so to construe the

1. How Exceptions Are Construed. — Wilson *v.* Xantho, L. R. 12 App. 503; Airey *v.* Merrill, 2 Curt. (U. S.) 8.

Clause Allowing Time. — "He [the charterer] is, in most cases, as he certainly was in the present instance, the party best acquainted with the trade for which the ship is taken up, and with the difficulties which may impede the performance by him of his contract; words, therefore, in a charter-party, relaxing in his favor a clause by which an allowance to him of time for a specified object is in the interest of the ship precisely limited, must be read as inserted on his requirement, and construed, at the least, with this degree of strictness against him, that they shall not have put upon them an addition to their obvious meaning. Nevertheless, where that meaning is ambiguous, as it is in the present case, we think it must be gathered from the surrounding circumstances to which the charter-party was intended to apply." Hudson *v.* Ede, L. R. 2 Q. B. 566.

Clear Words Must Be Used. — "There is in the second place another rule of construction which one would bring to bear upon this charter-party, and that is that one must see if this stipulation which we have got to construe is introduced by way of exception or in favor of one of the parties to the contract, and if so, we must take care not to give it an extension beyond what is fairly necessary, because those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words." Burton *v.* English, 12 Q. B. Div. 218.

Unless the terms of the charter-party expressly warrant it, it will not be construed as void at the option of the charterers while binding upon the shipowners. Watts *v.* Camors, 10 Fed. Rep. 145.

2. Williams, J., in Behn *v.* Burness, 3 B. & S. 751, 113 E. C. L. 751, *approved* in Bentsen *v.* Taylor, (1893) 2 Q. B. 274. See *infra*, this title, *Dissolution and Excuses for Nonperformance — Conditions Precedent.*

In charter-parties the words "warranty" and "condition" are synonymous. Behn *v.* Burness, 3 B. & S. 751, 113 E. C. L. 751.

Intention of the Parties Determines. — "The construction to be put upon contracts of this sort depends upon the intention of the parties to be gathered from the language of the individual instrument. Whether particular stipulations are to be conditions precedent or not must in all cases solely depend upon that intention as it is to be gathered from the instrument itself." Seeger *v.* Duthie, 8 C. B. N. S. 45, 98 E. C. L. 45.

Illustration. — Where it was agreed that defendant was to send his vessel to K. to load a cargo of salt for the plaintiffs, provided they would furnish a full cargo, at a stated price, and would guarantee eleven and one-half feet of water in the harbor, it was held that the stipulations as to a full cargo and as to the depth of water were conditions precedent to the performance of the contract, and not merely collateral or independent stipulations; and that, as there was not the depth of water guaranteed, nor such depth of water as would permit the defendant to load a full cargo, the defendant was not liable for not taking the plaintiff's salt. Gray *v.* Schooley, 43 U. C. Q. B. 209.

contract as to make such printed clause operative.[1]

(2) *Conflict Between Written and Printed Portions.* — If there is such a conflict between the written and printed portions of a charter-party that they cannot both be made effective, the written portion should prevail;[2] but if possible the written and printed provisions should be construed together.[3]

(3) *Original Printed Form to Be Considered.* — It has been decided that when a printed word was struck out of a printed form and a written word interlined in its place, for the purpose of ascertaining the real intention of the parties it was competent for the court to look at what the printed form originally was and to consider as well the word struck out as the word introduced.[4]

h. ADMISSIBILITY OF PAROL EVIDENCE. — The general rule that parol evidence is inadmissible to contradict or vary the terms of a written contract is equally as applicable to charter-parties as to other kinds of contracts.[5]

1. **Rule when a Printed Form Is Used.** — Pearson *v.* Goschen, 17 C. B. N. S. 352, 112 E. C. L. 352, 32 L. J. C. P. 265; Cross *v.* Pagliano, L. R. 6 Exch. 9; Grant *v.* Coverdale, L. R. 9 App. 470; Glynn *v.* Margetson, (1893) App. 351; Gray *v.* Carr, L. R. 6 Q. B. 522.

2. **Written Provision Prevails over Printed One.** — Scrutton *v.* Childs, 3 Asp. M. L. C. N. S. 373; Seagar *v.* New York, etc., Mail Steamship Co., 55 Fed. Rep. 324. See also Gumm *v.* Tyrie, 4 B. & S. 680, 116 E. C. L. 680, *affirmed* in 6 B. & S. 298, 118 E. C. L. 298; Dixon *v.* Heriot, 2 F. & F. 760; Moore *v.* Harris, 45 L. J. P. C. 55; The Nifa, (1892) Prob. 411.

3. **Conflicting Portions Should Be Harmonized.** — The Nifa, (1892) Prob. 411; Peters *v.* Canada Sugar Refining Co., 2 Montreal L. Rep. 420.

4. **Word Struck Out of Printed Form — Court May Consider.** — Harrison *v.* One Thousand Bags of Sugar, 50 Fed. Rep. 116, *affirming* 44 Fed. Rep. 686.

5. **Parol Evidence Is Generally Inadmissible.** — White *v.* Parkin, 12 East 578; Krall *v.* Burnett, 25 W. R. 305; The Eli Whitney, 1 Blatchf. (U. S.) 360; Baker *v.* Ward, 3 Ben. (U. S.) 499; Solomon *v.* Higgins, 6 Wend. (N. Y.) 425. See also the titles BILLS OF LADING, vol. 4, p. 525; PAROL EVIDENCE.

Conversation and Instructions Inadmissible. — When a charter-party is reduced to writing, the rights of the parties are fixed by and depend upon the written charter-party, and cannot be varied or affected by conversations or instructions in regard to the matters that are covered by the charter-party. Stokely *v.* Smith, 2 Ben. (U. S.) 407.

Parol Evidence of a Different Agreement Inadmissible. — In an action brought by the shipper against the general owner, for the nondelivery of the goods shipped, to which the defense was that the vessel had been let for hire for the voyage, to a third person, by a contract of charter-party, the plaintiff offered the testimony of the charterer to prove that, by virtue of an agreement between the plaintiff and himself, the voyage was to be conducted on different principles from those stated in the charter-party. It was held that such testimony was inadmissible; for if the agreement referred to was distinct from the charter-party, its contents could not be proved by parol; and if it was the same as the charter-party, it could not be varied, construed, or explained by parol. Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79.

Applying to Subject-matter. — The reservation in a charter-party of so much of the vessel "as may be necessary for the accommodation of the officers and crew, and the storage of provisions, water and fuel for the same," is not restricted to such parts as are indispensably necessary; but the officers and crew are to be accommodated in the mode proper for their station, taking into consideration the character of the vessel and the nature of the voyage; and if such parts of the vessel are voluntarily surrendered for the storage of the freight, the master can recover the customary charges for carrying the same, in addition to the sum mentioned in the charter-party. What portion of the vessel was within the exception, is a question of fact for the jury. Parol evidence is admissible to explain a written contract by applying it to the subject-matter; such evidence is not only competent but indispensable. Almgren *v.* Dutilh, 5 N. Y. 28.

Fraudulent Representations as to Capacity of Vessel. — In an action on a charter-party to recover the price agreed upon for the use of the vessel, the defendant may give evidence of fraudulent representations by the plaintiff as to the burthen or capacity of the vessel, in mitigation or satisfaction of the plaintiff's demand. Such evidence does not infringe the rule of the law that a written contract cannot be varied or enlarged by parol proof. Johnson *v.* Miln, 14 Wend. (N. Y.) 195. See also Weston *v.* Minot, 3 Woodb. & M. (U. S.) 436.

Where a charter-party of a vessel stated her to be "of the burden of 427 tons or thereabouts," but contained no other statement as to her carrying capacity, it was held that any other agreement as to her carrying capacity must be held to have been waived by the charterers, and that evidence of false representations by the owners as to her carrying capacity, and of the charterers being induced thereby to make the charter, was inadmissible. Baker *v.* Ward, 3 Ben. (U. S.) 499.

Course of the Vessel — "Northern Passage." — It was provided in a charter-party that the vessel should take the "northern passage." It was held that it might be shown by parol what such provision meant. The John H. Pearson, 121 U. S. 469.

Evidence of Inconsistent Agreement Inadmissible. — The legal construction of a charter-party

i. ADMISSIBILITY OF USAGE — (1) *To Explain Ambiguities.* — Evidence of a usage which is lawful and reasonable is admissible to explain the provisions of a charter-party, when otherwise the intention of the parties cannot be ascertained,[1] it being held that, in the absence of words of exclusion, such con-

in writing, upon a question in relation to which its terms are silent, cannot be varied by evidence of an inconsistent agreement prior or contemporaneous. Renard *v.* Sampson, 2 Duer (N. Y.) 285, *affirming* 12 N. Y. 561.

Substitution of Oral for Written Contract — Burden of Proof. — Where a shipowner alleges that a verbal contract has been substituted for a written charter-party, he must show such substitution by a preponderance of proof. Wheelwright *v.* Walsh, 42 Fed. Rep. 862.

1. Usage Admissible — *England.* — Bottomley *v.* Forbes, 5 Bing. N. Cas. 121, 35 E. C. L. 50; Robertson *v.* Jackson, 2 C. B. 412, 52 E. C. L. 412; Postlethwaite *v.* Freeland, L. R. 5 App. 599, 4 Exch. Div. 155; Adams *v.* Royal Mail Steam-Packet Co., 5 C. B. N. S. 492, 94 E. C. L. 492; Castlegate Steamship Co. *v.* Dempsey, (1892) 1 Q. B. 854, *reversing* (1892) 1 Q. B. 54; The Alne Holme, (1893) Prob. 173; Aktieselkab *v.* Ehman, (1897) 2 Q. B. 83; Harris *v.* Dreesman, 23 L. J. Exch. 210.

United States. — Barrett *v.* Schooner Wacousta, 1 Flipp. (U. S.) 517; Mauran *v.* Warren, 2 Lowell (U. S.) 53; The Schooner Reeside, 2 Sumn. (U. S.) 569; Davis *v.* Wallace, 3 Cliff. (U. S.) 123; The Hermitage, 4 Blatchf. (U. S.) 474; Keen *v.* Audenried, 5 Ben. (U. S.) 535; Boult *v.* Ship Naval Reserve, 5 Hughes (U. S.) 233; Smith *v.* Sixty Thousand Feet of Yellow Pine Lumber, etc., 2 Fed. Rep. 396; Lindsay *v.* Cusimano, 10 Fed. Rep. 302, 12 Fed. Rep. 504; Eleven Hundred Tons of Coal, 12 Fed. Rep. 185; Turnbull *v.* Citizens' Bank, 16 Fed. Rep. 145; Devato *v.* Eight Hundred and Twenty-three Barrels of Plumbago, 20 Fed. Rep. 510; Canada Shipping Co. *v.* Acer, 26 Fed. Rep. 874; Nordaas *v.* Hubbard, 48 Fed. Rep. 921; The India, 49 Fed. Rep. 76; Seagar *v.* New York, etc., Mail Steamship Co., 55 Fed. Rep. 324; Eddy *v.* Northern Steamship Co., 79 Fed. Rep. 361.

Illinois. — Dixon *v.* Dunham, 14 Ill. 324. See also Falkner *v.* Earle, 3 B. & S. 360, 113 E. C. L. 360; Gill *v.* Browne, 53 Fed. Rep. 394; Baldwin *v.* Sullivan Timber Co., (Supreme Ct.) 20 N. Y. Supp. 496, *affirmed* 142 N. Y. 279.

As to Manner of Loading. — By a charter-party, the charterers agreed to load on board a vessel, at a certain port, a full and complete cargo of sugar, etc. It appeared that it was the custom at the port of loading to load sugar in a certain way, in which way it could be carried more conveniently and with less loss than otherwise. It was held that the custom of the port was admissible in evidence, for it was applicable to such a charter-party, and did not control but only explained the contract, which ought to be construed with reference to the usage at the port of lading; and also that the custom was reasonable and good in law. Cuthbert *v.* Cumming, 11 Exch. 405.

As to Time of Loading. — In Leidemann *v.* Schultz, 14 C. B. 38, 78 E. C. L. 38, it was held that evidence was admissible to explain the meaning of the expression in a charter-party, "in regular turns of loading," by showing that there was a usage at the port of loading that vessels should take in their cargoes of coke in a certain regular order or turn, and that the question whether the vessel was loaded within a reasonable time ought not to be decided without reference to such usage, if proved. *Compare* Lawson *v.* Burness, 2 F. & F. 793; Hudson *v.* Clementson, 25 L. J. C. P. 234.

Of Unloading. — A charter-party contained a stipulation that the charterer should be allowed the usual and customary time to unload the ship in her port of discharge. It was held that the charterer was not liable for the detention of the ship in the London dock, if she was there unloaded in her turn into the bonded warehouses, such being the custom of the port of London. Rodgers *v.* Forresters, 2 Campb. 483, *distinguishing* Randall *v.* Lynch, 2 Campb. 352.

Custom as to Selling Fruit. — The custom of selling fruit by a single firm of auctioneers, and in restricted quantities, is not the kind of custom which the use of the phrase "customary dispatch in discharging" imports into the contract of affreightment between the parties, being concerned, not with the business of discharging, but with the business of selling, and not creating any impediment to a discharge with dispatch which the charterer would not have overcome by the use of mere ordinary diligence. Milburn *v.* Thirty-five Thousand Boxes of Oranges, etc., 57 Fed. Rep. 236. See also Liverpool, etc., Steam Co. *v.* Suitter, 17 Fed. Rep. 695.

Meaning of "Weight." — A latent ambiguity in a charter-party may be removed by parol evidence, and therefore, if the word "weight" in such instrument is susceptible of two meanings, such evidence is admissible to ascertain in which sense, according to commercial usage, it ought to be understood. Goddard *v.* Bulow, 1 Nott & M. (S. Car.) 45, 9 Am. Dec. 663. To the same effect is Pust *v.* Dowie, 34 L. J. Q. B. 127.

Measurement of Cargo. — Evidence of usage as to the measurement of the cargo of a vessel is admissible. Bottomley *v.* Forbes, 8 L. J. C. P. 85; Buckle *v.* Knoop, L. R. 2 Exch. 125; Nielsen *v.* Neame, 1 Cababé & E. 288; The Skandinav, 51 L. J. P. 93; Gibson *v.* Sturge, 24 L. J. Exch. 121.

Full Cargo. — The custom of the port of loading is to be taken into consideration in determining what is a full and complete cargo. Duckett *v.* Satterfield, L. R. 3 C. P. 227; Cuthbert *v.* Cumming, 11 Exch. 405.

"Rainy Days." — In Balfour *v.* Wilkins, 5 Sawy. (U. S.) 429, it was held that the phrase "rainy days" in a charter-party might be explained by usage at the port of loading.

Letting upon Shares. — Where a vessel was chartered by parol, it was held that a usage at the port where the vessels belonged, to let such vessels to the master upon shares, might be given in evidence to show the terms of the contract between the owners and the new

tracts are framed with reference to well-known customs of the trade to which they relate.[1]

The Character and Description of evidence admissible for this purpose is the fact of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses.[2]

(2) *Not to Contradict or Vary.* — But proof of usage is never admissible to contradict express stipulations, or to vary the language employed by the parties where their meaning is expressed in plain and unambiguous terms.[3]

master, and to sustain the testimony of the witnesses. Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

As to Lien for Freight. — In Kirchner *v.* Venus, 12 Moo. P. C. 361, evidence that by the usage of Liverpool the shipowner did not lose his lien for freight by making it payable at the port of shipment was admitted.

Both Parties Must Know. — In Isaksson *v.* Williams, 26 Fed. Rep. 642, it was held that the usage of a port, in order to be admissible in construing a charter-party, must be shown to have been known to both parties. *Compare* Paterson *v.* Dakin, 31 Fed. Rep. 682.

1. Custom Considered a Part of the Contract. — Brown *v.* Byrne, 3 El. & Bl. 703, 77 E. C. L. 703; Hudson *v.* Ede, L. R. 2 Q. B. 566; The Jaederen, (1892) Prob. 351; The Mary Riley *v.* Three Thousand R. R. Ties, 38 Fed. Rep. 254; McPherson *v.* Cox, 86 N. Y. 472. See also Meyer *v.* Dresser, 16 C. B. N. S. 646, 111 E. C. L. 646.

Customs Tacitly Incorporated. — "Stipulations in a charter-party as to loading a vessel must be construed with reference to the customs of the port of loading. Customs of the particular trade are tacitly incorporated in the contract. If the usages of a particular port are well known, at least in the trade to which the charter-party relates, it will be held, in the absence of exclusive words in it, to have been framed on the basis of such usages, although to one of the contracting parties these usages were unknown. The construction of a charter-party should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, or of the particular trade to which the contract relates." Paterson *v.* Dakin, 31 Fed. Rep. 682.

Towing Other Vessels. — In The Oregon, 55 Fed. Rep. 666, it was held that the construction of a charter-party which provided that the vessel chartered should make as many trips as possible could not be affected by showing that it was the custom for such a vessel to tow two, three, and sometimes as many as five vessels at a time, it being reasonable to suppose that the intention of the parties to the contract, in inserting the stipulation that the vessel should make as many trips as possible, was to prevent delays as well by towing of other vessels as by other causes.

Contradiction as to Existence. — Parties entering into a charter-party are regarded as dealing with the existence of a known custom in mind and are required to conform to it; but such a custom is not established when a large number of witnesses are produced to say that no such custom exists, when these witnesses have equal opportunities of knowledge with those who affirm the existence of the custom. The Harbinger, 50 Fed. Rep. 941.

2. Lewis *v.* Marshall, 7 M. & G. 729, 49 E. C. L. 729.

3. Not Admissible When the Contract Express or Unambiguous — *England.* — The Alhambra, 6 Prob. Div. 68; The Nifa, (1892) Prob. 411; Hayton *v.* Irwin, 5 C. P. Div. 130; Lishman *v.* Christie, 19 Q. B. Div. 333.

United States. — Hall *v.* Hurlbut, Taney's Dec. (U. S.) 589; Thacher *v.* Boston Gas-Light Co., 2 Lowell (U. S.) 361; The Schooner Reeside, 2 Sumn. (U. S.) 569; Davis *v.* Wallace, 3 Cliff. (U. S.) 123; Bjorkquist *v.* Certain Steel Raill Crop Ends, 3 Fed. Rep. 717; Pedersen *v.* Eugster, 14 Fed. Rep. 422; Williams *v.* Theobald, 15 Fed. Rep. 465; Turnbull *v.* Citizens' Bank, 16 Fed. Rep. 145; The Cyprus, 20 Fed. Rep. 144; Mott *v.* Frost, 47 Fed. Rep. 82; Blue Star Steamship Co. *v.* Keyser, 81 Fed. Rep. 507.

See also the titles BILLS OF LADING, vol. 4, p. 544; PAROL EVIDENCE; USAGES AND CUSTOMS.

Custom Overridden by Contract. — If the charter-party contains a provision for "quick dispatch," "the utmost possible dispatch," or the like, any custom of the port by which vessels in the trade are required to discharge at a particular dock and to await their turn for a berth will be overridden by the express agreement of the parties. Williams *v.* Theobald, 15 Fed. Rep. 465.

To Consider an Unsafe Port Safe. — Evidence of a custom to consider as safe a particular port which in fact is not reasonably safe would directly contradict the charter-party, and would therefore be incompetent as matter of law. The Gazelle, 128 U. S. 474.

"Ready to Receive Cargo." — It was provided by charter-party that "steamer to load end of November or early December, charterers having the option of canceling if she is not ready to receive cargo by the 12th December next. Steamer to be loaded on usual berth terms, etc." The vessel arrived on the 10th of December, and, her stern having been fastened to the breakwater, the captain gave the charterers notice that she was ready to receive the cargo, but the charterers refused to take notice that the vessel was "ready to receive cargo" unless she was moored alongside the quay, which could not be done before the 18th of December. In the meanwhile the charter-party was canceled and the vessel was loaded at a lower rate of freight than that specified in the contract. In an action to recover damages for loss of freight it was held that the shipowner was entitled to recover, as the vessel was "ready to receive cargo" within the meaning of the contract, although not moored alongside the quay, and that the matter was not affected by an alleged custom at the port that a vessel was not to be considered "ready to receive cargo" until moored alongside the quay. Hick *v.* Tweedy, 63 L. T. 765.

j. CHARTER-PARTY REFERRED TO IN A BILL OF LADING — (1) *Effect of Reference.* — The provision that the goods shall be delivered to a certain person or persons, he or they "paying freight and all other conditions as per charter-party," which is frequently inserted in bills of lading given when the vessel has been chartered, introduces into the bill of lading only the conditions which are to be performed by the receiver of the cargo, such as the payment of demurrage, the payment of freight, or the manner of paying freight.[1] Thus such a clause does not import into a bill of lading an exception of perils which was found in the charter-party;[2] nor a cesser of liability clause;[3] nor a clause providing for arbitration.[4]

(2) *Master's Right to Insert Stipulations.* — The master of the vessel can and should insert in bills of lading given by him stipulations which will protect the interests of the shipowner, as agreed upon in the charter-party;[5] unless it is otherwise provided in the charter-party.[6]

(3) *Shipper Ignorant of Charter-party Containing Unreasonable Stipulations.* — But the shipper who, without notice of any charter-party, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the master refuses to sign bills of lading except subject to a charter-party containing objectionable provisions.[7]

k. CONFLICT BETWEEN CHARTER-PARTY AND BILL OF LADING — (1) *Between Shipowner and Charterer.* — The general rule is that as between the original parties, when there is a conflict between the charter-party and the

Measurement — Custom of Liverpool. — The custom at Liverpool to pay the freight according to the measurement at that port, and not at the port of shipment, can prevail only in cases where such measurement is not inconsistent with the contract in the charter-party. Belmont *v.* Tyson, 3 Blatchf. (U. S.) 530. See *infra*, this title, *Freight — Rate and Amount.*

Effect Necessarily Altered. — Evidence of usage is not inadmissible in construing a charter-party simply because it varies the apparent contract, for any material incident added to the written terms of a contract will alter its effect more or less. Humfrey *v.* Dale, 26 L. J. Q. B. 137.

1. Imports Only Conditions to Be Performed to Person Receiving Cargo. — Serraino *v.* Campbell, 25 Q. B. Div. 501, (1891) 1 Q. B. 290; Delaurier *v.* Wyllie, 17 Sess. Cas. (4th ser.) 167; Taylor *v.* Perrin, *cited* in Carver on Carriage by Sea, § 160; Manchester Trust Co. *v.* Furness, 64 L. J. Q. B. 766; Burrill *v.* Crossman, 65 Fed. Rep. 104, 69 Fed. Rep. 749; Leisy *v.* Buyers, 36 La. Ann. 705.

See *infra*, this section, *Conflict Between Charter-Party and Bill of Lading;* and the section *Liens — Lien of the Shipper.*

2. In a bill of lading where freight is made payable as per charter-party, this reference incorporates into the bill of lading all the clauses in the charter-party which relate to the amount of freight, but only for the purpose of computing the amount of freight, not for the purpose of transferring to the holder of a bill of lading the benefit of the covenants found in the same clauses of the charter-party, but not affecting the amount of freight. The Norway, Brown & L. Adm. 226.

"Paying" Omitted. — In Diedirechsen *v.* Farquharson, Law Journal Dec. 11, 1897, it was held that the omission of the word "paying" made no difference in the meaning of such a clause, and that a stipulation in the charter-party that the ship was to carry a deck cargo at the merchant's risk was not thereby incorporated into the bill of lading. Russell *v.* Niemann, 17 C. B. N. S. 163, 112 E. C. L. 163.

3. Gullischen *v.* Stewart, 13 Q. B. Div. 317.

4. Hamilton *v.* Mackie, 5 Times L. R. 677.

5. Gomila *v.* Adams, 36 La. Ann. 221. See also Arrospe *v.* Barr, 8 Sc. Sess. Cas. (4th ser.) 602; Hyde *v.* Willis, 3 Campb. 202; O'Connell *v.* One Thousand and Two Bales of Sisal Hemp, 75 Fed. Rep. 410.

Master Has a Right to Insert Reference to Stipulation of the Charter-Party. — In The Peer of the Realm, 19 Fed. Rep. 216, the question for decision was whether the master had the right to insist upon inserting in bills of lading for goods put on board by the charterer the stipulation "other conditions as per charter-party." The court said: "From all of which it seems clear that the owner had a clear right to stipulate for a lien on the entire cargo for freight, dead freight, and demurrage; that such stipulation was good against the charterer, and probably good against all shippers with notice; that the master had no right to derogate from the charter-party, or jeopardize the liens stipulated therein; and that the ship was not bound to take any cargo furnished by charterer, except according to the terms of the charter-party. It is clear that if the master had given clean bills of lading, and shippers had been given no notice, the lien given by the charter-party might have been entirely defeated. It follows, therefore, that the master of the Peer of the Realm was not only justified in refusing to sign bills of lading without adding 'other conditions as per charter-party,' but he was pursuing the exact line of his duty in order to protect the owners' interest."

6. See *supra*, this section, *Contents — Bills of Lading.*

7. Peek *v.* Larsen, L. R. 12 Eq. 378; Leisy *v.* Buyers, 36 La. Ann. 705.

bill of lading, the charter-party controls, the bill of lading being deemed merely a receipt or acknowledgment of the goods taken on board, which does not supersede, add to, or vary the obligations of the charter-party.[1]

Construed Together Where Possible. — Where the charter-party and bill of lading differ in their provisions, they must, if possible, be construed together and due effect be given to the provisions of each.[2]

(2) *Between Shipowner and Person Other than Charterer.* — But as between the shipowner and a person other than the charterer, the bill of lading must frequently be considered as constituting the contract when there is a

1. **Charter-party Controls Bill of Lading** — *England.* — Campion *v.* Colvin, 3 Bing. N. Cas. 17, 32 E. C. L. 19; Capper *v.* Wallace, 5 Q. B. Div. 163; Rodocanachi *v.* Milburn, 18 Q. B. Div. 67; Sewell *v.* Burdick, L. R. 10 App. 74.

Canada. — North-west Transp. Co. *v.* McKenzie, 25 Can. Sup. Ct. Rep. 38.

United States. — Lamb *v.* Parkman, 1 Sprague (U. S.) 343; The Salem's Cargo, 1 Sprague (U. S.) 389; Willett *v.* Phillips, 8 Ben. (U. S.) 459; Hart *v.* Leach, 21 Fed. Rep. 77; Crenshawe *v.* Pearce, 37 Fed. Rep. 432; The Iona, 80 Fed. Rep. 933; Two Hundred and Sixty Hogsheads of Molasses, 1 Hask. (U. S.) 24.

Massachusetts. — Pickman *v.* Woods, 6 Pick. (Mass.) 248.

See also Gledstanes *v.* Allen, 12 C. B. 202, 74 E. C. L. 202; Webb *v.* Anderson, Taney's Dec. (U. S.) 504; The Karo, 29 Fed. Rep. 652; Burrill *v.* Crossman, 65 Fed. Rep. 104. See the title BILLS OF LADING, vol. 4, p. 537.

The rule that bills of lading define, control, and limit the duties and liabilities of the shipper and owner, is to be taken with great qualification where there is a charter-party for the hire of a vessel, containing mutual stipulations regulating the course of a voyage and the mode in which the vessel is to be employed. In such a case a bill of lading would not necessarily annul or supersede the formal contract previously entered into by the parties, and under which the cargo or a portion of it has been laden on board the vessel. It certainly would not so operate unless it was intended by the parties to have that effect. Cobb *v.* Blanchard, 11 Allen (Mass.) 409. See also Wagstaff *v.* Anderson, 5 C. P. Div. 171.

Charter Is the Deliberate and Controlling Document. — " Incompatibilities of expression between the charter and the bill of lading are not infrequent, where the charterer's goods are laden on board. Often the two papers wholly fail to be adjusted nicely to each other. A bill of lading referring to a charter-party is never construed as intending to express the whole intent, or to control the charter-party in consequence of mere inharmonious expressions. The charter is the deliberate and controlling document; and, where the intent of the charter is clear, a bill of lading given under it, and referring to it, as between the ship and the charterer, does not supersede the express provisions of the charter-party that are clearly intended to apply to the situation, however inartificially the bill of lading may be framed." The Chadwicke, 29 Fed. Rep. 521.

Prior Parol Charter-party. — Where it is established that a parol charter-party was made, even if it is inconsistent with a bill of lading subsequently executed, the parol charter will control. Huron Barge Co. *v.* Turney, 71 Fed. Rep. 972.

Where No Intention to Make Bill of Lading Controlling. — The provision of a bill of lading that the liability of a carrier shall be governed by the law of a foreign country will not control the contract between the parties as fully expressed in a charter-party containing no such clause, when there was no intention to modify such contract by such printed clause in the bill of lading. The Energia, 66 Fed. Rep. 604.

Towage. — Between the parties to a written charter, the charter controls the bill of lading where there is any difference; and therefore a clause in a bill of lading allowing the vessel " to tow and assist vessels in all situations " did not justify the vessel in proceeding, after she was loaded, forty miles directly away from her port of destination and away from the ordinary course of the voyage. Ardan Steamship Co. *v.* Theband, 35 Fed. Rep. 620.

Primage. — In Carr *v.* Austin, etc., R. Co., 14 Fed. Rep. 419, it was held that as the charter-party made no mention of primage, none could be allowed, although it was stipulated for in the bill of lading.

Any Portion of the Charter-party Which Is Wholly Inapplicable to the state of things existing when the bill of lading is to be construed must be rejected. Porteus *v.* Watney, 3 Q. B. Div. 534; Gullischen *v.* Stewart, 11 Q. B. Div. 186.

Effect of Reference in the Charter-party to the Bill of Lading. — The terms of the bill of lading may, by reference to it in the charter-party, be written into the charter-party so as to become a part of the charter-party contract. Oriental Steamship Co. *v.* Tylor, (1893) 2 Q. B. 518.

Bill of Lading May Become the Contract in Some Respects. — Where the shippers have, notwithstanding the charter-party, accepted bills of lading for the goods and brought suit thereon, and the owner of the vessel has, notwithstanding the charter-party, entered into special contracts through the master by means of the bills of lading, in respect to the carriage and delivery of the goods, the bills of lading must be regarded as the contract by which the rights of the parties are to be governed so far as respects the matters provided for therein. The Bark Carlotta, 9 Ben. (U. S.) 1.

2. The San Roman, L. R. 3 Adm. & Eccl. 583; Barwick *v.* Burnyeat, 36 L. T. N. S. 250. See also Gullischen *v.* Stewart, 11 Q. B. Div. 186; North-West Transp. Co. *v.* McKenzie, 25 Can. Sup. Ct. Rep. 38.

conflict between these instruments.[1]

l. LAW GOVERNING. — A charter-party is generally governed by the law of the country where it is made, unless, from the terms of such contract or from the circumstances under which it was made, it may be inferred that such law was not intended by the parties to apply.[2]

But Where a Charter-party Is to Be Wholly Performed Abroad, the reasonable presumption is that it is intended to be governed by the law of the place of performance.[3]

V. RIGHTS AND LIABILITIES UNDER THE CHARTER-PARTY — 1. In General. — The rights and liabilities of the parties to a charter-party, except, of course, in so far as they are controlled by the express provisions thereof, depend largely upon whether or not the charter-party amounts to a demise of the vessel. If such is the effect thereof, the charterer for the time being becomes clothed with the rights and subject to the liabilities of the general owner; but if not, the rights and liabilities of the parties thereto are in a great measure the same as those of the parties to other kinds of contracts of affreightment.[4]

1. When the Shipper Is a Stranger. — "It is well settled that where a shipowner who has chartered out the hold of his ship retains control of its navigation, as the owner did in this instance, and bills of lading in the ordinary form for goods actually consigned in the vessel and containing the contract of affreightment are issued by the master to shippers who have no notice of a charter-party, such bills of lading are binding upon the owner, notwithstanding provisions in the charter-party inconsistent therewith. In this case the bills of lading were silent as to the charter-party, and there was no evidence that the plaintiff knew of its existence at the time the shipment was made. Moreover, according to the weight of authority, the bills of lading would govern whether the shippers had notice of the charter-party or not." Robinson *v.* Holst, 96 Ga. 19.

The words "freight and all conditions as per charter-party" were struck out of a bill of lading in the presence and with the acquiescence of the master of the vessel by the shipper, who presumed and believed that the vessel was operating under a charter-party, but did not know its terms or conditions. It was held that the bills of lading alone controlled the contract of affreightment, independently of the stipulations of the charter-party, even though the master subsequently entered his protest. O'Connell *v.* One Thousand and Two Bales of Sisal Hemp, 75 Fed. Rep. 410.

As Against Indorsees. — Where the bill of lading is indorsed over, as between the shipowner and the indorsee, the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods. Leduc *v.* Ward, 20 Q. B. Div. 475. To the same effect is Oriental Steamship Co. *v.* Tylor, (1893) 2 Q. B. 518.

Consignees with Notice Are Bound by the Charter-party. — In The Bark Ethel, 5 Ben. (U. S.) 154, it was held that a bill of lading amounted to no more than a receipt to indicate the quantity shipped, when the consignees had notice of the existence of a charter-party by the provision in the bill of lading that the freight was to be paid as per charter-party, and that accordingly the charter-party alone was to be looked to for the contract of the parties.

See also *infra*, this title, *Liens — Lien of the Shipowner — Vessel Chartered — General Owner, Owner for the Voyage — As Against Other Persons.*

2. What Law Governs. — Leggett on Charter Parties 167; 2 Dicey on Conflict of Laws 590; Lloyd *v.* Guibert, L. R. 1 Q. B. 115; The Wilhelm Schmidt, 25 L. T. N. S. 34; The Express, L. R. 3 Adm. & Eccl. 597; The San Roman, L. R. 3 Adm. & Eccl. 583; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397; Naylor *v.* Baltzell, Taney's Dec. (U. S.) 55; Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311. See also the title PRIVATE INTERNATIONAL LAW.

Law of the Flag. — In a charter of a foreign ship, the convenience of commerce and the desirability of having some certain rule upon which to act require that, unless there is something in the contract to show the contrary, the law of the flag should prevail. The Industrie, (1894) Prob. 58, *citing* The August, (1891) Prob. 328.

3. Leggett on Charter Parties 155. See also the title PRIVATE INTERNATIONAL LAW.

4. Rights and Liabilities Depend upon Whether the Charter-party Amounts to a Demise. — The Steamship Francis Wright, 7 Ben. (U. S.) 88; Posey *v.* Scoville, 10 Fed. Rep. 140; Finnegan *v.* Frank, 67 Ala. 21; Marquette First Nat. Bank *v.* Stewart, 26 Mich. 83; Ross *v.* Charleston, etc., Transp. Co., 42 S. Car. 447. See *supra*, this title, *Charter-parties — Kinds of Charter-parties.*

Charterers Alone Responsible for Damages and Contracts. — "The law, I think, is perfectly well settled that where there is a charter-party, and by its terms the charterers, as in this case, are to have exclusive possession, control, and management of the vessel during the term specified — are to appoint the master, run the vessel, and receive the entire profits — they, and not the general owners, are to be deemed the owners, and are alone responsible for damages and contracts." Wells, J., in Hill *v.* The Steamer Golden Gate, Newb. Adm. 308, 5 Am. L. Reg. 142, *affirmed* in 6 Am. L. Reg. 273.

Failure Properly to Attend a Sick Seaman. — When a vessel was sailed by the master, one of several joint owners thereof, under an arrangement that he should sail it on shares and pay for victualing, manning, and furnishing supplies, the other owners having nothing to

2. Master and Crew — *a.* EMPLOYMENT. — Although the authorities are not clear, the general rule seems to require the owner of the vessel to man her, unless there is a contrary stipulation in the charter-party, or its nature and object devolve that duty on the charterer.[1]

b. LIABILITY FOR ACTS AND CONDUCT. — When the general owner is also the owner for the voyage, the master is the agent of such general owner, and the crew are to be regarded as in his employment, and he is responsible for their acts and conduct within the scope of their employment.[2] But when the charterer is the owner for the voyage, the master and crew are his servants, bound to obey his orders, and for the time being he is liable in the place of the general owner for their acts and conduct.[3]

do therewith, it was held that this was not an actual demise, and that all the joint owners were liable to the mate of the vessel for damages sustained by reason of the neglect of the master to furnish and render to him necessary medical attendance and care. Scarff *v.* Metcalf, 107 N. Y. 211, 1 Am. St. Rep. 807.

Salvage. — The mere fact that the vessel sails under a charter-party does not divest the absolute owner of his right to salvage or entitle the charterer to salvage, unless he thereby becomes owner for the voyage. The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542, *citing* Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240.

Wharfage. — Where, by the terms of a charter-party, the charterer becomes the owner *pro hac vice*, the general owner is not responsible for wharfage afterwards incurred, the remedy being against the vessel or the charterer. Philadelphia *v.* Naglee, 1 Ashm. (Pa.) 37.

Exemptions, When Chartered to the Crown. — In Trinity-House *v.* Clark, 4 M. & S. 288, it was held that a temporary ownership in a vessel having passed to the crown under a charter-party, such vessel was not liable for lighthouse duties nor buoyage and beaconage during the time covered by the charter-party.

1. General Rule as to Manning the Vessel. — Hagar *v.* Clark, 78 N. Y. 45, *citing* 7 Abbott on Shipping (Am. ed.) 349. *Compare* Goodridge *v.* Lord, 10 Mass. 483. But see The Aberfoyle, Abb. Adm. 242.

Employment by the Charterer. — The charterer, if the temporary owner, may, when necessary, employ a master and crew. Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135; Hooe *v.* Groverman, 1 Cranch (U. S.) 214; Marcardier *v.* Chesapeake Ins. Co., 8 Cranch (U. S.) 39; White *v.* Norfolk, etc., R. Co., 115 N. Car. 631, 44 Am. St. Rep. 489, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 144.

Seamen's Wages. — It seems that the temporary, and not the general, owner is liable for the wages of seamen employed by such temporary owner. Meiklereid *v.* West, 1 Q. B. Div. 428; Giles *v.* Vigoreux, 35 Me. 300, 58 Am. Dec. 704, *distinguishing* Skolfield *v.* Potter, 2 Ware (U. S.) 394, in which Webb *v.* Peirce, 1 Curt. (U. S.) 104 is adversely criticised. See also the title SEAMEN.

2. Master and Crew Servants of the Shipowner. — Dalyell *v.* Tyrer, El. Bl. & El. 899, 96 E. C. L. 899; Marquand *v.* Banner, 6 El. & Bl. 232, 88 E. C. L. 232, Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135; Reed *v.* U. S., 11 Wall. (U. S.) 601; The Craigallion, 20 Fed. Rep. 747; The Nicaragua, 72 Fed. Rep. 207, *affirming* 71 Fed. Rep. 723; Swift *v.* Tatner, 89 Ga. 660; Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179; Hagar *v.* Clark, 78 N. Y. 45. See also Reynolds *v.* Toppan, 15 Mass. 371, 8 Am. Dec. 110.

If the person chartering the vessel has the entire control of it, so that the captain and seamen are primarily in his employ, and he runs it at his own expense, then he is regarded as the owner for the time being, and the general owner is relieved from liability. But if, notwithstanding the charter-party, the general owner retains the possession of the vessel so far as to run it by his own captain and seamen, the latter will be in his employ, and he will be liable. Sheriffs *v.* Pugh, 22 Wis. 273, 94 Am. Dec. 600.

Negligence of the Captain. — Where the owner of a ship, by a verbal agreement, gave up all control of her to the captain, but retained a right to one-third of the net profits and was, subsequently to the agreement, registered as managing owner under the Merchants' Shipping Act, it was held that the agreement did not amount to a demise of the vessel, and that whatever was the precise relationship thereby created between the owner and the captain, the owner was responsible to the public for the negligence of the captain. Steel *v.* Lester, 3 C. P. Div. 121.

Negligence of the Engineer. — When the charter-party was not a demise, the owner of the vessel was held liable when the voyage was delayed by the giving way of the boiler, caused by the negligence of the engineer. Hagar *v.* Clark, 78 N. Y. 45.

Injury to a Stevedore — *Defective Tackle.* — The owners of a vessel are liable for an injury to a stevedore employed by the charterer, caused by defective tackle for loading, when the charter-party is a mere contract of affreightment and the owners have contracted to furnish the tackle for loading. Anderson *v.* The Ashebrooke, 44 Fed. Rep. 124; The Elton, 83 Fed. Rep. 519.

Negligence of the Crew. — And for an injury happening to a stevedore because of the negligence of one of the crew the general owner is liable, unless the charterer is the temporary owner. The Terrier, 73 Fed. Rep. 265.

3. Master and Crew Servants of the Charterer. — Sandeman *v.* Scurr, L. R. 2 Q. B. 86; Omoa, etc., Coal, etc., Co. *v.* Huntley, 2 C. P. Div. 464; Trinity-House *v.* Clark, 4 M. & S. 288; Baumwoll Manufactur, etc., *v.* Gilchrest, (1892) 1 Q. B. 253; Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 160; Webb *v.* Peirce, 1 Curt. (U. S.) 104; Richardson *v.* Winsor, 3 Cliff. (U. S.) 395; Winter *v.* Simonton, 3 Cranch (C. C.)

Collisions. — The charterer, who is owner *pro hac vice*, is liable for damages resulting from a collision with another vessel; [1] but the general owner is liable when the charter-party is only a simple contract of affreightment.[2]

3. Repairs and Supplies — *a.* BY EXPRESS AGREEMENT. — The parties to the contract may, of course, expressly agree who shall pay for supplies and repairs, and this is frequently done.[3]

104; Posey *v.* Scoville, 10 Fed. Rep. 140. See also Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268.

Master and Crew Pass with the Vessel. — In Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135, the court said: "In such cases the services of the master and crew, unless others are appointed by the charterer, pass as merely accessorial to the principal subject-matter of the contract, and they attorn to it, as it were, to the charterer, and become temporarily the servants of the charterer, and as such, for the time being, are bound to obey his orders."

Wilful Torts or Crimes of Crew. — Where the charterer of the boat becomes the owner *pro hac vice*, the general owner is not liable for the wilful torts or crimes of a boatman put in charge of the vessel by the charterer. The Daniel Burns, 52 Fed. Rep. 159.

1. Thorp *v.* Hammond, 12 Wall. (U. S.) 416; Webster *v.* Disharoon, 64 Fed. Rep. 143; Somes *v.* White, 65 Me. 542, 20 Am. Rep. 718. See also Campbell *v.* Perkins, 8 N. Y. 430.

2. Fentón *v.* Dublin Steam Packet Co., 8 Ad. & El. 835, 35 E. C. L. 541.

Death of a Passenger upon Another Vessel. — In Cuddy *v.* Horn, 46 Mich. 596, 41 Am. Rep. 178, it was held that the general owners of a yacht which had been chartered for a pleasure party, but remained under the control of their engineer and captain, were liable for the death of a passenger upon another vessel caused by the negligence of such captain and engineer.

Officer of the Government to Whom Vessel Chartered on Board. — If a ship be chartered to the government as an armed vessel, and an injury be done to another vessel by the negligence of the master and crew of the chartered vessel, an action may be sustained for the injury against the owners of the vessel, although a government officer was on board when the injury was inflicted. Fletcher *v.* Braddick, 2 B. & P. N. R. 182.

Control Assumed by a Government Officer. — When a vessel is chartered to the government for a naval expedition, and a collision causing injury happens as a result of obeying the commands of a government officer on board the vessel, it seems that the owner of the vessel would not be liable. Hodgkinson *v.* Fernie, 3 Jur. N. S. 818.

3. **Agreement to Furnish Repairs and Supplies** — *England.* — Ripley *v.* Scaife, 5 B. & C. 167, 11 E. C. L. 188.

Canada. — Anglin *v.* Henderson, 21 U. C. Q. B. 27.

United States. — Campbell *v.* Ship Alknomac, Bee Adm. 124; Skolfield *v.* Potter, Davies (U. S.) 392; Webb *v.* Peirce, 1 Curt. (U. S.) 104; Mayo *v.* Snow, 2 Curt. (U. S.) 102; Mott *v.* Ruckman, 3 Blatchf. (U. S.) 71; The Steamship Francis Wright, 7 Ben. (U. S.) 88; Fox *v.* Holt, 4 Ben. (U. S.) 278, 36 Conn. 558; The Giles Loring, 48 Fed. Rep. 463.

Alabama. — Finnegan *v.* Frank, 67 Ala. 21.

Maine. — Thompson *v.* Snow, 4 Me. 264, 16 Am. Dec. 263; Houston *v.* Darling, 16 Me. 413; McLellan *v.* Reed, 35 Me. 172; Swanton *v.* Reed, 35 Me. 176.

Massachusetts. — Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179; Rich *v.* Jordan, 164 Mass. 127; Baker *v.* Huckins, 5 Gray (Mass.) 596; Perry *v.* Osborne, 5 Pick. (Mass.) 422; Manter *v.* Holmes, 10 Met. (Mass.) 402.

New York. — Hallet *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272.

Charterer Must Have the Repairs Made. — "It is therefore necessarily understood, in a contract of charter-party where the owner contracts with the hirer, that the vessel shall be stanch, strong, suitably provided, etc., at the expense of the owner; that every defect of the vessel happening abroad, in the course of the voyage, is to be remedied by the care of the hirer and employer; not that he is to subject the owner to a loss equal to the expectations and casual profits of the voyage, and for that purpose to stand still, calling for repairs, and demanding the performance, literally, of the covenants in the charter-party. It is enough for all the reasonable effect of this contract that the hirer, either on his own credit or the credit of the owner, and ultimately at his expense, provide whatever is necessary to enable the vessel to continue on the voyage and employment for which the hirer has engaged her. And the event, so far as that depends on the dangers of the seas and the ordinary wear and tear of the vessel and her furniture, is a risk mutually and equally of the owner and employer. If the vessel, sufficient at the commencement of the voyage, be entirely lost in the course of it, the one must betake himself to another vessel, and the other loses his freight money, but nothing more, upon the contract of charter-party. The hirer must not abandon the vessel while he can keep her afloat and suitably provided for the employment and destination for which she was hired; and the owner must be ready to pay all expenses and damages necessarily incurred for the purpose." Sewall, J., in Kimball *v.* Tucker, 10 Mass. 192.

Expenses in Consequence of Necessity for Repairing. — A vessel was chartered for the purpose of carrying passengers. During the voyage the vessel sprung a leak which made it necessary to land the passengers for the purpose of repairing the vessel. It was held that the owner of the vessel was liable for expenses incurred in landing and embarking the passengers, for housing them on shore, and for any other expenses incurred in consequence thereof. Weston *v.* Train, 2 Curt. (U. S.) 49.

Expenses Advanced by the Consignee. — Where a ship was chartered, and by the terms of the charter-party it was stipulated that the charterer should advance the expenses of the

Notice of Agreement Unnecessary. — And it has been held that whether the person furnishing the supplies or making the repairs had notice of the agreement making the charterer responsible or not, the general owner could not be held liable.[1]

b. WITHOUT AGREEMENT. — When there is no agreement, the charterer, when he is the temporary owner, is certainly liable for supplies;[2] and a decision in which the liability for repairs is discussed seems to hold that under a charter-party amounting to a demise the charterer is liable for repairs.[3] But generally the law will imply a stipulation on the part of the shipowner to keep the vessel in repair.[4]

c. LIABILITY OF THE VESSEL. — It is well established that when necessary supplies have been furnished to, or repairs made upon, a vessel in a foreign port, upon the credit of the vessel, a lien attaches upon such vessel for such supplies or repairs. This is equally true when the vessel has been chartered, whatever the nature of the charter-party or the personal liability of the owner of the vessel.[5]

ship to a certain amount, and he consigns her to a person at the port for which the cargo is to be shipped who makes these advances in his stead, it was held that if the consignee was cognizant of the terms and conditions of the charter-party, in the absence of any express agreement to the contrary he must be considered as having advanced funds for his principal, the charterer, and has no action for reimbursement against the shipowner or captain. Maury *v.* Watts, 15 La. Ann. 430.

1. McLellan *v.* Reed, 35 Me. 172; Swanton *v.* Reed, 35 Me. 176. *Compare* Kenzel *v.* Kirk, 2 Abb. App. Dec. (N. Y.) 500, *affirming* 37 Barb. (N. Y.) 113.

Registered Owner Not Liable. — A steam vessel was let by charter-party for twelve months, the registered owners engaging to keep the engine in repair, but the charterer binding himself to do all other repairs, to pay all wages and charges of navigating, etc., and to indemnify the owners against all debts, costs, damages, expenses, etc., incurred in respect of the charter-party and employment of the vessel. The owners were to appoint the engineers. The charterer, who acted as captain, had repairs done to the vessel by persons unacquainted with the above contract. It was held that no action lay, in respect of those repairs, against the registered owners. Reeve *v.* Davis, 1 Ad. & El. 312, 28 E. C. L. 95.

2. **The Temporary Owner Is Liable for Supplies.** — Frazer *v.* Marsh, 13 East 238; Mayo *v.* Snow, 2 Curt. (U. S.) 102; Pontchartrain R. Co. *v.* Heirne, 2 La. Ann. 131; Fish *v.* Sullivan, 40 La. Ann. 193; Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103; Baker *v.* Huckins, 5 Gray (Mass.) 596; Tucker *v.* Stimson, 12 Gray (Mass.) 487. See also Lyman *v.* Upper Canada Bank, 8 U. C. Q. B. 354; Cutler *v.* Thurlo, 20 Me. 213.

3. **Temporary Owner Liable for Repairs.** — In Finnegan *v.* Frank, 67 Ala. 21, it was provided in a charter-party "that the party of the second part [the charterer] shall assume all liability for * * * all and every wear and tear of said steamer Peerless, and should the party of the first part and the party of the second part disagree as to such wear and tear, then it shall be left to arbitration, and such arbitration shall be binding on the respective parties to this charter." And it was further provided as follows: "The party of the second part [the charterer] agrees to return to the party of the first part, at the expiration of the charter, the steamboat Peerless in the same condition as when received, ordinary wear and tear excepted, as set forth in the preceding section." An action was brought to recover a certain amount due for work and labor done in repairing the vessel, and it was held that under the provisions of the charter-party the charterer was liable. Stone, J., delivering the opinion of the court, said: "Charter-parties, like most other contracts, are made to assume very varying forms. Sometimes the owner parts only with his interest in the freights, retaining the command and control of the vessel. A class of such contracts may be found in which only partial dominion and direction of the ship or boat is parted with. In yet another class the bailment is complete, and the charterer, during the continuance of the contract, has absolute control of the vessel, its voyages, manning, and direction. Parties, as a rule, can make their own contracts, can make them more or less binding; and when no rule of law or public policy is contravened, courts have no discretion but to enforce their contracts as they make them. In the class last above stated, the charterer, for the time, is clothed with all the rights and subject to all the duties and liabilities which attach to ownership. * * * Under the contract of charter in evidence in this case, Finnegan [the charterer], during his term, became the *quasi* owner of the steamboat, entitled to all the benefits of ownership, and subject to all its liabilities, including those incurred for necessary repairs." Since by the express agreement of the parties the charterer was liable for repairs, that part of the decision which would seem to make the liability of the charterers depend upon the nature of the charter-party is a mere *dictum*.

4. Ripley *v.* Scaife, 5 B. & C. 167, 11 E. C. L. 188; Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179. See also Kimball *v.* Tucker, 10 Mass. 192.

5. **Liability of the Vessel for Supplies and Repairs.** — Thomas *v.* Osborn, 19 How. (U. S.) 22; Fox *v.* Holt, 4 Ben. (U. S.) 278; The City of New York, 3 Blatchf. (U. S.) 187; The Bombay, 38 Fed. Rep. 512; The William

4. Loss or Damage to the Vessel — *a.* By Express Agreement. — The liability of the charterer in case of the loss of or damage to the vessel is sometimes provided for by an express stipulation in the charter-party.[1]

War Risks. — When a vessel is chartered to the government during the progress of a war, it is usual for the government to agree to compensate the owner for loss or damage to his vessel resulting from war risks.[2]

Cook, 12 Fed. Rep. 919; Stephenson *v.* The Francis, 21 Fed. Rep. 715. For a full treatment of this question and of other questions as to maritime liens, see the title Maritime Liens.

Necessaries Ordered by Special Owner. — "It is not essential to the creation of a lien for supplies furnished a foreign ship that the supplies be ordered by the general owner or his agent. When the general owner of a ship intrusts her entire possession and control to another as her special owner, he thereby assents to the creation of liens upon the ship for necessaries supplied by order of the special owner, and when such necessaries are so supplied upon the credit of the ship, the ship is bound, although no personal liability is incurred by the general owner." Benedict, D. J., in The India, 14 Fed. Rep. 476, 16 Fed. Rep. 262.

1. Strong *v.* U. S., 154 U. S. 632; White *v.* U. S., 154 U. S. 661; Fougère *v.* Boucher, 2 Rev. de Lég. 78; Anglin *v.* Henderson, 21 U. C. Q. B. 27.

Destruction Caused by Act of God. — Where a vessel is chartered for a specified time at a fixed price under a written contract, and a bond with security is given conditioned for the payment of the price and for the return of the vessel at the time named "in as tight, stanch, and good condition as she now is, reasonable wear and tear excepted," and before the time for her return the vessel is destroyed in a gale by the act of God, through no fault or negligence whatever, the charterer and his surety are still liable upon their bond and must respond in damages to the owner of the vessel for not returning her according to the terms of their obligation. Steele *v.* Buck, 61 Ill. 343, 14 Am. Rep. 60.

Charterers Not Insurers Against Perils of the Seas. — By a clause in the agreement relating to the return of the vessels, to wit, "in as good condition as they now are, with the exception of the ordinary use and wear," the charterers do not undertake to become insurers against the perils of the sea or risks of navigation. Ames *v.* Belden, 17 Barb. (N. Y.) 513.

Entire Destruction Not Contemplated. — In a charter-party was this clause: "In case of a loss of the said boat, she will be at the risk of the owners." It was held that the entire destruction or annihilation of the boat was not the loss contemplated by the parties, but that the loss intended was such as would entirely defeat the object of the contract, that is, the running of the boat. Goddin *v.* Welton, 34 Mo. 448.

Accidental Fire. — Under a covenant in a charter-party to restore the vessel to the owners, dangers of the seas excepted, the charterer is liable for the value of the vessel in case of its destruction by an accidental fire originating on board, such fire not being one of the dangers of the seas within the exception. Airey *v.* Merrill, 2 Curt. (U. S.) 8; Larned *v.* McRae, 1 U. C. Q. B. 99.

Destroyed by Worms. — Where a charter-party provides that the vessel shall be kept tight, stanch, and strong, and that she shall remain in service as long as required, the owner cannot recover for her loss, although compelled to keep her in service in southern waters where she is destroyed by worms. Pratt's Case, 3 Ct. of Cl. 105.

Construction of Different Covenants as to Damage. — Where one covenant of a charter-party requires the owners to keep the vessel tight, stanch, etc., "in every respect fit for merchant service, at the cost and charge of her owners," and places her for an unlimited time at the entire disposal of the charterers, while another requires the charterers to return the vessel to the owners "in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port excepted," the covenants are not inconsistent. The intent of the agreement is that the owners shall bear only the marine risks and ordinary wear and tear, the charterers the injuries caused by the service in which they put the vessel. Silliman's Case, 12 Ct. of Cl. 433.

2. Proximate Cause. — In order to bring the injury complained of within the stipulation as to war risks in a charter-party, the damage must have resulted directly, or proximately, at least, from some act or operation of the public enemy. Morgan's Case, 5 Ct. of Cl. 182, *affirmed* in 14 Wall. (U. S.) 531; White *v.* U. S., 154 U. S. 661.

Driven Ashore and Captured. — Where the government, during the war, insured in a charter-party against the war risk, and the vessel was driven ashore by a gale and captured by the enemy, it was held that the acts of the enemy constituted the proximate cause of the loss, and that the government was liable. Clyde's Case, 9 Ct. of Cl. 184; The Schooner Mannahasset, 3 Ct. of Cl. 76.

Damage Sustained on a Military Expedition. — When the charter-party provides that the war risk is to be borne by the charterers and the marine risk by the owners, it is not sufficient to show that an injury might have been caused by an obstruction in the river, planted by the enemy. If the injury is of the nature of a marine risk, the fact that it was suffered on a military expedition and might have been caused by the enemy does not render the charterers liable. Field's Case, 12 Ct. of Cl. 355.

Negligence. — Damage to a vessel resulting from the neglect of the master or crew of the vessel is not included in such an agreement. White *v.* U. S., 154 U. S. 661; The Walthan, 3 Opp. Atty.-Gen. 119.

Command Assumed by Military Officer. — A

Marine Risks. — In such a charter-party the owner of the vessel generally assumes all liability for marine risks;[1] and, unless there is an express agreement to the contrary, extraordinary as well as ordinary marine risks are included.[2]

Vessel Damaged While Obeying the Charterer's Orders. — When a vessel was forced by an officer of the government, while chartered to the government, against the protest of her captain, to undertake a service for which she was not competent, and in consequence of such service her machinery was broken, it was held that the government was liable for the amount necessary to repair the vessel.[3]

b. WITHOUT AGREEMENT. — When the charter-party contains no such agreement, the liability of the charterer for loss or damage depends upon whether the charter-party amounts to a demise or not. If it does, the charterer is liable;[4] but if not, the general owner must bear the loss.[5]

schooner was chartered by the government under a contract providing that only war risks should be borne by the government. While in the service of the government, an order was issued that she should be towed into another channel, and the captain of a naval tug took her in tow in the night-time, against the remonstrances of the master, and ran her aground, whereby she was injured. It was held that the government was liable for all damages sustained. Talbot's Case, 7 Ct. of Cl. 417. See also Schultz's Case, 3 Ct. of Cl. 56.

Charterer to Pay the Difference Between Freight Already Paid and the Appraised Value. — A charter-party was executed by the owner of the vessel to the United States, by which the latter assumed the war risk. The charterer fixed an appraised value upon the vessel, and provided that should she be retained in the service so long that the money paid (less her expenses, repairs and an agreed profit) "shall be equal to said appraised value, then the said vessel shall become the property of the United States." The vessel was destroyed by a war risk before the excess equaled the appraised value. It was held that the government was liable only for the balance of the appraised value. Spear's Case, 5 Ct. of Cl. 166. See also New Bedford Propeller Co.'s Case, 5 Ct. of Cl. 270.

1. Strong *v.* U. S., 154 U. S. 632; Pratt's Case, 3 Ct. of Cl. 105; Flushing Ferry Co.'s Case, 6 Ct. of Cl. 1; Goodwin's Case, 6 Ct. of Cl. 146; Clark's Case, 9 Ct. of Cl. 377.

Injury from Ice a Marine Risk. — The term "marine risk" means necessarily the marine risk incident to the service in which a vessel is employed, and when it is chartered for military service in time of war, necessarily involves those risks arising from military exigencies and orders; and, therefore, when a vessel chartered to the government for military services is ordered to proceed down a river at a time when ordinary navigation is suspended by reason of ice, and the vessel is lost through injuries received from the ice, the loss must be borne by the owners. Reybold's Case, 5 Ct. of Cl. 277, *affirmed* in 15 Wall. (U. S.) 207. See also Morgan's Case, 5 Ct. of Cl. 182, *affirmed* in 14 Wall. (U. S.) 531.

2. Extraordinary Marine Risks Included. — Where a vessel is chartered to the government for military purposes in time of war, and the owner, by the charter-party, assumes the marine risk, all marine risks, both ordinary and extraordinary, are included; and therefore an owner whose vessel was wrecked by a collision in a fog cannot recover, although compelled by an officer of the government to undertake the voyage, against the protest of her officers. Mott's Case, 9 Ct. of Cl. 257.

An injury to a vessel caused by striking upon a sunken mooring-anchor while backing out of an harbor is not within the stipulation by which the government in a charter-party assumes liability for any extraordinary marine risk. Leary's Case, 5 Ct. of Cl. 234.

3. Schultz's Case, 3 Ct. of Cl. 56.

4. Liable When the Boat Is Laid Up. — Where the charter-party gives the charterer full and absolute control of the boat, when, where, and how she shall be employed, he is responsible for damages done to the boat when laid up equally as when *en voyage*. Ames *v.* New Orleans, etc., Transp. Co., 36 La. Ann. 479.

Part Owner Liable to His Co-owners. — Where one of several joint owners of a vessel, by contract with the others took the vessel to sail it on shares, with absolute control and management thereof, it was held that he was in no sense the agent of his co-owners, but was the owner of the vessel *pro hac vice*, and that he was liable to his co-owners for the loss of the vessel caused by his negligence. Williams *v.* Hays, 143 N. Y. 442, 42 Am. St. Rep. 743, *distinguishing* and *disapproving* Moody *v.* Buck, 1 Sandf. (N. Y.) 304.

5. When the Loss Falls on the General Owner. — Shaw *v.* U. S., 93 U. S. 235; Flushing Ferry Co.'s Case, 6 Ct. of Cl. 1; Thompson *v.* Fowler, 23 Ont. Rep. 644.

Charterer Without Control of the Navigation. — In The Martin Kalbfleisch, 55 Fed. Rep. 336, it was held that the charterer was not liable for the loss of a vessel which ran on a quicksand when it was shown that he did not guarantee any depth of water, nor agree to put a pilot aboard the vessel to pilot her to sea, nor reserve any control whatever over her movements or navigation.

Pilot Furnished by the Charterer. — The charterer who is not the owner *pro hac vice* will not become liable for the loss of a vessel occasioned by the fault of the pilot, because at a port where there were no pilotage regulations he furnished such pilot, who was accepted by the master of the vessel. Bramble *v.* Culmer, 78 Fed. Rep. 497.

5. Liability for Carriage of Cargo — *a.* OF SHIPOWNER TO CHARTERER — **Shipowner Liable as Bailee.** — A ship which has been chartered to carry a cargo for a certain person upon a certain voyage is not a common carrier, and the owner thereof is liable, as between himself and the charterer, only as a bailee for hire, bound to the use of ordinary care and skill in the transportation of the cargo.[1]

No Liability When the Vessel Demised. — And the shipowner is not liable to the charterer, even as above stated, except when the charter-party amounts only to a simple contract of affreightment.[2]

b. OF SHIPOWNER AND CHARTERER TO SHIPPER — (1) *General Owner, Owner for the Voyage.* — The doctrine which seems to be supported by the weight of authority is that when, notwithstanding the charter-party, the general owner continues to be responsible for the control and navigation of the vessel, if such vessel is put up as a general ship, he, as well as the charterer, is liable to a shipper for a breach of the contract of carriage, if the shipper does not have notice that the vessel has been chartered when he enters into the contract of carriage.[3] But the view has been taken that, when goods are

1. Owners of Chartered Vessel Are Liable Only as Bailees. — Nugent *v.* Smith, 1 C. P. Div. 423, *overruling* 1 C. P. Div. 19; Lamb *v.* Parkman, 1 Sprague (U. S.) 343; Sumner *v.* Caswell, 20 Fed. Rep. 249; Guerard *v.* Lovspring, 42 Fed. Rep. 853. See also Hotham *v.* East India Co., 1 Doug. 272; Brown *v.* Clayton, 12 Ga. 564; Allen *v.* Sackrider, 37 N. Y. 341. And see the title COMMON CARRIERS, vol. 6, pp. 122, 126.

Charter-party Distinguished from Other Forms of Bailment. — In Johnson *v.* Meeker, 96 N. Y. 93, 48 Am. Rep. 609, the court said: "The plaintiffs [the owners] here furnished the captain and crew of the barge, thus retaining to some extent control over the same, and never parted with the actual possession thereof, and here lies the difference between this case and an ordinary bailment. The possession of the defendants [the charterers] was not absolute and exclusive, for the officers and men who manned the vessel were employed and paid by the plaintiffs, and were only to a limited extent the servants of the defendants. The plaintiffs thus retained a right to the possession of the vessel, and the defendants had only the right to direct the officers and men of the plaintiffs as to the manner in which they should be employed."

Liable for Negligence Only. — In The Dan, 40 Fed. Rep. 691, it was held that as the vessel was chartered to transport a specific cargo only, she was not a common carrier, and therefore not an insurer of the safe delivery of the cargo, and could be held only upon proof of negligence.

When the Contract of Hiring Is Not a Charter-party. — The defendant was a barge owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against him by the plaintiffs for not safely and securely carrying certain goods, it was held that he was a common carrier, and liable although the goods were lost without negligence on his part. But it seems that if the agreement under which the goods were carried had been equivalent to a charter-party, the vessel would not have been a common carrier and therefore not liable for the loss of the goods. Liver Alkali Co. *v.* Johnson, L. R. 7 Exch. 267.

2. When the Shipowner Is Liable to the Charterer. — Omoa, etc., Coal, etc., Co. *v.* Huntley, 2 C. P. Div. 464; Richardson *v.* Winsor, 3 Cliff. (U. S.) 400; The Craigallion, 20 Fed. Rep. 747.

See *supra*, this section, *Master and Crew — Liability for Acts and Conduct.*

3. General Owner and Charterer Both Liable. — The St. Cloud, Brown & L. Adm. 4; Wagstaff *v.* Anderson, 4 C. P. Div. 283; The Figlia Maggiore, L. R. 2 Adm. & Eccl. 106; Richardson *v.* Winsor, 3 Cliff. (U. S.) 395; The Boskenna Bay, 22 Fed. Rep. 662; Milburn *v.* Nord-Deutscher Lloyd, 58 Fed. Rep. 603. See also Parish *v.* Crawford, 2 Stra. 1251; Sack *v.* Ford, 13 C. B. N. S. 90, 106 E. C. L. 90; Hayn *v.* Culliford, 4 C. P. Div. 182; Burpee *v.* Carvill, 16 New Bruns. 141; Campbell *v.* Perkins, 8 N. Y. 430. *Compare* Mackenzie *v.* Rowe, 2 Campb. 482; James *v.* Jones, 3 Esp. N. P. 27.

Notice. — In Carver on Carriage by Sea, § 157, the view is taken that it perhaps does not matter whether or not the shipper or indorsee had notice of the charter-party, unless he also had notice by the charter-party that the master had no authority to give such a bill of lading for the shipowner, but there seems to be no express decision to that effect.

Charterers Liable for Damage from Injurious Goods. — The charterers of a vessel who have put her up as a general ship are liable for damages to part of her cargo caused by taking on board an article the injurious character of which was unknown either to the charterers or the owners. Pierce *v.* Winsor, 2 Cliff. (U. S.) 18.

Presumption that Master Signs Bills of Lading for the Owner. — In Sandeman *v.* Scurr, L. R. 2 Q. B. 86, Cockburn, C. J., said: "A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and

shipped by a third person who takes a bill of lading from the master of the vessel for them, the master signs the bill of lading as the agent of the charterer only, and that the owner of the vessel is not liable under such a bill of lading, although the charter-party does not amount to a demise of the ship.[1]

therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office." *Quoted with approval* in The Patria, L. R. 3 Adm. & Eccl. 436.

See *supra*, this title, *Charter-parties — Contents — Bills of Lading.*

General Owner Liable to Shipper Without a Bill of Lading. — The general owner of a vessel who has given to another a charter for a voyage, but who retains control, equips, mans, victuals, and sails her at his own expense, is owner for the voyage; and is liable for the safe carriage and proper delivery of goods received on board by the master, although so received under the contract by the owner with the charterer, and although the master has given no bill of lading. Robinson *v.* Chittenden, 69 N. Y. 525.

Vessel Chartered on Shares. — Where a vessel was chartered to the master for a certain voyage, and by the terms of the charter-party it was agreed that the master should employ and navigate the vessel, and victual and man her, and should be entitled to retain, as his compensation therefor and for his own services as master, one-half of the freight which should be earned by the vessel, and should pay the other half of the freight to the owners of said vessel, it was held that the general owners were directly liable as owners for the voyage, and that the claim of shippers for damages was not restricted to the master personally, although their agreement was made solely with him. Arthur *v.* The Schooner Cassius, 2 Story (U. S.) 81, *distinguishing* Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140.

Tea Impregnated with Camphor. — A vessel took on board as part of its cargo a lot of tea, and thereafter a quantity of camphor was also taken aboard. When the tea was unloaded it was found to have become damaged by being impregnated with the odor of camphor. It was held that the general owners of the vessel, who retained control of her navigation, were liable for the loss sustained. The T. A. Goddard, 12 Fed. Rep. 174.

Owner Prima Facie Liable for Improper Stowage. — The owner and not the charterer of a ship is *prima facie* liable to the consignees for damage done to goods on the voyage by reason of improper stowage. Swainston *v.* Garrick, 2 L. J. N. S. Exch. 255.

Consignee of Shipper with Notice Cannot Recover from Owner. — If a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods be injured by bad stowage. Major *v.* White, 7 C. & P. 41, 32 E. C. L. 429.

Knowledge of Contents of Charter-party Presumed. — It has been said that it seems that persons contracting with the charterer of a vessel must be presumed to know the terms of the charter-party. Adams *v.* Homeyer, 45 Mo. 545, 100 Am. Dec. 391, *quoting* Shaw *v.* Thompson, Olc. Adm. 148, in which the court said: "The respondents [the consignees of the charterer] must be presumed to know the terms of the charter-party, and that they could not deal with the charterer as owner of the vessel for the voyage, her entire possession and control being reserved to the master and owners."

Right of Charterer as Against the Shipowner. — When the consignees of damaged goods have paid freight in full to the charterer, they have a legal right of action against the charterer for the damage to their goods in transit, and for this the charterer has a right to indemnity from the ship or her owners, so far as the same arose from bad stowage. Milburn *v.* Nord-Deutscher Lloyd, 58 Fed. Rep. 603.

1. View that the Master Signs Bills of Lading as the Charterer's Agent. — See Burpee *v.* Carvill, 16 New Bruns. 141, *citing* Holt on Shipping 474.

See *supra*, this title, *Charter-parties — Contents — Bills of Lading.*

Origin of This View. — Marquand *v.* Banner, 2 Jur. N. S. 708, 6 El. & Bl. 232, 88 E. C. L. 232, 25 L. J. Q. B. 313, is the authority generally cited as first expressing this view, though the right of the shipowner to collect the bill of lading freights, and not his liability, was the question discussed in that case; and it is expressly stated therein that the charterer was regarded as the owner *pro hac vice*, though by its terms the charter-party seemed to be a mere contract of affreightment. And in Gilkison *v.* Middleton, 2 C. B. N. S. 134, 89 E. C. L. 134, 26 L. J. C. P. 209, it is said that Marquand *v.* Banner, 2 Jur. N. S. 708, 6 El. & Bl. 232, 88 E. C. L. 232, 25 L. J. Q. B. 313, must have proceeded upon the authority of Newberry *v.* Colvin, 7 Bing. 190, 20 E. C. L. 95, *affirmed* 1 Cl. & F. 283, in which case the charterer was plainly the owner *pro hac vice*.

In Schuster *v.* McKellar, 7 El. & Bl. 704, 90 E. C. L. 704, Lord Campbell, C. J. said: "The master and crew were employed and paid by the owner, and this certainly cannot be considered *locatio navis*, a demise of the ship itself with its furniture and apparel; it amounts to *locatio navis et operarum magistri et nauticorum*, a demise of the ship in a state fit for mercantile adventure, which is to be distinguished from the *locatio operis vehendarum mercium*, a contract for the carriage of the merchant's goods in the owner's ship and by his servants, where the owner has all the responsibility of a carrier of the goods. Notwithstanding some early conflicting decisions, it seems now settled by a numerous class of cases, from Newberry *v.* Colvin, 7 Bing. 190, 20 E. C. L. 95, to Marquand *v.* Banner, 6 El. & Bl. 232, 88 E. C. L. 232, that where there is a hiring of the ship according to the second form above specified,

(2) *Charterer, Owner Pro Hac Vice.* — When, by the charter-party, the charterer becomes for the time being the owner for the voyage, he becomes liable for any breach of the contract of carriage, and the general owner is relieved from all personal liability therefor.[1]

with the intention that the charterer shall employ the ship as a general ship for his own profit, when the master signs bills of lading he does so as the agent of the charterer, not of the owner. But still, the owner being in possession of the ship by his master and crew, he has rights in respect of this possession, as to claim a lien on goods on board for freight due to him; and he is liable for the acts and negligence of the master as master, irrespective of the contracts entered into by the master with the shippers of goods, as agents for the charterer. Thus the owner, although the ship be so chartered, is clearly liable for a collision arising from the improper management of the ship, and for what the master does within the scope of his general authority as master, which cannot be ascribed to his agency for the charterer."

1. General Owner Is Not Liable When the Charterer Is Temporary Owner. — Lyman *v.* Redman, 23 Me. 289; Bonzey *v.* Hodgkins, 55 Me. 98; Reynolds *v.* Toppan, 15 Mass. 370, 8 Am. Dec. 110; Cutler *v.* Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385. See also Mackenzie *v.* Rowe, 2 Campb. 482; Herman *v.* Royal Exch. Shipping Co., 1 Cababé & E. 413; Burpee *v.* Carvill, 16 New Bruns. 141.

Owner Not Liable Though Charterer a Minor. — In an action for not delivering goods shipped on board a vessel which was chartered by parol to a minor who, by the terms of the contract, became the owner of the vessel *pro hac vice*, it was held that the contract of charter was not void but voidable, and it not having been avoided by the minor, the shipper had no cause of action against the general owners. Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

Nondelivery of Goods. — Where the general owner of a vessel had let her for hire to another person, for a certain voyage, by a contract of charter-party by which the charterer was to have, and in pursuance of which he actually had, the exclusive possession and the entire management and control of the vessel during such voyage, and was exclusively entitled to the profits thereof, it was held that the general owner was not liable to the shipper for the nondelivery of goods shipped after the execution of such charter-party. Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79.

Vessel Chartered by the Master — Shipper Without Notice. — In Oakland Cotton Mfg. Co. *v.* Jennings, 46 Cal. 175, 13 Am. Rep. 209, it was held that if the registered owner of a vessel appoints a master with an agreement that the master shall have the entire control of the vessel, and victual and man her, and make contracts of affreightment and divide the gross earnings with the owner, the owner is liable on contracts of affreightment made by the master with shippers who have no notice of the arrangement between the master and the owner. *Followed and approved* in Tomlinson *v.* Holt, 49 Cal. 310.

Qualification of Rule — Applicable to Shippers with Notice of Charter-party. — It has been stated as the rule that the general owner is relieved from liability under such a charter-party when the shipper has notice thereof. Colvin *v.* Newberry, 1 Cl. & F. 283, *affirming* Newberry *v.* Colvin, 7 Bing. 190, 20 E. C. L. 95.

Notice Immaterial. — But in a recent case upon this subject, commenting upon Newberry *v.* Colvin, 7 Bing. 190, 20 E. C. L. 95, it is said that it does not seem that it is essential that the shipper should have notice. Baumwoll Manufactur, etc., *v.* Furness, (1893) App. 8, *affirming* Baumvoll Manufactur, etc., *v.* Gilchrest, (1892) 1 Q. B. 253, *reversing* (1891) 2 Q. B. 310, in which case it was held that the owner of a ship, registered as such and as the managing owner, under the Merchants' Shipping Act 1876, who had parted with the possession and control of the ship under a charter-party to the charterer, was not liable for the loss of goods shipped under bills of lading signed by the captain, who was the servant of the charterer and not of the owner, and who had no authority from the owner to pledge his credit, although the shipper of the goods had no notice of those facts. Lord Herschell, in the judgment delivered by him, said: "The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them, and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel rest upon that person who is for those purposes during that time in point of law to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your lordships' judgment, as I apprehend, which would detract in the least from the law as it has been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person who, although not the absolute owner of the vessel, is during a particular adventure the owner for all those purposes. * * * In Colvin *v.* Newberry, 1 Cl. & F. 299, both in the Exchequer Chamber and in your lordships' House, the law seems to have been regarded as I have submitted it to your lordships to be. It is quite true that in that case the shipper had notice of the charter, and therefore knew of the relation which existed between the shipowner and the charterer.

c. Of Vessel to Shipper — **Charter a Contract of Affreightment Only.** — When, although the vessel has been chartered, the general owner continues to have possession and control of her, such vessel is, of course, bound *in rem* to the shipper when there is such a breach of the contract of carriage that such shipper can maintain an action for damages.[1]

Charterer the Owner Pro Hac Vice. — And it has been decided by the court of highest authority in the United States that the vessel is bound to the shipper for the performance of a contract entered into by him with the master in good faith and within the apparent scope of the master's authority, without regard to the temporary ownership of the vessel and despite the fact that for the time being the master is the agent of the charterer of the vessel, and not of the general owner.[2] It has also been held that the vessel is liable upon contracts of affreightment made by the special owner himself.[3]

d. Of Charterer to Shipowner. — When a chartered ship is set up by the charterer as a general ship for the transportation of goods, the charterer is bound to indemnify the shipowner against any claims arising out of contracts of carriage made with third persons.[4]

VI. Rights and Liabilities Common to All Contracts of Affreightment — **1. In General.** — As a general rule, a carrier by water stands on the same footing as a carrier by land, and, whether employed in internal, coasting, or foreign commerce, is a common carrier with the liability of an insurer against all losses

But I do not gather from the judgments either in the Exchequer Chamber or in your lordships' House that that was considered an essential part of the defendant's case." Baumwoll Mænufactur, etc., *v.* Furness, (1893) App. 8.

1. **Vessel and Her Owners Liable.** — " The owners of the bark, retaining the possession and control of her, were therefore as carriers responsible for her navigation and for due care and diligence in the custody, stowage, and transportation of the goods, according to the terms of the charter-party and the usages of trade; and the vessel became liable *in rem* for any breach of those obligations." The T. A. Goddard, 12 Fed. Rep. 174.

Delay in Delivery. — When, after a shipper had put his goods on board of a chartered vessel of which the general owner still had control, a controversy arose between the owners and charterers upon the terms of the charter, in consequence of which the sailing of the vessel was greatly delayed, it was held that the vessel was liable to the shipper because the goods were not delivered within a reasonable time. The Coventina, 52 Fed. Rep. 156.

2. **Vessel Liable Although the Owner Is Not.** — The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182; The Paragon, 1 Ware (U. S.) 322; Richardson *v.* Winsor, 3 Cliff. (U. S.) 406; The T. A. Goddard, 12 Fed. Rep. 174. See also The Stroma, 41 Fed. Rep. 599.

Statement of the Doctrine. — In The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182, the court, by Curtis, J., said: " We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master in good faith and within the scope of his apparent authority as master bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel and whether the master be the agent of the general or the special owner. In the case of The Phebe, 1 Ware (U. S.) 263, Judge Ware has traced the power of the master to bind the vessel by contracts of affreightment to the maritime usages of the middle ages. So far as respects such contracts made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law; though we should hesitate to declare that their effect has not been modified by our own commercial law, which has recognized interests and rights unknown to the commercial world when those usages obtained. And we desire to be understood as not intending to say that all contracts made by a master within the usual scope of his employment, which, by the ancient maritime law, would have created liens on the vessel, will now do so in such manner as to bind the interests in the vessel of parties whom he does not represent as agent. For the ground on which we rest the authority of a master, who is either special owner or agent of the special owner, is that when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel. The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons; and that bills of lading, or charter-parties, must, in the invariable regular course of that business, be made, for the performance of which the law confers a lien on the vessel."

3. The Alert, 61 Fed. Rep. 113.

4. The Enchantress, 58 Fed. Rep. 910, *affirmed* in 63 Fed. Rep. 272.

except those resulting from the act of God and the public enemy.[1]

2. Loss Through Inherent Vice of Cargo. — If, however, during the voyage, without default on the part of the shipowner or his servants, the cargo deteriorates or decays, the shipowner cannot be held liable.[2]

1. Carrier by Water Is Liable as a Common Carrier — *England.* — Rich *v.* Kneeland, Cro. Jac. 330; Gosling *v.* Higgins, 1 Campb. 451; Kay *v.* Wheeler, L. R. 2 C. P. 302; Liver-Alkali Co. *v.* Johnson, L. R. 7 Exch. 267; Hill *v.* Scott, (1895) 2 Q. B. 371, 65 L. J. Q. B. 87.

Canada. — Warren *v.* Wilson, 6 U. C. Q. B. (O. S.) 435.

United States. — The Zenobia, Abb. Adm. 80; The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397; The Miletus, 5 Blatchf. (U. S.) 335; The Bark Carlotta, 9 Ben. (U. S.) 1; Tygert Co. *v.* The Charles P. Sinnickson, 24 Fed. Rep. 304; The H. G. Johnson, 48 Fed. Rep. 696; The Connemara, 57 Fed. Rep. 314; The Glide, 78 Fed. Rep. 152.

Florida. — Clyde Steamship Co. *v.* Burrows, 36 Fla. 121.

New Jersey. — Mershon *v.* Hobensack, 22 N. J. L. 372.

New York. — McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

Hawaii. — Asegut *v.* King, 2 Hawaiian 733.

See also Dale *v.* Hall, 1 Wils. 282; Siordet *v.* Hall, 4 Bing. 607, 15 E. C. L. 87.

See also *supra*, this title, *Charter-parties; Rights and Liabilities under the Charter-party*, and *infra*, *Limitation of Liability*. See further the titles CARRIERS OF GOODS, vol. 5, p. 233 *et seq.*; COMMON CARRIERS, vol. 6, p. 269 *et seq.*

Doctrine of Common Carriers Not Confined to Internal Commerce. — In Elliott *v.* Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306, Kent, C. J., said: "Masters and owners of vessels are liable, as common carriers, on the high seas, as well as in port; and the argument of the ingenious counsel for the defendants is not well supported in the position, that this doctrine of common carriers is, by the common law of England, to be confined to cases of transportation by water, within the jurisdiction of the realm, and that it does not apply to losses arising out of the state. All the books and all the cases which touch this subject lay down the rule generally, and apply it as well to shipments, to or from a foreign port, as to internal commerce." To the same effect are: Nugent *v.* Smith, 1 C. P. Div. 19; Barclay *v.* Cuculla y Gana, 3 Doug. 389, 26 E. C. L. 157; Laveroni *v.* Drury, 8 Exch. 166. See also Morse *v.* Slue, 2 Lev. 69, 1 Vent. 190; Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206; Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213; Bell *v.* Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398; M'Clures *v.* Hammong, 1 Bay (S. Car.) 99, 1 Am. Dec. 598.

Act of God. — For a full treatment of this subject, see ACT OF GOD, vol. 1, p. 584; CARRIERS OF GOODS, vol. 5, p. 234; and COMMON CARRIERS, vol. 6, p. 262.

Meaning of "Public Enemy" — *"Public Enemy" Does Not Mean Thieves and Robbers.* — By enemies is not to be understood thieves and robbers, but open and armed enemies; those in hostility to the government. Lewis *v.* Ludwick, 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454.

Includes Enemies of the Sovereign of the Maker of a Bill of Lading. — A bill of lading for goods shipped in a Russian port, on board a Mecklenburg ship, for a port in England, contained an exception of the king's enemies. It was held that the "king's enemies" meant, or at all events included, the enemies of the sovereign of the person who made the bill of lading, viz., the Duke of Mecklenburg; and, consequently, that the exception protected the captain against the consequences of a hostile seizure by the Danes, then at war with Mecklenburg. Russell *v.* Niemann, 17 C. B. N. S. 163, 112 E. C. L. 163, 34 L. J. C. P. 10, 10 L. T. 786, 13 W. R. 93. And see CARRIERS OF GOODS, vol. 5, p. 235; COMMON CARRIERS, vol. 6, p. 262.

Liability Not Altered by the Wreck of the Vessel. — The obligations, liabilities, and duties of a carrier by water still continue after the vessel is wrecked, and he is bound to show that no human diligence, skill, or care could save the property from being lost by the disaster. King *v.* Shepherd, 3 Story (U. S.) 358; The Propeller Niagara *v.* Cordes, 21 How (U. S.) 7.

No Bill of Lading Necessary. — The obligations of the carrier by water to use due care and diligence in the stowage and transportation of the goods received on board exist independently of any bill of lading. The T. A. Goddard, 12 Fed. Rep. 174; The Peytona, 2 Curt. (U. S.) 21; Brower *v.* The Brig Water Witch, 19 How. Pr. (U. S. Cir. Ct.) 241, *affirmed* 1 Black (U. S.) 494; Robinson *v.* Chittenden, 69 N. Y. 525. See also The Bark Edwin, 1 Sprague (U. S.) 477, *affirmed* 24 How. (U. S.) 386.

2. Owner Not Liable for Inherent Vice. — The Ida, 32 L. T. 541; The Barcore, (1896) Prob. 294; Nelson *v.* Woodruff, 1 Black (U. S.) 156; Brown *v.* Clayton, 12 Ga. 564. See also The Ship Freedom *v.* Simmonds, L. R. 3 P. C. 594; Hudson *v.* Baxendale, 2 H. & N. 575, 27 L. J. Exch. 93; Stuart *v.* Crawley, 2 Stark. 323, 3 E. C. L. 428; Clark *v.* Barnwell, 12 How. (U. S.) 282. And see the title CARRIERS OF GOODS, vol. 5, p. 242; and *infra*, this title, *Limitation of Liability — By Statute — The Harter Act.*

Defective Casks. — In Warden *v.* Greer, 6 Watts (Pa.) 424, the court said: "The defendants ought not to be answerable for loss occasioned by the peculiar nature of this article [molasses] carried at that season of the year, nor leakage arising from secret defects of the casks which could not have been observed or remedied after the casks were stowed away."

Live Stock. — In the transportation of live stock the carrier, in the absence of negligence, is relieved from responsibility for such injuries as occur in consequence of the vitality of the cargo. Nugent *v.* Smith, 1 C. P. Div. 423; Ephraim *v.* Bark Forest Queen, 7 Hawaiian 170. And see the title CARRIERS OF LIVE STOCK, vol. 5, p. 428.

3. Embezzlement and Theft. — The shipowner is liable for goods stolen by third persons or embezzled by the crew.[1]

4. Negligence. — The shipowner is liable for any negligence on the part of himself or his servants whereby the cargo is damaged.[2]

Effect of Exceptions. — Even when by the contract of affreightment the shipowner is exempted from liability for loss, damage, or delay in certain cases, he is not relieved from liability for such loss, damage, or delay occasioned by the causes named in the exception, if there is negligence on the part of himself or his servants. The duty still remains to use due care and skill in the performance of the contract.[3] The shipowner can only be relieved from liability for negligence by an express stipulation to that effect, and such a stipulation is, as hereinafter stated, invalid in many jurisdictions.[4]

5. Stowage — *a.* IN GENERAL. — It is the duty of the shipowner to see that the cargo is well stowed, and, if it consists of different articles, to see that only the proper goods are stowed together; and for any injury to the cargo resulting from his failure in this respect he is liable to compensate the owner of the cargo.[5]

1. Barclay *v.* Cuculla y Gana, 3 Doug. 389, 26 E. C. L. 157; Morse *v.* Slue, 1 Vent. 190; King *v.* Shepherd, 3 Story (U. S.) 349; Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206; Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213. See also Elliott *v.* Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306.

2. Liability for Negligence. — Leslie *v.* Wilson, 3 Brod. & B. 171, 7 E. C. L. 395.

Loss Caused by Stranding. — A vessel is liable for the loss and damage sustained by her cargo caused by the stranding of the vessel through the negligence of those at the time in control of her navigation. The Alpin, 23 Fed. Rep. 815; The Fred H. Rice, 40 Fed. Rep. 690. See also The Norway, Brown & L. Adm. 404.

Lighter Improperly Moored. — The owners of a cargo of iron, which has been damaged by slipping into the water from a lighter, may recover damages from the owners of the lighter when it is shown that the accident happened because the lighter was improperly moored. The John Cottrell, 34 Fed. Rep. 907.

3. Exceptions Do Not Relieve from Liability for Negligence. — Steel *v.* State Line Steamship Co., L. R. 3 App. 72; Lloyd *v.* General Iron Screw Collier Co., 3 H. & C. 284; Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600; Phillips *v.* Clark, 2 C. B. N. S. 156, 89 E. C. L. 156, 26 L. J. C. P. 168, 3 Jur. N. S. 467, 5 Jur. N. S. 1081; Czech *v.* General Steam Nav. Co., 17 L. T. 246; Hayn *v.* Culliford, 4 C. P. Div. 182, *affirming* L. R. 3 C. P. 14; Wilson *v.* The Xantho, L. R. 12 App. 503; Trainor *v.* Black Diamond Steamship Co., 16 Can. Sup. Ct. Rep. 156; Slocum *v.* Fairchild, 7 Hill (N. Y.) 292, *affirming* 19 Wend. (N. Y.) 329; Gleadell *v.* Thomson, 56 N. Y. 194; Robertson *v.* Dominion Steamship Co., 13 Nova Scotia 149; Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104. See also Woodley *v.* Michell, 11 Q. B. Div. 47.

Cattle Suffocated Because of Negligence. — Several of the cattle which formed the cargo of a vessel were suffocated and killed from the vessel's overturning because it was sent to sea without proper ballast, and it was shown that the injury was occasioned by the negligence of the owners of the vessel. It was held that the owner of the cattle was entitled to recover notwithstanding the exception in the bill of lading relieving the owners of the vessel from liability for any loss arising from suffocation or other causes, occurring to horses, dogs, cattle, or other animals. Leuw *v.* Dudgeon, L. R. 3 C. P. 17 note.

4. See *infra*, this title, *Limitation of Liability — Negligence.*

5. Duty to Stow Properly. — Hayn *v.* Culliford, 4 C. P. Div. 182; The Figlia Maggiore, L. R. 2 Adm. & Eccl. 106; Gillespy *v.* Thompson, 6 El. & Bl. 477, note, 88 E. C. L. 477; The Bark Antoinetta C., 5 Ben. (U. S.) 564; The Ship Sabioncello, 7 Ben. (U. S.) 360; The Svend, 1 Fed. Rep. 54; Mainwaring *v.* Bark Carrie Delap, 1 Fed. Rep. 874; Hamilton *v.* Bark Kate Irving, 5 Fed. Rep. 630; The T. A. Goddard, 12 Fed. Rep. 174; The Excellent, 16 Fed. Rep. 148; Hills *v.* Mackill, 36 Fed. Rep. 702; The Marinin S., 28 Fed. Rep 664; The Maggie M., 30 Fed. Rep. 692; Dickie *v.* Wilson, 49 Fed. Rep. 390. See *infra*, this title, *Limitation of Liability — By Statute — The Harter Act.*

Improper Place. — Damage to cargo occasioned by salt water does not come within the excepted perils, when by reason of the place in which it is stowed it is exceptionally liable to such damage in severe weather. The Oquendo, 38 L. T. 151.

Sugar Next to the Ceiling. — In Robinson *v.* Franklin Sugar Refining Co., 70 Fed. Rep 792, it was held that it was improper to stow a cargo of sugar directly on the ceiling of the hold without proper dunnage between the sugar and the ceiling, and that for damage to the sugar resulting from such stowage the shipowner was liable.

Presumption of Improper Stowage. — Two drums of glycerine, out of a cargo of one hundred and two drums, were injured by the dropping away of the wood placed between them to prevent damage. It was shown that on the voyage the vessel encountered very rough weather. The court held that the facts shown would not permit the inference that the damage arose from rough weather alone, since in that case the wood between other drums would have been similarly affected; but that the only fair inference of fact was that the

Dunnage. — If dunnage is necessary for the proper stowage and protection of the cargo, the shipowner must supply it.[1]

b. PROPER CARE. — In determining whether proper care has been taken in stowing the cargo, the customs and usages of the place of shipment are to be considered; and if these customs have been followed, and if none of the known and usual precautions for safe stowage have been omitted, the owner of the cargo cannot recover for any injury to his goods alleged

wood between these two drums was not secured in the usual and proper manner, and that negligence in this respect was the cause of the wood dropping out, and thereby of the leakage which caused the loss. Marx *v.* The Britannia, 34 Fed. Rep. 906. To the same effect is The Burgundia, 29 Fed. Rep. 607.

But see The Polynesia, 30 Fed. Rep. 210, where Benedict, J., said: "I do not understand the law to be that proof that some part of a cargo endured the voyage without damage raises the presumption that damage to another part of the same cargo during the same voyage was occasioned by bad stowage."

Restowage After a Collision. — When in repairing a vessel after a collision it is found that certain goods in the two forward holds have been damaged, the owners of the vessel will be liable for damages to the goods resulting thereafter if they do not examine into the condition of the goods in those holds, and, if necessary, recondition and restow them. The Guildhall, 64 Fed. Rep. 867.

Character of Goods Unknown to Shipowner. — Stearine which was shipped as tallow, and so described in the bill of lading, was put in a place proper and sufficient for the stowage of tallow, but not for stearine, by the stevedore in the employment of the ship, who had no knowledge of the real character of the goods. It was held that the owners of the stearine could not recover. The Mississippi, 76 Fed. Rep. 375.

If a shipper, knowing an article to have corrosive properties, desires it to be shipped on board a general ship and stowed in bulk, without communicating the character of the article to the shipowner, and it is shipped accordingly, and being placed in the ship in contact with certain casks, it corrodes their hoops so that liquids contained in them flow out of them and into the above-mentioned article and spoil it, the shipowner, being unaware of the character of the article, is not liable to the shipper as for negligence in carrying and conveying, although the article is well known in commerce. Hutchinson *v.* Guion, 5 C. B. N. S. 149, 94 E. C. L. 149.

Statute as to Dangerous Goods. — Under 17 and 18 Vict., c. 104, § 329, and 25 and 26 Vict., c. 63, § 38, the shippers of goods of a dangerous nature, which those employed on behalf of the shipowner may not, on inspection, be reasonably expected to know to be of a dangerous nature, are required to give notice of their dangerous character. Brass *v.* Maitland, 6 El. & Bl. 471, 88 E. C. L. 471. See also the title CARRIERS OF GOODS, vol. 5, p. 371.

When Shipowner May Examine, No Warranty as to Character of Goods. — When the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage. Acatos *v.* Burns, 3 Exch. Div. 282, *distinguishing* Brass *v.* Maitland, 6 El. & Bl. 471, 88 E. C. L. 471.

Contact of Injurious Goods — *Salt and Iron.* — In loading a vessel, salt was placed over iron, and these articles were stowed within an inch or so of the mast. During the voyage the mast coat was rent and the iron damaged by sea-water which trickled through the salt and thence on to the iron. In an action brought to recover damages for the loss so occasioned, the court said: "Admitting that the rent in the mast coat was a peril of the sea, had it not been for this bad stowage no harm would have resulted to the cargo, as the water would have run down the side of the mast to the bottom of the vessel. A peril of the sea does not excuse the carrier from a loss or injury to the goods committed to his care if his own negligence or want of skill has contributed to the result. The cargo, and particularly the salt, should have been dunnaged away from the mast, so the water flowing down the same would not have affected it." The Nith, 36 Fed. Rep. 383, *affirming* 36 Fed. Rep. 86.

Rape Seed and Chalk. — In The Bitterne, 35 Fed. Rep. 927, it was held to be negligence on the part of the ship to stow bags of rape seed over chalk, with only a sail and canvas spread between them.

Plumbago and Oil. — The owner of a vessel is liable for damage to a cargo of plumbago, resulting from improper stowage in contact with casks of oil. The H. G. Johnson, 48 Fed. Rep. 696; Crooks *v.* The Fanny Skolfield, 65 Fed. Rep. 814.

Broken Stowage and Oil. — In The Dunbritton, 73 Fed. Rep. 352, it was held that when packages susceptible to damage from oil were taken simply as broken stowage, the ship was not entitled to use them as dunnage for casks of oil which were known to be so liable to leak as those which came from Ceylon, nor to stow them in immediate physical contact with such casks, where it was almost inevitable that they would be soaked with oil before the voyage was ended.

1. Shipowner Must Supply Dunnage. — The Marathon, 4 Asp. M. L. C. 75; Denyssen *v.* Macfie, 3 L. T. 25; The Brig Sloga, 10 Ben. (U. S.) 315; The Aspasia, 51 U. S. App. 71. See also The Cressington, (1891) Prob. 152.

A charter-party contained the following clause: "The charterer furnishing the lining hides and bones for dunnage only." It was held that this clause did not relieve the owner of the vessel from the duty to properly protect the cargo by furnishing the dunnage usually employed to protect such cargo. The Bark Wilhelmina, 3 Ben. (U. S.) 110.

to have been caused by improper stowage.[1]

c. STOWAGE UNDER DECK. — Formerly, when goods carried by water had necessarily to be transported in sailing vessels, the rule was well settled that if the contract of carriage was silent as to the place of stowing goods, it was to be presumed that the goods were to be stowed under deck;[2] but this presumption might be rebutted by showing a positive agreement between the parties that the goods were to be carried on deck, or the intention to have goods stowed on deck might be deduced from other circumstances, such, for example, as the goods paying deck freight only.[3] But it has been held that this rule is not applicable to steamers navigating inland and coastwise waters on short voyages and that if the main deck on such steamers is sufficiently protected it is proper to stow goods there.[4]

Usage. — And it has been said that the liability of the shipowner for the loss of a deck cargo depends upon the usage which prevails in respect to deck loading in the particular kind of navigation in which the ship is engaged.[5]

d. BURDEN OF PROOF. — It is incumbent upon the owner of the cargo to show that it was not properly stowed, but this may be inferred from circumstances.[6]

e. QUESTION FOR THE JURY. — Whether or not the cargo of a vessel was properly stowed, is a question for the jury.[7]

6. Delay. — When there is no express stipulation in the contract of affreightment as to the time at which the vessel shall begin and complete her voyage, there is an implied obligation that the vessel shall sail without unnecessary delay and proceed with all reasonable dispatch to her destination, and for any injury caused by an unreasonable or unnecessary delay the shipowner is liable.[8]

1. Usual and Customary Care Sufficient. — Carver on Carriage by Sea, § 86; Baxter *v.* Leland, Abb. Adm. 348, 1 Blatchf. (U. S.) 526; Lamb *v.* Parkman, 1 Sprague (U. S.) 343; Carao *v.* Guimaraes, 10 Fed. Rep. 783; The Titania, 19 Fed. Rep. 101; The George Heaton, 20 Fed. Rep. 323; The Chasca, 23 Fed. Rep. 156; The City of Alexandria, 23 Fed. Rep. 826; The Portuense, 35 Fed. Rep. 670; The Dan, 40 Fed. Rep. 691; The Dunbritton, 61 Fed. Rep. 764; The G. R. Booth, 64 Fed. Rep. 878. See also Clark *v.* Barnwell, 12 How. (U. S.) 283; The Tommy, 16 Fed. Rep. 601.

Vessel Old and Leaky. — More than usual care in the stowage of merchandise liable to be damaged by water should be exercised when the vessel is old and liable to incur more than usual leakage. The Johanne, 48 Fed. Rep. 733.

Perils of the Sea to Be Considered. — In an action against the proprietors of a steam-vessel to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it is left in doubt what the cause of the injury was, or if it may as well be attributable to perils of the sea as to negligence, the plaintiff cannot recover; but if the perils of the sea require that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence for which the owners of the vessel will be answerable. Muddle *v.* Stride, 9 C. & P. 380, 38 E. C. L. 163.

Utmost Skill of a Competent Stevedore. — It is the duty of the owner of a vessel to stow the cargo with as much skill as a competent stevedore can do. Anglo-African Co. *v.* Lamzed, L. R. 1 C. P. 226.

2. Goods Stowed Under Deck. — The Rebecca, 1 Ware (U. S.) 188; The Peytona, 1 Ware (U. S.) 541, *affirming* 2 Curt. (U. S.) 21; The Waldo, Davies (U. S.) 161; Two Hundred and Sixty Hogsheads of Molasses, 1 Hask. (U. S.) 24; The Delaware, 14 Wall. (U. S.) 579; The New Orleans, 26 Fed. Rep. 44; Sayward *v.* Stevens, 3 Gray (Mass.) 97.

3. Vernard *v.* Hudson, 28 Fed. Cas. No. 16921; Two Hundred and Sixty Hogsheads of Molasses, 1 Hask. (U. S.) 24.

4. When Rule Inapplicable — Inland and Coastwise Steamers. — The Neptune, 6 Blatchf. (U. S.) 193; The William Crane, 50 Fed. Rep. 444. See also Gillett *v.* Ellis, 11 Ill. 579; Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375.

5. Paterson *v.* Black, 5 U. C. Q. B. 481; Stephens *v.* McDonell, M. T. 6 Vict. (2 Rob. & J. Dig. 3580).

6. The Fern Holme, 24 Fed. Rep. 502. *Compare* The Alexandra, 14 L. T. 742.

7. Zipsey *v.* Hill, 1 F. & F. 570.

8. Implied Obligation Against Unnecessary Delay — *England.* — M'Andrew *v.* Adams, 1 Bing. N. Cas. 29, 27 E. C. L. 297; Avery *v.* Bowden, 6 El. & Bl. 953, 88 E. C. L. 953; Freeman *v.* Taylor, 8 Bing. 124, 21 E. C. L. 246; Pole *v.* Cetcovich, 9 C. B. N. S. 430, 99 E. C. L. 430.

Canada. — Cassels *v.* Burns, 14 Can. Sup. Ct. Rep. 256, *affirming* 25 New Bruns. 13.

United States. — The Maggie Hammond, 9 Wall. (U. S.) 435; Lovell *v.* Davis, 101 U. S. 541; The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7; Fearing *v.* Cheeseman, 3 Cliff. (U. S.) 91; The Star of Hope, 22 Fed. Cas. No. 13, 312; The Success, 7 Blatchf. (U. S.) 551; Hoadley *v.* The Lizzie, 39 Fed. Rep. 44; The Progreso, 50 Fed. Rep. 835; Wood *v.* Hubbard, 62 Fed. Rep. 753. See also Culliford *v.* Gomila, 128 U. S. 135.

And see *infra*, this title, *Dissolution and Ex-*

And the shipowner is liable for unnecessary delay in delivering her cargo after she has arrived at her destination, as well as for such delay in beginning or completing her voyage.[1]

A Carrier Not an Insurer as to Time. — Delay in the beginning or completion of the voyage may be excused by accident or misfortune, although not inevitable nor produced by the act of God.[2]

7. Deviation — *a.* GENERAL DOCTRINE — **Loss Occurring During the Deviation.** — It is the duty of the owner of a vessel, whether a general ship or one chartered for the special purpose of a particular voyage, to proceed, without unnecessary deviation, in the course designated by the contract, or, if no particular course is designated, in the course customarily taken by vessels making the designated voyage; and the general rule is that for any loss sustained during an unnecessary deviation, the owner of the cargo may recover commensurate damages.[3]

cuses for Nonperformance — Conditions Precedent — Situation and Time of Loading and Sailing.

Illustration. — A vessel was chartered for a voyage from Baltimore to Havre, it being stated in the charter-party that the vessel was then lying in the port of Boston. The contract imposed it as a duty upon the owners to cause the vessel to proceed without unnecessary delay from Baltimore to Havre. It was held that the performance of this duty necessarily involved that of causing her to proceed without unnecessary delay from Boston to Baltimore. Renard *v.* Sampson, 2 Duer (N. Y.) 285.

A Shipper Risks All Necessary Delay. — When the written contract contains no stipulation on the part of the owners that the vessel shall arrive at or before a particular day, the law implies no other condition than that reasonable and proper exertion shall be made to perform the voyages contemplated by the charter-party as speedily as practicable, and the charterer takes the risk of delay or detention by any superior force which the vessel could not resist or overcome, whether it be an embargo by the government or a storm on the ocean. Hall *v.* Hurlbut, Taney's Dec. (U. S.) 589.

Delay by Fault of Both Parties. — By a mistake of the master of the vessel and the charterer's agent the vessel was loaded with an excessive cargo, in consequence of which she was delayed several days in getting over a bar at the mouth of the harbor at her port of destination. It was held that both parties were equally liable for the loss resulting therefrom. Shaw *v.* Folsom, 38 Fed. Rep. 356.

Delay in Transshipment. — A steamship company which contracts to deliver a cargo at a certain destination, reserving the liberty to transship any part of said cargo, is not obliged to employ a vessel other than one of its own; but it is obliged to use diligence and care to provide adequate facilities for transporting the cargo without unreasonable delay, and for any injury resulting to the cargo from an unreasonable detention at the place of transshipment the steamship company is liable. Mina *v.* I. & V. Florio Steamship Co., 23 Fed. Rep. 915.

1. Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402.

2. Boner *v.* Merchants' Steamboat Co., 1 Jones L. (46 N. Car.) 211. See Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145. See also the titles CARRIERS OF GOODS, vol. 5, p. 244; COMMON CARRIERS, vol. 6, p. 266.

Freezing of the Waterway. — "The freezing of our canals or rivers has indeed been held such an intervention of the *vis major* as excuses the delay of the common carrier by water. But still he is bound to exercise at least ordinary forecast in anticipating the obstruction; to exert the proper means for overcoming it, and to exercise due diligence in accomplishing the transportation so soon as it ceases to operate. In the meantime he must not be guilty of negligence in taking care of the article detained. Indeed, these obligations are not questioned." Bowman *v.* Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562.

Delayed by Act of the Government. — Detention and delay in sailing are justified when the vessel is impressed into service by the government. The Onrust, 6 Blatchf. (U. S.) 536, commenting upon Paradine *v.* Jane, Alleyn 26. See also Coombs *v.* Nolan, 7 Ben. (U. S.) 301.

Delay Occasioned by a Storm. — A vessel with a perishable cargo, driven by stress of weather out of her course and into a strange port for repairs, is not liable for such injuries to the cargo as are caused merely by the delay of the voyage. The consignee cannot recover against the vessel for the loss thus occasioned to the cargo without showing some fault, misbehavior, or negligence of the master or crew. The Brig Collenberg, 1 Black (U. S.) 170.

Anticipated Obstructions No Excuse. — In Holland *v.* Seven Hundred and Twenty-five Tons of Coal, 36 Fed. Rep. 784, the court said: "The vessel owed diligence and promptitude in delivering. She was bound to diligent effort, and was obligated to deliver during that season of navigation unless prevented by stress of weather endangering the safety of the cargo, or preventing further progress. Exposure to inclement weather or fear of encountering ice or cold constitute no excuse."

3. Deviation as a Ground for Damages. — Parker *v.* James, 4 Campb. 112; Davis *v.* Garrett, 6 Bing. 716, 19 E. C. L. 212; Phelps *v.* Hill, (1891) 1 Q. B. 605; Wright *v.* Holcombe, 6 U. C. C. P. 531; Thatcher *v.* McCulloh, Olc. Adm. 365; The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7; The Schooner Sarah, 2 Sprague (U. S.) 31; Nichols *v.* Tremlett, 1 Sprague (U. S.) 361; Phillips *v.* Brigham, 26 Ga. 617, 71 Am. Dec. 227; The Mary

Loss Occurring After Deviation Has Ended. — And this rule seems to obtain when a loss happens at any time during the voyage after a deviation, though at the time of the loss the vessel has returned to her proper course and the deviation has come to an end.[1]

Presumption That Deviation Caused the Loss. — It having been shown that a deviation was made, and that a loss occurred during such deviation, or, it seems, thereafter on the voyage, the presumption arises that such loss was caused by the deviation, and the shipowner to escape liability must show that the loss not only might have happened, but must have happened, although the deviation had not been made.[2]

Exceptions as to Liability Rendered Ineffectual. — When a deviation is made, the carrier by sea becomes liable as an insurer for any loss occurring during such deviation, notwithstanding any stipulation in the contract limiting the liability of such carrier.[3]

b. JUSTIFIABLE DEVIATION — **In General.** — When the master of the vessel, acting as a prudent man and having regard to the interests of all concerned, thinks it best that he should go out of his course, he is not only justified in doing so, but it is his duty in the right performance of his contract with the owner of the cargo.[4]

To Save Life. — A deviation for the purpose of saving life is justifiable; but

Hawes, (U. S. Dist. Ct. of Mass.) 1 Parsons Shipping & Adm. 171, note; Souter *v.* Baymore, 7 Pa. St. 415, 47 Am. Dec. 518. See also Cole *v.* Mallett, 3 Lev. 41, *cited* in Lander *v.* Clark, 1 Hall (N. Y.) 370; Ellis *v.* Turner, 8 T. R. 531; Notara *v.* Henderson, L. R. 7 Q. B. 235; and see the titles CARRIERS OF GOODS, vol. 5, p. 422; DEVIATION; and *infra*, this title, *Limitation of Liability — By Statute — The Harter Act.*

Barratry. — As to whether a deviation amounts to barratry, see the title BARRATRY, vol. 3, p. 865.

Change of Voyage and Deviation Distinguished. — In Lander *v.* Clark, 1 Hall (N. Y.) 355, the court said: "The criterion established by our courts for distinguishing between a change of voyage and a deviation is, whether the termini of the voyage are preserved or not. If the voyage upon which a ship sails have the termini of the voyage described in the contract, the identity of the voyage is preserved; and if she touches or trades at intermediate ports in the course or track of the voyage, she deviates only, but does not desert the voyage." Kewley *v.* Ryan, 2 H. Bl. 343; Marine Ins. Co. *v.* Tucker, 3 Cranch (U. S.) 375; Henshaw *v.* Marine Ins. Co., 2 Cai. (N. Y.) 274.

Intention to Deviate. — When it appears that at the time of sailing the master of a vessel intended to put into an intermediate port, and actually did put in there, it may still be shown that such deviation was made by him because of necessity, and not in furtherance of his original intention, and when this is shown the shipowner is not liable for injury to goods damaged by the perils of the sea after such deviation has been made. Hobart *v.* Norton, 8 Pick. (Mass.) 159.

Deviation Caused by "Stress of Weather." — It was provided that the vessel was to sail a certain course unless absolutely forced to deviate therefrom by stress of weather. The vessel in her voyage left the prescribed course. It was held that an entry in her log-book that she suffered from heavy labor in high seas showed that the deviation was necessary. The Maria Luigia, 28 Fed. Rep. 244, *reversing* 18 Fed. Rep. 556.

1. See Carver on Carriage by Sea, § 288; Davis *v.* Garrett, 6 Bing. 716, 19 E. C. L. 212.

2. **Deviation Is Prima Facie the Cause of the Loss.** — Davis *v.* Garrett, 6 Bing. 716, 19 E. C. L. 212; Scaramanga *v.* Stamp, 4 C. P. Div. 316. See also Maghee *v.* Camden, etc., R. Transp. Co., 45 N. Y. 523, 6 Am. Rep. 124. See also the title CARRIERS OF GOODS, vol. 5, p. 423.

3. **Deviation Makes the Carrier an Insurer.** — Davis *v.* Garrett, 6 Bing. 716, 19 E. C. L. 212; Scaramanga *v.* Stamp, 4 C. P. Div. 316, *affirmed* in 5 C. P. Div. 295; Leduc *v.* Ward, 20 Q. B. Div. 475; Phelps *v.* Hill, (1891) 1 Q. B. 605; The Dunbeth, (1897) Prob. 133, 76 L. T. 658; Bond *v.* The Cora, Pet. Adm. 373, 2 Wash. (U. S.) 80; Knox *v.* The Schooner Ninetta, Crabbe (U. S.) 534; Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745; Hand *v.* Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54. See also Ellis *v.* Turner, 8 T. R. 531; The Steamboat Sultana *v.* Chapman, 5 Wis. 454.

Liable Although Injury Caused by the Public Enemy. — "A carrier is liable for all injury to the freight which does not arise from the act of God (inevitable accident) or the enemies of the state. He undertakes for the safe keeping of the goods intrusted to him, the proper conduct of the vessel, and the keeping the proper lights and watch for her preservation. He is bound not to expose the goods to any extraordinary hazard or risk, and if he deviate from the usual and common course of the trade, and the goods are lost or injured during such deviation and exposure, he is not excused, even if the loss or injury result from inevitable accident or the public enemies. Such excuse is only available to him while in the pursuit of his voyage in the usual way." Lawrence *v.* McGregor, Wright (Ohio) 193.

4. Lopes, L. J., in Phelps *v.* Hill, (1891) 1 Q. B. 605. See also The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7.

a deviation for the mere purpose of saving property is not.[1]

To Avoid Capture. — No liability is incurred by the shipowner when the master, believing upon reasonable grounds that if he continues the designated voyage the vessel will be captured by a hostile power, deviates from the usual course.[2]

To Escape Other Dangers. — And it seems that the master, acting as a prudent man, would be justified in making a deviation when credibly informed that by pursuing his course he would encounter pirates, icebergs, or other probable causes of great damage to the vessel or cargo.[3]

Temporary Obstacle. — A deviation for the purpose of avoiding an obstacle which is of a temporary nature only is not justifiable.[4]

c. AUTHORIZED DEVIATION. — It is sometimes provided by an express stipulation in the contract of affreightment that the vessel may stop at an intermediate port or ports to load or unload a cargo and for other purposes,[5]

1. Saving Life. — Bond *v.* The Cora, Pet. Adm. 373, 2 Wash. (U. S.) 80. See also Phelps *v.* Hill, (1891) 1 Q. B. 605; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240.

Saving Property in Order to Save Life. — In Scaramanga *v.* Stamp, 5 C. P. Div. 295, *affirming* 4 C. P. Div. 316, Cockburn, C. J., in the opinion delivered by him, said: "Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of 'perils of the seas.' And as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation. But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating."

Inland Navigation. — But in Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342, a distinction is made between the liability in this respect of vessels engaged in inland and ocean navigation; and it was held that when a vessel plying upon the Mississippi river made a deviation to aid another boat in distress, the owners were not liable for a loss resulting from such deviation, even though there was no danger of any loss to life.

2. Preventing Capture. — Duncan *v.* Köster, L. R. 4 P. C. 171; The Express, L. R. 3 Adm. & Eccl. 597; Anderson *v.* San Roman, L. R. 5 P. C. 301; The Wilhelm Schmidt, 25 L. T. 34; The Heinrich, L. R. 3 Adm. & Eccl. 424, 24 L. T. 914.

To Make Inquiries as to a Blockade. — The owner of the vessel is not liable for a loss of time occasioned by a deviation made for the purpose of ascertaining whether the port of destination called for in the charter-party is blockaded or not. Stokely *v.* Smith, 2 Ben. (U. S.) 407.

3. Duncan *v.* Köster, L. R. 4 P. C. 171.

4. Locks of Canal Out of Order. — In Hand *v.* Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54, the prescribed course of the voyage was in part through a canal. When the vessel arrived at the mouth of such canal, the locks were found to be out of order, and the vessel attempted to proceed to her destination by sea. She was driven on a shoal by a storm and the cargo damaged. The owners of the vessel were held liable for the loss.

Course Frozen Over. — And the owners of a vessel were held liable for a loss occurring during a deviation made because the vessel was prevented by ice from pursuing her proper course. Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

5. Stipulation Construed — *Right to Load and Discharge.* — Among other things, it was provided that the ship should have "liberty to call at any ports in any order." It was held that the "liberty to call at any ports" included the liberty to call for the purpose of loading or discharging other cargo there. Caffin *v.* Aldridge, (1895) 2 Q. B. 648.

Means Ports Which Will Be Passed on the Designated Voyage. — In Leduc *v.* Ward, 20 Q. B. Div. 475, Lord Esher, M. R., in the opinion delivered by him, said: "In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course, such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea-term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their

or may depart from her proper course to tow or assist disabled vessels.[1]

Deviation Assented to. — Stopping at an intermediate port is not a deviation for which the shipowner will be liable if the intention of the master to stop there was known to the shipper at the time that the contract was executed and was assented to or acquiesced in by him.[2]

d. CUSTOMARY DEVIATION. — If a known usage of trade exists between certain ports to stop at certain intermediate port, such stop may be made there without the shipowners incurring any liability for a deviation.[3]

e. DEVIATION CAUSED BY THE FREIGHTER — **Freight.** — Although as a general rule freight is not payable if the vessel is lost, if a deviation has been made for the benefit of the freighters, then they become liable for the freight whether the ship arrives or not.[4]

Injury to the Vessel. — If an injury is sustained by the vessel in going to a point where the charterer has no right to take her under the contract, the loss occasioned by this deviation from the voyage must be borne by the charterer, and not by the shipowner.[5]

f. ACCEPTING CARGO — WAIVER OF DEVIATION. — If the owner of the cargo intends to set up the deviation of the ship on her voyage as a defense to his liability for freight, he should refuse to receive the cargo. If he does receive it, he thereby waives his right to annul the contract and must rely

geographical order; and therefore the words 'in any order' are frequently added; but in any case it appears to me that the ports must be ports substantially on the course of the voyage." To the same effect is Glynn *v.* Margetson, (1893) App. 351.

Quarantined Port. — If, by the bill of lading, liberty is given to call at any port or ports, and it is known to the shipper that one of the ports at which the vessel customarily stops is quarantined, such shipper cannot recover damages, though the cargo which consists of fruit is injured by the detention in quarantine at that port. The Sidonian, 35 Fed. Rep. 534, *affirming* 34 Fed. Rep. 805.

As to Coaling — General Principle of Construction. — In Hurlbut *v.* Turnure, 76 Fed. Rep. 587, *affirmed* in 81 Fed. Rep. 208, Brown, J., said: "The bill of lading contains a clause authorizing the vessel to 'call at any port or ports for whatever purpose.' I do not think this clause has any material bearing upon the present question. It has been repeatedly construed and adjudged not to authorize any departure to ports away from the ordinary course of the voyage, or for any purpose disconnected with the voyage. In other words, it is to receive a reasonable construction; a construction not inconsistent with the well-settled right of the shipper to have the specified voyage pursued in the usual manner, without unnecessary delays, or the increased risks incident to such delays. It authorizes calls for reasonable cause, or for necessity arising upon the voyage. But it is not reasonable, and the clause cannot be deemed intended, to release the ship from the performance of any of her ordinary duties in preparing for the voyage, or to authorize the ship to sail voluntarily from the port of departure with a short supply of coal, and thus deliberately to create a necessity for calling at intermediate ports not mentioned in the bill of lading, and contrary to the customary course of the voyage."

1. Assisting Disabled Vessels. — Potter *v.* Burrell, (1897) 1 Q. B. 97; The Wells City, 61 Fed. Rep. 857, *affirming* 57 Fed. Rep. 317; Schwarzchild *v.* National Steamship Co., 74 Fed. Rep. 257, *distinguishing* The Wells City, 61 Fed. Rep. 857, 57 Fed. Rep. 317. See also Stuart *v.* British, etc., Steam Nav. Co., 32 L. T. 257.

In Ardan Steamship Co. *v.* Thebaud, 35 Fed. Rep. 620, Brown, J., said: "The additional clause in the bill of lading in the present case, 'to tow and assist vessels in all situations,' is used in immediate connection with the 'liberty to call at any port or ports, for whatever purpose,' and seems to me manifestly subject to the same necessary implications. It was intended to authorize assistance to vessels needing help in all situations that might be met with in the ordinary course of the voyage. It was not designed to authorize, and did not justify the vessel in proceeding, after she was loaded, as was done in this case, forty miles directly away from her port of destination, and away from the ordinary course of the voyage. Her doing so added materially to the risks of the voyage, and seems to me a deviation wholly foreign to the purpose and to the well-known construction of such clauses in bills of lading."

2. Thatcher *v.* McCulloh, Olc. Adm. 365; Hedricks *v.* Steamship Morning Star, 18 La. Ann. 353; Lowry *v.* Russell, 8 Pick. (Mass.) 360. See also Cormack *v.* Gladstone, 11 East 347.

3. Hostetter *v.* Park, 137 U. S. 30; Thatcher *v.* McCulloh, Olc. Adm. 365; Lowry *v.* Russell, 8 Pick. (Mass.) 360.

4. Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240.

Deviation by a Sub-Charterer. — If a ship is diverted from the charter limits by a sub-charter executed by the charterer, the owners of the ship are not responsible for a loss to the charterer, because of the failure of the master to obtain health papers, and are entitled to recover the charter-money agreed upon. Donkin *v.* Herbst, 55 Fed. Rep. 1002, *affirming* 49 Fed. Rep. 379.

5. Latson *v.* Sturm, 2 Ben. (U. S.) 327.

upon his right to recover damages for its breach.[1]

8. Variation in Manner or Means of Transporting Cargo. — If a carrier by water attempts to perform his contract in a manner different from his undertaking, he becomes, as in the case of a deviation, an insurer for the absolute delivery of the goods, and cannot avail himself of any exception made in his behalf in the contract.[2] Thus, when such carrier agrees to transport goods by steam, but sends them by sail or *vice versa*, and a loss occurs, the shipowner must respond in damages, though such loss was occasioned by an excepted peril.[3] And the same rule obtains when the owner of the cargo contracts to have it transported in a particular ship and another is substituted instead.[4]

9. Seaworthiness — *a.* WARRANTY — (1) *By Implication of Law.* — As has been before stated, it is customary in charter-parties to insert an express stipulation that the vessel shall be seaworthy, but in every contract or conveyance by water, whether it be a charter-party, bill of lading, or simple contract of affreightment, there is, where there is no agreement to the contrary, an implied warranty that the vessel is stanch, strong, and capable of performing the contemplated voyage;[5] and further, that she is in a reasonably suitable condition to transport the particular cargo named in the contract.[6]

1. Acceptance of Cargo Is a Waiver. — Thatcher *v.* McCulloh, Olc. Adm. 365.

2. Dunseth *v.* Wade, 3 Ill. 286.

3. Sail Substituted for Steam. — Merrick *v.* Webster, 3 Mich. 268; Wilcox *v.* Parmelee, 3 Sandf. (N. Y.) 610; Robertson *v.* National Steamship Co., 60 N. Y. Super. Ct. 132; Wallace *v.* Swift, 31 U. C. Q. B. 523, *reversing* 28 U. C. Q. B. 563.

4. Vessels Changed. — Bazin *v.* Liverpool, etc., Steamship Co., 5 Am. L. Reg. 459.

5. Owner Warrants the Vessel Seaworthy — *England.* — Kopitoff *v.* Wilson, 1 Q. B. Div. 377; Cohn *v.* Davidson, 2 Q. B. Div. 455; Lyon *v.* Mells, 5 East 428.

United States. — The Tornado, 108 U. S. 342; Work *v.* Leathers, 97 U. S. 379; The Caledonia, 157 U. S. 124, *affirming* 50 Fed. Rep. 567; The Merrimac, 2 Sawy. (U. S.) 593; The Steamship Francis Wright, 7 Ben. (U. S.) 88; Ye Seng Co. *v.* Corbitt, 9 Fed. Rep. 423; McCann *v.* Conery, 11 Fed. Rep. 747; Hubert *v.* Recknagel, 13 Fed. Rep. 912; The Titania, 19 Fed. Rep. 101; Sumner *v.* Caswell, 20 Fed. Rep. 249; The Mangalore, 23 Fed. Rep. 463, 9 Sawy. (U. S.) 71; The Brantford City, 29 Fed. Rep. 373; The Rover, 33 Fed. Rep. 515; McAdams *v.* Leverich, 35 Fed. Rep. 305; The Mary L. Peters, 68 Fed. Rep. 919. *Compare* Bowie *v.* Wheelwright, 2 Cranch (C. C.) 167.

Michigan. — Lyon *v.* Tiffany, 76 Mich. 158.

New York. — Donovan *v.* Sheridan, 4 Misc. Rep. (N. Y. Super. Ct.) 433; Tebo *v.* Jordan, 67 Hun (N. Y.) 392.

See also *infra*, this title, *Dissolution and Excuses for Nonperformance — Conditions Precedent;* and *Limitation of Liability — By Statute — The Harter Act.*

In Wilson *v.* Griswold, 9 Blatchf. (U. S.) 267, it is said that a covenant or undertaking of seaworthiness is universally implied in contracts of affreightment, and that there is no distinction in this respect between a charter wherein the owner mans, victuals, and navigates the ship, and a charter wherein the charterer assumes to do this. See also Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179; Abbott on Shipping 421, 422.

6. Fitness for Cargo. — Stanton *v.* Richardson, 45 L. J. C. P. 78, L. R. 7 C. P. 421, L. R. 9. C. P. 390; Trainor *v.* Black Diamond Steamship Co., 16 Can. Sup. Ct. Rep. 156; The Vesta, 6 Fed. Rep. 532; Ye Seng Co. *v.* Corbitt, 9 Fed. Rep. 423; The Regulus, 18 Fed. Rep. 380; The Director, 34 Fed. Rep. 57.

The cargo of a vessel consisted in part of flour and in part of oil. In the course of the voyage the flour was injured by leakage from the oil. It was held that the ship was liable for the damage. The court said: "A ship may be seaworthy as to one sort of cargo, and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship, and carried on a voyage, the master guarantees the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. The ship is impliedly warranted to be seaworthy *quoad* that article, and if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the *non sequitur* that it is capable of carrying safely, and without damage, some other article of a different character." The Thames, 61 Fed. Rep. 1014.

Fitted Up at Charterer's Expense. — Where part of a cargo of asphalt was damaged because of the improper construction of a bulkhead put in for the purpose of carrying this particular cargo, it was held that the owner of the cargo could recover, although the charter provided that the fittings were "to be done by owner's agents at charterer's expense." Hine *v.* New York, etc., Co., 68 Fed. Rep. 920.

Not Properly Cleansed. — Damages were allowed when a cargo of almonds was injured because the hold of a vessel in which petroleum had been carried on a previous voyage was not properly cleansed. The Barque Carlotta, 3 Asp. M. L. C. N. S. 456; The Lizzie W. Virden, 19 Blatchf (U. S.) 340.

Failure to Fit Properly Is Negligence. — Failure on the part of the owners of a vessel to

Owner's Ignorance of the Charterer's Purpose. — There can be no implied warranty of a vessel's seagoing qualities when the owner is kept in ignorance of her destination and of the service in which she is to be engaged and the use to which she is to be put.[1]

(2) *Latent Defects.* — The warranty of seaworthiness, whether expressed in a charter-party or implied by law in a bill of lading or other contract of affreightment, extends to latent as well as patent defects.[2]

(3) *Time to Which Warranty Relates.* — The warranty of seaworthiness exists not only at the time when the vessel begins to take her cargo on board but at the time when she actually begins her voyage.[3] But there is no warranty that a vessel chartered at a port other than the port of loading is sea-

properly fit up a ship for carrying cattle which they have contracted to carry is negligence for which the ship and her owners are responsible. The Iowa, 50 Fed. Rep. 561.

Improper Ventilation. — A shipper is justified in refusing to load cattle in a part of a vessel in which, owing to a want of proper ventilation, he cannot obtain the insurance upon them, and the vessel is liable for the damages sustained by the shipper by reason of the non-shipment of cattle in that part of the ship. The Alvah, 59 Fed. Rep. 630.

1. No Warranty When Owner Is Ignorant of Use and Destination. — Richardson's Case, 2 Ct. of Cl. 483.

2. Latent Defects — *England.* — Kopitoff *v.* Wilson, 1 Q. B. Div. 380; Steel *v.* State Line Steamship Co., L. R. 3 App. 72; The Glenfruin, 10 Prob. Div. 103.

United States. — The Titania, 19 Fed. Rep. 101; Hubert *v.* Recknagel, 13 Fed. Rep. 912; The Lillie Hamilton, 18 Fed. Rep. 327; The Regulus, 18 Fed. Rep. 380; Sumner *v.* Caswell, 20 Fed. Rep. 249; The Rover, 33 Fed. Rep. 515; The Bergenseren, 36 Fed. Rep. 700; The Giles Loring, 48 Fed. Rep. 463; Work *v.* Leathers, 97 U. S. 380.

Massachusetts. — Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179. *Compare* Cook *v.* Gowan, 15 Gray (Mass.) 237.

New York. — Talcott *v.* Commercial Ins. Co., 2 Johns. (N. Y.) 124, 3 Am. Dec. 406.

A defect, in order to be latent, must have been not discoverable at the time of the shipment. It could not, in its nature, have been capable of discovery then and have become capable of evading discovery subsequently. The Carib Prince, 68 Fed. Rep. 254. See also 63 Fed. Rep. 266.

Warranty Is Absolute. — "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." The Caledonia, 43 Fed. Rep. 681, *affirmed* in 157 U. S. 124; *quoted* and *approved* in The Edwin I. Morrison, 153 U. S. 210.

Rule as to Inspection. — When the ventilators of a vessel were carried away in a storm which damaged the vessel greatly in other ways, and sea-water entered the ventilator holes, damaging the cargo, it was held that this was a peril of the sea for which the ship was not liable when there was proof of a special inspection and testing of the security of the ventilators according to known tests. The Dunbritton, 73 Fed. Rep. 353, *distinguishing* The Edwin I. Morrison, 153 U. S. 199. But *compare* The Casco, 5 Fed. Cas. No. 2486, 2 Ware (U. S.) 188.

Express Stipulation. — Where the owner of a vessel agreed to hire her to another for a certain period and stipulated at the same time that she should be "furnished with sufficient cables, anchors, and other tackle," and the vessel was lost before the expiration of that period, in consequence of a defect in one of her cables, it was held that the owner could not recover hire for the whole period, although it appeared that the defect in the cable could not have been discovered by the most attentive examination. Parker *v.* Gilliam, 1 Ired. L. (23 N. Car.) 545. See also McCann *v.* Conery, 11 Fed. Rep. 747.

3. At the Time of Beginning the Voyage. — The Caledonia, 157 U. S. 129; Sumner *v.* Caswell, 20 Fed. Rep. 249; The Eugene Vesta, 28 Fed. Rep. 762; Bowring *v.* Thebaud, 56 Fed. Rep. 520; Purvis *v.* Tunno, 2 Bay (S. Car.) 492. See also Bermon *v.* Woodbridge, 2 Doug. 781.

The implied warranty of seaworthiness into which the owner of a ship enters with the owner of her cargo attaches at the time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her port of destination; and this warranty is broken if she is then unfit to encounter these perils, although she may have been seaworthy while lying in the port of loading, and also at the times of starting from her anchorage for and arriving at the place of loading appointed by the charterer, and of commencing to take on board her cargo. Cohn *v.* Davidson, 2 Q. B. Div. 455.

When Voyage Is Divided Into Stages. — If the voyage agreed upon in a charter-party is to be an undivided one, it is the duty of the owner of the vessel to see that she is seaworthy when she leaves the port of loading, and in a condition to bear all the ordinary vicissitudes of the voyage, among other things having on board a sufficiency of coal for the voyage under ordinary conditions; and if the voyage is to be divided into stages, it is the duty of the owner to see that the vessel is properly equipped at the commencement of each stage. Thin *v.* Richards, (1892) 2 Q. B. 141. To the same effect see Biccard *v.* Shepherd, 14 Moo. P. C. 471; Dixon *v.* Sadler, 5 M. & W. 405.

worthy at the date of the execution of the charter-party. It is sufficient if she is seaworthy upon her arrival at the port of loading when she is ready to receive her cargo.[1]

(4) *Maintaining Seaworthiness.* — The vessel must not only be seaworthy when entering upon the voyage, but must, in as far as is reasonably practicable, be kept in this condition throughout its course.[2]

b. MEANING OF THE TERM. — By this term is meant that the ship shall be in a reasonably fit state as to repair, equipment, crew, and in all other respects, to encounter the ordinary perils of the contemplated voyage;[3] but not that she shall be capable of withstanding every peril.[4] It is a relative term depending on the voyage and cargo.[5]

1. The Star of Hope, 22 Fed. Cas. No. 13312. See also Burns *v.* Cassels, 25 New Bruns. 13, *affirmed* in 14 Can. Sup. Ct. Rep. 256.

2. The Marlborough, 47 Fed. Rep. 667; Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179. *Compare* Worms *v.* Storey, 11 Exch. 427.

3. Fit to Encounter Ordinary Perils. — Dixon *v.* Sadler, 5 M. & W. 414; Biccard *v.* Shepherd, 14 Moo. P. C. 471; Amies *v.* Stevens, 1 Stra. 128; The Orient, 16 Fed. Rep. 916; The Sintram, 64 Fed. Rep. 884; The Titania, 19 Fed. Rep. 101. See also The Northern Belle, 9 Wall. (U. S.) 526; Holland *v.* Seven Hundred and Twenty-five Tons of Coal, 36 Fed. Rep. 784.

Degrees of Safety. — "The vessel must be reasonably safe for the service and voyage undertaken. There are, however, degrees of safety, and she need not be the safest. A new vessel of the highest order of construction is safer than one several years old and of a lower order of workmanship; yet the latter may be, and if in good condition is, seaworthy." The Marlborough, 47 Fed. Rep. 667.

Test of Seaworthiness. — The test as to seaworthiness is not whether the ship may possibly make one or several voyages without foundering, but whether she is so stanch in her character as to approve herself as fit for the navigation contemplated, in the judgment of competent men according to the customs and usages of the port or country. Premuda *v.* Goepel, 23 Fed. Rep. 410. See also Tidmarsh *v.* Worthington F. & M. Ins. Co., 4 Mason (U. S.) 439; The Titania, 19 Fed. Rep. 101; The Rover, 33 Fed. Rep. 515.

Seaworthiness of the Hull. — To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, stanch, and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo. Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162, *followed* and *approved* in The Lillie Hamilton, 18 Fed. Rep. 327.

Requirements in the Case of a Steamship. — In The Colima, 82 Fed. Rep. 665, Brown, J., discussing this question, said: "No steamship can be deemed fit for a sea voyage if in an ordinary storm, when not disabled, she can neither keep out of the trough of the sea, nor ride safely in it. * * * They [steamers] should be stable enough to lie safely, in ordinary storms, in the trough of the sea; because they are liable at any time to be forced into that situation, and often are forced into it, for considerable periods, by the accidental disabling of their machinery."

Grain Barges. — The owners of barges to be used for grain have been held by the admiralty courts very strictly to the duty of keeping their boats tight, strong, and in every way fit for the purpose for which they are used, that is to say, so that the water shall not reach the grain. Wood *v.* Canal Boat Wilmington, 5 Hughes (U. S.) 205. To the same effect are The Northern Belle, 9 Wall. (U. S.) 526; Kellogg *v.* La Crosse, etc., Packet Co., 3 Biss. (U. S.) 496.

As to Insurance. — A warranty that a vessel is seaworthy is not a warranty that the charterers can get insurance, but it is a warranty that the vessel is insurable. Premuda *v.* Goepel, 23 Fed. Rep. 410; Card *v.* Hine, 39 Fed. Rep. 818.

Deviation of the Compass. — In The E. A. Shores, 73 Fed. Rep. 342, it was held that a slight deviation of the compass could not be regarded as a ground to condemn the vessel as unseaworthy, especially in the absence of any showing of its continuance for sufficient time to require notice.

Sails in Improper Condition. — The owners of a vessel are liable to the charterers thereof for an injury to the cargo occurring because, through the negligence of the master of the vessel, the sails were not in a proper condition. The Schooner Thomas Jefferson, 3 Ben. (U. S.) 302.

Defective Limbers. — On account of the defective condition of a vessel's limbers, water which came in through a leak was prevented from passing to her pumps, and her cargo was thereby injured. It was held that she was not fit for the voyage, and was unseaworthy, and that her owners were liable for the damage to the cargo. Standard Sugar Refinery *v.* The Schooner Centennial, 2 Fed. Rep. 409.

Broken Pipe. — When a pipe leading to a water tank of a vessel was so insufficiently protected that it was broken on the voyage, and the cargo was damaged after the arrival of the ship in port by a leakage from this pipe while the tank was being filled with water, it was held that this was a breach of the warranty of seaworthiness and that the owner of the vessel was liable for the damage to the cargo. The Glenmavis, 69 Fed. Rep. 472.

Breaking of Machinery During a Gale. — In Chadwick *v.* Denniston, 41 Fed. Rep. 58, it was held that the fact that a crank-shaft which had been in use for eleven years, broke during a severe gale, did not show the vessel to be unseaworthy.

4. The Allie, 24 Fed. Rep. 749.

5. Depends upon Voyage and Cargo. — The Director, 34 Fed. Rep. 57. See also Knill *v.*

Officers and Crew. — In order to fulfil the obligation of seaworthiness, a vessel must be furnished with an adequate number of persons of competent skill and ability to navigate her.[1]

c. PRESUMPTION AND BURDEN OF PROOF — **In General.** — Ordinarily, the presumption is that a ship is seaworthy when she undertakes a voyage.[2]

Effect of Declaration. — And where a charter-party declares that the vessel is in good order, the presumption is in favor of seaworthiness, and the burden of showing unseaworthiness is upon the charterer.[3]

Presumption Rebutted. — But this presumption is overcome when it is shown that a short while after sailing, and before encountering any unusually rough weather, the machinery of the vessel broke down or she began to leak badly;[4] and the burden of showing that the vessel is seaworthy may be thrown upon

Hooper, 2 H. & N. 277; The Calvin S. Edwards, 50 Fed. Rep. 477.

1. Must Have Competent Officers and Crew. — The Bark Gentleman, Olc. Adm. 110; The Schooner Sarah, 2 Sprague (U. S.) 31; The Vincennes, 3 Ware (U. S.) 171; Richardson *v.* Winsor, 3 Cliff. (U. S.) 395; The Planter, 2 Woods (U. S.) 490; Holland *v.* Seven Hundred and Twenty-Five Tons of Coal, 36 Fed. Rep. 784; The Giles Loring, 48 Fed. Rep. 463; Tebo *v.* Jordan, 67 Hun (N. Y.) 392.

Sickness and Desertion of Crew. — It is the duty of the shipowner to provide and keep on board a full crew, and he is liable to the charterer for any loss occurring because of sickness or desertions. The Bark Ethel, 5 Ben. (U. S.) 154. *Compare* The Bark Gentleman, Olc. Adm. 110.

Drunken Master. — When the cargo was damaged as the result of a collision, it was held that the owners of the vessel who had put in command of the ship a master who was in the habit of becoming intoxicated and who at the time of the collision was so drunk as to be unable to control the navigation of the vessel, were liable. The Guildhall, 58 Fed. Rep. 796.

It is not a breach of the warranty of seaworthiness that the master of the vessel was drunk at the port of delivery whilst the cargo was being discharged, where the duty of discharging devolved on the consignees of the charterers. Mahoney *v.* Martin, 35 La. Ann. 29.

Number of Crew Dependent upon the Voyage. — In Wood *v.* Hubbard, 62 Fed. Rep. 753, it was held that a vessel might be thoroughly seaworthy, so far as her crew was concerned, for a voyage down a river, when she would not be seaworthy for a voyage upon the ocean, and that the failure to have a full complement of her crew on board when passing down the river on which she had been loaded, when it was shown that the vacancies were to be filled before the vessel left that river, did not militate against the idea that the voyage had commenced.

2. Presumption of Seaworthiness. — Werk *v.* Leathers, 1 Woods (U. S.) 271; Pyman *v.* Von Singen, 3 Fed. Rep. 802; Stackpole *v.* Wickham, 7 La. Ann. 678.

3. Presumption from a Declaration in a Charter Party. — McCann *v.* Conery, 11 Fed. Rep. 747.

Covenant of Seaworthiness. — When the owners of a ship by the terms of the charter-party have covenanted that the ship should be seaworthy, if she springs a leak in the course of the voyage the burden of proof is upon such owners to show that when the ship sailed she was seaworthy. Hubert *v.* Recknagel, 13 Fed. Rep. 912.

4. Burden Shifted to the Shipowner. — Cort *v.* Delaware Ins. Co., 2 Wash. (U. S.) 375; Higgie *v.* American Lloyds, 14 Fed. Rep. 143; Werk *v.* Leathers, 1 Woods (U. S.) 271; The Gulnare, 42 Fed. Rep. 861; The Millie R. Bohannon, 64 Fed. Rep. 883; The Sintram, 64 Fed. Rep. 884. See also Anderson *v.* Morice, L. R. 10 C. P. 58; Pickup *v.* Thames, etc., Marine Ins. Co., 3 Q. B. Div. 594; Parker *v.* Union Ins. Co., 15 La. Ann. 688; Talcott *v.* Commercial Ins. Co., 2 Johns. (N. Y.) 124, 3 Am. Dec. 406; Walsh *v.* Washington Marine Ins. Co., 32 N. Y. 427; Miller *v.* South Carolina Ins. Co., 2 McCord L. (S. Car.) 336, 13 Am. Dec. 734.

Unaccountable Weakness. — "Though the presumption is in favor of seaworthiness, and the burden is on the party denying it by some sufficient evidence to remove it, this may be done by proving the existence of defects amounting to unseaworthiness before she sailed, or that she broke down during the voyage, not having encountered any extraordinary action of the winds and the waves, or any other peril of the sea sufficient to produce such an effect upon a seaworthy vessel, or by showing that an examination during the voyage disclosed such a state of decay and weakness as amounted to unseaworthiness, for which the lapse of time, and the occurrences of the voyage, would not account." The Giles Loring, 48 Fed. Rep. 463.

Presumption from Successfully Encountering Sea Perils. — "Where a vessel, soon after leaving port, becomes leaky, without stress of weather or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness because no visible or rational cause, other than latent or inherent defects in the vessel, can be assigned for the result. But, where it satisfactorily appears that the vessel encountered marine perils which might well disable a stanch and well-manned ship, no such presumption can be invoked. And where, for a considerable time, she has encountered such perils, and shown herself stanch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated." The Warren Adams, 74 Fed. Rep. 413, *quoted and approved* in The Mauna Loa, 76 Fed. Rep. 829.

her owner by showing that the vessel is very old and has not been completely repaired during a long period.[1]

10. Commencement of Liability. — The liability of the shipowner, under the contract of affreightment, begins as soon as such goods are delivered to him, or to some one intrusted by him having express or implied authority to receive them.[2]

Shipowner's Order Not to Receive Goods. — And the shipowner is not relieved from his liability by giving orders to the persons put in charge of the vessel by himself, and apparently acting as his agents, not to receive goods, the shipper not having notice of such orders.[3]

Who Is an Agent for This Purpose. — One of the deck hands upon a vessel is not the agent of the shipowner for the purpose of receiving goods for transportation;[4] but it seems that the mate[5] or the captain[6] may be.

Contract Must Be Made with the Shipowner. — In order to make the shipowner responsible, the delivery must be made to an agent of such shipowner with an intention, by such delivery, to enter into a contract for carriage with the ship-

1. The Vincennes, 3 Ware (U. S.) 171. See also Werk *v.* Leathers, 1 Woods (U. S.) 271.

Insurance Refused. — The refusal of several insurance companies to insure the cargo upon a vessel when there is no limit as to the rate, is very strong presumptive evidence of the unseaworthiness of the vessel in the judgment of persons especially competent to pass upon that question. Premuda *v.* Goepel, 23 Fed. Rep. 410. See also The Vesta, 6 Fed. Rep. 532.

Preliminary Survey. — But when a preliminary survey of the vessel has been made at the instance of the charterers, and she has been found seaworthy and fit to undertake the voyage, in the absence of any evidence of concealment, latent defects, bias or fraud, the presumption of seaworthiness from such preliminary survey is strong. The Piskataqua, 35 Fed. Rep. 622.

2. When Liability Begins. — British Columbia, etc., Lumber, etc., Co. *v.* Nettleship, L. R. 3 C. P. 499; Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Goff *v.* Clinkard, *cited* in Dale *v.* Hall, 1 Wils. 281; Stuart *v.* Crawley, 2 Stark. 323, 3 E. C. L. 428; Williams *v.* Peytavin, 4 Martin (La.) 304; Tirrell *v.* Gage, 4 Allen (Mass.) 245; Clarke *v.* Needles, 25 Pa. St. 338. See also Morse *v.* Slue, 1 Vent. 190; Rich *v.* Kneeland, Hob. 17; Freeman *v.* Newton, 3 E. D. Smith (N. Y.) 246. See the title CARRIERS OF GOODS, vol. 5, p. 180; and *infra*, this title, *Liens — When Liens Take Effect.*

Goods Laden on Board. — As soon as the goods are laden on board the vessel, the liability of the shipowner commences. The Ship Panama, Olc. Adm. 343; Faulkner *v.* Wright, Rice L. (S. Car.) 107.

Goods Receipted for. — After goods have been receipted for, they are at the risk of the shipowner as much as if they had been taken on board. Greenwood *v.* Cooper, 10 La. Ann. 796.

No Bill of Lading Until After Loss. — The shipowner is liable from the time of the shipment of the goods although a bill of lading was not signed therefor until after the loss of such goods. Snow *v.* Carruth, 1 Sprague (U. S.) 324.

Illustrations. — The plaintiff sent boards in a scow alongside of the defendant's vessel to be shipped, but before they could be taken on board they had to be surveyed and classified by the plaintiff's surveyor, and before this was done they were stolen. It was held that the defendant was not liable for the loss of the boards. Carter, C. J., delivering the opinion of the court, said: "The responsibility of a common carrier arises as soon as the goods are put into his possession, and the possession of the owner is so far relinquished that the carrier can at once proceed to carry them; but if the owner retains the possession and control of them, in order to do something with them for his own benefit and from his own wish, so that the carrier cannot carry them till that is done, the goods, until that process is completed, seem to us to be at the risk of the owner and not the carrier." Cushing *v.* Roberts, 10 New Bruns. 150.

It appeared from the evidence that the goods for the loss of which the action was brought were put on board the vessel by some of the men employed upon her, but no delivery was made to the purser, or mate, or any known officer of the boat. It further appeared that just as the boat was leaving the wharf, a bill of lading for the goods was delivered to the purser of the steamer, and it was proved to be the custom that receipts were not given on the part of the proprietors of the vessel until the return trip, owing to the shortness of the time for receiving and delivering the goods. It was held that the owner of the goods could recover. Howland *v.* Bethune, 13 U. C. Q. B. 270.

3. Agents Violating Orders. — The captain and owner of a small coaster, on which kind of vessel it appears it is not usual to have a mate, left her in charge of two men who, with himself, formed the entire ship's company, with orders not to receive any heavy freight during his absence. After his departure a cask of brandy was received by the persons left in charge, and, in attempting to lower it into the hold of the vessel, one of the chimes of the cask broke and the contents were lost. It was held that the shipowner was liable. Street *v.* Morrison, 10 New Bruns. 296.

4. Trowbridge *v.* Chapin, 23 Conn. 595.

5. Cobban *v.* Downe, 5 Esp. N. P. 41.

6. Witbeck *v.* Schuyler, 44 Barb. (N. Y.) 469.

owner, and not with such agent himself as a bailee.[1]

11. Termination of Liability — *a.* DELIVERY. — The general rule is that the shipowner, like any other carrier, is liable on his contract of affreightment until the goods have been carried to their destination and delivered to the consignee or other owner thereof, or to some one authorized by him to receive them; or until some act equivalent to an actual delivery has been done.[2]

Delivery to Wrong Person. — The shipowner is responsible if the cargo is delivered to any other person than the cargo owner or his duly authorized agent.[3]

b. WHAT IS SUFFICIENT DELIVERY — (1) *Place of Delivery* — **At the Wharf.** — Since ships trading from port to port have not the means of carrying goods on land, it is well settled that the carrier by water shall carry from port to port only, and that he is not bound to deliver the goods at the warehouse of

1. Shipowner Not Responsible for Goods Carried by an Agent as Bailee. — A., who was the purser of a steamship, received a box of cigars, agreeing to deliver them to one L. and collect the value thereof. It was understood that no freight was to be paid for the transportation of the cigars. A. gave a bill of lading for the cigars signed by himself as purser, but he testified that he had no authority so to do and that he did it at the request of the owner of the cigars in order that he might get insurance on them. A. delivered the cigars to L. but did not collect their value as he had agreed to do. L. having failed to pay for them, an action was brought against the shipowner to recover their value, but it was held that he was not liable. Suarez *v.* Steamship George Washington, 1 Woods (U. S.) 96. To the same effect is McLeod *v.* Eberts, 7 U. C. Q. B. 244.

2. Delivery Terminates Liability. — Segura *v.* Reed, 3 La. Ann. 695; Harkness *v.* Church, 10 La. Ann. 64; Tirrell *v.* Gage, 4 Allen (Mass.) 245. And see generally the title CARRIERS OF GOODS, vol. 5, p. 191 *et seq.*

Liable While in Possession of the Cargo. — So long as the possession of common carriers continues they are liable for the goods; in fact, they are insurers. It is their duty to carry the goods to the place of their destination and to land them and either deliver them to the consignee or notify him of their arrival. So long as they remain in the possession and under the control of the carrier he is responsible. Friendly *v.* Canada Transit Co., 10 Ont. Rep. 756.

Distinction Between Inland and Ocean Carriage. — In a few cases decided by the courts of *Pennsylvania* there has been an attempt to draw a distinction between the duty of a carrier engaged in inland or coast trade and the duty of a carrier engaged in ocean commerce, as to delivery. Cope *v.* Cordova, 1 Rawle (Pa.) 203; Hemphill *v.* Chenie, 6 W. & S. (Pa.) 62. See also Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541.

But this distinction has been expressly denied in other jurisdictions. McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 18 Vt. 131, 16 Vt. 52.

Liability as Warehouseman. — When goods are not to be shipped in the regular course of business, but are to be retained at the warehouse of the shipowner until the shipper gives directions for their shipment, the shipowner is liable as a warehouseman only; and when goods have been unloaded on the wharf at the port of destination, after reasonable notice given to the owner of the goods, and when the owner of the goods has had a reasonable time in which to remove them, the responsibility of the shipowner is that of a warehouseman only.

For a full discussion of this subject see the title CARRIERS OF GOODS, vol. 5, p. 261 *et seq.*

3. Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541. And see the title CARRIERS OF GOODS, vol. 5, p. 194.

Illustration. — Certain cotton was shipped on board a vessel, and bills of lading were given to the shipper. These bills of lading were transferred, without the knowledge of the shipowner, and upon the arrival of the vessel at her destination the cotton was delivered to the consignees named in the bills of lading, without their producing such bills of lading. These consignees sold the cotton on the day it was delivered, and failed within a few days afterwards. It was held that the shipowner was liable to the transferees of the bills of lading. Strong, J., delivering the opinion of the court, said: "No argument is needed to show, what is most manifest, that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search. And if, after inquiry, the consignee or the indorsees of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from a carrier's responsibility. He has no right under any circumstances to deliver to a stranger." The Thames, 14 Wall. (U. S.) 98.

the owner of the goods, but that a delivery at a suitable wharf is sufficient.[1]

(2) *Time of Delivery.* — A delivery, to be effectual, should not only be at the proper place, but at the proper time. A shipowner who should deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian before the consignee or owner had proper time or opportunity to take them into his possession, would not be relieved from his liability for such goods.[2]

1. Delivery at the Wharf Is Sufficient — *England.* — Gatliffe *v.* Bourne, 4 Bing. N. Cas. 314, 33 E. C. L. 364, 3 M. & G. 643, 42 E. C. L. 337; Hyde *v.* Trent, etc., Nav. Co., 5 T. R. 389. See also Quiggin *v.* Duff, 1 M. & W. 174.

Canada. — Close *v.* Beatty, 28 U. C. C. P. 470; Ontario Salt Co. *v.* Larkin, 36 U. C. Q. B. 486.

United States. — The Grafton, 1 Blatchf. (U. S.) 173; Salmon Falls Mfg. Co. *v.* The Bark Tangier, 1 Cliff. (U. S.) 396, 3 Ware (U. S.) 110, 6 Am. L. Reg. 504, 21 Fed. Cas. Nos. 12265, 12266, 12267; The E. H. Fittler, 1 Lowell (U. S.) 114; The Peytona, 2 Curt. (U. S.) 21; Vose *v.* Allen, 2 Am. L. Reg. 563; Kennedy *v.* Dodge, 1 Ben. (U. S.) 311; Richardson *v.* Goddard, 23 How. (U. S.) 28; The Eddy, 5 Wall. (U. S.) 481.

Illinois. — Dixon *v.* Dunham, 14 Ill. 324.

Louisiana. — Northern *v.* Williams, 6 La. Ann. 579; Sleade *v.* Payne, 14 La. Ann. 457.

Massachusetts. — Chickering *v.* Fowler, 4 Pick. (Mass.) 371; Pickering *v.* Weld, 159 Mass. 522. See also Mansur *v.* New England Mut. Marine Ins. Co., 12 Gray (Mass.) 520.

New York. — Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Richmond *v.* Union Steamboat Co., 87 N. Y. 240; Barclay *v.* Clyde, 2 E. D. Smith (N. Y.) 95; Price *v.* Powell, 3 N. Y. 322; Ostrander *v.* Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211. See also Gibson *v.* Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297.

Pennsylvania. — Cope *v.* Cordova, 1 Rawle (Pa.) 203.

Texas. — Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

Vermont. — Farmers', etc., Bank *v.* Champlain Transp. Co., 16 Vt. 52, 18 Vt. 131, 23 Vt. 186.

See also the title CARRIERS OF GOODS, vol. 5, p. 219; and *infra*, this title, *Freight — When Payable — Upon Delivery.*

Safe Wharf. — In order for a delivery upon a wharf to be equivalent to a personal delivery, the wharf must be safe; and so, when a wharf upon which a cargo of iron had been unloaded gave way, and the iron was lost, it was held that the shipowner was liable. Vose *v.* Allen 2 Am. L. Reg. 563; Kennedy *v.* Dodge, 1 Ben. (U. S.) 311.

Unloaded and Stored by Order of a Port Official. — On the arrival of a vessel at the port of destination, no persons appearing with the necessary bill of lading or other document authorizing them to receive delivery of the cargo within the time limited by law for unloading (Rev. Stat. U. S., § 2880), it was directed by the collector of the port to be discharged and stored in the public storehouse, and afterwards, to avoid further expense, it was sold for duties and charges, netting a balance insufficient to pay the freight due under the charter. It was held that the ship's discharge of the cargo under the direction of the collector was therefore a right delivery of the cargo, and the fulfilment of the ship's contract under the charter. McKay *v.* Ennis, 37 Fed. Rep. 229.

Selection of the Wharf. — The usual rule is that the master of a general ship may choose the wharf at which he will discharge his cargo. The E. H. Fittler, 1 Lowell (U. S.) 114; Richmond *v.* Union Steamboat Co., 87 N. Y. 240.

But when there is but one consignee, or the consignees are unanimous in desiring a delivery at a certain wharf within the port, the master must be governed in his selection of the place of unloading by the wishes of the cargo owner or owners, if he is seasonably notified of his or their selection. The E. H. Fittler, 1 Lowell (U. S.) 114; The Boston, 1 Lowell (U. S.) 464; Richmond *v.* Union Steamboat Co., 87 N. Y. 240.

By a usage of the port, the owners of a majority of the cargo may select the wharf. The E. H. Fittler, 1 Lowell (U. S.) 114; Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. Rep. 510; Robertson *v.* Dominion Steamship Co., 13 Nova Scotia 149.

And the largest single consignee has been allowed, in accordance with the custom of the port of unloading, to select the wharf, although the part of the cargo owned by him did not amount to as much as one-half. Blossom *v.* Smith, 3 Blatchf. (U. S.) 316. See *supra*, this title, *Charter-parties — Contents — Loading and Unloading.*

Injury from Exposure After Unloading. — A shipowner is liable for damage to cargo caused by exposure to the sun on an unsheltered pier, when a protected pier suitable for landing the cargo had been designated by the owners of the cargo. The Cervin, 17 Fed. Rep. 462.

Duty to Separate the Different Consignments. — It is the duty of the captain not merely to deliver the goods on the wharf, but as far as possible to separate the different consignments, so as to render them accessible to their respective owners; and so, when by reason of a failure to separate several consignments, a portion of the goods which it was the duty of the captain to deliver to their consignee got directly from the captain's custody into the possession of a stranger, the shipowner was held liable. Ontario Salt Co. *v.* Larkin, 36 U. C. Q. B. 486. To the same effect is The Middlesex, 21 Law Rep. 14. See also Salmon Falls Mfg. Co. *v.* The Bark Tangier, 1 Cliff. (U. S.) 396.

2. Richardson *v.* Goddard, 23 How. (U. S.) 28; Salmon Falls Mfg. Co. *v.* The Bark Tangier, 1 Cliff. (U. S.) 396, 21 Fed. Cas. No. 12266.

Delivery on a Holiday. — In Richardson *v.*

(3) *Notice.* — But the shipowner will not be relieved from his liability by a simple delivery of the goods upon the wharf at a proper time. To constitute a valid delivery there, the master of the vessel should give due and reasonable notice to the cargo owner, so as to afford him a fair opportunity to remove the goods or put them under proper care and custody.[1]

Waiver of Notice. — The giving of notice may be waived by the previous course of dealing between the parties. The carrier by water may also be

Goddard, 23 How. (U. S.) 28, it was held that a "Fast Day" was a suitable time for the delivery of the cargo of a vessel. Grier, J., speaking for the court, said: "The proclamation of the governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, and holiday is a privilege, not a duty. In almost every state in the Union a day of thanksgiving is appointed in the fall of the year by the governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended fast day that all labor should cease, and the day be observed as a sabbath, or as a holiday. It is not so treated by those who conscientiously observe every Friday as a fast day." *Reversing* in effect Salmon Falls Mfg. Co. *v.* The Tangier, 21 Law Rep. 6, 6 Am. L. Reg. 504, 21 Fed. Cas. No. 12265, *followed* in Salmon Falls Mfg. Co. *v.* The Bark Tangier, 1 Cliff. (U. S.) 396, 21 Fed. Cas. No. 12266.

1. Notice Necessary — *United States.* — The Mary Washington, 1 Abb. (U. S.) 1, Chase Dec. (U. S.) 125; The E. H. Fittler, 1 Lowell (U. S.) 114; Vose *v.* Allen, 2 Am. L. Reg. 563; Kennedy *v.* Dodge, 1 Ben. (U. S.) 311; The Peytona, 2 Curt. (U. S.) 21; The Eddy, 5 Wall. (U. S.) 481; The Nail City, 22 Fed. Rep. 537; Richardson *v.* Goddard, 23 How. (U. S.) 28. See also The Grafton, 1 Blatchf. (U. S.) 173; 1265 Vitrified Pipes, etc., 14 Blatchf. (U. S.) 274.

Illinois. — Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

Louisiana. — Northern *v.* Williams, 6 La. Ann. 579; Sleade *v.* Payne, 14 La. Ann. 457.

Massachusetts. — Pickering *v.* Weld, 159 Mass. 522. See also Mansur *v.* New England Mut. Marine Ins. Co., 12 Gray (Mass.) 520.

New York. — Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Gleadell *v.* Thomson, 56 N. Y. 194; Robinson *v.* Chittenden, 69 N. Y. 534; Richmond *v.* Union Steamboat Co., 87 N. Y. 240; Barclay *v.* Clyde, 2 E. D. Smith (N. Y.) 95; Price *v.* Powell, 3 N. Y. 322; Ostrander *v.* Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211. See also Gibson *v.* Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297.

Texas. — Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

Canada. — McKay *v.* Lockhart, 4 U. C. Q. B. (O. S.) 407; Ontario Salt Co. *v.* Larkin, 36 U. C. Q. B. 486.

Reasonable Notice Defined. — In Salmon Falls Mfg. Co. *v.* The Bark Tangier, 21 Law Rep. 6, 6 Am. L. Reg. 504, 21 Fed. Cas. No. 12265, Curtis, J., said: "In the first place it is necessary that the notice to the consignee should be a reasonable notice, by which I understand that it must not so long precede the readiness to deliver as to impose on the consignee an unusual and unnecessary burden of keeping in readiness to receive and transport his goods; nor, on the other hand, that it should fail to allow the consignee reasonably sufficient time to make usual and necessary preparations to receive and transport them."

At What Time Notice Should Be Given. — In Salmon Falls Mfg. Co. *v.* The Bark Tangier, 1 Cliff. (U. S.) 396, 21 Fed. Cas. No. 12266, Clifford, J., said: "It is a mistake, however, to suppose that such notice cannot be given until after the unlading is completed and all the acts performed which are required to discharge the carrier. On the contrary, it is more usual and equally effective to give the notice at the time the work of discharging the vessel is commenced; and when so given, it is not in general necessary that it should be repeated, providing the unlading is prosecuted without unnecessary or unusual delay. Casual interruptions in the prosecution of the work for brief periods by such impediments and obstructions as are necessarily incident to the nature of the business, as by the blocking up of a small wharf by the vessel's own cargo, are not unusual and do not create any necessity whatever for a second notice."

Newspaper Notice. — A notice published in a newspaper of the time and place when the cargo of the vessel will be unloaded is not sufficient, unless it is shown that knowledge of such notice was brought home to the owner of the cargo. Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453; Sleade *v.* Payne, 14 La. Ann. 457.

Want of Notice Is Excused when a consignee is unknown, or is absent, or cannot be found after diligent search. The Thames, 14 Wall. (U. S.) 98; The Ravensdale, 75 Fed. Rep. 413.

English Rule — Notice to Consignee Unnecessary. — It seems that in England the carrier by water need not give personal notice to the consignee, it being his duty to watch for the ship's arrival. Harman *v.* Clarke, 4 Campb. 159; Harman *v.* Mant, 4 Campb. 161; Nelson *v.* Dahl, 12 Ch. Div. 583; Houlder *v.* General Steam Nav. Co., 3 F. & F. 170.

The proper entry of the vessel's arrival should, however, be made at the custom house, and such other public notification as is usual at the port of destination should be made. Carver on Carriage by Sea, § 465. And see Harman *v.* Clarke, 4 Campb. 159.

Followed in Vermont. — And in Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt 186, the English rule seems to be followed.

relieved from the necessity of giving notice by showing that the uniform usage and course of business of carriers in the same trade at the port where the goods were left was to leave the same without notice to the consignee; and that he, the carrier, acted in accordance with such usage. The necessity for notice may also be waived by contract.[1]

(4) *Storing Goods.* — When goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive them, or is not known and cannot, after due efforts are made, be found, the carrier by water may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business at the place of delivery, for and on account of the owner. But if he leaves them exposed upon the wharf he is liable for any loss or damage happening to the goods.[2]

(5) *Usage.* — The rules of law which would otherwise exist as to the termination of the liability of a carrier may be modified to some extent by the course and usages of trade and business, but there is a difficulty in defining by a general statement how far such modification may go.[3]

1. Notice Waived. — Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618. And see Hutchinson on Carriers, § 365 *et seq.*

2. Shipowner Must Protect the Cargo. — The Eddy, 5 Wall. (U. S.) 481; Arthur *v.* The Schooner Cassius, 2 Story (U. S.) 81; Richardson *v.* Goddard, 23 How. (U. S.) 28; Irzo *v.* Perkins, 10 Fed. Rep. 779; The Ravensdale, 75 Fed. Rep. 413; Ostrander *v.* Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Scheu *v.* Benedict, 116 N. Y. 510, 15 Am. St. Rep. 426; Hemphill *v.* Chenie, 6 W. & S. (Pa.) 62.

Statement of the Rule. — "A discharge from the vessel at a proper place, seasonable hour, and upon due notice to the consignee, does not discharge the carrier from all responsibility for the safety of the goods. It may, under some circumstances, be regarded as a delivery to the consignee, and a performance of the contract of affreightment, so as to discharge the shipowner from the stringent liability of a carrier; but such cases are exceptional, and as a rule, if for any reason the consignee does not appear to claim the goods, or does not receive them, it is the duty of the carrier to provide a proper place of deposit, or in case of imported goods, subject to duty, to see that they are in proper custody. The general rule is, and to it there are no recognized exceptions, if the consignee is unable or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf, but it is his duty to take care of them for the owner." Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390, *per* Allen, J.

No Consignee Named. — A carrier is not justified in landing goods at a wharf and leaving them there without placing them in charge of any person willing to receive and be responsible for them, because there is no party named in the bill of lading there to accept them and no one to whom notice of their arrival can be sent. It seems that it is his duty to retain the goods until they are claimed, or to store them prudently for and on account of their owner. Close *v.* Beatty, 28 U. C. C. P. 470.

Illustration. — Where the consignee of certain kegs of butter sent from A. to N. by a freight barge was a clerk having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and who, after reasonable inquiries by the carrier's agent, could not be found, it was held that the carrier discharged himself from further responsibility by depositing the property with a storehouse keeper then in good credit, for the owner, and in taking his receipt for the same according to the usual course of business of that trade, though the butter was subsequently sold by the storehouse keeper and the proceeds lost to the owner by his failure. Fisk *v.* Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649.

3. Modification by Usage — *England.* — Gatliffe *v.* Bourne, 4 Bing. N. Cas. 314, 33 E. C. L. 364, 3 M. & G. 643, 42 E. C. L. 337, 7 M.& G. 850, 49 E. C. L. 850; Gaudet *v.* Brown, L. R. 5 P. C. 134; Catley *v.* Wintringham, 1 Peake N. P. 150 (ed. 1795).

United States. — Richardson *v.* Goddard, 23 How. (U. S.) 28; The Boston, 1 Lowell (U. S.) 464; The E. H. Fittler, 1 Lowell (U. S.) 114; Blossom *v.* Smith, 3 Blatchf. (U. S.) 316; Irzo *v.* Perkins, 10 Fed. Rep. 779; Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. Rep. 510.

Illinois. — Dixon *v.* Dunham, 14 Ill. 324; Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

Louisiana. — Sleade *v.* Payne, 14 La. Ann. 457, *citing* Abbot on Shipping 378.

New York. — Richmond *v.* Union Steamboat Co., 87 N. Y. 240. See also Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155.

See *supra*, this title, *Charter-Parties — Construction — Admissibility of Usage.* See also the title USAGE AND CUSTOM.

Illustrations. — In Pickering *v.* Weld, 159 Mass. 522, it was held that a general custom of the port of Boston that "after a vessel arrives at the port and goes to a wharf designated by the consignee, and due notice has been given to the consignee, and the cargo is taken off and distributed upon the wharf according to the marks and numbers, the care of the goods devolves upon the consignee," was a good custom.

What constitutes a delivery of goods by a carrier, where no consignee has been named, depends upon the usages of the trade. Landing cotton on a wharf in Charleston, it seems,

12. Who May Sue for a Breach of the Contract — *a.* IN GENERAL. — When the carrier by water has been guilty of a breach of his contract, the question often arises in whose name the action for damages should be brought. The general rule is that the action should be brought by the owner of the goods.[1]

b. THE CONSIGNEE. — Usually the action is brought by the consignee, since, if the goods have been placed at his absolute disposal, and no other fact appears, the legal presumption is that he is the true owner.[2]

c. THE CONSIGNOR. — If the consignor makes a special contract with the carrier, and the carrier agrees to take the goods from him and to deliver them to any particular person, at any particular place, the special contract supersedes the necessity of ownership, and the consignor may maintain the action though the goods may belong to the consignee.[3]

d. ENGLISH BILLS OF LADING ACT. — In England, prior to the passage of the Bills of Lading Act, the transferee of such a bill could not bring an action for a breach of the contract contained therein in his own name.[4] By

is not a delivery according to the usage; but it should be stored to the order of the owner. Galloway *v.* Hughes, 1 Bailey L. (S. Car.) 553.

1. Action Brought by the Owner. — Sargent *v.* Morris, 3 B. & Ald. 277, 5 E. C. L. 283; Blanchard *v.* Page, 8 Gray (Mass.) 281; Ogden *v.* Coddington, 2 E. D. Smith (N. Y.) 317; Everett *v.* Saltus, 15 Wend. (N. Y.) 475. See also Dawes *v.* Peck, 8 T. R. 330.

2. Action Brought by the Consignee. — Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Sargent *v.* Morris, 3 B. & Ald. 277, 5 E. C. L. 283, *citing* Evans *v.* Martlett, 1 Ld. Raym. 271; Anderson *v.* Clark, 2 Bing. 20, 9 E. C. L. 300; Lawrence *v.* Minturn, 17 How. (U. S.) 100; McKinlay *v.* Morrish, 21 How. (U. S.) 343; Jones *v.* Sims, 6 Port. (Ala.) 138; Webb *v.* Winter, 1 Cal. 417; Brower *v.* The Brig Water Witch, 19 How. Pr. (U. S. Cir. Ct.) 241, *affirmed* in 1 Black (U. S.) 494; Everett *v.* Saltus, 15 Wend. (N. Y.) 475; Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429, 9 Am. Dec. 444.

Consignee Paying the Freight. — If goods be shipped for the account and risk of the consignee, he paying the freight, and it is so expressed in the invoice and bill of lading, the delivery to the carrier is considered as a delivery to the consignee, who alone can bring an action against the carrier, in case they are not delivered. The property, by the bill of lading, is vested in the consignee. Potter *v.* Lansing, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310.

Foreign Consignee. — Goods consigned to a merchant in a foreign country are stated in the bill of lading to be shipped by order and on account of the consignee. The consignor cannot maintain any action against the shipowner in respect of the goods, as the property must be taken to have vested in the consignee from the time they were put on board the ship. Brown *v.* Hodgson, 2 Campb. 36.

3. Action by the Consignor. — Dunlop *v.* Lambert, 6 Cl. & F. 600; Joseph *v.* Knox, 3 Campb. 320. See also Davis *v.* James, 5 Burr. 2680; Ahiu *v.* Lambert, 3 Hawaiian, 481.

Consignor Acting as Agent. — In Blanchard *v.* Page, 8 Gray (Mass.) 281, *citing* and *approving* Joseph *v.* Knox, 3 Campb. 320; Sargent *v.* Morris, 3 B. & Ald. 277, 5 E. C. L. 283, and Dunlop *v.* Lambert, 6 Cl. & F. 600, it was held that the shipper named in a bill of lading may sue the carrier for an injury to the goods although he has no property, general or special, therein. Shaw, C. J., delivering the opinion of the court, said: "There is no doubt that the party who was owner at the time, or becomes owner of the goods afterwards, by assignment of the shipper or otherwise, and who was consignee, indorsee of the bill of lading, or lawful holder of a bill of lading in blank, and who really sustains the damage, may maintain an action against the shipowner, not because he has any contract with him for the carriage, but because the shipowner has the goods lawfully in his possession; it has become his duty to carry them safely, and deliver them to the consignee, subject only to a lien for his freight; and if the consignee is ready to discharge that lien by a payment or tender of that freight, the refusal of the carrier to deliver the goods to such consignee is a breach of duty, and a wrong done him, for which an action, either in tort for the conversion or in assumpsit upon the implied promise to perform such duty, may be maintained. So in all cases where it is shown that the consignor was the agent of the consignee, and shipped the goods for his account, or by his order. But it does not follow, because a third party, not appearing on the bill of lading, either as the principal for whom the shipper acted as agent or as the owner of goods damaged by the breach of du y of the carrier, can maintain an action, that the shipper cannot maintain an action on his original contract."

In Sargent *v.* Morris, 3 B. & Ald. 277, 5 E. C. L. 283, Bayley, J., said: "Now I take the rule to be this: If an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action either in the name of the party by whom the contract was made or of the party for whom the contract was made." To the same effect is Van Casteel *v.* Booker, 2 Exch. 691.

4. Thompson *v.* Dominy, 14 M. & W. 403, 15 L. J. Exch. 320. See also Sanders *v.* Vanzeller,

this statute, the consignee of goods named in a bill of lading, and the indorsee of a bill of lading to whom the property in the goods mentioned has passed by such indorsement, has transferred to him and vested in him all rights of suit.[1]

VII. Limitation of Liability — 1. By Implication of Law. — The exceptions as to liability which exist by implication of law in favor of the shipowner, and the difference in his liability when the vessel is set up as a general ship and when she is chartered, have already been considered.[2]

2. By Contract — *a.* In General. — In nearly every contract of affreightment are to be found provisions exempting the shipowner from liability in case the loss or damage to the cargo or delay in delivering the same arises from certain enumerated causes, and in a large majority of the cases in which a recovery is sought, the shipowner attempts to escape liability by bringing the cause of such loss, damage, or delay within such exception. These stipulations will, therefore, be considered in detail.

b. Usual Exceptions — (1) *Perils of the Seas.* — The most usual exception is from a breach of the contract of affreightment occasioned by perils or dangers of the seas.

Longer Form of the Exception. — Instead of the short clause "perils of the seas," this exception generally reads, "dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind." This form is said to have come into use because of a decision of the English courts which was thought too greatly to restrict the meaning of "perils of the seas." [3] It is difficult to state with accuracy what the effect of this change upon the liability of the shipowner is, and as it is the usual form now employed, the distinction between the two forms is not important. It has been held, however, that the terms "perils of the seas" and "dangers of navigation" are not identical in meaning.[4]

(a) **Meaning of Phrase.** — By perils or dangers of the seas are meant those accidents peculiar to navigation that are of an extraordinary nature or arise from

4 Q. B. 260, 45 E. C. L. 260; Tindal *v.* Taylor, 4 El. & Bl. 219, 82 E. C. L. 219; Sewell *v.* Burdick, L. R. 10 App. 74.

1. The Ship Freedom *v.* Simmonds, L. R. 3 P. C. 594. See also The Rona, 51 L. T. 28; The Wilhelm Schmidt, 25 L. T. 34; Sewell *v.* Burdick, L. R. 10 App. 74; Short *v.* Simpson, L. R. 1 C. P. 248.

2. See *supra*, this title, *Rights and Liabilities Under the Charter-party*, and *Rights and Liabilities Common to All Contracts of Affreightment.*

3. **Reason for the Long Form.** — In Abbott on Shipping (5th ed.) 322, it is said that this change was made to meet the effect of Smith *v.* Shepard, Abbott on Shipping (5th ed.) 215. See also Carver on Carriage by Sea 93; 1 Parsons on Shipping & Adm. 253.

4. **Perils of the Sea and Dangers of Navigation Distinguished.** — In The Sailing Ship "Garston" Co. *v.* Hickie, 18 Q. B. Div. 17, 56 L. J. Q. B. 38, Lord Esher, M. R., said: "The charter-party here in question, like many others, contains, in addition to the exception of perils of the sea, the expression 'all dangers or accidents of navigation.' What is the true construction of that expression? Must it be construed as identical with 'perils of the sea,' or must some further effect be given to those additional words? If so, the decision that such a collision is not a peril of the sea does not necessarily conclude this case. The question which the court has to determine, having regard to its knowledge of what happens at sea, is whether a loss of which the moving and direct cause is a collision caused by the negligence of another ship is not caused by a 'danger or accident of navigation' within the meaning of those words in the charter, notwithstanding that such collision has been held not to be a peril of the sea. A peril of the sea is a peril caused by some action of the elements, but what is a peril of navigation? Navigation is the act of navigating ships. I will not say that a danger or accident caused by the mode in which the carrying ship is navigated would be a danger or accident of navigation. But, putting aside the case where the loss was so occasioned, one class of dangers which would most readily occur to the minds of persons accustomed to the sea would be the dangers caused by the negligent navigation of other ships. There are other dangers, but this is perhaps the principal and most obvious kind of danger which may happen at sea other than those included in the expression 'perils of the sea.' The navigation rules are principally intended to deal with such dangers. Is such a danger, then, within the words 'dangers of navigation'? I should say that it most certainly is. Though not a peril of the sea, it is, in my opinion, clearly a danger of navigation. If the loss were occasioned by the negligent navigation of the ship carrying the cargo, I do not think that would be a danger of navigation within the words; that would be a loss brought about by the act or default of the shipowner's servants for which he would be liable. It would be a danger, not of navigation, but caused by his employing inefficient servants."

irresistible force or overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence.[1]

(b) **Illustrations — Shipping Water During Storm.** — Damage to cargo by sea water shipped during a severe storm is attributable to perils of the seas.[2]

1. Perils of the Seas - Defined and Construed. — Tuckerman *v.* Stephens, etc., Transp. Co., 32 N. J. L. 320.

"The words 'perils of the seas' embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, etc., and every species of damage done to the ship or goods at sea by the violent and immediate action of the winds and waves, not comprehended in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate cause." Leggett on Charter Parties 625, *citing* 2 Arnould on Marine Insur. (6th ed.) 744.

Story's Definition.—In The Schooner Reeside, 2 Sumn. (U. S.) 567, Story, J., said: "The phrase 'danger of the seas,' whether understood in its most limited sense as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

Kent's Definition. — "All those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee nor his strength resist." 3 Kent Com. (13th ed.) 300.

Occurrences by Human Agency. — In Gage *v.* Tirrell, 9 Allen (Mass.) 299, the court said: "Perils of the seas embrace not only inevitable accidents arising from tempests, floods, earthquakes, and other dangers happening without the intervention of man, but also those caused by collisions, fires, pirates, and other occurrences to the happening of which human agency directly contributes."

Confiscation Is Not a Sea Peril. — A cargo of goods shipped under a bill of lading containing exceptions for losses occasioned by "the act of God, * * * all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever," was taken from the vessel by the customs officers at an intermediate port and confiscated. It was held that the loss was not within any of the exceptions in the bill of lading, but was occasioned by inevitable necessity, against which the shipowner ought to have provided by his contract. Spence *v.* Chodwick, 10 Q. B. 517, 59 E. C. L. 517.

Loss from Wear and Tear Is Not a Sea Peril. — "No loss which is the result of ordinary wear and tear, or a necessary consequence of the employment of the vessel in the usual course of navigation, is a loss by 'perils of the seas.' That term may be defined as denoting 'all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence, upon the fabric of the vessel; casualties which may, and not consequences which must, occur." The Warren Adams, 74 Fed. Rep. 413.

Dangers of Rivers and River Navigation. — The exception as to dangers of rivers and river navigation found in contracts for the carriage of goods upon inland waters has, it seems, the same significance as the exceptions "perils of the seas" and "dangers of navigation" found in the contracts of carriers by sea, except in a few instances when the reason differs. Leggett on Charter Parties 635; The Walthan, 13 Opp. Atty.-Gen. 119; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Gilmore *v.* Carman, 1 Smed. & M. (Miss.) 279; Williams *v.* Branson, 1 Murph. (5 N. Car.) 417, 4 Am. Dec. 562; Gordon *v.* Little, 8 S. & R. (Pa.) 533, 11 Am. Dec. 632. See also Dunseth *v.* Wade, 3 Ill. 286; Chouteaux *v.* Leech, 18 Pa. St. 224.

Unknown Obstructions. — When the contract contains this exception, the carrier is not liable for the loss caused by running upon a hidden obstruction newly placed in the river and unknown to the carrier. Johnson *v.* Friar, 4 Yerg. (Tenn.) 48, 26 Am. Dec. 215; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561; Faulkner *v.* Wright, 1 Rice L. (S. Car.) 107.

Known Obstructions. — It has been held that there is no liability for loss caused by running upon a known obstruction, if there is no other way but to pass over it, and if the course usually pursued by skilful pilots is the one followed. Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81. See also Ready *v.* Steamboat Highland Mary, 17 Mo. 461; but see Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

Other cases wherein the term "perils of the sea" is construed are: Fletcher *v.* Inglis, 2 B. & Ald. 315; Gabay *v.* Lloyd, 3 B. & C. 793, 10 E. C. L. 229; Lawrence *v.* Aberdeen, 5 B. & Ald. 107, 7 E. C. L. 38; Gillespy *v.* Thompson, 6 El. & Bl. 477, note, 88 E. C. L. 477; Dixon *v.* Sadler, 9 L. J. Exch. 48; The Neptune, 16 L. T. N. S. 36; The Milwaukee Belle, 21 L. T. 800; Philpott *v.* Swann, 11 C. B. N. S. 270, 103 E. C. L. 270; Davidson *v.* Burnand, L. R. 4 C. P. 117; Hunter *v.* Potts, 4 Campb. 203; Rohl *v.* Parr, 1 Esp. N. P. 445; Green *v.* Elmslie, Peake N. P. 212 (ed. 1795); Livie *v.* Janson, 12 East 648; Cannon *v.* Meaburn, 1 Bing. 243, 8 E. C. L. 491; Thompson *v.* Whitmore, 3 Taunt. 227; The Thrunscoe, 77 L. T. 407 (Dec. 4, 1897); Kelly *v.* Mississippi, etc., Steamship Co., 39 L. Can. Jur. 42; Clark *v.* Barnwell, 12 How. (U. S.) 272; Boyle *v.* M'Laughlin, 4 Har. & J. (Md.) 291; Brewer *v.* The Bark Alster, 6 Hawaiian 251.

2. Damage by Sea Water. — Montoya *v.* London Assur. Co., 6 Exch. 451, 20 L. J. Exch. 254; The Chasca, 23 Fed. Rep. 156; Fowler *v.* The Bertram L. Townsend, 35 Fed. Rep. 797; Evans *v.* Spreckels, 45 Fed. Rep. 265.

Straining of Vessel in Bad Weather. — Damage to a cargo caused by the straining of the vessel in bad weather is within this exception, if the cargo is properly stowed.[1]

Breaking Adrift of Properly Stowed Cargo. — So also is damage to a cargo of skins caused by the breaking adrift of a cask of oil which has been properly stowed in the between-decks during a storm of extreme violence.[2]

The Stranding of a Vessel, resulting from the fact that her anchors, which were sufficient in number and of a proper kind, did not hold, is a sea peril.[3]

Bad Stowage is not a peril of the sea.[4]

Injury to a Cargo in Consequence of the Crew Boring Holes through the sides of the ship, for the purpose of scuttling her, is not a loss from a sea peril.[5]

The Nondelivery of Goods Occasioned by a Suit instituted in the admiralty court on a bottomry bond is not an exception within the meaning of the phrase "perils of the seas."[6]

Pirates. — A breach of the contract of carriage caused by the acts of pirates falls within the exception of "perils of the seas."[7]

Loss by Fire is not a peril of the sea.[8]

Collisions. — An unavoidable collision is a sea peril.[9] And so is a collision which happens without the fault of the carrying ship.[10] But when the collision

1. The Catherine Chalmers, 32 L. T. 847; May *v.* Schooner Sovereign, 6 Hawaiian 42.

2. The Zealandia, 48 Fed. Rep. 697.

3. The Etona, 64 Fed. Rep. 880. See also Hahn *v.* Corbitt, 2 Bing. 205, 9 E. C. L. 383.

4. **Bad Stowage.** — The Bark Antoinetta C., 5 Ben. (U. S.) 564. See also Clark *v.* Barnwell, 12 How. (U. S.) 272. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Stowage.*

Filberts Injured by Coal Dust. — A cargo of filberts was injured by coal dust which penetrated the movable bulkhead against which the filberts were stowed. It was held that the shipowners were liable for the damage. The court said: "Damage from coal dust is not, at least directly, a damage from sea perils. If a ship is seaworthy at the start, and performs her whole duty in properly stowing and protecting the goods against the dangers likely to be incurred on the voyage, subsequent damage arising from unusual rolling or pitching in extraordinary weather is, doubtless, damage arising from a peril of the sea. So, where a fixed custom permits the stowage of different kinds of goods together, damage that arises from their injuring each other during extraordinary weather is held one of the perils of navigation assumed by the shipper, and within the ordinary exception of the bill of lading, if they are well stowed; otherwise not." Hills *v.* Mackill, 36 Fed. Rep. 702. To the same effect, The Florida, 69 Fed. Rep. 159.

Animals and Vegetables Stowed Together. — In The Ship Freedom *v.* Simmonds, L. R. 3 P. C. 594, it was held that as the proximate cause of the damage arose from the nature and collocation of the cargo, consisting of animals, vegetables, and, to some extent, putrescible matter, and the want of due ventilation, it was not brought within the legal exception of dangers of the seas.

Petroleum Damage. — Damage to a cargo of almonds caused by stowing them in a hold in which petroleum had been carried on a former voyage, and which had not since been properly cleansed, is not within the exception of perils of the seas. The Lizzie W. Virden, 19 Blatchf. (U. S.) 340.

5. The Chasca, L. R. 4 Adm. & Eccl. 446.

6. Benson *v.* Duncan, 3 Exch. 644.

7. **Pirates.** — Pickering *v.* Barclay, Styles 132; Barton *v.* Wolliford, Comb. 56. See also Russell *v.* Niemann, 17 C. B. N. S. 163, 112 E. C. L. 163; King *v.* Shepherd, 3 Story (U. S.) 349; Gage *v.* Tirrell, 9 Allen (Mass.) 310. And see the title PIRACY.

8. **Loss by Fire.** — Hong Kong, etc., Banking Co. *v.* Baker, 7 Bom. H. C. R. 186; Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145; Gilmore *v.* Carman, 1 Smed. & M. (Miss.) 279. See also Forward *v.* Pittard, 1 T. R. 27; Bourne *v.* Gatliffe, 7 M. & G. 850, 49 E. C. L. 850; Ching Hong *v.* Sing Moh, 1 L. R. 4 Cal. 736; Airey *v.* Merrill, 2 Curt. (U. S.) 8. But see Hunt *v.* Morris, 6 Martin (La.) 676, 12 Am. Dec. 489; and dicta in Hunters *v.* Morning Star, Newfoundland Rep. 270; Plaisted *v.* Boston, etc., Steam Nav. Co., 27 Me. 133, 46 Am. Dec. 587; Gage *v.* Tirrell, 9 Allen (Mass.) 299.

9. **Unavoidable Collision.** — Buller *v.* Fisher, 3 Esp. N. P. 67; Plaisted *v.* Boston, etc., Steam Nav. Co., 27 Me. 133, 46 Am. Dec. 587; Marsh *v.* Blythe, 1 Nott & M. (S. Car.) 170, 1 McCord L. (S. Car.) 360.

10. **Carrying Vessel Not Negligent.** — Smith *v.* Scott, 4 Taunt. 126; The Kathleen, L. R. 4 Adm. & Eccl. 269; Wilson *v.* The Xantho, L. R. 12 App. 503, *reversing* 11 Prob. Div. 170, and *overruling* Woodley *v.* Michell, 11 Q. B. Div. 47, in which it was held that if the collision happened by the negligence of either vessel the loss was not within the exception as to perils of the sea. See also Steamboat New Jersey, Olc. Adm. 448; Hays *v.* Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627. *Compare* The Sailing Ship "Garston" Co. *v.* Hickie, 18 Q. B. Div. 17, *approving* Woodley *v.* Michell, 11 Q. B. Div. 47; Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., 10 Q.

happens through the negligence of those navigating the carrying ship, the loss does not fall within this exception.[1]

Damage by Rats or Vermin is not a peril of the sea, and the owner of the cargo may recover therefor,[2] unless there is an exception of damage from such causes; and it seems that even then a recovery may be had unless proper precautions have been taken to exterminate the rats or vermin.[3]

(c) **As an Implied Exception.** — There are cases in which the terms "perils of the sea" and "act of God" seem to be regarded as synonymous, and these cases hold that a carrier by water is, without any express stipulation to that effect, relieved by implication of law from loss or damage occasioned by "perils of the sea."[4] But these cases are not in accord with the generally accepted doctrine upon the subject.[5]

(2) *Seaworthiness and Fitness.* — The liability of the shipowner as to seaworthiness and fitness may be limited by an express stipulation to that effect,[6] except when this is forbidden by statute.[7]

Effect of Other Exceptions. — Generally, the exceptions in a contract of affreightment apply only to matters arising upon the voyage, and do not override the express or implied warranty of seaworthiness and fitness.[8]

B. Div. 530; Marsh *v.* Blythe, 1 McCord L. (S. Car.) 360.

1. Carrying Vessel Negligent. — Lloyd *v.* General Iron Screw Collier Co., 3 H. & C. 284; Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600. See also Wilson *v.* The Xantho, L. R. 12 App. 503, *reversing* 11 Prob. Div. 170.

2. Vermin. — Laveroni *v.* Drury, 16 Eng. L. & Eq. 510; Kay *v.* Wheeler, L. R. 2 C. P. 302; Dale *v.* Hall, 1 Wils. 281; Hamilton *v.* Pandorf, L. R. 12 App. 518; The Bark Carlotta, 9 Ben. (U. S.) 1; The Miletus, 5 Blatchf. (U. S.) 335; The Italia, 59 Fed. Rep. 617. See also Garrigues *v.* Coxe, 1 Binn. (Pa.) 592.

Damage Indirectly Caused by Rats. — A cargo of sugar was damaged by water escaping from a lead pipe in which a hole had been gnawed by rats. It was held that this was not a sea peril within the exception of the bill of lading. The court said: "The evidence is quite convincing that this hole was gnawed by rats, but damage to cargo directly caused by rats is not a sea peril; it is usually provided for by the 'vermin' clause in bills of lading. And we see no good reason to lay down a different rule where the action of the rats has so disarranged the interior appliances of the ship that water intentionally taken aboard does not find the outlet provided for it, but is diverted into the cargo. When a case arises where a hole, through which the sea forces its way into the ship from without, is made by vermin from within, it will be time enough to discuss the case." The Euripides, 71 Fed. Rep. 728, 52 Fed. Rep. 161.

3. Cats Provided to Kill the Rats. — The bill of lading contained an exception of damage from vermin. On the voyage the cargo, which consisted of bags of beans, was badly damaged by being gnawed by rats. It was shown that the vessel had five cats on board, which had abundant access to the cargo, and the sum of the testimony was that the cats proved to be active and vigilant. It was held that the shipowners were not liable for the damage to the bags of beans. The Timor, 67 Fed. Rep. 356, *reversing* 46 Fed. Rep. 859, 61 Fed. Rep. 633.

4. The Casco, 5 Fed. Cas. No. 2486; The Star of Hope, 22 Fed. Cas. No. 13,312; The Paragon, 1 Ware (U. S.) 322; Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235; Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745. See also The Steamboat New Jersey, Olc. Adm. 444.

5. See the title ACT OF GOD, vol. 1, pp. 586, 588. And see *infra*, this section, *By Contract.*

"Perils of Sea" and "Act of God" Not Synonymous. — The expression "perils of the sea" is not synonymous in legal signification with the terms "act of God" or "the public enemy." An act of God may include a peril of the sea, but there may be perils of the sea not embraced within the term "act of God." Clyde Steamship Co. *v.* Burrows, 36 Fla. 121; Plaisted *v.* Boston, etc., Steam Nav. Co., 27 Me. 132, 46 Am. Dec. 587.

6. The Cargo ex Laertes, 12 Prob. Div. 187.

Exception as to Latent Defects. — In a bill of lading there was a clause excepting the ship from liability for injuries arising from "latent defects in hull, tackle, boilers, and machinery." It was held that this exception limited the warranty which the law would otherwise have implied that the ship was seaworthy at the beginning of the voyage, and exempted the ship if due diligence was exercised by the owner, and that, therefore, no liability was incurred for damage to the cargo resulting from a latent defect in a rivet in the water tank of the vessel. The Carib Prince, 68 Fed. Rep. 254, *affirming* 63 Fed. Rep. 266.

7. See *infra*, this section, *By Statute — The Harter Act.*

8. Warranty of Seaworthiness Not Affected by Other Exceptions. — The Cargo ex Laertes, 12 Prob. Div. 187; Kopitoff *v.* Wilson, 1 Q. B. Div. 380; Seville Sulphur Co. *v.* Colvils, 25 Sc. L. R. 437; Tattersall *v.* National Steamship Co., 12 Q. B. Div. 297; Gilroy *v.* Price, (1893) App. 56; Steel *v.* State Line Steamship Co., L. R. 3 App. 72; The Marathon, 4 Asp. M. & C. 75; Trainor *v.* Black Diamond Steamship Co., 16 Can. Sup. Ct. Rep. 156; The Edwin I. Morrison, 153 U. S. 199; The Hadji, 16 Fed. Rep. 861; The Eugene Vesta, 28 Fed. Rep. 762;

(3) *Fire.* — Contracts of affreightment sometimes contain a clause exempting the shipowner from liability for loss or damage occasioned by fire.[1]

(4) *Accidents to Machinery.* — A provision against liability for loss or damage caused by accidents to the machinery of the ship is sometimes inserted.[2]

(5) *Rust, Leakage, or Breakage.* — Liability for rust, leakage, or breakage is sometimes stipulated against.[3]

(6) *Deterioration of Cargo.* — The carrier may, by contract, relieve himself

The Brantford City, 29 Fed. Rep. 381; The Rover, 33 Fed. Rep. 515; Gleadell *v.* Thomson, 56 N. Y. 194.

Exception as to Negligence of Servants. — A shipowner is not relieved from his duty to furnish a seaworthy vessel by special clauses in a bill of lading exonerating the shipowner from liability, even for perils induced by the negligence of his servants. Steel *v.* State Line Steamship Co., L. R. 3 App. 72; Dobell *v.* Steamship Rossmore Co., (1895) 2 Q. B. 408.

Defective Refrigerating Machinery. — A cargo of frozen meat was shipped on board a steamship which was fitted with refrigerating machinery. The bill of lading for the cargo contained the following clause: "Steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances." On the voyage the machinery broke down, and the shippers brought an action for damages. It was held that the bill of lading contained an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat in good condition to its destination, and that the exceptions in the bill of lading applied only to what might happen during the voyage, and not to the original fitness of the machinery. Ship Maori King *v.* Hughes, (1895) 2 Q. B. 550.

Liability of the Owner, Not His Duty, Limited. — In The Caledonia, 157 U. S. 124, it was claimed that the vessel was exempted from the losses caused by her unseaworthiness from a defective shaft at the commencement of the voyage by the exception of "loss or damage from delays, * * * steam boilers and machinery, or defects therein," but the court held that such exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel. To the same effect is Steinman *v.* Angier Line, (1891) 1 Q. B. 624.

1. Exception as to Loss by Fire. — See 1 Pars. on Shipping and Admiralty, 256; Forward *v.* Pittard, 1 T. R. 27; Trent Nav. Co. *v.* Wood, 4 Doug. 287, 26 E. C. L. 358; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344.

Exception as to Fire Valid. — In Gould *v.* Hill, 2 Hill (N. Y.) 623, it was held that an exception against loss by fire was void, as against public policy. But this decision is not in accord with the current of authority, and was expressly *overruled* in Parsons *v.* Monteath, 13 Barb. (N. Y.) 353. See also Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith (N. Y.) 115.

2. Accidents to Machinery. — The Miranda, L. R. 3 Adm. & Eccl. 561; The Galley of Lorne, Mit. Mar. Reg. Feb. 11, 1876; Cox *v.* Star Nav. Co., Mit. Mar. Reg. 2d June, 1876; Pyman *v.* Von Singen, 3 Fed. Rep. 802; The Curlew, 55 Fed. Rep. 1003, *affirming* 51 Fed. Rep. 246.

3. Rust, Leakage, etc. — Phillips *v.* Clark, 2 C. B. N. S. 156, 89 E. C. L. 156, 26 L. J. C. P. 168; Thrift *v.* Youle, 2 C. P. Div. 432, 3 Jur. N. S. 467, 5 Jur. N. S. 1081; Robertson *v.* Dominion Steamship Co., 13 Nova Scotia 149; The Ship Delhi, 4 Ben. (U. S.) 345; The Steamship Pereire, 8 Ben. (U. S.) 301; Macfarlane *v.* The Bark Cerastes, 7 Hawaiian 152. See also New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344.

No Protection as to Other Goods. — The clause in a bill of lading by which the shipowner is "not accountable for rust, leakage, or breakage" is limited to the rust, leakage, or breakage of the goods themselves, and does not protect the shipowner from liability for damage done to other goods in consequence of such rust, leakage, or breakage. Thrift *v.* Youle, 2 C. P. Div. 432, 46 L. J. C. P. 402, 36 L. T. 114.

Includes Extraordinary as Well as Ordinary Leakage. — A bill of lading containing the following memorandum, "Weights, measurement, and contents unknown, and not accountable for leakage," protects the shipowner as to all leakage, whether ordinary or extraordinary, except that caused by negligence. Ohrloff *v.* Briscall, 4 Moo. P. C. N. S. 70; *sub nom.* The Helene, Brown & L. Adm. 429.

"Rust" Includes Oxidation of All Metals. — In Wolff *v.* The Vaderland, 18 Fed. Rep. 733, Brown, J., said: "I do not see, therefore, why the word 'rust' should be confined to the oxidation of an iron surface and excluded from the oxidation of a zinc surface, except on proof of such a restricted use of the word. The process of oxidation, or rusting, is the same in both; the injury by corrosion the same; the exciting causes are the same; and there is no reason in the circumstances, or in the liability to such damage on board ship, for supposing that the carriers designed to exempt themselves from injury through iron rust, and not through zinc rust. The oxidation of iron produces one kind of rust, the oxidation of zinc another kind. Both are equally and truly rust. The term 'rust,' though most commonly applied to the red or yellowish rust of iron — because iron is in much more familiar use than other metals — includes, as a part of its definition, the oxidation of any other metals, as well as of iron. (Worcest., Johns., Latham, Webst. Dict.) The general term 'rust' in these bills of lading must be held, therefore, to have been used in its general sense, as there is no evidence of any restriction of its meaning in commercial usage, and hence be held to include the oxidation of this wire, which forms the white damage referred to."

from liability in case of the deterioration or decay of articles stipulated in the cargo.[1]

(7) *Ship Damage.* — In a charter-party it was stipulated that the shipowner was not to be liable for any damage done the ship, except such as appeared to be ship damage. It was held that damage to the cargo by a storm was not ship damage within the meaning of that stipulation, which included only such damage as happened by the insufficiency of the ship, or the negligence of those who had the charge of her.[2]

(8) *Restraints of Princes, Rulers, and Peoples.* — This clause excepts the shipowner from liability for any breach of his contract caused by the forcible interference of the ruling power of any country, whether directed against the country to which the shipowner belongs or not. Thus orders restraining exportations, embargoes, blockades, and confiscation of goods as contraband are within this exception.[3]

Delays and Deviations made to avoid the seizure of the cargo are excused by this clause.[4] But it has been said that the restraint meant by this exception must be an actual and operative restraint, and not merely an expected and contingent one.[5]

The Proceedings of Courts of Law do not fall within this exception.[6]

1. The Hindoustan, 67 Fed. Rep. 794.

2. East India Co. *v.* Todd, 1 Bro. P. C. 405.

3. **Princes, etc.** — Carver on Carriage by Sea, § 82; Leggett on Charter Parties, 569; Finlay *v.* Liverpool, etc., Steamship Co., 23 L. T. 251; Smith *v.* Rosario Nitrate Co., (1894) 1 Q. B. 174, *affirming* (1893) 2 Q. B. 323; Nobel's Explosives Co. *v.* Jenkins, (1896) 2 Q. B. 326. See also Nesbitt *v.* Lushington, 4 T. R. 783; Aubert *v.* Gray 3 B. & S. 163, 113 E. C. L. 163, 9 Jur. N. S. 714, 32 L. J. Q. B. 50. And see *infra*, this title, *Dissolution and Excuses for Nonperformance — Effect of War; Effect of Blockade; Effect of Embargo;* and the title MARINE INSURANCE.

Blockade. — The owners of a vessel agreed to load a cargo of coal, and having loaded, to proceed as soon as wind and weather would permit to Hamburg, and there deliver the coal, the restraint of princes and rulers excepted. Before anything had been done in furtherance of the contract, war broke out between France and Germany, and the French government proceeded to blockade the port of Hamburg. It was held that such blockade was within the clause as to restraint of princes, and was a sufficient reason for the owner's refusal to carry out the contract. Geipel *v.* Smith, L. R. 7 Q. B. 404.

4. **Precautions to Prevent Seizure.** — Carver on Carriage by Sea, § 82. *Citing* Duncan *v.* Köster, L. R. 4 P. C. 171; Anderson *v.* The San Roman, L. R. 5 P. C. 301. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Delay; Deviation.*

Cargo Landed at a Port Not Specified. — The plaintiffs shipped goods which were contraband of war, on the defendant's ship, for carriage from London to Yokohama, under a bill of lading containing the exception of "restraint of princes," and also a special clause that "if the entering of or discharging in the port [of discharge] shall be considered by the master unsafe by reason of war * * * the master may land the goods at the nearest safe and convenient port." The ship also carried goods belonging to other shippers. In the course of her voyage the ship arrived at Hong Kong, and on the day of her arrival there war was declared between China and Japan. There were at that time several Chinese war-vessels in and around the port of Hong Kong, and if the master had attempted to sail thence with the plaintiff's goods on board, there would have been a serious danger of their being seized and confiscated. The master accordingly landed them there. In an action for breach of contract to carry the goods to Yokohama, it was held (1) that the risk of the goods being seized, if attempted to be carried further, amounted to a "restraint of princes" within the exception; (2) that such risk of seizure, on the voyage between Hong Kong and Yokohama, rendered the "entering of or discharging in the port" of Yokohama unsafe within the meaning of the special clause; and (3) that the master's duty to take care of the cargo justified him, apart from any exceptions in the bill of lading, in landing the plaintiffs' goods where he did. Nobel's Explosives Co. *v.* Jenkins, (1896) 2 Q. B. 326. *Compare* The Patria, L. R. 3 Adm. & Eccl. 436, in which case the bill of lading contained no exception as to restraint of princes.

"Detention at Quarantine" is included in the scope of that clause in a charter-party which has reference to the "restraint of princes, rulers, and people." The Bohemia, 38 Fed. Rep. 756; The Progreso, 50 Fed. Rep. 835.

5. Lord Ellenborough, C. J., in Atkinson *v.* Ritchie, 10 East 530.

6. **Legal Proceedings.** — The acts or restraints of princes and rulers provided against in a bill of lading refer to the forcible interference of a state, or the government of a country taking possession of the goods *manu forti*, and do not extend to legal proceedings in foreign courts, nor, in an action founded on contract, can the act of any court of law or judicial tribunal, deciding that the shipowners should hold possession of the goods to the order of the true owner, relieve them from performing their contract, such act or decision not having been expressly excepted against in the bill of

(9) *Negligence* — (a) **United States.** — Stipulations exempting the carrier by water from liability for losses caused by the negligence of himself or his servants have been declared void by the federal courts, and by the courts of most of the states.[1]

(b) **England.** — But in England it seems to be well settled that shipowners may exempt themselves from damages caused even by their own negligence, provided this intention be unequivocally expressed. Such clauses, being inserted for the benefit of the shipowner, are to be construed most favorably to the shipper and most strongly against the shipowner, and will not be held to embrace the latter's own negligence, unless that be specially excepted in connection with the actual cause of the loss.[2]

ading. Finlay *v.* Liverpool, etc., Steamship Co., 23 L. T. 251. See also Crew *v.* Great Western Steamship Co., 4 Times L. R. 148.

1. Limiting Liability for Negligence. — Nelson *v.* National Steamship Co., 7 Ben. (U. S.) 340; Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104; The Trinacria, 42 Fed. Rep. 863; The Guildhall, 58 Fed. Rep. 796; Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am Dec. 398; Camp *v.* Hartford, etc., Steamboat Co., 43 Conn. 333; Simon *v.* Steamship Fung Shuey, 21 La. Ann. 363; Seller *v.* Steamship Pacific, 1 Oregon 409. See also the title CARRIERS OF GOODS, vol. 5, p. 307; and *infra*, this section, *By Statute — The Harter Act.*

Are Against Public Policy. — "Since the decision of the Supreme Court in Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, the law of this country upon this subject, as administered in the federal courts, is settled. It was there decided that a contract made in this country for the carriage of goods in a foreign ship to a foreign port, under circumstances similar to those in this case, is to be construed in the courts of the United States by the law of this country; and by that law an express stipulation by a common carrier for hire, whether foreign or domestic, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable, and contrary to public policy, and cannot be enforced against the shipper. So far, then, as the exemption clauses in the contract in this case were intended to exempt the ship and owners from liability for the negligence of her officers, they must be held void, and the ship liable for the losses incurred." The Iowa, 50 Fed. Rep. 561.

New York Doctrine. — But in New York the doctrine of the federal court and of most of the state courts does not obtain. The rule in this state upon the subject has been stated as follows: "The rule is firmly established in this state that a common carrier may contract for immunity from its negligence or that of its agents, but that to accomplish that object the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation except where the carrier's immunity from the consequence of negligence is read in the agreement *ipsissimis verbis*." Rubens *v.* Ludgate Hill Steamship Co., (Supreme Ct.) 20 N. Y. Supp. 481, *quoting and following* Kenney *v.* New York Cent., etc., R. Co., 125 N. Y. 422. See the title CARRIERS OF GOODS, vol. 5, p. 313.

Hawaii. — The doctrine of the United States courts seems to obtain in Hawaii. Ephraim *v.* Bark Forest Queen, 7 Hawaiian 170.

2. Exceptions as to Negligence Valid in England. — The Duero, L. R. 2 Adm. & Eccl. 393; Hayn *v.* Culliford, 3 C. P. Div. 410, 4 C. P. Div. 182; Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., 9 Q. B. Div. 118; Taubman *v.* Pacific S. Nav. Co., 26 L. T. 704; Taylor *v.* Liverpool, etc., Steam Co., L. R. 9 Q. B. 549; Steel *v.* State Line Steamship Co., L. R. 3 App. 88; Gilroy *v.* Price, (1893) App. 56; Norman *v.* Binnington, 25 Q. B. Div. 475; The Ferro, (1893) Prob. 38; *In re* Missouri Steamship Co., 42 Ch. Div. 321. See also Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397; The Titania, 19 Fed. Rep. 101; The Trinacria, 42 Fed. Rep. 863; The Marlborough, 47 Fed. Rep. 667; Brauer *v.* Campania Navigacion La Flecha, 66 Fed. Rep. 776.

Canada. — The English rule upon this question obtains in Canada. See Trainor *v.* Black Diamond Steamship Co., 16 Can. Sup. Ct. Rep. 156.

Negligent Failure to Stop a Leak. — A cargo of wheat was shipped by the charterers on board a vessel under a charter-party and bill of lading, both of which excepted "perils of the sea * * * and other accidents of navigation, * * * even when occasioned by the negligence" of the master. During the voyage, in consequence of heavy weather the vessel sprung a leak. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was damaged by sea water. It was held that the shipowner was not liable, either for the original source of damage to the cargo or for the damage arising from the continuance of the leakage not being prevented, because the inflow of water being a peril of the sea and an accident of navigation, the negligence of the master in respect of it was covered by the exception in the bill of lading. The Cressington, (1891) Prob. 152

Valve Negligently Left Open. — By charter-party and bill of lading the defendants were exempted from liability for damage to the plaintiff's cargo arising from "perils, dangers, and accidents of the sea or other waters, of what nature and kind soever; * * * strandings, * * * and all other accidents of navigation, and all losses and damages

(10) *Amount of Damages.* — A stipulation in a contract of affreightment limiting the liability of a shipowner to the invoice value of the cargo has been held valid.[1]

(11) *Other Exceptions.* — It would be useless as well as impossible to attempt to enumerate all the exceptions to be found in these contracts, as the parties thereto may vary them at pleasure, to meet the exigencies of the contemplated service. In addition to those exceptions already mentioned, the following frequently appear in such contracts: strikes and riots,[2] pirates,[3] robbers and thieves,[4] ice and frost,[5] unavoidable accidents,[6] stoppage of navigation.[7]

caused thereby, * * * even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but unless stranded, sunk, or burnt, nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by * * * improper opening of valves, sluices, and ports, or by causes other than those above excepted." While the defendant's steamship was lying at her moorings, loading the plaintiff's cargo of grain under the above charter-party and bill of lading, the circulating pump delivery valve in the side of the ship was reasonably and properly opened by the defendant's engineer, but was negligently and improperly left open, whereby a quantity of sea water entered the ship and damaged the plaintiff's cargo. To prevent the vessel foundering at her moorings, where the water was deep, the master had her towed into shallower water, where she settled on the ground, and the water was subsequently pumped out. For the loss so sustained the plaintiffs sued the defendants. It was held that the defendants were not liable, as the negligence clause applied to "dangers and accidents of the sea or other waters" as well as to "accidents of navigation," and the words "unless stranded, sunk, or burnt" constituted a condition preventing liability attaching to the shipowner for the damage occasioned by the valve being improperly open. The Southgate, (1893) Prob. 329.

Negligent Stowage. — A bill of lading for a cargo of eggs contained, among other exemptions, one by which the shipowner was not to be liable for "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, or otherwise." Part of the eggs were damaged by being negligently stowed by a stevedore employed by the shipowner. It was held that the shipowner was not liable because the words "or otherwise" in the bill of lading were general, and did not limit the exemption to loss or damage arising from negligence in matters akin to navigation, or to loss or damage arising from negligence in relation to the other excepted perils of the bill of lading. Baerselman *v.* Bailey, (1895) 2 Q. B. 301.

Collision Between Two Ships Belonging to the Same Owner. — In Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., 10 Q. B. Div. 521, it was held that the owner of a vessel was not liable for a failure to carry goods safely upon the voyage when the bill of lading under which the goods were shipped excepted collisions and accidents, loss or damage from any act, neglect, or default whatsoever of the pilot, master, mariners, or other servants of the company in navigating the ship, and said failure to deliver was caused by a collision between the vessel on which the goods were being carried and another vessel belonging to the same owner.

1. Damages Limited to Invoice Value. — In Pearse *v.* Quebec Steam Ship Co., 24 Fed. Rep. 285, *following* The Lydian Monarch, 23 Fed. Rep. 298, it was provided in a bill of lading that "in case of damage, loss, or nondelivery, the shipowners will not be liable for more than the invoice value of the goods." In construing this clause, the court said: "The carrier's responsibility is for the whole invoice value of the goods damaged, and no more; and the net proceeds of the sale of the damaged goods over all charges and expenses, if received by the owner, must therefore go in diminution of the invoice price and freight, and the carrier must pay the difference."

In Brown *v.* Cunard Steamship Co., 147 Mass. 58, which *disapproved* the cases just cited, the bill of lading contained this provision: "Ship not accountable for any sum exceeding £100 per package, for goods of whatever description, unless the value is declared and the freight as may be agreed paid thereon; and in event of loss or damage for which the ship is responsible, the liability shall not exceed the invoice or the declared value for the United States customs duty." In construing this provision, Holmes, J., said: "As we read the contract, the damages are to be ascertained in the usual way, by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding £100 when the value is not declared; or, in this case, up to but not exceeding the invoice value."

See *infra*, this title, *Measure of Damages*.

2. Strikes and Riots. — Fenwick *v.* Schmalz, L. R. 3 C. P. 313; The Village Belle, 30 L. T. 232; Stephens *v.* Harris, 6 Asp. M. L. C. 193; Richardson *v.* Samuel, 77 L. T. 479 (Dec. 23, 1897).

3. Pirates. — Palmer *v.* Naylor, 23 L. J. Exch. 323; Nesbitt *v.* Lushington, 4 T. R. 783.

4. Robbers and Thieves. — De Rothschild *v.* Royal Mail Steam Packet Co., 21 L. J. Exch. 273; Steinman *v.* Angier Line (1891) 1 Q. B. 619; Taylor *v.* Liverpool, etc., Steam Co., L. R. 9 Q. B. 547.

5. Ice and Frost. — Kay *v.* Field, 10 Q. B. Div. 241; Grant *v.* Coverdale, L. R. 9 App. 470.

6. Fenwick *v.* Schmalz, L. R. 3 C. P. 313.

7. Allerton Steamship Co. *v.* Falk, 6 Asp. M. L. C. 287.

c. BURDEN OF PROOF — (1) *Upon Shipowner to Bring the Breach Within the Exceptions.* — When the cargo has been lost or damaged, or the delivery thereof delayed, the onus is upon the shipowner to show that such loss, damage, or delay was caused by one of the causes excepted by implication of law, by statute, or by express contract.[1]

(2) *Upon the Cargo Owner to Show Negligence.* — When such a state of facts is shown that the loss, damage, or delay complained of apparently arose from a cause excepted either by implication of law, by statute, or by express contract, the burden of proof is upon the owner of the cargo to show that the shipowner is not entitled to the benefit of the exception by reason of the negligence of himself or his servants.[2]

d. WHEN EXCEPTIONS APPLY — (1) *In General.* — The question sometimes arises as to when the exceptions in a contract of affreightment apply; whether they relate only to that part of the voyage in which the ship is actually engaged in transporting the cargo, or may also relate to a time before the cargo was loaded on board the vessel, or while it is being loaded or unloaded. If certain perils are "always excepted," the shipowner is relieved from a breach of his contract occasioned by such excepted causes whenever occurring,[3] but when it is not so provided, the time when the exceptions apply is not so certain.

(2) *Preliminary Voyage.* — Thus it has been held that if the vessel is to proceed to a different port from that at which she is lying when the contract is made, the exceptions in the contract apply not only to the voyage contracted for, but also to the preliminary voyage to the port of loading.[4]

(3) *Previous Voyage.* — But it seems that if the shipowner is prevented from fulfilling his contract by the happening of an event within the exceptions while the vessel is completing a voyage on which she was engaged at the time the

1. What Shipowners Must Show — *England.* — Taylor *v.* Liverpool, etc., Steam Co., L. R. 9 Q. B. 546; The Alexandra, 14 L. T. 742; The Rona, 51 L. T. 28; Muddle *v.* Stride, 9 C. & P. 380, 38 E. C. L. 163.

Canada. — Harnden *v.* Proctor, 9 U. C. Q. B. 592.

United States. — Rich *v.* Lambert, 12 How. (U. S.) 347; The Schooner Emma Johnson, 1 Sprague (U. S.) 527; The Lizzie W. Virden, 19 Blatchf. (U. S.) 340; King *v.* Shepherd, 3 Story (U. S.) 349; The Lydian Monarch, 23 Fed. Rep. 298; The Isaac Reed, 82 Fed. Rep. 566. See also The Majestic, 166 U. S. 386.

Louisiana. — Edwards *v.* Steamer Cahawba, 14 La. Ann. 220.

Pennsylvania. — Whitesides *v.* Russell, 8 W. & S. (Pa.) 44.

Tennessee. — Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515.

Hawaii. — May *v.* Schooner Sovereign, 6 Hawaiian 42.

See also the title CARRIERS OF GOODS, vol. 5, p. 358.

Must Show that the Damage Was Actually Caused by an Excepted Peril. — In The Dunbritton, 73 Fed. Rep. 352, *affirming* 61 Fed. Rep. 764, the court said: "Having proved a sea peril for the results of which she is not responsible, the ship must next show that it is that sea peril which caused the damage to the cargo. This may be done by negative as conclusively as by positive proof. The sea peril having left water aboard the ship which might reasonably be expected to cause the damage found to exist, it will be presumed to have produced it, if there is satisfactory and sufficient proof that any or all other suggested causes did not produce it."

2. Negligence Must Be Shown by the Cargo Owner — *England.* — Czech *v.* General Steam Nav. Co., L. R. 3 C. P. 14; Taylor *v.* Liverpool, etc., Steam Co., L. R. 9 Q. B. 546; Peninsular, etc., Co. *v.* Shand, 3 Moo. P. C. N. S. 272; The Glendarroch, (1894) Prob. 226.

Canada. — Harnden *v.* Proctor, 9 U. C. Q. B. 592.

United States. — Western Transp. Co. *v.* Downer, 11 Wall. (U. S.) 129; Clark *v.* Barnwell, 12 How. (U. S.) 272; The Neptune, 6 Blatchf. (U. S.) 193; The Ship Delhi, 4 Ben. (U. S.) 345; The Steamship Pereire, 8 Ben. (U. S.) 301; Wolff *v.* The Vaderland, 18 Fed. Rep. 733; The New Orleans, 26 Fed. Rep. 44; The Polynesia, 30 Fed. Rep. 210; Marx *v.* The Brittania, 34 Fed. Rep. 906; The Portuense, 35 Fed. Rep. 670; The G. R. Booth, 64 Fed. Rep. 878; The Etona, 64 Fed. Rep. 880; The Timor, 67 Fed. Rep. 356; The Hindoustan, 67 Fed. Rep. 794; The Centurion, 68 Fed. Rep. 382, *reversing* 57 Fed. Rep. 412; The Flintshire, 69 Fed. Rep. 471; The Warren Adams, 74 Fed. Rep. 413; The Isaac Reed, 82 Fed. Rep. 566. See also Wilson *v.* The Xantho, L. R. 12 App. 503. *Compare* Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

3. Carver on Carriage by Sea 155; Leggett on Charter Parties 563.

4. Hudson *v.* Hill, 43 L. J. C. P. 273, 30 L. T. 555; Barker *v.* M'Andrew, 18 C. B. N. S. 759, 114 E. C. L. 759, 11 Jur. N. S. 637; Harrison *v.* Garthorne, 26 L. T. 508, 20 W. R. 722; Donaldson *v.* Little, 10 Sc. Sess. Cas. (4th ser.) 413.

contract was made, he would be liable for the breach.[1]

(4) *Loading and Unloading.* — It has been held that the exceptions apply if the vessel is prevented from loading by a cause excepted "during the voyage."[2] If a loss occurs during the loading of the vessel, by reason of a cause within the exception clause, it seems that the shipowner is relieved from liability,[3] and so also when a loss occurs while the vessel is being unloaded.[4] And it seems to apply if the loss happens after the cargo has been unloaded, but is still in the custody of the shipowner or his agent.[5]

(5) *Transportation of the Cargo Unnecessarily Prolonged.* — When the shipowner continued the carriage of the goods long beyond the time allowed by the contract, exposing them to many times the sea perils contemplated, and finally reshipped them upon another vessel from the original port of departure, whereby they were lost through sea perils, it was held that the owners of the goods might recover for their loss, notwithstanding the loss was occasioned by a cause within the exception clause.[6]

c. Whom They Benefit — (1) *In General.* — It has been broadly stated that exceptions in a contract of affreightment are introduced for the benefit of the shipowner, and not of the shipper.[7] But this does not seem always to be true, and appears to depend upon the manner of introducing the exception clause. If the covenants of the shipowner and shipper are separate, and the clause as to exceptions is contained in the shipowner's covenant only, then, of course, he alone is entitled to the benefit of the exceptions.[8] But when the

1. Carver on Carriage by Sea 156; Leggett on Charter Parties 564; Harrison *v.* Garthorne, 26 L. T. 508, 20 W. R. 722. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Commencement of Liability; Termination of Liability.*

2. Bruce *v.* Nicolopulo, 24 L. J. Exch. 321, 11 Exch. 129, *disapproving* Crow *v.* Falk, 15 L. J. Q. B. 183, 8 Q. B. 467, 55 E. C. L. 467.

3. Carver on Carriage by Sea 156; Leggett on Charter Parties 564. See also Nottebohn *v.* Richter, 18 Q. B. Div. 63.

"Voyage" Includes Time of Loading. — It was agreed by a charter-party that the owners of a vessel should not be liable "for any act, neglect, or default whatsoever of their servants during the said voyage." It was held that the term "voyage" included the period of time during which the vessel was being loaded, and that consequently the owners were not liable for damage done to a cargo of sugar while it was being loaded, through a valve in the engine room having been negligently left open by one of the engineers of the vessel. The Carron Park, 15 Prob. Div. 203.

4. Laurie *v.* Douglas, 15 M. & W. 746.

Includes Conveyance Ashore in Ship's Boat. — The owners of a cargo cannot recover if it is lost by perils of the sea while being carried ashore in a shallop belonging to the ship, according to the custom of the port of discharge. Johnston *v.* Benson, 4 Moo. 90.

"Ordinary Course of Voyage" Does Not Include Discharging. — By the terms of a charter-party the owners of the vessel were relieved from liability for "any act, negligence, or default of master or crew in the navigation of the ship, in the ordinary course of the voyage." While the cargo was being discharged after the arrival of the vessel at her destination, the cargo was damaged through the negligence of the crew. It was held that such negligence was not within the meaning of the exception and that the owners were liable. The Accomac, 15 Prob. Div. 208.

5. Parsons *v.* Monteath, 13 Barb. (N. Y.) 353. See also Hong Kong, etc., Banking Co. *v.* Baker, 7 Bom. H. C. R. 186.

6. Calderon *v* Atlas Steamship Co., 64 Fed. Rep. 874.

7. Touteng *v.* Hubbard, 3 B. & P. 291. See also Bright *v.* Page, 3 B. & P. 295, note *a*; The Sailing Ship "Garston" Co. *v.* Hickie, 18 Q. B. Div. 17. *Compare* Geipel *v.* Smith, L. R. 7 Q. B. 411.

8. Carver on Carriage by Sea 157; Leggett on Charter Parties 566; Sjoerds *v.* Luscombe, 16 East 201.

In Storer *v.* Gordon, 3 M. & S. 308, Lord Ellenborough, C. J., said: "It does not appear to us, however, that these words would have been any excuse to the plaintiff [the shipowner]; and admitting that they would, it by no means follows that they afford one to the defendants [the charterers]. The words seem rather intended to mark the time when the plaintiff's obligation to receive a homeward cargo should attach, viz., when his ship, from being clear of one cargo, should be in a condition to receive another, and they are accompanied with those express words of condition which would naturally have been used, had there been any intention of giving the plaintiff an option of terminating the contract and refusing a homeward cargo, if he should have been prevented by any accident from delivering the outward cargo. But admitting that the plaintiff might have been discharged from his obligation to receive, does it follow that if the plaintiff is willing to receive, the defendants are discharged from their obligation to deliver? The plaintiff might wish to reserve an option to himself, and might therefore qualify his covenant; but he might not choose to give any option to the defendants, and might insist from them upon an uncondi-

exception clause is introduced after the several clauses containing the mutual agreements of the shipowner and the shipper, without specially referring to any one of them, it seems that the shipper may claim the benefit of the exceptions also.[1]

(2) *Under Special Agreement.* — In many such contracts it is expressly agreed that the parties thereto shall be mutually excepted from loss occasioned by certain enumerated causes.[2]

3. By Public Notice. — The right of a carrier, whether by land or water, to limit his liability by a public notice has been discussed elsewhere in this work, and as there stated, the doctrine generally recognized both in England and the United States is that the shipowner can, by a notice publicly posted, providing that the true value of all articles shipped must be declared at the time of shipment, or else that his liability will be limited to the apparent value of the articles, though it is not shown that such notice was called to the attention of the particular shipper whom it is sought to affect, limit his liability to the amount stated in the notice; but that, with this exception, the shipowner cannot limit his liability by public notice, unless it is shown that such notice, having been brought to the knowledge or attention of the shipowner within a reasonable time before shipment, was expressly assented to by him.[3]

4. By Statute — *a.* UNITED STATES — (1) *The Harter Act* — (a) **Stipulation for Nonliability in Certain Cases Prohibited** — *aa.* AS TO NEGLIGENCE. — By the first section of an enactment of Congress commonly known as the Harter Act it is provided: "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."[4]

bb. AS TO SEAWORTHINESS. — By the second section of the same act it is provided: "It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable

tional and unqualified covenant. The plaintiff has in terms introduced, as an exception into his covenant, the perils of the seas and capture, restraint, or detention by enemies, princes, or rulers, but he has suffered no such exception to be in the covenant of the defendants. He did not, therefore, mean that whatever would be an excuse to him should also be an excuse to the defendants; and we cannot, therefore, by implication from the wording of the plaintiff's covenant, introduce an exception into that of the defendants."

1. Carver on Carriage by Sea 157; Leggett on Charter Parties 566. See Ford *v.* Cotesworth, L. R. 5 Q. B. 548. But see Bright *v.* Page, 3 B. & P. 295, note *a*.

2. Carver on Carriage by Sea 157; Leggett on Charter Parties 566, *citing* Bruce *v.* Nicolopulo, 24 L. J. Exch. 321. See Smith *v.* Rosario Nitrate Co., (1894) 1 Q. B. 174, *affirming* (1893) 2 Q. B. 323; Holyoke *v.* Depew, 2 Ben. (U. S.) 334.

3. New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Merriman *v.* The Brig May Queen, Newb. Adm. (U. S.) 464; The Pacific, Deady (U. S.) 192; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186. See also Nicholson *v.* Willan, 5 East 507. And see the title CARRIERS OF GOODS, vol. 5, pp. 289, 290.

4. 27 U. S. Stat. at Large 445, c. 105, § 1.

Contrary Stipulations of No Effect. — Under the first section of the Harter Act, if shipowners are chargeable with negligence or failure in the proper loading, stowage, or proper delivery of the cargo, they are liable for the damages arising therefrom, anything else in the bill of lading or in the provisions indorsed thereon to the contrary notwithstanding. Calderon *v.* Atlas Steamship Co., 64 Fed. Rep. 874. See *supra*, this section, *By Contract — Negligence*.

of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided." [1]

(b) **No Liability in Certain Cases.** — The third section of this act provides that "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." [2]

1. 27 U. S. Stat. at Large 445, c. 105, § 2. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Seaworthiness*.

2. 27 U. S. Stat. at Large 445, c. 105, § 3.

Improper Anchorage. — The drifting of a vessel ashore because of improper anchorage is a fault in the management or navigation of the vessel within the provisions of the Harter Act, and the owner of the vessel is not liable for damages to the cargo resulting therefrom. The Etona, 64 Fed. Rep. 880, *affirmed* in 71 Fed. Rep. 895.

Failure Properly to Protect Glass Ports. — Failure on the part of the officers of a ship to cover glass ports with iron covers which have been provided by the owners of the ship is a fault in the navigation or management of the vessel, and under the Harter Act the owner of the vessel is not liable if the cargo is damaged in consequence of the breaking of these glass ports and the ingress of sea water. The Silvia, 64 Fed. Rep. 607, *affirmed* in 68 Fed. Rep. 230. See also The Mexican Prince, 82 Fed. Rep. 484.

Negligent Steering. — In The E. A. Shores, 73 Fed. Rep. 342, it was held that if the mate, who was steering the vessel, neglecting the warning of a well-known flashlight upon the shore and trusting entirely to the accuracy of his compass or course, stranded the vessel and thereby damaged the cargo, this was clearly a fault or error in navigation and the owners of the vessel were relieved from all liability therefor by the Harter Act.

Opening Sluiceways. — The daily opening of the sluiceways is a part of the management of the ship, and damages arising from negligence in this regard, therefore, would fall within the exception of the Harter Act. The Sandfield, 79 Fed. Rep. 371.

Vessel Used for Stowage. — It seems that the shipowner would be relieved from liability under the provisions of this act as to negligence or default in the management, when the cargo of a vessel was injured in consequence of severe gales while the vessel was moored at a wharf and used for stowage. The Richard Winslow, 67 Fed. Rep. 259.

As to Latent Defects. — In The Millie R. Bohannon, 64 Fed. Rep. 883, Brown, J., said that under the Harter Act owners of vessels were relieved from the consequences of all latent defects in their construction where due diligence had been used to make them perfect. But, in The Alvena, 74 Fed. Rep. 252, the same judge, remarking upon the case just cited, said: "It is at least doubtful whether any loss arising solely from a latent defect in the ship and not through any fault or error of navigation or management is covered by the act."

Stipulations Against Liability for Latent Defects. — In The Carib Prince, 68 Fed. Rep. 254, the question was discussed as to whether or not, by this act, shipowners were prohibited from exempting themselves from liability for latent defects. After considering the language of the act as it left the House of Representatives and the Senate's amendments thereto, the court said: "These amendments indicate the intent which ran through the act as it left the Senate, and make it plain that one design of the act as amended was to permit the owner to relieve himself from the rigidity of the warranty of seaworthiness, but not to permit him to lessen his obligation to exercise due diligence in all respects at the inception of the voyage."

Due Diligence. — Under this act, the owner of a vessel, in order to be relieved from liability for damage to the cargo, must use due diligence in ascertaining the condition of the ship and seeing that she is made seaworthy, and he is chargeable in this respect with any negligence of his agents appointed to inspect and repair the vessel. The Mary L. Peters, 68 Fed. Rep. 919; The Flamborough, 69 Fed. Rep. 470; The Colima, 82 Fed. Rep. 665. See also Hine *v.* New York, etc., Co., 68 Fed. Rep. 920.

No new rule due of diligence is established by this act, and a vessel is liable for damages to her cargo from sea water coming in through a leak caused by the corrosive action of sugar drainings upon one of her iron plates, which was insufficiently protected by cement, and which had become cracked before the com-

(c) **Applicable to Foreign Vessels.** — The provisions of section three are applicable to foreign vessels "transporting merchandise or property to or from any port in the United States," as well as to vessels of the United States.[1]

(d) **Applicable to Both Foreign and Domestic Commerce.** — And the provisions of this section apply to all contracts of affreightment on American waters and to all vessels, whether engaged in foreign or domestic trade.[2]

(e) **To What the Act Relates.** — This act relates only to the rights and liabilities of owners and shippers as between themselves with respect to the cargo.[3]

(f) **Not Retroactive.** — The Harter Act is not retroactive in its operation, and therefore has no application to cases arising prior to its passage.[4]

(2) *Act Regulating Transportation of Merchandise* — (a) **Character and Value of the Goods.** — By a statute of the United States, "if any shipper of [certain enumerated articles] shall lade the same as freight or baggage on any vessel without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any

mencement of the voyage, which cracking should have been discovered upon a proper inspection. The Alvena, 74 Fed. Rep. 252.

Redocking. — Under this act, diligent care of the ship does not require redocking more than once a year in the absence of some known necessity for it. The Sandfield, 79 Fed. Rep. 371.

Damage Caused by Perils of the Sea. — When it is shown that the ship was seaworthy at the time of sailing, having reference to the cargo and the contemplated voyage, the owners thereof are protected by the provisions of the third section of the Harter Act from an action for damages to a cargo of tea occasioned by the taking in of sea water through her waterways during a gale in which very heavy seas were encountered. The Sintram, 64 Fed. Rep. 884.

Exception Extends to the Time of Discharge. — Goods were shipped under a bill of lading incorporating the Act of Congress known as the Harter Act, by which the owner of the vessel is not to be responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel. After the arrival of the vessel at her port of destination, and during the discharge of the cargo, it became necessary to stiffen the ship. For this purpose the engineer ran water into the ballast tank, but negligently omitted first to ascertain the condition of the sounding pipe and casing, which had, owing to heavy weather during the voyage, become broken. The owner of the goods damaged by the water getting to the cargo brought an action to recover damages. It was held that the shipowner was exempt from liability, as the damage resulted from a fault in the management of the vessel, and the operation of the exception as to management was not limited to the period during which the vessel was at sea, but extended to the period during which the cargo was being discharged. The Glenochil, (1896) Prob. 10.

Negligence in Loading or Stowing Not Excepted. — Where a quantity of wool was damaged by the drainage from sugar, caused by negligence and inattention in the loading or stowage of the cargo, it was held that the shipowner was not relieved from liability by the provision in the Harter Act exempting shipowners from liability for damages arising through error or fault in the management of the vessel. Botany Worsted Mills *v.* Knott, 82 Fed. Rep. 471, *affirming* 76 Fed. Rep. 582, *distinguishing* The Silvia, 64 Fed. Rep. 607; The Glenochil, (1896) Prob. 10. See also The Colima, 82 Fed. Rep. 679.

Stipulations as to Negligent Navigation Ineffective Before This Act. — Prior to the passage of the Harter Act, the clause in a bill of lading exempting the shipowner from liability for negligent navigation was inoperative, being considered as against public policy. The Hugo, 57 Fed. Rep. 403; The Guildhall, 58 Fed. Rep. 796; The Glenmavis, 69 Fed. Rep. 472.

Contribution to General Average Loss. — Under this section of this act the cargo is liable to contribute to a general average loss, although such loss has been occasioned by the negligence of the officers in the management of the vessel. Chrystal *v.* Flint, 82 Fed. Rep. 472.

1. The Etona, 64 Fed. Rep. 880; The Silvia, 68 Fed. Rep. 230, *affirming* 64 Fed. Rep. 607.

In The Chattahoochee, 74 Fed. Rep. 899, which was an action for damages resulting from a collision between an American vessel and a British vessel bound for Boston, the court expressed a doubt as to whether this section was applicable to foreign vessels.

2. The E. A. Shores, 73 Fed. Rep. 342.

3. The Berkshire, 59 Fed. Rep. 1007; The Viola, 59 Fed. Rep. 632; The Delaware, 161 U. S. 459.

Not to Torts Against Third Persons or Their Property. — The Harter Act is limited to the regulation of the liability of the vessel, her owners, and master to the shipper, and has no application to torts committed against other persons or their property. Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique, 63 Fed. Rep. 845.

4. Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104; Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique, 63 Fed. Rep. 845; Humboldt Lumber Mfg. Assoc. *v.* Christopherson, 73 Fed. Rep. 239.

form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." [1]

(b) **Loss by Fire.** — It is also provided by a subsequent section of this statute that "no owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." [2]

(c) **Liability Limited to Interest.** — Another section provides that "the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." [3]

Privity or Knowledge of the Master. — The owner is not deprived of the benefit of this section by reason of the privity or knowledge of the master of the vessel.[4]

Effect of Demise of the Vessel. — Nor are the rights of the shipowner under this section lost when the vessel has been chartered, though by the terms of the charter-party the charterer becomes the owner *pro hac vice*.[5]

(d) **When the Charterer Is to Be Deemed the Owner.** — "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense or by his own procurement, shall be deemed the owner of such vessel within the meaning" of these enactments, "and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner." [6]

(e) **Inapplicable to Vessels Used in Inland Navigation.** — It is provided further that the preceding sections "relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal boat, barge, or lighter, or to

1. U. S. Rev. Stat., c. 6, § 4281.

2. U. S. Rev. Stat., c. 6, § 4282.

Statute Construed. — For cases construing this statute, see Keene *v.* The Bark Whistler, 2 Sawy. (U. S.) 348; Walker *v.* Western Transp. Co., 3 Wall. (U. S.) 150; The City of Hartford, 11 Blatchf. (U. S.) 290; The Egypt 25 Fed. Rep. 320; Black *v.* Ashley, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428. See also the title CARRIERS OF GOODS, vol. 5, p. 341.

3. U. S. Rev. Stat., c. 6, § 4283.

Meaning of Freight. — In Main *v.* Williams, 152 U. S. 122, it was held that under Rev. Stat. U. S., § 4283, the words "freight then pending" included the earnings of the voyage, whether from the carriage of passengers or merchandise, and all freight for the voyage, whether paid in advance or not.

Value when the Voyage Ended. — It has been held that under this statute the value of the vessel when the voyage terminated is the value to be considered in ascertaining the limit of her owner's liability. The Anna, 47 Fed. Rep. 525.

Owner Cannot Determine Priorities of Claimants. — In The Giles Loring, 48 Fed. Rep. 463, it was held that the owners of vessels had no right to determine the priority of claims or the distribution of the fund representing their limited liability.

Applicable to Actions for Personal Injury. — It has been decided that by this statute the owner's liability is limited in actions brought to recover damages for an injury to a person. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527; Craig *v.* Continental Ins. Co., 141 U. S. 638; Quinlan *v.* Pew, 56 Fed. Rep. 111.

Applicable to Foreign Vessels. — In The Scotland, 105 U. S. 24, it was held that the provisions of this section were applicable to foreign as well as domestic vessels.

Apportionment of Interest Among Several Cargo Owners. — In the following section a proportionate payment is provided for when several owners of cargo have suffered loss and the value of the vessel and freight is insufficient to compensate for the total loss. U. S. Rev. Stat., c. 6, § 4284.

Construction. — This section is construed in Place *v.* The Steamboat City of Norwich, 1 Ben. (U. S.) 89; Norwich Co. *v.* Wright, 13 Wall. (U. S.) 104. In the latter case Justice Bradley discusses at length this and similar acts limiting the liability of the shipowner.

Transfer of Interest to Trustee. — In the next section a transfer of the shipowner's interest in the vessel and freight to a trustee, in full settlement of all claims against him, is provided for. U. S. Rev. Stat., c. 6, § 4285.

4. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527; Craig *v.* Continental Ins. Co., 141 U. S. 638; Quinlan *v.* Pew, 56 Fed. Rep. 111.

5. Quinlan *v.* Pew, 56 Fed. Rep. 111.

6. U. S. Rev. Stat., c. 6, § 4286.

any vessel of any description whatsoever used in rivers or inland navigation." [1]

b. ENGLAND. — In England there is a statute very similar in its provisions and effects to the statute last discussed.[2]

VIII. FREIGHT — 1. Definition. — Freight, in its most general and comprehensive sense, means a reward, hire, or compensation paid for the use of a ship or other vehicle of transportation for carrying either goods or passengers.[3]

In This Article the term will be used to mean the remuneration payable for the transportation of goods in a ship.

2. Classification. — **With Respect to the Manner and Amount of Payment,** the following classification may be made: First, freight payable in proportion to the quantity of goods carried and delivered; second, freight payable in a lump sum for a certain voyage or service; and third, freight payable as hire for the use of the ship for a certain time.

With Respect to the Time When Payment Is Due, freight may be divided into two kinds, first: freight upon delivery; second, advance freight.[4]

Dead Freight. — To this enumeration may be added "dead freight," which is a term often, though inaccurately, used to signify the sum due the shipowners by the master as damages for a failure to load a full cargo.[5]

1. U. S. Rev. Stat., c. 6, § 4289.

2. **English Merchant Shipping Act.** — 17 & 18 Vict., c. 104, amended by 18 & 19 Vict., c. 91; 25 & 26 Vict., c. 63, and 39 & 40 Vict., c. 80.

Lighter Not a Vessel. — In Hunter *v.* Gower, 1 Bligh 573, it was held that a lighter was not a ship or vessel within the meaning of 26 Geo. III., c. 86, § 2, which was re-enacted in 17 & 18 Vict., c. 104, § 503, and if goods on freight were shipped on board such vessel and destroyed by fire accidentally or through the negligence of the master, the owners were not protected by that statute, but were responsible as at common law. To the same effect is Morewood *v.* Pollok, 1 El. & Bl. 743, 72 E. C. L. 743.

The provisions contained in section 34 of the Merchant Shipping Act, 1876 (39 & 40 Vict., c. 80), as to the detention of ships which are unsafe by reason of overloading, apply to the ships of a foreign state taking cargo at a port in the United Kingdom, although there has not been any order in council under section 37 specifically applying such provisions to the ships of such state. Chalmers *v.* Scopenich, (1892) 1 Q. B. 735.

Carriers by Land and Canals. — And statutes somewhat similar in their provisions and effects have been enacted in England as to carriers by land and on canals.

Carriers' Act. — 11 Geo. IV., and 1 Wm. IV., c. 68, §§ 1–8.

The Railway and Traffic Act. — 17 & 18 Vict., c. 31, § 7.

These acts and the cases arising thereunder will be found fully discussed in CARRIERS OF GOODS, vol. 5, p. 341 *et seq.*

3. **General Definition of Freight.** — In Giles *v.* The Brig Cynthia, Pet. Adm. 203, the court said: "I think the force and true meaning of 'freight' has been much misconceived. It is a technical expression. It does not always imply that it is the *naulum*, *merces*, or *fare* for the transportation of goods. It is applied to all rewards, hire, or compensation paid for the use of ships; either for an entire voyage, one divided into sections, or engaged by the month, or any period. It is also called 'freight' (and it is to be determined on the like legal principles) in the case of passengers, transported in vessels, for compensation. In Saxon, from which much of the English language is derived, it is called *fracht*, whether it be a compensation for transportation in ships by sea or carriage by land, either of goods or persons, in gross or detail." See also Kirchner *v.* Venus, 12 Moo. P. C. 361, 5 Jur. N. S. 395.

The term "freight" includes all reward or compensation paid for the use of ships. 1 Bouv. Law Dict., p. 694. See also Andrew *v.* Moorhouse, 5 Taunt. 435; Kirchner *v.* Venus, 12 Moo. P. C. 361.

Passage Money Equivalent to Freight. — Ships carrying passengers on hire stand on the same footing of responsibility, in that respect, with those carrying merchandise on freight — passage money and freight being in legal acceptation equivalents. The liability of the vessel in specie, upon a contract of affreightment, is not varied by the circumstance that the contemplated subjects of transportation are passengers instead of merchandise. A passage contract is, in respect of the vessel's liability, only a species of affreightment in which the passengers constitute the cargo and the passage money answers to the freight. *Per* Betts, J., in The Aberfoyle, Abb. Adm. 242. See also Brown *v.* Harris, 2 Gray (Mass.) 359; Cope *v.* Dodd, 13 Pa. St. 33.

As Meaning Cargo. — The term "freight" also means the cargo transported. Cent. Dict. See Brittan *v.* Barnaby, 21 How. (U. S.) 527.

4. Carver on Carriage by Sea, § 542.

5. **Dead Freight Defined.** — M'Lean *v.* Fleming, L. R. 2 H. L. Sc. App. 128; Phillips *v.* Rodie, 15 East 547. See *infra*, this title, *Measure of Damages — Amount Recoverable by the Shipowner.*

In Gray *v.* Carr, L. R. 6 Q. B. 522, dead freight was defined as "damages for short loading." Bramwell, B., in the opinion delivered by him, said: "Dead freight apparently, in strictness, means some agreed sum, fixed or capable of calculation, for short loading."

3. When Payable — *a.* UPON DELIVERY — (1) *General Rule.* — In the absence of an express stipulation to the contrary, the general rule is that freight is not to be paid until the voyage has been performed and the cargo carried to, and delivered at, the port of destination.[1]

(2) *What Is Meant by Delivery.* — Actual delivery to the cargo owner is not necessary, but, as a general rule, freight is earned by the carriage and arrival of the goods at the destined port, ready to be delivered to the cargo owner.[2] The shipowner is not, however, ready to deliver so as to be entitled to freight, until the whole cargo has been discharged from the vessel and placed subject to inspection by the cargo owner.[3]

Time for Which the Shipowner Must Be Ready. —When there is no express agreement in the contract, the shipowner must continue to be ready to deliver the cargo for a reasonable time after the arrival of the vessel at her destination,[4] and the period of four days has been said to be such reasonable time.[5] But the parties to the contract may regulate this matter by an express provision.[6]

1. Freight Payable upon Performance of the Contract — *England.* — Thompson *v.* Gillespy, 1 Jur. N. S. 779; Cook *v.* Jennings, 7 T. R. 381; Mitchell *v.* Darthez, 2 Bing. N. Cas. 555, 29 E. C. L. 419; Metcalfe *v.* Britannia Ironworks Co., 2 Q. B. Div. 423; Johnson *v.* Greaves, 2 Taunt. 344; Smith *v.* Wilson, 8 East 437; Hunter *v.* Prinsep, 10 East 378; Clarke *v.* Gurnell, 1 Bulst. 167; Cleary *v.* McAndrew, Brown & L. Adm. 167; The Soblomsten, L. R. 1 Adm. & Eccl. 293.

United States. — Bork *v.* Norton, 2 McLean (U. S.) 422; The Saratoga, 2 Gall. (U. S.) 164; Howland *v.* The Brig Lavinia, Pet. Adm. 126; Arthur *v.* The Schooner Cassius, 2 Story (U. S.) 81; The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542; One Hundred and Seventy-five Tons of Coal, 9 Ben. (U. S.) 400; The Cuba, 3 Ware (U. S.) 260; Brittan *v.* Barnaby, 21 How. (U. S.) 527; Reed *v.* U. S., 11 Wall. (U. S.) 591; British, etc., Marine Ins. Co. *v.* Southern Pac. Co., 72 Fed. Rep. 285.

Alabama. — Waring *v.* Moore, 7 Ala. 343.

Delaware. — Thibault *v.* Russell, 5 Har. (Del.) 293.

Maryland. — Wirgman *v.* Mactier, 1 Gill & J. (Md.) 150, 4 Har. & J. (Md.) 568.

New York. — Western Transp. Co. *v.* Hoyt, 69 N. Y. 230, 25 Am. Rep. 175.

Virginia. — Brown *v.* Ralston, 4 Rand. (Va.) 504.

Payment for Lost Cargo Equivalent to Delivery. — Where a shipowner pays damages for the loss of goods by negligence or unskilful management, it is tantamount to a safe delivery, and he is entitled to his freight. Hammond *v.* McClures, 1 Bay (S. Car.) 101.

2. Dakin *v.* Oxley, 33 L. J. C. P. 115; Gaudet *v.* Brown, L. R. 5 P. C. 134; Brittan *v.* Barnaby, 21 How. (U. S.) 527. See also Duthie *v.* Hilton, L. R. 4 C. P. 138; Juson *v.* Aylward, 14 L. C. Rep. 164. *Compare* Brown *v.* Tanner, L. R. 3 Ch. 597.

Conveyance to Destination Insufficient. — Freight does not accrue until the goods are not only conveyed to their destination, but are also delivered. Cato *v.* Irving, 21 L. J. Ch. 675.

Delivery Prevented by the Shipper's Agents. — Upon the arrival of a ship at her destination, notice of such arrival was given to the agents of the shipper, and they were requested to name a wharf where the vessel might discharge her cargo. The agents declined to do so, and on the next day the vessel and cargo were seized under process from the admiralty court. It was held that the shipowner had shown such readiness and willingness to deliver the cargo as entitled him to freight. Stewart *v.* Rogerson, L. R. 6 C. P. 424.

3. Brittan *v.* Barnaby, 21 How. (U. S.) 527; 1265 Vitrified Pipes, etc., 14 Blatchf. (U. S.) 274; Clark *v.* Five Hundred and Five Thousand Feet of Lumber, 65 Fed. Rep. 236; Lanata *v.* Grinnell, 13 La. Ann. 24; Clark *v.* Masters, 1 Bosw. (N. Y.) 177. See also The Eddy, 5 Wall. (U. S.) 481; Gauche *v.* Storer, 14 La. Ann. 413. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Termination of Liability.*

When a Cargo Has Been Discharged into a Warehouse, subject to the shipowner's lien for freight, and has then been taken from such warehouse by the cargo owner, upon giving security for the freight, there is a sufficient delivery to entitle the shipowner to freight. The Adella S. Hills, 47 Fed. Rep. 76, *distinguishing* Metcalfe *v.* Britannia Ironworks Co., 2 Q. B. Div. 423, which was a case where the cargo was discharged and stored at an intermediate port, and the voyage not having been performed, the cargo was taken by its owners under protest that the voyage was not completed.

4. Duthie *v.* Hilton, L. R. 4 C. P. 138.

5. Gaudet *v.* Brown, L. R. 5 P. C. 161.

6. In Duthie *v.* Hilton, L. R. 4 C. P. 138, the defendants shipped cement under a bill of lading which stipulated that freight should be paid " within three days after arrival of ship, and before delivery of any portion of the goods." The ship arrived in port with the cement on board, but was, within the three days, in consequence of an accidental fire, scuttled with a view to the saving of ship and cargo; and on her being raised the cement was found to be useless, having ceased to exist as cement. The consignees refused to accept it or to pay freight. It was held that the shipowners, not being ready to perform their part of the contract, were not entitled to sue for freight. Brett, J., in the opinion delivered by him, said: " The whole question in this case arises upon the construction of the bill of lad-

(3) *Payment and Delivery Concurrent.* — When freight is payable on delivery, the payment of the freight and the delivery of the cargo must be concurrent acts. The cargo owner is not entitled to have the goods unless he is ready to pay the freight, nor, on the other hand, is the shipowner entitled to the freight unless he is ready to deliver the cargo.[1]

(4) *Right to Partial Freight upon Partial Delivery.* — The general rule is that the consignee is not bound to accept the goods or pay the freight until he has had an opportunity of examining their actual state and condition.[2] It follows that, upon a partial delivery, the shipowner cannot demand payment of the freight on the goods actually delivered where the consignee has had no opportunity of inspecting the portion undelivered,[3] unless, by the terms of the contract between the parties, it appears that the owner of the goods has waived his right to inspect them before actual delivery.[4] The shipowner, however,

ing; and, though it is in an unusual form, I think it must be construed with reference to what is the ordinary form of a bill of lading, and how far the parties have intended to depart from that form, and how that intention is expressed. Now, under an ordinary bill of lading, the shipowner is not entitled to claim freight unless the goods have arrived and he is ready and willing to deliver them. Here there is an alteration in that part of the contract; and the question is how far it departs from the accustomed form. It seems to me that the ordinary contract was intended to exist during the three days after the arrival of the vessel with the goods on board. If the freighters within the three days demanded the goods and tendered the freight, the shipowners would be bound to deliver them. But, after the expiration of the three days, I incline to think that the ordinary state of things would be altered, and that the shipowner might sue for the freight without averring readiness and willingness to deliver. Here, however, the plaintiffs could not at any time have averred that they were ready and willing to deliver, the goods having been destroyed before the expiration of the three days. I therefore think they are not entitled to recover."

1. Paynter *v.* James, L. R. 2 C. P. 348; Clark *v.* Masters, 1 Bosw. (N. Y.) 177. See also Tate *v.* Meek, 8 Taunt. 280, 4 E. C. L. 105; Yates *v.* Railston, 8 Taunt. 293, 4 E. C. L. 109; Yates *v.* Meynell, 8 Taunt. 302, 4 E. C. L. 112.

2. Brittan *v.* Barnaby, 21 How. (U. S.) 527. See also *supra*, this section.

3. **Where No Opportunity to Inspect, Partial Freight on Partial Delivery Not Demandable.** — Clark *v.* Masters, 1 Bosw. (N. Y.) 177, where the court, by Duer, J., said: " If, before it has been ascertained that the goods to be delivered are all undamaged, and that there is no deficiency in quantity, the master is allowed to divide the consignment into parcels, and demand pay for each parcel as delivered, it was justly observed by the counsel for the plaintiff that the right of the consignee to recover for damages, or a deficient quantity, may be effectually defeated. One-half of the cargo may have been delivered in this form in a sound state, and the *pro rata* freight paid, and yet the damage to the residue may exceed the whole freight which the consignee, had there been no damage, would have been liable to pay; one-half of this amount, however, he has already paid, and unless this is immediately refunded, his only remedy is by an action for its recovery."

But if the consignee of the cargo offers to pay freight upon successive deliveries as the deliveries are made, the shipowner has no right to refuse this offer and demand payment of the whole freight as a condition precedent to making a partial delivery, where the consignee has had no opportunity of inspecting the condition of the cargo. Brittan *v.* Barnaby, 21 How. (U. S.) 527.

4. Black *v.* Rose, 2 Moo. P. C. N. S. 277, 10 Jur. N. S. 1009.

In this case it appeared that, by the terms of the charter-party, freight was to be paid at and after a certain rate " on the quantity safely delivered," " the cargo to be taken alongside and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship." Upon the arrival of the ship at the port of discharge, the master required the merchant to pay daily the freight for the amount of cargo delivered each day over the ship's side into the merchant's boats, and refused to deliver more cargo on the merchant refusing to pay on delivery. In an action for nondelivery of a portion of the cargo it was held that the master was justified in requiring daily payment for freight delivered. In the judgment delivered by Sir Edward Creasey, Chief Justice of the Supreme Court of Ceylon, which was approved by the judgment of the Privy Council, it is said: " As a general principle, when there is no express stipulation as to the time and manner of payment of freight, the master is not bound to part with the goods until his freight is paid." And after stating the clauses of the charter-party set out above, the chief justice continued: " We think it clear that in this case it was intended that the master should deliver, and the merchant receive, at the ship's side; that on such delivery and receipt the master ceased to be responsible for the goods, and also ceased to have any lien on the goods. It is clear on all authority and common sense that he had a right to be paid before he gave up his lien. It has been said on the other side, that it was impossible for the merchant to examine the condition and weight of the bags of rice as they came out of the ship. * * * Even if there had been any difficulty of the kind, it was one which the merchant brought upon himself by the mode in which he contracted."

has a right, when the goods are actually ready for delivery, to demand payment of freight before the actual delivery,[1] and it would appear that he has therefore a right to demand payment of the freight *pro tanto* as successive partial deliveries are made.[2] But where a partial delivery is made and accepted, the acceptance, in the absence of an agreement on the part of the consignee to accept delivery within a reasonable time, does not render him liable to the shipowner for damages resulting to the latter for a delay in accepting delivery of the residue.[3]

(5) *Performance of Contract Prevented by the Cargo Owner* — (a) **In General.** — If the performance of the contract is prevented by the act or default of the cargo owner, the full freight stipulated for becomes due although the cargo has not been carried to its destination nor delivered.[4]

(b) **Cargo Reclaimed.** — So if during the progress of the voyage, when the shipowner is willing and able to complete the voyage, the cargo is taken from him

1. See *infra*, this title, *Liens — Lien of the Shipowner — For Freight.*

2. **Right to Demand Pro Rata Freight on Partial Delivery.** — See Carver on Carriage by Sea, § 546; Brown *v.* Tanner, L. R. 3 Ch. 604.

In Moeller *v.* Young, 5 El. & Bl. 7, 85 E. C. L. 7, it was held, in the Court of Queen's Bench, that the assignee of a bill of lading to whom a partial delivery had been made was liable to the shipowner for damages to him, analogous to demurrage, occasioned by the consignee's refusal to accept the offer of the shipowner to deliver the remainder upon receiving payment for the freight on the goods already delivered. In delivering judgment Erle, J., said: "Had the charterer received the goods himself, he must have paid contemporaneously. If the goods could not be delivered in parts, there would be but one act on each side. If they were to be delivered divisibly, still the law would consider the whole as one transaction, and would hold the parties to the contract as nearly as possible. The assignees appear to have contracted to receive the parts simultaneously with payment by themselves; the captain might therefore refuse to deliver the rest till payment was made; and the defendants would then have to answer for a delay which, in effect, was analogous to demurrage." The liability to damages rested under the pleadings upon a contract on the part of the consignees to receive delivery within a reasonable time. There was no such express agreement, but the court appeared to be of opinion that the consignee's making the claim under the bill of lading and the assenting to the claim were sufficient to raise such a contract. The case was appealed to the Exchequer Chamber, Young *v.* Moeller, 5 El. & Bl. 755, 85 E. C. L. 755, and was there reversed upon the ground that there was not proved to be any agreement to accept delivery within a reasonable time. This judgment, however, does not appear to affect the principle of the judgment of the Court of Queen's Bench in a case where the consignee is bound by the provisions of the charter-party relative to demurrage, that is, where he is not a mere indorsee of the bill of lading, nor to affect the general principle as to the right to withhold complete delivery until partial payment.

Perhaps some expressions in Brittan *v.* Barnaby, 21 How. (U. S.) 527, and Clark *v.* Masters, 1 Bosw. (N. Y.) 177, appear to favor the view that the shipowner is never entitled to demand a partial payment upon the freight, but in both these cases the facts were that the shipowner demanded a partial payment before he was ready, and prepared to tender a delivery of the whole cargo.

3. Young *v.* Moeller, 5 El. & Bl. 755, 85 E. C. L. 755. See the last note *supra*.

4. **Freight Due When Cargo Owner Prevents Performance.** — Cargo ex Galam, 33 L. J. Adm. 97, Brown & L. Adm. 167; Stewart *v.* Rogerson, L. R. 6 C. P. 424; The Gazelle, 128 U. S. 474; Hart *v.* Shaw, 1 Cliff. (U. S.) 358; Bork *v.* Norton, 2 McLean (U. S.) 422; One Hundred and Seventy-five Tons of Coal, 9 Ben. (U. S.) 400; Murray *v.* Ætna Ins. Co., 4 Biss. (U. S.) 417; The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542; Wood *v.* Hubbard, 62 Fed. Rep. 753; Brown *v.* Ralston, 4 Rand. (Va.) 504. See also Lutwidge *v.* Grey, Abbott (5th ed.), 307; The Soblomsten, L. R. 1 Adm. & Eccl. 293; Gumm *v.* Tyrie, 34 L. J. Q. B. 124. *Compare* Smith *v.* Wilson, 8 East 437. See *infra*, this title, *Measure of Damages — Amount Recoverable by the Shipowner*.

Fraudulent Conduct of the Shipowner. — Freight (though, by the terms of a charter-party, payable monthly if required) is not to be recovered where the voyage was never completed, but the vessel was condemned by a foreign tribunal in consequence of a fraud attempted by one of the owners intrusted by the rest with the care of the vessel, though no proof appears of their assenting to such fraudulent act. Hadfield *v.* Jameson, 2 Munf. (Va). 53.

Delivery Prevented by Default of Shipowner. — In Bradstreet *v.* Baldwin, 11 Mass. 229, it was held that where the master of a chartered vessel was prevented from delivering the cargo by a seizure for the default of the freighter, the owners were entitled to the hire as upon an actual delivery.

Unsafe Port. — The shipowner is entitled to full freight when the consignee of the cargo, without any fault on the shipowner's part, has named a port at which it is impossible to deliver the cargo, and when, upon the shipowner's failure to go to such port, he is required by the consignee to land the cargo at one of several ports named in the charter-party. Duncan *v.* Köster, L. R. 4 P. C. 171.

by the cargo owner without his consent, full freight becomes due.[1] And if the cargo owner, before the voyage is begun, the vessel being and remaining ready to enter on the voyage, undertakes to reclaim his goods, the shipowner is entitled to full freight.[2]

(c) **Vessel Captured.** — When a neutral vessel is captured because she is loaded with goods of the enemy, the full freight stipulated for in the contract is due from her captors, who take the place of the cargo owner, because by their acts the performance of the contract is prevented;[3] and if such vessel is recaptured and her cargo unloaded by order of court at some place other than her destination, it seems that full freight will be allowed the shipowner.[4]

(6) *Legality of the Voyage.* — Although the voyage has been performed and the cargo delivered, the shipowner cannot recover freight unless the voyage was a legal one.[5]

(7) *Right to Repair or Transship.* — If during the voyage the vessel is injured, the master may retain the cargo until the vessel can be repaired, if this can be done in a reasonable time, the nature of the cargo being considered; or, if he thinks best, he may employ another vessel to carry the cargo to its destination; and if the cargo owner refuses to allow a reasonable time for repairing the vessel, or to have his goods transshipped, he becomes liable for the full contract freight.[6]

1. Braithwaite *v.* Aikin, 1 N. Dak. 455. See also Bailey *v.* Damon, 3 Gray (Mass.) 92.

Completion of the Voyage Waived. — If by the orders of the cargo owner the cargo is delivered at a point other than the agreed destination, the completion of the voyage is thereby waived and full freight becomes due. The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542; Ellis *v.* Willard, 9 N. Y. 529.

2. The Tornado, 108 U. S. 342; Bartlett *v.* Carnley, 6 Duer (N. Y.) 194. See also Thompson *v.* Small, 1 C. B. 328, 50 E. C. L. 328. But see Burgess *v.* Gun, 3 Har. & J. (Md.) 225; Bailey *v.* Damon, 3 Gray (Mass.) 92. And see *infra*, this title, *Liens — When Liens Take Effect*.

Redemanding Goods Before Voyage. — "By the usage of trade the merchant, if he redemands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him, on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them; but these are conditions to be performed before the original contract can be affected by the demand of the goods. It would be most unjust to the owners and master of the ship if we were to hold that upon a simple demand at any time the goods must be delivered back in the port of outfit." Tindal *v.* Taylor, 4 El. & Bl. 227, 82 E. C. L. 227, 1 Jur. N. S. 112.

Charterer May Reclaim Damaged Cargo. — If the cargo already furnished to the vessel by the charterers is damaged before sailing to such an extent that it is worth less than the freight stipulated for, the charterers have a right to substitute a sound cargo in place of the damaged cargo, and the refusal of the master of the vessel to accept the substituted cargo tendered will entitle the charterers to treat the charter as broken and to demand the damaged cargo without payment of freight. The Bark Luteken, 6 Ben. (U. S.) 565.

3. The Copenhagen, 1 C. Rob. 289; The Fortuna, Edw. Adm. 56.

4. The Racehorse, 3 C. Rob. 101; The Martha, 3 C. Rob. 106; The Hoffnung, 6 C. Rob. 231.

5. Illustrations. — In Muller *v.* Gernon, 3 Taunt. 394, it was held that an order of the English Council, permitting the consignee of goods coming from an enemy's country without a license to land them in England, on condition of immediately re-exporting them, did not legalize the voyage so as to enable the master of the ship to recover his freight.

A vessel freighted from D. to L. was, on her arrival, and after a delivery of part of her cargo, seized by the revenue officers on suspicion that she was not Prussian built. The Treasury, on petition, ordered the ship to be restored on condition that the cargo should be exported, and on payment of a certain sum as a satisfaction to the seizing officers. It was held that this was sufficient to show that the voyage was illegal, without condemnation, and that although the freighters afterwards accepted and exported the cargo according to the terms of the order, the shipowner was precluded from recovering the freight. Blanck *v.* Solly, 1 Moo. 531, Holt 554, 3 E. C. L. 218.

6. Freight Earned by Repairing the Vessel or Transshipping the Cargo — *England.* — Luke *v.* Lyde, 2 Burr. 882; Shipton *v.* Thornton, 1 Perry & D. 216; The Bahia, Brown & L. Adm. 292; The Soblomsten, L. R. 1 Adm. & Eccl. 293; Benson *v.* Chapman, 2 H. L. Cas. 696.

Canada. — Owen *v.* Outerbridge, 26 Can. Sup. Ct. Rep. 272.

United States. — Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595; The Maggie Hammond, 9 Wall. (U. S.) 435; Jordan *v.* Warren Ins. Co., 1 Story (U. S.) 342; Card *v.* Hine, 39 Fed. Rep. 818.

Maryland. — Merchants' Mut. Ins. Co. *v.* Butler, 20 Md. 41.

New York. — Herbert *v.* Hallett, 3 Johns. Cas. (N. Y.) 93; Schieffelin *v.* New York Ins. Co., 9 Johns. (N. Y.) 21; Saltus *v.* Ocean Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290, 14 Johns. (N. Y.) 138; Whitney *v.* New York Fire-

(8) *Abandonment of Ship During Voyage* — (a) **England.** — According to the English authorities, when the ship has been abandoned by her crew during the voyage without any intention to retake possession, and the vessel and her cargo are then brought to port by salvors, the cargo owners may treat the contract of affreightment as at an end, and the shipowner has no right to demand that the cargo be delivered to him upon his securing the charges of the salvors, that he may carry the cargo to its destination and thereby earn the contract freight.[1]

(b) **United States.** — But in the United States the opposite view has been taken.[2]

(9) *Cargo Damaged* — (a) **Freight Sometimes Due.** — If the shipowner has carried the cargo to its destination and is ready to deliver it there, he does not necessarily lose his right to freight because the cargo has deteriorated in value or has been damaged.[3]

men Ins. Co., 18 Johns. (N. Y.) 208; Hughes *v.* Sun Mut. Ins. Co., 100 N. Y. 58.

South Carolina. — Sturgis *v.* Gairdner, 2 Brev. (S. Car.) 233.

Tennessee. — Crawford *v.* Williams, 1 Sneed (Tenn.) 205, 60 Am. Dec. 146.

Compare Gibbs *v.* Grey, 2 H. & N. 22.

As to the duty to repair or transship, see the titles ABANDONMENT AND TOTAL LOSS, vol. 1, p. 19; MASTERS OF VESSELS; SHIPS AND SHIPPING.

" When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, he [the master] is at liberty to transship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, it becomes his duty under such circumstances to procure it and transport the goods to their place of destination, and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured. That rule, however, is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time. In that state of the case he may, if he deems it best, retain the goods until the repairs are made, and forward them in his own vessel; and upon the same principle, and for the same end, if he have no means to transship the goods it is his duty to repair his own vessel, when capable of being repaired, provided it can be done within a reasonable time, and he has the means at his command; and if not, and the means cannot be obtained from the owner, or upon the security of the ship, he may sell a part, or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be enabled to resume the voyage and carry the goods, or the residue, as the case may be, to the place of destination; and he is not entitled to recover for freight if he refuses to transship the goods, unless he repairs his own vessel within a reasonable time, and carries them on to the place of delivery." The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7.

It is not of the essence of the contract of affreightment that the merchandise should be transported in the same vessel to the port of destination. In case of necessity, the captain or owner may repair the vessel or furnish another to complete the voyage and earn the freight. If the merchant refuses to allow repairs, or permit the captain to employ another vessel, the owners of the chartered vessel will be entitled to the whole freight of the full voyage, although the cargo is not delivered at the port of destination. So, where a vessel was so much injured on the second day of her voyage as to make it necessary to return to port and repair, and when a large part of the cargo was so damaged that it was sold by order of the port wardens for whom it might concern, and the remainder unfit to ship without repacking, it was held that the freighters of the vessel were bound to pay full freight, as if the cargo had been delivered at the port of destination, by declining to reship, on being notified ten days after the accident that the vessel was ready to take in the cargo and proceed on her voyage. Tio *v.* Vance, 11 La. 199.

1. Effect of Abandonment — England. — The Kathleen, L. R. 4 Adm. & Eccl. 269; The Cito, 7 Prob. Div. 5. See also The Leptir, 5 Asp. M. L. C. 411.

2. United States. — " We feel compelled to hold that the circumstance of derelict, followed by the further circumstance that the derelict comes into the hands of salvors, and from their hands into the admiralty court, is only a particular phase, not differing in essentials from other phases, of the incidents of the perils of navigation from which the ship is bound to relieve the cargo, so far as circumstances will permit, and which will not deprive the vessel of its freight, if prepared to earn it." *Per* Putnam, J., in The Eliza Lines, 61 Fed. Rep. 330, discussing and *disapproving* The Kathleen, L. R. 4 Adm. & Eccl. 269; The Cito, 7 Prob. Div. 5.

3. Luthwidge *v.* Grey, Abbott (5th ed.) 307; Moorson *v.* Page, 4 Campb. 103; Lewis *v.* The Elizabeth, 1 Ware (U. S.) 41; Halcrow *v.* Lemesurier, 10 Quebec L. Rep. 239. See also Shields *v.* Davis, 6 Taunt. 65.

When Freight Recoverable for Delivery of Damaged Cargo. — In Griswold *v.* New York Ins. Co., 3 Johns. (N. Y.) 321, 3 Am. Dec. 490, Kent, C. J., said: " The shipowner performs his engagement when he carries and delivers the goods. The condition which was to precede payment is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract or compare it with the common-law doc-

(b) **Amount of Damage Permissible.** — It is difficult to state with accuracy what amount of damage will deprive the shipowner of his freight. It is undoubtedly true that freight may be recovered although the cargo when ready for delivery is worth less than the freight due upon it;[1] and it has been stated as the proper rule that if the cargo arrives at its destination *in specie*, capable of being delivered, the shipowner is entitled to receive his freight although such cargo is so deteriorated or damaged that it is of no value.[2]

Merchantable Character of Cargo. — In a late English case in which this question is discussed, it is said that the fact that the cargo has not been totally destroyed, but retains its original appearance and is of some value, will not necessarily entitle the shipowner to freight, but that if there has been a destruction of the merchantable character of the cargo, its owner need pay nothing for its carriage.[3]

Destruction in Specie. — The cargo-owner is certainly not liable for the freight if there has been a destruction *in specie* of the cargo.[4]

(c) **Cause of Damage Immaterial.** — The right to recover freight upon a damaged cargo does not depend upon the cause of the deterioration or damage, but is the same whether the cargo has deteriorated from inherent infirmities,[5] or has been damaged by sea perils,[6] or because of the negligence of the master and crew.[7]

(d) **Acceptance of Damaged Goods.** — If the owner of a cargo which arrives in a damaged condition accepts it, he is bound to pay freight.[8]

(e) **Animals Dying on the Voyage.** — Animals forming the cargo of a vessel frequently die during the voyage, and the question then arises as to the cargo owner's liability for freight. It has been said by an acknowledged authority that freight would not be payable upon animals which died during the voyage and were thrown overboard, nor, probably, would it be payable although the

trine of carrying for hire, we cannot discover any principle which makes the carrier an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage he has no concern with the diminution of their value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper."

1. Cargo Worth Less than the Freight. — Dakin *v.* Oxley, 15 C. B. N. S. 646, 109 E. C. L. 646. *Compare* Luke *v.* Lyde, 2 Burr. 887.

2. Delivery in Specie. — The Ann D. Richardson, Abb. Adm. 499; Jordan *v.* Warren Ins. Co., 1 Story (U. S.) 354; Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109; M'Gaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405; Whitney *v.* New York Firemen Ins. Co., 18 Johns. (N. Y.) 208.

Illustration. — In Garrett *v.* Melluish, 4 Jur. N. S. 943, freight was allowed for the transportation of a cargo of bricks which had been crushed by heavy machinery stowed upon them.

3. Merchantable Character Destroyed. — A vessel on which dates had been loaded was sunk during the course of the voyage, and subsequently raised. The evidence went to show that the dates were saturated with sewage, and were in a state of fermentation and putrefaction and unquestionably unmerchantable as dates; but it appeared that they still retained the appearance of dates, and were sold for £2,400, for the purpose of distillation into spirit. It was held that no freight was payable for the carriage of the dates. Asfar *v.* Blundell, (1895) 2 Q. B. 196.

4. Destruction in Specie. — Dickson *v.* Buchanan, 13 Sc. L. Rep. 401; Ridyard *v.* Phillips, 4 Blatchf. (U. S.) 443.

When a vessel loaded with cement sunk, and the cement, having been overflowed by water, hardened into a solid mass when the vessel was raised, it was held that no freight was due. Duthie *v.* Hilton, L. R. 4 C. P. 138.

5. Inherent Infirmity. — Abbott on Shipping (8th ed.), 427; Whitney *v.* New York Firemen Ins. Co., 18 Johns. (N. Y.) 208.

"It has been a question, when goods from natural causes have become deteriorated in the course of the voyage so as to be worthless, whether the consignee may not abandon them for the freight. And it has been held by authors of high authority in maritime law that he may. But the better opinion, I think, and that supported by the better reasons, is that he cannot, and that in such a case the master is entitled to full freight on all that is laden. The loss is not attributable to his fault, but to the intrinsic vice of the goods, and by the principles of natural law, the loss falls on the owner. *Res perit domino.* And this decision is conformable to the principles of the contract of hiring." Steelman *v.* Taylor, 3 Ware (U. S.) 52, *per* Ware, D. J.

6. Sea Perils. — Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109; Whitney *v.* New York Firemen Ins Co., 18 Johns. (N. Y.) 208.

7. Negligence. — Carver on Carriage by Sea, § 549; 1 Parsons on Shipping and Admiralty, 217; Dakin *v.* Oxley, 15 C. B. N. S. 646, 109 E. C. L. 646. See *infra*, this section, *Cross Action or Set-off for Damage to Cargo.*

8. Knox *v.* The Schooner Ninetta, Crabbe (U. S.) 534.

carcasses were carried to their destination.[1] But by other authorities the liability for freight has been made to depend upon the agreement of the parties to the contract. If there was no express agreement respecting the payment of freight, the general rule is said to be that freight is to be paid for the dead as well as for the living; but if the agreement was to pay for the transportation of the animals, then no freight is to be paid for those that died during the voyage.[2]

(f) **Contents of Casks or Other Vessels Lost.** — When liquids such as wine and molasses, or other articles such as sugar and salt, which are usually stowed in casks or other vessels, have during the voyage diminished in quantity so that upon the arrival of the ship the casks or other vessels are empty, or nearly so, the question arises whether freight is payable or not. It has been decided that if such articles are washed out and lost by the perils of the sea, no freight is due.[3] But if the loss was occasioned by fermentation, evaporation, or other inherent waste, or by leakage resulting from the imperfections of the casks or other vessels, it seems that freight would be due.[4]

(g) **Cross Action or Set-off for Damage to Cargo — England.** — The rule of the English courts is that when the owner of the cargo which has been lost or damaged by the negligence of the shipowner is sued for freight, he cannot set up as a defense to such action the loss of or damage to the cargo, but his remedy is by a cross action.[5]

Canada. — And the same rule obtains in Canada.[6]

United States. — But the general rule of the federal courts, and also of the courts of the several states of the American Union, is that the cargo owner

1. Carver on Carriage by Sea, § 548. And see the title CARRIERS OF LIVE STOCK, vol. 5, p. 427.

2. Abbott on Shipping (5th ed.), 274, *citing* Dig. 14, 2, 10; Roccus Not. 76, 77, 78; Mollov, Book 2, c. 4, § 8; 3 Kent's Com. 225; Angell on Carriers, § 394.

It has been held that when the contract was to let certain space, and when there was no express agreement to deliver the cattle, which constituted the cargo, at the port of destination, freight was due for cattle which perished during a storm and were thrown overboard. Murray *v.* Bickerdike, 3 Leg. N. (Quebec) 47.

3. 3 Kent's Com. 226.

Where one hundred and ninety hogsheads of sugar had been shipped at S., to be delivered at N., and during the voyage the ship leaked, owing to tempestuous weather, and fifty hogsheads of sugar were washed out so that the casks were empty, and some of them had fallen to pieces on the arrival of the vessel at N., where one hundred and forty hogsheads were received by the consignee, who refused to pay for the residue, it was held that no freight was due for the empty hogsheads, the sugar being considered as lost by the perils of the sea. Frith *v.* Barker, 2 Johns. (N. Y.) 327.

4. 3 Kent's Com. 226; 1 Parsons on Shipping and Admiralty, 218. See Carver on Carriage by Sea, § 549; Frith *v.* Barker, 2 Johns. (N. Y.) 327; Gunther *v.* Colin, 3 Daly (N. Y.) 125.

Goods in Casks — Delivered Empty or Partly So. — "The owner of liquids, or any articles shipped in casks of any description, is, in the first instance, chargeable with the duty of supplying proper ones, and would presumptively be responsible for a loss arising from their insufficiency or defects. The effect of an unqualified bill of lading is to transfer this presumptive responsibility to the captain and owners of the vessel. They therein acknowledge the good condition of the casks, upon their reception on board, and engage to deliver them and their contents, as described, in the same condition. When the case presents nothing else, if the casks be delivered empty, or nearly so, and the actual cause of the leakage be unknown or conjectural, the owners of the vessel lose their freight. They have not performed their engagement. A proportion of freight would also be lost, for any number of the casks delivered empty, as well as for any portion of the contents of any cask leaked out. The loss in these cases is legally attributable to the defect of stowage, or some cause over which the master had control, and for which he has engaged to be responsible. As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the shipowner and master to prove explicitly that the casks were, in fact, unsound or badly made; and in such a case the original responsibility of the owner for their condition is restored, and he is bound to pay the freight." Nelson *v.* Stephenson, 5 Duer (N. Y.) 538, *per* Hoffman, J.

5. **England — Cross Action Necessary.** — Bellamy *v.* Russell, 2 Show. 167; Bornmann *v.* Tooke, 1 Campb. 377; Shields *v.* Davis, 6 Taunt. 65; Gibson *v.* Sturge, 10 Exch. 622; Thompson *v.* Gillespy, 5 El. & Bl. 209, 85 E. C. L. 209; Davidson *v.* Gwynne, 12 East 381; Stimson *v.* Hall, 1 H. & N. 831; Meyer *v.* Dresser, 16 C. B. N. S. 646, 111 E. C. L. 646; Garrett *v.* Melhuish, 4 Jur. N. S. 943; Dakin *v.* Oxley, 15 C. B. N. S. 646, 109 E. C. L. 646; 33 L. J. C. P. 115. See also The Norway, 13 L. T. 50, 11 Jur. N. S. 892; Merchant's Shipping Co. *v.* Armitage, L. R. 9 Q. B. 99.

6. **Canada.** — Brown *v.* Muckle, 7 U. C. L. J. 298; Allen *v.* Chisholm, 33 U. C. Q. B. 237.

may defeat an action for freight in whole or in part by showing that the cargo has been lost or damaged by a cause for which the shipowner is responsible.[1]

(10) *Apportionment of Freight* — (a) **Full Cargo Not Loaded or Delivered.** — When all the cargo which it was agreed to carry upon the vessel has not been loaded thereon, or a part of the cargo which was loaded upon the vessel has not been delivered, the general rule is that freight is payable in proportion to the quantity of the cargo carried and delivered.[2]

(b) **Entire Voyage Not Performed** — *aa.* GENERAL RULE — **Freight Pro Rata Itineris.** — It is well settled that if, by reason of *vis major* or inevitable accident, or for other causes, it becomes necessary or desirable to deliver the cargo of a vessel at an intermediate port, and the owner of such cargo voluntarily accepts it there, he must pay freight *pro rata itineris*.[3]

1. United States — Set-off Allowed. — 1 Parsons on Shipping and Admiralty 206.

United States. — Bradstreet *v.* Heron, Abb. Adm. 209; Thatcher *v.* McCulloh, Olc. Adm. 365; Knox *v.* Ninetta, Crabbe (U. S.) 534; Snow *v.* Carruth, 1 Sprague (U. S.) 324; Bearse *v.* Ropes, 1 Sprague (U. S.) 331; The Tangier, 32 Fed. Rep. 230. See also Kerruish *v.* Havemeyers, etc., Sugar Refining Co., 49 Fed Rep. 280.

Alabama. — Waring *v.* Morse, 7 Ala. 343.

Illinois. — Edwards *v.* Todd, 2 Ill. 462.

Kentucky. — Boggs *v.* Martin, 13 B. Mon. (Ky.) 239.

Louisiana. — Rappahannock *v.* Woodruff, 11 La. Ann. 698.

New York. — Schureman *v.* Withers, Anth. (N. Y.) 166; Ogden *v.* Coddington, 2 E. D. Smith (N. Y.) 317; Hinsdell *v.* Weed, 5 Den. (N. Y.) 172; Elwell *v.* Skiddy, 77 N. Y. 282.

Pennsylvania. — Bartram *v.* McKee, 1 Watts (Pa.) 39; Leech *v.* Baldwin, 5 Watts (Pa.) 446; Humphreys *v.* Reed, 6 Whart. (Pa.) 435.

South Carolina. — Ewart *v.* Kerr, Rice L. (S. Car.) 203.

Compare Brown *v.* Clayton, 12 Ga. 576.

Damages for Breach of Contract Deducted. — Where the master of a vessel has wrongfully refused to permit her to be loaded in accordance with the charter-party, the damages sustained by the charterer on account of such refusal are to be deducted from the freight. Parsons *v.* Ogden, 4 Blatchf. (U. S.) 99.

Hawaii — Set-off Allowed. — The rule of the courts of the United States is also the rule of the courts of Hawaii. La Motte *v.* Angel, 1 Hawaiian 136.

2. Pro Rata Freight Payable for Partial Delivery. — Abbott on Shipping 301; 1 Parsons on Shipping and Admiralty 205; Christy *v.* Row, 1 Taunt. 300; The Brig Collenberg, 1 Black (U. S.) 170; M'Gaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405; Frith *v.* Barker, 2 Johns. (N. Y.) 327.

Complete Cargo Not a Condition Precedent. — Where the master and freighter of a vessel of four hundred tons mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. P., and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to L., and deliver the same on being paid freight for hemp five pounds per ton, for iron five shillings per ton, etc., one-half to be paid on right delivery, the other at three months, it was held that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. Ritchie *v.* Atkinson, 10 East 295.

Part of Cargo Not Loaded. — Where only a part of the cargo is loaded, though the charterer has furnished the whole cargo stipulated for, freight is due at the agreed rate on the part delivered, with the right on the charterer's part to recoup for any damage caused by the breach of the charter-party in this respect. Holyoke *v.* Depew, 2 Ben. (U. S.) 334.

Acceptance by Consignee. — If a part of the cargo be lost in the course of the voyage, yet if the consignee accept the residue, he becomes liable to pay freight *pro rata*. Hinsdell *v.* Weed, 5 Den. (N. Y.) 172.

Pro Rata Freight Not Recoverable in an Action of Covenant. — No freight can be recovered in an action of covenant upon a contract of affreightment when only a part of the cargo has been delivered. Bright *v.* Cowper, 1 Brownl. & G. 21; Cook *v.* Jennings, 7 T. R. 377.

3. When Freight Pro Rata Itineris Is Payable. — Laws of Oleron, art. 4; Roccus, 81*n*; Laws of Wisbuy, art. 16; Malynes *Lex Mercatoria* 98.

England. — Lutwidge *v.* Grey, Abbott on Shipping 438; Osgood *v.* Groning, 2 Campb. 466; Christy *v.* Row, 1 Taunt. 300; Luke *v.* Lyde, 2 Burr. 882; Mitchell *v.* Darthez, 2 Bing. N. Cas. 555, 29 E. C. L. 419; Metcalfe *v.* Britannia Ironworks Co., 2 Q. B. Div. 423; The Newport, Swab. 335; The Soblomsten, L. R. 1 Adm. & Eccl. 293.

United States. — The Saratoga, 2 Gall. (U. S.) 164; Bork *v.* Norton, 2 McLean (U. S.) 422; The Velona, 3 Ware (U. S.) 139; The Ann D. Richardson, Abb. Adm. 499; Marcardier *v.* Chesapeake Ins. Co., 8 Cranch (U. S.) 39; Propeller Mohawk, 8 Wall. (U. S.) 153; The Spartan, 25 Fed. Rep. 44.

Louisiana. — Vance *v.* Clark, 1 La. 324.

Maine. — Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387.

Massachusetts. — Coffin *v.* Storer, 5 Mass. 252, 4 Am. Dec. 54; Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151.

Michigan. — Rossiter *v.* Chester, 1 Dougl. (Mich.) 154.

Minnesota. — Bass *v.* Upton, 1 Minn. 408.

New Hampshire. — Harris *v.* Rand, 4 N. H. 259, 17 Am. Dec. 421.

New York. — Atlantic Mut. Ins. Co. *v.* Bird,

bb. What Is a Voluntary Acceptance. — What constitutes such a voluntary acceptance of goods by the owner thereof at an intermediate port as will entitle the vessel to freight *pro rata*, is not so clearly settled. It has been held that a sale of the cargo by the owner thereof at an intermediate port made him liable for freight,[1] and that an abandonment to the underwriters who had insured such cargo, and their acceptance of it, were equivalent to a sale.[2]

2 Bosw. (N. Y.) 195; Kinsman *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 460.

Pennsylvania. — Armroyd *v.* Union Ins. Co., 3 Binn. (Pa.) 437; Callender *v.* Insurance Co. of North America, 5 Binn. (Pa.) 525; Gray *v.* Waln, 2 S. & R. (Pa.) 229, 7 Am. Dec. 642; Richardson *v.* Young, 38 Pa. St. 169.

South Carolina. — Lorent *v.* Kentring, 1 Nott. & M. (S. Car.) 132; Halwerson *v.* Cole, 1 Spears L. (S. Car.) 321, 40 Am. Dec. 603; Forbes *v.* Rice, 2 Brev. (S. Car.) 363, 4 Am. Dec. 589.

Tennessee. — Crawford *v.* Williams, 1 Sneed (Tenn.) 205, 60 Am. Dec. 146.

Texas. — Adams *v.* Haught, 14 Tex. 243.

Hawaii. — Olsson *v.* Davies, 8 Hawaiian 43.

See also The Copenhagen, 1 C. Rob. 289; Rogers *v.* West, 9 Ind. 400; Western Transp. Co. *v.* Hoyt, 69 N. Y. 230, 25 Am. Rep. 175; Braithwaite *v.* Aiken, 1 N. Dak. 455; Hooe *v.* Mason, 1 Wash. (Va.) 207.

Compare Mulloy *v.* Backer, 5 East 316; Sturgis *v.* Gairdner, 2 Brev. (S. Car.) 233.

Early Cases. — Some of the early cases in attempting to follow Luke *v.* Lyde, 2 Burr. 882, construe that case to hold that the owner of goods is bound to pay *pro rata* freight if he accepts his goods, even though his acceptance is not voluntary; but it does not seem that such was ever meant to be the doctrine of that case, and the statement of the text is now sustained by all the authorities. Williams *v.* Smith, 2 Cai. (N. Y.) 13; Post *v.* Robertson, 1 Johns. (N. Y.) 24; Scott *v.* Libby, 2 Johns. (N. Y.) 336, 3 Am. Dec. 431; Robinson *v.* Marine Ins. Co., 2 Johns. (N. Y.) 323, *not followed* as to this point in Atlantic Mut. Ins. Co. *v.* Bird, 2 Bosw. (N. Y.) 195.

Explanation of the Doctrine. — In M'Gaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405, Shaw, C. J., said: "When the goods are shipped and the voyage is commenced the right of the shipowner to full freight has attached; and in case of accident and detention, either by putting back to the port of departure or by stopping at an intermediate port, more or less distant from the port of destination, the shipper has no right, without the consent of the shipowner, to demand and obtain the goods without paying full freight, in case the shipowner, or the master in his behalf, can either refit his own ship within a reasonable time, and proceeds to do so, or within a like reasonable time will transmit the goods in another vessel. If a beneficial part of the voyage has been performed when the voyage has been so interrupted, and the goods can be transported the remainder of the way at a cost less than the original freight, and the shipper consents there to receive his goods, and the shipowner to deliver them, the law raises a promise to pay freight *pro rata itineris* for the part of the voyage thus performed. The original contract is not executed, and the stipulated freight is not earned; but by the consent of both parties the original contract is relinquished, and then, from the beneficial service performed by the one party for the benefit of the other, the law raises a promise, upon equitable considerations, to pay a part of the stipulated freight, in the proportion that the service actually done bears to that undertaken to be done. This, we think, is the true principle upon which the case of Luke *v.* Lyde, 2 Burr. 882, was decided, modified and adopted as it has been by more recent cases."

Voluntary Acceptance. — Freight *pro rata itineris* is not ordinarily due unless there has been a voluntary acceptance of the cargo at an intermediate port; and not where there has been an acceptance from mere necessity, occasioned by an overwhelming calamity or superior force. The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542.

Canal Voyage Interrupted by Ice. — When a common carrier on the canals is prevented by the canals freezing up from accomplishing the whole voyage, he is bound to deliver the goods at the place to which he undertook to transport them, on the canal again becoming navigable; but if the owner of the goods accepts them at the place where the voyage was interrupted by the ice, the carrier is discharged from further responsibility, and becomes entitled to a *pro rata* compensation for the transportation of the goods to that place. Murray *v.* Ætna Ins. Co., 4 Biss. (U. S.) 417; Parsons *v.* Hardy, 14 Wend. (N. Y.) 216.

Negligence of the Carrier. — But if through the negligence of the owner or his agent the voyage of a canalboat is interrupted by the freezing of the canal, no freight can be recovered. Spann *v.* Erie Boatman's Transp. Co., 11 N. Y. Misc. Rep. (Buffalo Super. Ct.) 680.

Damaged Goods Accepted. — Part of the cargo of a vessel was totally destroyed by fire, and the balance, which was badly damaged, was landed at an intermediate port and accepted by the owner. It was held that for the portion of the cargo which had been destroyed no freight was due, as it was not capable of being delivered by the ship nor accepted by the owner, but that the damaged goods which were voluntarily received by the owner were chargeable with *pro rata* freight. British, etc., Marine Ins. Co. *v.* Southern Pac. Co., 72 Fed. Rep. 285, *affirming* 55 Fed. Rep. 82.

1. Sale by Owner of Cargo. — Smyth *v.* Wright, 15 Barb. (N. Y.) 51.

2. Abandonment Equivalent to Voluntary Acceptance. — Smyth *v.* Wright, 15 Barb. (N. Y.) 51.

A *pro rata* freight may be recovered from the shipper if he abandons the goods to the underwriter after the voyage is broken up by the stranding of the vessel. Van Norden *v.* Littlejohn, Term (4 N. Car.) 16. To the same effect are British, etc., Marine Ins. Co. *v.*

Sale Without Consent of Owner. — But a sale of the cargo at an intermediate port without the consent of the owner will not entitle the vessel to freight,[1] nor is a receipt of the proceeds of such a sale a voluntary acceptance.[2]

Receipt from Admiralty Court After Capture. — *Pro rata* freight is not due when the owner of goods has been compelled to receive them at the hands of the admiralty after the capture and condemnation of the vessel and cargo and restoration of a part of the cargo.[3]

Southern Pac. Co., 55 Fed. Rep. 82, *affirmed* in 72 Fed. Rep. 285; McKibbin *v.* Peck, 39 N. Y. 262.

1. Liddard *v.* Lopes, 1 East 526.

No Freight though Goods Damaged Before Sale. — Where goods damaged on the voyage are landed at an intermediate port and sold without the consent of the owner, the shipowner is not entitled to freight *pro rata itineris*. Acatos *v.* Burns, 3 Exch. Div. 282; Duthie *v.* Hilton, L. R. 4 C. P. 138; Hopper *v.* Burness, 1 C. P. Div. 137; Hill *v.* Wilson, 4 C. P. Div. 329.

A cargo of rice, shipped at B., was, by the bill of lading, to be delivered at R. to the plaintiff, he paying freight for the same. The vessel, having encountered a hurricane, was compelled to put into M., where the rice, having been found to be damaged, and in a state of rapid putrefaction, was, of necessity, sold by the master, who acted *bona fide*, but without the knowledge of either the shipper or shipowner. It was held, under the above circumstances, that no freight was due, either for the whole voyage or *pro rata itineris*. Vlierboom *v.* Chapman, 13 M. & W. 230. To the same effect is The Industrie, (1894) Prob. 58.

2. Receipt of Proceeds of Sale Not Such Acceptance. — Goods shipped on freight to a certain point, after part performance of the voyage, were carried to a different port, where they were taken and sold by a stranger, who remitted the proceeds to the shipper. It was held that the reception of such proceeds by the shipper was not equivalent to a voluntary acceptance of the goods, so as to render him liable for freight *pro rata itineris peracti*. Escopiniche *v.* Stewart, 2 Conn. 391.

If the cargo shipped is not carried to the place of its destination, no freight can be demanded; if voluntarily accepted by the owner or his agent at any other port, freight *pro rata* is due; but if it is received by compulsion, and the supercargo or captain, acting for the benefit of all, receives the proceeds thereof, no freight is earned or due. Hurtin *v.* Union Ins. Co., 1 Wash. (U. S.) 530.

Acceptance of the Proceeds of a Judicial Sale. — In Hunter *v.* Prinsep, 10 East 378, it was held that the acceptance of the proceeds of the cargo, sold by the order of a vice-admiralty court, the vessel having been wrecked but the cargo saved, did not entitle the shipowner to any freight, when it appeared that the sale was made by the court on the application of the master of the vessel, who acted to the best of his judgment for all concerned but without the knowledge of the cargo owners. Lord Ellenborough, C. J., delivering the opinion of the court, said: "However just it may be that a substitution of money for goods made by the authority of a competent tribunal shall be equivalent to the actual restitution of the goods themselves as far as respects all interests in and liens upon that fund, and however reasonable it may be that an owner thus taking the substitute, which requires no further conveyance, should be considered as virtually dispensing with the further duty of the shipowners which would have remained to be performed if the goods had still continued *in specie;* yet no such dispensation with the duty of further conveyance on the part of the owner of the goods can be implied in a case like the present, in which the further conveyance of them is rendered impossible by an act of the immediate agent of the shipowners themselves to which he, the owner of the goods, is neither actually nor virtually consenting by himself or any other agent empowered to consent on his behalf, and to which he is not compelled to submit by any regular exercise of legal authority in any quarter whatsoever, and from which he can, according to what is contended for on the part of the defendants, derive no benefit whatever, inasmuch as the *pro rata* freight claimed by them exceeds the whole amount of the proceeds of the goods sold."

Receipt under an Express Promise. — In Thornton *v.* Fairlie, 8 Taunt. 354, 4 E. C. L. 130, it was held that a promise to pay *pro rata* freight, in consideration of the proceeds of the cargo, which had been stopped by the shipowner, being liberated, was founded on a good consideration and might be enforced.

3. Compulsive Receipt from Admiralty Court. — Where a vessel has been captured on her voyage and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored. Sampayo *v.* Salter, 1 Mason (U. S.) 43. Story, J., delivering the opinion of the court in this case, said: "The doctrine upon this subject in Luke *v.* Lyde, 2 Burr. 882, and other subsequent cases, rests upon the ground that there is a voluntary receipt of the goods at an intermediate port of the voyage, and an agreement to dispense with the party's transporting them farther. But it never has been supposed that a *pro rata* freight was due when by a capture the party has been incapable of performing the voyage, and the shipper has been compelled to receive his goods at the hands of the admiralty." To the same effect is Caze *v.* Baltimore Ins. Co., 7 Cranch (U. S.) 358. But see The Copenhagen, 1 C. Rob. 289; Baillie *v.* Modigliani, 6 T. R. 421, note *d;* and the *dissenting* opinion of Johnson, J., in Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383.

A ship bound for L., after taking in her cargo, but before breaking ground, was cut out of her port of lading in J. by a French privateer, but was afterwards recaptured and carried into another port in the same island, where the cargo was sold by order of the Court

Landing at Intermediate Port — Failure to Repair or Transship. — It has been decided that where the landing of the goods at such intermediate port was made necessary by the fact that the vessel was damaged, and the master thereof fails or refuses to repair the ship or to transship the goods in another vessel, no freight can be collected.[1]

cc. CARGO ACCEPTED AT PORT OF LOADING. — Where the port of distress and of acceptance of the cargo is the port of shipment, and where no part of the voyage has been performed, the owner of goods cannot be required to pay any freight.[2]

dd. AMOUNT. — The rule laid down in the leading case upon the subject is that when freight *pro rata itineris* is due, the amount paid should bear the same proportion to the total freight as the part of the voyage performed bears to the whole voyage.[3] But this rule has been disapproved, and it has been held that the owners of goods should pay the whole amount of the freight stipulated for, less the cost of transportation from the intermediate port where the goods were accepted to the stipulated port of destination, such payment being more nearly in proportion to the benefit received by the owner of the goods, which is the object to be sought for in determining the amount of *pro rata* freight.[4]

b. ADVANCE FREIGHT — (1) *Due by Express Agreement.* — It is competent for the parties to a contract of affreightment to stipulate expressly that the freight or a part thereof shall be payable absolutely at the time of the shipment of the cargo, or at a certain time thereafter, without regard to the performance of the contract.[5]

of Admiralty for the benefit of the freighters. It was held that the owners of the ship were not entitled to any part of the freight, though by the usage of trade the ship was loaded at their expense. Curling *v.* Long, 1 B. & P. 634.

1. The Soblomsten, L. R. 1 Adm. & Eccl. 297; Castel *v.* Trechmann, 1 Cababé & E. 276.

Master Must Be Able and Willing to Transport. — "We regard the law as now settled, that a *pro rata* freight is only due where the owner of the goods elects to receive them at the intermediate port, and that this election can only be made when the master is able and willing to transport them to their port of destination. When the vessel is wholly disabled, and no effort or offer is made by the master or shipowner to transport the goods to their final port by any other conveyance, their acceptance by their owner is compulsory, and no freight whatever is demandable. The right to freight *pro rata itineris* must arise out of some new contract between the freighter and master, either expressly made or to be inferred from their conduct." Atlantic Mut. Ins. Co. *v.* Bird, 2 Bosw. (N. Y.) 195, *per* Bosworth, J. See also Welch *v.* Hicks, 6 Cow. (N. Y.) 504; Williams *v.* Smith, 2 Cai. (N. Y.) 13, 2 Am. Dec. 209.

2. **Goods Brought Back to the Port of Shipment.** — Miston *v.* Lord, 1 Blatchf. (U. S.) 354; Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109; Scott *v.* Libbey, 2 Johns. (N. Y.) 336, 3 Am. Dec. 431. See also The Isabella Jacobina, 4 C. Rob. 77; The Hiram, 3 Rob. Adm. 180.

3. **Amount in Proportion to Voyage Performed.** — Luke *v.* Lyde, 2 Burr. 882; Robinson *v.* Marine Ins. Co., 2 Johns. (N. Y.) 323; Smyth *v.* Wright, 15 Barb. (N. Y.) 51, *distinguishing* and *disapproving* Coffin *v.* Storer, 5 Mass. 252, 4 Am. Dec. 54. See also United Ins. Co. *v.* Lenox, 2 Johns. Cas. (N. Y.) 443.

4. **Should Be Determined According to the Benefit Received.** — Coffin *v.* Storer, 5 Mass. 252, 4 Am. Dec. 54, *disapproving* Luke *v.* Lyde, 2 Burr. 882, *approved* in 1 Parsons on Shipping and Admiralty 243.

5. **Definition.** — Advance freight means the sum of money to be paid at all events upon the taking of goods on board to be carried on a voyage in lieu of the expectation of earning freight upon the contingency of the ship's arrival. Andrew *v.* Moorhouse, 5 Taunt. 435, 1 Marsh. 122, 1 E. C. L. 147.

Construction of Such Stipulations. — In Thompson *v.* Gillespy, 1 Jur. N. S. 779, the contract provided that one-fourth of the freight was to be paid "on the ship having sailed." When the loss of the vessel happened, she had left the harbor, but her crew was not complete, the master and crew were not on board, her shrouds and cables were not in proper condition, the bills of lading for her cargo were not signed, and the intention was that she should remain at anchor in the roadstead until the preparations for her voyage were complete. It was held that she had not sailed within the meaning of the stipulation in the contract.

In Price *v.* Livingstone, 9 Q. B. Div. 679, the vessel had been towed out to sea clear of the loading port, but not beyond the custom-house limits, and had been anchored and was afterwards driven ashore. It was held that she had sailed finally so that advances of freight stipulated for were due.

In Roelandts *v.* Harrison, 23 L. J. Exch. 169, it was agreed that the freight was to be paid on the "final sailing" of the vessel. The vessel had loaded and had left her dock in the tow of a tug, but in passing through an artificial channel, which led from her dock to the sea, she ran aground and became a wreck. It was held that freight could not be recovered,

(2) *Stipulation for Advance Freight Must Be Clear.* — But as such a stipulation is intended to control the usual rule of law applicable to such contracts and to substitute in its place a positive agreement of the parties, it is necessary to express it in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment; otherwise the general rule of law must prevail.[1]

(3) *Insurance as a Test.* — Since freight payable absolutely in advance is at the risk of the cargo owner, but an advance as a simple loan is not, when it appears from the contract that it is intended that the cargo owner shall insure such advance, this seems to stamp the transaction as a payment on account of freight and not a mere loan.[2]

as she had not sailed finally within the meaning of the charter-party. See also Hudson *v.* Bilton, 6 El. & Bl. 565, 88 E. C. L. 565, 2 Jur. N. S. 784.

No Inference from Mere Advance Payment. — An agreement for advance freight cannot be inferred from the mere fact of payment in advance. Brown *v.* Harris, 2 Gray (Mass.) 359.

Part of Freight Payable When Bills of Lading Signed. — By the terms of a charter-party, one-third of the freight was to be paid when the bills of lading therefor were signed. The bills of lading were to be signed within twenty-four hours after the cargo was on board. After the commencement of the voyage, and before the bills of lading were signed, the vessel sank and the cargo was lost. It was held that the loss of the cargo did not relieve the charterers from their liability to present bills of lading, and that the shipowner was entitled to recover damages equal to the amount of the advance freight. Oriental Steamship Co. *v.* Tylor, (1893) 2 Q. B. 518.

Freight to Be Paid at the Port of Loading. — Where a stipulated sum is agreed to be paid for freight at all events at the port of loading upon the taking of goods on board to be carried on a voyage, the shipowner, if it is not paid, may recover the sum from the shipper, notwithstanding the fact that the goods have been lost on the voyage, and, therefore, that as they have not been carried to their port of destination, freight, strictly speaking, had not been earned. Andrew *v.* Moorhouse, 5 Taunt. 435.

Stipulation Making Requirement a Condition Precedent. — A cargo was shipped under a charter-party which contained the following clause: "One-third freight, if required, to be advanced." Shortly after the commencement of the voyage the vessel was wrecked and the cargo lost. After the loss, and not before, the shipowner required payment of advance freight. It was held that the requirement by the shipowner was a condition precedent to the liability of the charterer to pay advance freight, that the requirement was made too late, and that the charterer was not liable. Smith *v.* Pyman, (1891) 1 Q. B. 742.

Held Optional with the Shipowner. — A charter-party contained this clause: "Cash for steamer's ordinary disbursements at port or ports of loading; not exceeding £150 in all, to be advanced at exchange of 50*d.* to the dollar on account of freight, subject to three per cent to cover cost of insurance, etc." It was held that this clause was optional, not obligatory on the shipowners, so that if they provided the master with money to disburse the ship he was not bound to apply to the charterers for cash up to the limited amount by way of advance freight, and that the charterers could not deduct from the freight due the shipowners the profit they would have made by the difference of exchange on the amount stipulated in the charter-party. The Primula, (1894) Prob. 128.

1. *Per* Bigelow, C. J., in Benner *v.* Equitable Safety Ins. Co., 6 Allen (Mass.) 222; Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311.

Illustration. — In some of the bills of lading given for goods loaded upon a vessel was the following provision: "Freight for the said goods being paid in London;" and in other bills of lading there was this provision: "The shippers paying freight for the said goods in London." By the terms of the contract, the goods were to be delivered at Lisbon. It was held that these provisions in the bills of lading meant only that the freight should be paid in London instead of at Lisbon, and that they by no means dispensed with the performance of the voyage. Mashiter *v.* Buller, 1 Campb. 84. See also Krall *v.* Burnett, 25 W. R. 305. *Compare* Blakey *v.* Dixon, 2 B. & P. 321.

2. Insuring an Advance Shows Not a Mere Loan. — By a charter-party it was agreed that cash for the ship's disbursements was to be advanced to the extent of three hundred pounds, free of interest, but subject to insurance and commission. The ship reached B., and while there money was advanced by the charterer's agent for the ship's disbursements. It was held that the stipulated advance was to be taken as prepayment of freight and not as a loan, and that, therefore, the charterer could not recover back his advance. Lord Campbell, C. J., said: "The only question is whether the money disbursed at B. by the plaintiff's agent was a mere loan or an advance of freight, the liability of the defendants to refund the money to the plaintiff depending entirely on the construction to be put upon the charter-party. I am of opinion that this sum of £300 is to be taken as payment of freight. The clause on which the question turns is, 'cash for ship's disbursements to be advanced to the extent of £300, free of interest, but subject to insurance,' etc. Now, this mention of insurance seems to me to stamp the transaction indelibly as a payment on account of freight, and not a mere loan, for, if the advance was to be insured, it must be an advance of freight, which is insurable, whereas a loan is not." Hicks *v.* Shield, 26 L. J. Q. B. 205. To the same effect is Jackson *v.* Isaacs, 3 H. & N. 405. See also Leggett

(4) *Question for the Jury.* — Whether a stipulation amounts to a contract for advanced freight or not, is sometimes a question for the jury to decide from the surrounding circumstances.[1]

(5) *To Be Deducted from Contract Freight.* — Such advance freight is, of course, to be deducted from the total contract freight;[2] and it has been said that the shipper has a right to deduct the whole amount so paid by him in advance from any freight which may be actually earned, in case of a loss of a part of the cargo, and not a proportionate part of it only.[3]

(6) *Repayment in Case of Nonperformance* — (a) **When Not Obligatory.** — When such a stipulation as to advance freight has been expressly inserted in the contract by the parties thereto, the shipowner is not liable to reimburse the shipper who has paid such advance freight though such contract fail of performance.[4]

(b) **When Obligatory.** — But when, without any special agreement, freight is paid in advance and the contract is not performed by reason of any event not imputable to the shipper, such advance payment must be repaid.[5]

on Charter Parties 440, *citing* The Karnak, 21 L. T. 159.

Seaworthiness of the Vessel. — Since the shipper is entitled to indemnify himself against loss by effecting a sufficient amount of insurance to cover both the value of the cargo and the freight paid in advance, and since such insurance cannot be obtained if the vessel is not seaworthy, advanced freight cannot be recovered by the shipowner after the vessel has been wrecked, when it appears that she was not in a seaworthy condition when she sailed on her voyage. Thompson *v.* Gillespy, 1 Jur. N. S. 779.

1. Lidgett *v.* Perrin, 11 C. B. N. S. 362, 103 E. C. L. 362.

2. See Leggett on Charter Parties 440, *citing* The Karnak, 21 L. T. 159.

3. Leggett on Charter Parties 448; Allison *v.* Bristol Marine Ins. Co., L. R. 1 App. 209.

4. **Express Stipulation Relieves from Liability to Repay** — *England.* — Anonymous, 2 Show. 283; Saunders *v.* Drew, 3 B. & Ad. 445, 23 E. C. L. 115; Rodocanachi *v.* Milburn, 18 Q. B. Div. 67; The John, 3 W. Rob. 170; Byrne *v.* Schiller, L. R. 6 Exch. 319; Greeves *v.* West India, etc., Steamship Co., 22 L. T. 615, *reversing* 20 L. T. 914; Trayes *v.* Wormes, 34 L. J. C. P. 274; Allison *v.* Bristol Marine Ins. Co., L. R. 1 App. 209; Hicks *v.* Shield, 26 L. J. Q. B. 205.

Massachusetts. — Benner *v.* Equitable Safety Ins. Co., 6 Allen (Mass.) 222; Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311.

See also Jackson *v.* Isaacs, 3 H. & N. 405.

Shipper Loses Advance Freight. — When the charterer covenants to pay part of the freight at different periods of the voyage, or the whole of it when the goods are on board, it is not a violent construction to hold that the covenants of the shipper find their consideration in the covenants of the shipowner, and that where a failure to complete the voyage, or, in other words, of the shipowner to perform the covenants on his part, results from inevitable accident, the nonperformance is excused, and so much of the freight as was agreed should be paid in advance would be the loss of the shipper, and so much as was made payable on performance of the voyage would be the loss of the shipowner. De Silvale *v.* Kendall, 4 M. & S. 37.

Where a charter-party stipulated on the part of the charterers that the master should be supplied by them with a sum not exceeding one-third of the freight, "free of interest and commission, which is to be in part payment of the freight, at the exchange of twelve per cent. premium, together with the cost of insurance on such advance," and by further provisions any other advances they thought fit to make on the credit of the freight should, with premium, interest, commission, and insurance, be considered in part payment of freight, advances made under the first stipulation, where the voyage was in part performed, were at the risk of the charterers, voluntarily placed by them at the hazard of the voyage, and were to be deemed freight earned, and not liable to be refunded, though the vessel was afterwards lost. Kinsman *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 460.

Whether a Loan or Not. — Whether the shipper can recover sums advanced when the contract of affreightment is not performed, depends upon whether such sums were loans or really advance freight. In the latter case the shipper cannot recover. The Karnak, 21 L. T. 159.

Advance Freight as Part of Damages. — In Dufourcet *v.* Bishop, 18 Q. B. Div. 373, Denman, J., said: "They [the cases] establish as a general rule that money paid by way of advanced freight cannot be recovered back on the failure of the voyage. They by no means establish that where the cargo owner has, as part of the price of the goods, paid or become liable to pay a sum for freight in advance, and the goods are lost by negligence of the shipowner, he may not, as part of his damages (which are to be considered with reference to the value of the goods at the port of arrival), be allowed as against the shipowner an amount equal to the freight so advanced; and if he happens to be partially indemnified against that loss by an insurance of that very amount of advanced freight, I can see no reason why the insurer of that amount should not be entitled to sue in his name for it as part of the damage which the cargo owner, but for the insurance, would have sustained by the defendant's negligence."

5. **Money Advanced as a Loan Must Be Refunded.** — Assicurazioni Generali *v.* S. S. Bes-

Wilful Nonperformance. — If the shipowner wilfully fails to perform the contract of affreightment, freight paid in advance must be repaid.[1]

4. Time Freight — *a.* General Rule. — Whenever the payment of freight under a charter is to be made by time only, it is due and earned at each interval specified unless otherwise agreed. In such case each of the stipulated periods of payment, if such are provided for in the charter-party, is to be considered as if it were a separate voyage.[2]

b. Dependent upon Completion of Part of the Voyage. — The contract may, however, make the payment of any freight at all dependent upon the completion of a part of the agreed voyage.[3]

c. Dependent upon Completion of Outward and Homeward Voyage. — Or, under the stipulations of the contract, no freight may be recoverable until the ship has performed a complete outward and homeward voyage.[4]

sie Morris Co., (1892) 2 Q. B. 652; The Ship Panama, Olc. Adm. 343; Reina *v.* Cross, 6 Cal. 30; Griggs *v.* Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175; Phelps *v.* Williamson, 5 Sandf. (N. Y.) 578. *Semble*, Pitman *v.* Hooper, 3 Sumn. (U. S.) 50. See also Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86; Brown *v.* Harris, 2 Gray (Mass.) 359.

Illustrations. — A charter-party contained this stipulation: "The captain to be supplied with cash for the ship's use." It was held that money obtained under this clause was a mere loan and not advance freight, and, therefore, was to be repaid when the contract was not performed. Manfield *v.* Maitland, 4 B. & Ald. 582, 6 E. C. L. 610, *distinguishing* De Silvale *v.* Kendall, 4 M. & S. 37.

The clause in a charter-party, "ship lost or not lost," refers only to losses through excepted perils, and where money is to be paid by the shipper to the shipowners before the delivery of the goods, it will be recoverable if the goods are not lost by excepted perils. Great Indian Peninsular R. Co. *v.* Turnbull, 53 L. T. 325.

Where freight is paid in advance on a contract for the transportation of goods, and the vessel is shipwrecked so that the voyage is broken up, the master or owner is bound to refund the freight paid in advance unless there is a special agreement to the contrary. Watson *v.* Duykinck, 3 Johns. (N. Y.) 335.

1. The Zenobia, Abb. Adm. 48.

2. *Per* Bigelow, J., in McGilvery *v.* Capen, 7 Gray (Mass.) 525; Havelock *v.* Geddes, 10 East 555; Cook *v.* Gowan, 15 Gray (Mass.) 237. See also Angier *v.* Stewart, 1 Cababé & E. 357.

Freight Due When Contract Dissolved by Consent. — Where a charter-party was entered into whereby A let a schooner to B and C for the transportation of stone, for the term of six months, the affreighters engaging to pay for the vessel at the rate of three hundred dollars per month, for six months, or in the same proportion for whatever time she might be so employed, and at the expiration of four months an end was put to the contract by a stipulation between the owner of the vessel and one of the affreighters, it was held that such act of one of the affreighters was obligatory upon both; that a *pro rata* compensation was recoverable by the owner of the vessel under a special count upon the contract, alleging the employment of the vessel for the time stipulated in the contract until the day when it was by mutual consent dissolved, or that the compensation might be claimed under a general count of *indebitatis assumpsit*. Wheeler *v.* Curtis, 11 Wend. (N. Y.) 653.

3. **Partial Completion of Voyage.** — By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz., so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specified periods. It was held that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss. Gibbon *v.* Mendez, 2 B. & Ald. 17. See also Byrne *v.* Pattison, Abb. (5th ed.) 335.

4. **Entire Voyage.** — Coffin *v.* Storer, 5 Mass. 252, 4 Am. Dec. 54. See also Smith *v.* Wilson, 8 East 437; Blanchard *v.* Bucknam, 3 Me. 1; Levatte *v.* Salter, 3 Nova Scotia 387. See *infra*, this section, *Lump Freight*.

Return a Condition Precedent. — In Hamilton *v.* Warfield, 2 Gill & J. (Md.) 482, 20 Am. Dec. 448, a vessel was chartered for a voyage from Baltimore to the West Indies and back to Baltimore. It was agreed that the charterer was to pay a certain sum for each and every month, and so in proportion for a less time as the vessel should be continued on the voyage, in ten days after her return to Baltimore. It was held that this constituted a charter for one voyage, to commence at Baltimore and terminate on the return of the vessel to that port; that the contract was an indivisible one, and the return of the vessel to Baltimore a condition precedent to the payment of freight. Martin, J., delivering the opinion of the court, said: "Upon examining the English authori-

Outward and Homeward Voyage Treated as Distinct. — But although an outward and homeward voyage are stipulated for, the freight becomes due upon the performance of each voyage when they are spoken of in the contract as distinct.[1]

d. PRESUMPTION AS TO DIVISIBILITY. — Though the voyage is described as one when freight is payable by time, the presumption of the maritime law is that for the purpose of freight it is divisible into as many voyages as there are ports of delivery.[2]

e. DEDUCTION FOR TIME LOST — **Agreement Necessary.** — No deduction from time freight will be allowed the charterer for the time during which the vessel is necessarily laid up for repairs, unless there is a specific agreement to that effect;[3] even though it is expressly agreed that the shipowner shall keep the vessel in repair.[4]

Time Prolonged by Capture. — And if the time for performing the agreed voyage is prolonged by the capture of the vessel, the charterer must pay freight for the whole period, without deduction for the time during which he was deprived of the use of the vessel.[5]

Express Agreement as to Lost Time. — But by an express stipulation, the charterer may be relieved from liability for freight for such a time during the continuance of the charter-party as the vessel is not in a condition to perform the agreed service.[6]

ties, many nice and almost imperceptible distinctions may be found upon the doctrine of freight *pro rata itineris*, but it seems to be settled that where freight is to be paid after the return of the vessel from her destined voyage, her return is a condition precedent, and no freight is demandable until that condition is performed."

1. **Divisible Voyage.** — Brown *v.* Hunt, 11 Mass. 45; Locke *v.* Swan, 13 Mass. 76.

Illustration. — A charter-party whereby the owners let a vessel to freight by the month, for such time as should be taken up in performing a voyage from L. to P., the island of G., and from thence back to L., on the terms that the owners should receive, and the freighters should load and unload, a cargo at G. on such outward and homeward voyage, is to be construed to mean two distinct voyages, from L. to G., and thence back to L., and not one entire voyage. The vessel, having unloaded a cargo at G., and loaded another, on her return to L. was, with the cargo, entirely lost. It was held that the owners were entitled to freight for the voyage to G. Mackrell *v.* Simond, 2 Chit. Rep. 666, 18 E. C. L. 450.

2. The Erie, 8 Fed. Cas. No. 4512, commenting upon Coffin *v.* Storer, 5 Mass. 252, 4 Am. Dec. 54.

3. **Deduction for Time Lost.** — Bowley's Case, 8 Ct. of Cl. 187; Kimball *v.* Tucker, 10 Mass. 195; Cook *v.* Gowan, 15 Gray (Mass.) 237. See also Inman Steamship Co. *v.* Bischoff, 6 Q. B. Div. 648, L. R. 7 App. 670; Hough *v.* Head, 54 L. J. Q. B. 294, 55 L. J. Q. B. 43; Reed *v.* U. S., 11 Wall. (U. S.) 591. *Compare* Goodwin *v.* U. S., 17 Wall. (U. S.) 515, *affirming* 6 Ct. of Cl. 146.

4. Havelock *v.* Geddes, 10 East 555.

Illustration. — By a charter-party, the freighter of a ship agreed to pay for her two hundred pounds, per month for six months certain, and so in proportion for any longer time that she might be in his employ. The ship was to be kept in repair by the owner. Before the termination of the voyage for which the ship was chartered certain repairs were necessary, which occupied a period of twenty-eight days. It was held that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight. Ripley *v.* Scaife, 5 B. & C. 167, 11 E. C. L. 188.

5. Moorsom *v.* Greaves, 2 Campb. 627.

6. Strong *v.* U. S., 154 U. S. 632; White's Case, 11 Ct. of Cl. 578.

Stipulation for Repairs Must Be Performed. — In a charter-party was the following stipulation: The steamer "is to lay up for overhauling two weeks each year in winter, at time charterers designate." In construing this provision the court said: "The need of such overhauling in winter is assumed by the charter, and * * * the charterers were bound under the charter to expect, and therefore had the right to count on, an overhauling at such time during the winter as they should designate, and upon a cessation of pay during this period; * * * the owners could not defeat the charterer's arrangements as to the time for this overhauling and cessation of pay by the claim that overhauling was unnecessary." The Ceres, 61 Fed. Rep. 701.

Time Consumed in Unloading— Vessel Disabled. — Where a charter-party contained a clause providing that the charterer should not pay hire in case of a loss of time caused by a breakdown of the machinery, etc., stopping the working of the vessel for forty-eight consecutive hours, it was held that the owners could not recover hire for the time while the vessel was being towed by a tug and was not independently efficient for the purpose of making the voyage; but that, the machinery for unloading being in good working order, a recovery might be had for such time as was occupied in discharging freight intended for the port to which the vessel was towed. Hogarth *v.* Miller, (1891) App. 48.

Inability Because of Sickness of the Crew. — Where a charter-party provided that in case

5. Lump Freight — *a.* In General. — The freight due the shipowner for carrying and delivering goods is sometimes made payable in a lump sum.[1]

b. Partial Nonperformance. — Cases sometimes occur when the voyage agreed upon has not been completed, or the whole cargo carried and delivered; the question then arises whether any freight at all is due, and if so, how much.

(1) *Whole Voyage Not Completed* — (a) **Entire Contract.** — When the contract of affreightment stipulates for the payment to the shipowner of a lump sum in consideration of a voyage to a certain port and back to the port of loading, no freight can be recovered by the shipowner unless both the outward and homeward voyages have been performed.[2]

(b) **Divisible Contract.** — But if, under the provisions of the contract, the voyages, outward and homeward, can be regarded as separate voyages, and the lump sum which the cargo owner agrees to pay is made payable in part upon the performance of the outward voyage, and the remainder upon the arrival of the vessel after completing the homeward voyage, it seems that the shipowner can recover the sum payable upon the completion of the outward voyage though the homeward voyage be not performed.[3]

(c) **Presumption as to Divisibility.** — When the shipowner stipulates for a gross sum to be paid on the return of the ship to her home port, the presumption is that the parties intended the contract to be indivisible; but this presumption is liable to be controlled by other conditions in the contract showing a different intention.[4]

(2) *Whole Cargo Not Delivered.* — There is a direct conflict of authority between the decisions of the courts of England and the earlier decisions of the courts of the United States as to the right of the shipowner to recover when a lump sum is payable for the transportation of goods and the whole cargo is not delivered; but in both countries it is held that the contract for lump freight is indivisible and that there can be no apportionment of such freight.[5]

(a) **England.** — According to the English authorities, although during the

of the inability of the ship "to execute or proceed on the service" certain persons should be at liberty to make such abatement out of the freight as they should think reasonable, it was held that an inability of the ship to proceed to sea for want of men to navigate her was within the proviso, although such want of men proceeded from the ravages of the small-pox among the original crew, the death of some, and the desertion of others from the fear of the distemper, and the impossibility of procuring others on the spot in their place. Beatson *v.* Schank, 3 East 233.

1. Pust *v.* Dowie, 9 Jur. N. S. 1322; Brown *v.* Tanner, L. R. 3 Ch. 597; Blanchet *v.* Powell's Llantivit Collieries Co., L. R. 9 Exch. 77; Shaw *v.* Folsom, 38 Fed. Rep. 356; Stewart *v.* Reed, 46 Me. 321. And see the cases cited *infra*.

In one case it was provided that the shipowner should be paid a lump sum if he was prevented from unloading the cargo carried and obtaining another, upon bringing back the original cargo to a port of the country where the vessel was loaded. Bell *v.* Puller, 2 Taunt. 286.

2. Crozier *v.* Smith, 1 M. & G. 407, 39 E. C. L. 504; Weston *v.* Minot, 3 Woodb. & M. (U. S.) 436; Donahoe *v.* Kettell, 1 Cliff. (U. S.) 135; Towle *v.* Kettell, 5 Cush. (Mass.) 18; Penoyer *v.* Hallett, 15 Johns. (N. Y.) 332, 8 Am. Dec. 239; Burrill *v.* Cleeman, 17 Johns. (N. Y.) 72. See also Puller *v.* Staniforth, 11 East 232; Benner *v.* Equitable Safety Ins. Co., 6 Allen (Mass.) 222.

Outward and Homeward Voyage One. — Where the vessel was chartered for one entire voyage from N. and M. and back again, and the vessel was captured upon her return and did not deliver her return cargo, it was held that no freight was due, notwithstanding the defendant may have had the benefit of the outward voyage, because by the express agreement of the parties the outward and the homeward voyage were one, and the profit depended upon the entire performance. Barker *v.* Cheriot, 2 Johns. (N. Y.) 352.

3. Burrill *v.* Cleeman, 17 Johns. (N. Y.) 72.

4. The Erie, 3 Ware (U. S.) 225, 8 Fed. Cas. No. 4512.

5. **No Apportionment of Lump Freight.** — Blanchet *v.* Powell's Llantivit Collieries Co., L. R. 9 Exch. 77; Hart *v.* Shaw, 1 Cliff. (U. S.) 358. And see *infra*, this section.

Quebec Doctrine. — In Quebec it has been held that if, under a charter-party in which a gross sum is stipulated for the freight, part of the cargo is delivered and accepted, an action will lie *pro tanto* for the freight. Guay *v.* Hunter, 2 Rev. de Leg. 77.

Hawaiian Doctrine. — It has been decided in Hawaii that in such cases there should be an apportionment of the freight, but this decision seems to have resulted from a misapprehension of the rule as to freight *pro rata itineris*. Harkness *v.* Aswan, 5 Hawaiian 672.

voyage a part of the cargo has been lost by excepted perils, the shipowner is entitled to the full sum stipulated for upon the due delivery of the residue of the cargo.[1] And it seems that there would be no difference in the rule though the partial loss of the cargo was occasioned by acts or occurrences for which the shipowner was liable, the cargo owner being in this case entitled to recover the value of the part of the cargo lost, in a cross action.[2] It seems, however, that some part of the cargo must be delivered to entitle the shipowner to lump freight.[3]

(b) **United States — Early Doctrine.** — In the United States it has been held in the earlier decisions that in such cases no freight can be recovered, and while, as will be seen upon an examination of the cases announcing this doctrine, the partial loss of the cargo was not occasioned by excepted risks, that fact does not seem to have influenced the decisions, which appear to be based upon the entirety of the contract and the necessity for a complete performance.[4]

Present Doctrine. — But the rule as laid down by a late case in the United States is that the shipowner is entitled to the whole lump freight less the damages for the part of the cargo lost; which is the English rule, except that the cargo owner is allowed to set off his claim for damages in the action brought

1. English Doctrine. — The Norway, 13 L. T. 50, 11 Jur. N. S. 892; Robinson *v.* Knights, L. R. 8 C. P. 465; Merchants' Shipping Co. *v.* Armitage, L. R. 9 Q. B. 99. See also Assicurazioni Generali *v.* S. S. Bessie Morris Co., (1892) 2 Q. B. 652.

2. Loss for Which Shipowner Liable. — In Merchant Shipping Co. *v.* Armitage, L. R. 9 Q. B. 99, Bramwell, B., in discussing this question, said: "Therefore, Mr. Williams's argument must go to the extent that for the nondelivery of a single article the whole amount is lost. He relies on the words 'that the ship shall take on board a full and complete cargo, and shall proceed therewith to London and discharge it.' That is the duty, but there is a qualification to that duty — 'the act of God, restraints of princes and rulers, the Queen's enemies, fire,' and so forth. Then it is said that it is only a qualification in diminution of the shipowner's liability. The clause is: 'A lump sum freight of £5,000 to be paid after entire discharge and right delivery of the cargo, in cash, two months after the date of the ship's report inwards at the custom house.' Now Mr. Williams says that until the ship is discharged, and there is a right delivery of the cargo, the lump sum is not due. It may possibly be that verbally he is right. If so, what is the meaning of 'the cargo'? In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped, but which she is not bound to deliver, which the shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her. Now there is a cogent argument in favor of this construction. Suppose that £5 worth of these goods had been stolen by the crew, that would not be within the exceptions; then would it have been possible to have said that the whole lump sum was lost? Would not the common rule have applied? The defendants would have had to pay the freight and seek their remedy by a cross action. If that is so, is it not very odd that the shipowner is worse off because he is not subject to an action than if he had been subject to an action, that is to say, he is worse off because fire has caused the loss than he would have been if he had been owing to a depredation of the crew? I venture to think some interpretation must be put upon the clause to preclude the entire delivery of the whole cargo being a condition precedent."

In The Norway, 11 Jur. N. S. 892, it became necessary on the voyage, because of perils of the sea, to jettison a part of the cargo, and it was held that the shipowner was entitled to recover the entire lump freight stipulated for. Williams, J., in the opinion delivered by him, said: "It is right to add that we do not mean to express an opinion that even if the jettison and sale had been attributable to the negligence of the master, there ought to have been a deduction. Perhaps in this case the proper remedy of the shipper would have been by a cross action. But it is not necessary to decide this point, which does not now arise."

3. Merchant Shipping Co. *v.* Armitage, L. R. 9 Q. B. 99.

4. Doctrine of Early United States Cases — Willett *v.* Phillips, 8 Ben. (U. S.) 459; Hart *v.* Shaw, 1 Cliff. (U. S.) 358. And see 1 Pars. on Ship. and Adm. 204.

Illustration. — On a bill of lading whereby the owners of a vessel agree for a gross sum to carry and deliver a number of miscellaneous goods, unlike in kind or value, incapable of being stowed together and bearing no definite proportion to each other in size or cost of transportation, no freight is payable in case part of the goods are lost by being improperly stowed, unless the residue be accepted by the consignee at the port of discharge, although the lost goods can easily be supplied at that port, and although the shipowner is authorized by the bill of lading to sell the goods if not received by the consignee within ten days after arrival, and does sell them accordingly, by the description in the bill of lading, and makes up the deficiency to the purchaser. Sayward *v.* Stevens, 3 Gray (Mass.) 97, *affirmed* 8 Gray (Mass.) 215.

by the shipowner to recover freight, instead of being compelled to resort to a cross action.[1]

6. Rate and Amount — *a.* RATE — (1) *Implied Rate.* — When it is evident from the terms of the contract that freight is to be paid, but no rate is expressly agreed upon, freight is to be paid at the ordinary market rate.[2]

(2) *Alternative Rate* — **Larger or Smaller Rate According to the Service.** — When the contract of affreightment contemplates that the shipowner in performing his contract may have to take an unusual risk, it is sometimes provided that he shall be paid freight at the ordinary rate for the services usually incident to the agreed voyage, and at a higher rate if the contemplated risk is successfully run.[3]

(3) *Rate upon Unenumerated Articles.* — When the contract of affreightment states the rate or rates of freight to be paid upon certain enumerated articles, but the vessel is loaded in whole or in part with articles not enumerated, freight is to be paid upon such unenumerated articles, not upon a *quantum meruit*, but at a rate to be deduced from the rate or rates specifically stated in the contract.[4]

(4) *Freight Free* — **Goods of Shipowner.** — It is often agreed that goods belonging to the shipowner shall be carried "freight free," or at a nominal rate of freight, and such an agreement must be respected by the person entitled to claim the freight; so if, after such an agreement has been made, the vessel is sold, or a mortgagee takes possession, no more freight than was stipulated for can be claimed as against the shipowner or other holders of bills of lading for the goods.[5]

Goods of Shipper. — And in view of the high rate of freight agreed upon, or because of other considerations in favor of the shipowner, it is sometimes expressly provided that certain goods of the shipper shall be carried "freight free." [6]

b. WEIGHT AND MEASUREMENT. — Since freight is payable generally according to the quantity of goods carried, questions as to the weight or measurement of the cargo arise frequently.

(1) *Increase or Diminution in Bulk or Weight* — **Increase.** — If, during the voyage, the cargo increases in bulk or weight, freight is payable on the measurement at the time of loading, and not on the increased measurement.[7]

1. Present Doctrine. — The Tangier, 32 Fed. Rep. 230.

2. Carver on Carriage by Sea, § 574. See Gunn *v.* Tyrie, 33 L. J. Q. B. 97, 34 L. J. Q. B. 124.

Tonnage or Time. — It may be agreed in a contract of affreightment that the shipowner shall be paid according to the quantity of goods loaded, or, upon the happening of a certain event, that he shall be paid according to the time during which the vessel shall be employed. Fenwick *v.* Boyd, 15 M. & W. 632.

3. Gibbens *v.* Buisson, 1 Bing. N. Cas. 283, 27 E. C. L. 391; Hedley *v.* Lapage, Holt 392, 3 E. C. L. 158.

Agreed Rate for Special Diligence — Effect of Delay. — When the owner of a vessel contracts for a high rate of freight in view of anticipated difficulties in completing the voyage by the date agreed upon, every proper effort should be made by him, and if, because of any dereliction on his part, the delivery of the cargo is delayed, he can only collect the current rate of freight at the time of the delivery. Holland *v.* Seven Hundred and Twenty-five Tons of Coal, 36 Fed. Rep. 784.

4. Warren *v.* Peabody, 8 C. B. 800, 65 E. C. L. 800. See also Thomas *v.* Clarke, 2 Stark. 450, 3 E. C. L. 484; Capper *v.* Forster, 3 Bing. N. Cas. 938, 32 E. C. L. 391; Cockburn *v.* Alexander, 6 C. B. 791, 60 E. C. L. 791. And see *infra*, this title, *Measure of Damages — Amount Recoverable by the Shipowner.*

5. Keith *v.* Burrows, 2 C. P. Div. 163, L. R. 2 App. 636; Brown *v.* North, 22 L. J. Exch. 49; Mercantile, etc., Bank *v.* Gladstone, L. R. 3 Exch. 233.

Shipowner's Goods Paying Freight. — Although freight is not ordinarily payable upon the goods of the shipowner carried in his own ship, it may be so payable if he makes third persons who have advanced him money the consignees of those goods and the goods are, by the bill of lading, deliverable to their order. Weguelin *v.* Cellier, L. R. 6 H. L. 286.

6. See Sweeting *v.* Darthez, 14 C. B. 538, 78 E. C. L. 538; O'Brien *v.* 1614 Bags of Guano, 48 Fed. Rep. 726, *affirmed* in 5 Hughes (U. S.) 410; Ship Societe, 9 Cranch (U. S.) 210.

7. Buckle *v.* Knoop, L. R. 2 Exch. 125; Shand *v.* Grant, 15 C. B. N. S. 324, 109 E. C. L. 324.

Wheat Expanded by Heat. — In the course of the voyage a portion of the wheat which

Diminution. — If the cargo diminishes in bulk or weight during the voyage, it seems that in computing the amount of freight the measurement at the time of delivery is to be taken.[1]

Agreement. — It is usual in contracts of affreightment to provide what measurements shall be taken in case the cargo increases or diminishes in weight or bulk during the voyage, and in such cases the express agreement controls.[2]

(2) *Statement in Bill of Lading as to Quantity.* — In determining the amount of freight due, the statement in a bill of lading as to the quantity of goods shipped is not conclusive,[3] unless it is expressly agreed that it shall be so.[4]

(3) *Intake Measurement and Weight.* — **Measurement.** — When a contract of affreightment provides that freight is to be payable on the cargo on the intake measure of the quantity delivered, freight is payable on the measurement figures as ascertained at the port of shipment, and not on the quantity delivered, measured at the port of discharge according to the intake mode of measurement.[5]

Weight. — The shipper may, by the terms of his agreement, be liable to pay freight upon the weight of the entire cargo shipped, though a part of such cargo is not delivered.[6]

formed the vessel's cargo, from some unknown cause became heated and damaged, whereby its bulk was increased. It was held that freight was payable on the quantity of wheat shipped, and not on its measurement at the port of discharge. Pollock, C. B., delivering the opinion of the court, said: " I agree that the bulk or weight, as appearing at the port of destination, may be *prima facie* the criterion of the freight to be paid; but when it is proved that that test is fallacious and untrue, and that the real quantity shipped was a different and smaller quantity (as the jury in this case have actually found), then I think that the freight ought to be calculated upon the true quantity shipped; and in my judgment the captain's ignorance of the true quantity (as expressed in the bill of lading) cannot entitle him to charge freight according to a false estimate; whether the actual quantity be stated and admitted in the bill of lading, or the contents are stated to be unknown, appears to me to make no difference as to the principle which ought to govern our decision. But it does appear to me to be contrary to the principles of natural justice that the shipowner should acquire a right to demand more freight, and the owner of the goods become liable to pay more freight, in consequence of a circumstance which is an injury to the goods, and which has occurred to them while they were in the care, custody, and keeping of the shipowner, or those who represent him; over the causes of which the owner of the goods has no control, but some of the possible causes of which are considerably, or entirely, under the control of the captain and the crew." Gibson *v.* Sturge, 10 Exch. 623. See also Tully *v.* Terry, L. R. 8 C. P. 679.

1. Carver on Carriage by Sea, § 576. See Gibson *v.* Sturge, 10 Exch. 622, 1 Jur. N. S. 259; Spaight *v.* Farnworth, 5 Q. B. Div. 115. But see Dakin *v.* Oxley, 15 C. B. N. S. 646, 109 E. C. L. 646.

2. Coulthurst *v.* Sweet, L. R. 1 C. P. 649; Tully *v.* Terry, L. R. 8 C. P. 679; The Frogner, 49 Fed. Rep. 876.

3. Geraldes *v.* Donison, Holt 346, 3 E. C. L. 141. See also Blanchet *v.* Powell's Llantivit Collieries Co., L. R. 9 Exch. 74; Dods *v.* Stewart, 8 Bengal L. Rep. 340.

Illustration. — A charter-party was entered into between the master of a vessel, on behalf of the owner, and one T., by which the vessel was to carry for T., from P. to N., a full and complete cargo of coals, for which freight was " payable at four dollars per chaldron, Pictou mines measure of 30 cwt., in approved acceptance of 30 days." The coal was not weighed at P., nor measured with any accuracy; but the bill of lading stated the cargo consisted of four hundred chaldrons of the Albion mines measure. In discharging the cargo at N., there proved to be nearly four hundred and sixty chaldrons. It was held that there was nothing in the charter-party which made the measuring or weighing conclusive upon the parties, and that the owner of the vessel was entitled to be paid four dollars for every thirty hundredweight. Ward *v.* Whitney, 3 Sandf. (N. Y.) 399.

4. Moller *v.* Living, 4 Taunt. 102; Tully *v.* Terry, L. R. 8 C. P. 679. And see the title Bills of Lading, vol. 4, p. 522.

5. Spaight *v.* Farnworth, 5 Q. B. Div. 115. See also Fullagsen *v.* Walford, 1 Cababé & E. 198; Cursetji Rustomji Setna *v.* Williams, I. L. R. 5 Bombay 313.

6. Intake Weight. — In making the contract the parties thereto used the ordinary printed form of a charter-party for the full capacity of the vessel, the printed clause providing for the payment of freight reading thus: " The freight to be paid on unloading and right delivery of the cargo at and after the rate of ——— per ton of twenty cwt. delivered." The printed word " delivered " was struck out by running the pen through it, and the words " on intake weight " were interlined in writing. On the voyage part of the cargo was damaged by an excepted peril without fault of the ship, and was sold for the benefit and without the knowledge and assent of the owners of the cargo. The question arose whether the freight was to be paid upon the entire cargo shipped, or only upon that portion which was delivered. It was held that

(4) *Usage as to Weight or Measurement.* — In determining upon what measurement freight is to be calculated, the usage in the particular trade to which the contract relates may be considered if the stipulation in the contract is ambiguous.[1]

Usage Expressly Agreed on. — The custom of a certain port as to measurement of cargo is sometimes expressly incorporated in the contract.[2]

(5) *Expense of Weighing or Measuring.* — In the absence of any custom to govern the matter, the shipowner must incur the trouble and expense of weighing and measuring the cargo.[3]

By Custom. — It may be shown that in a particular trade it is the custom of the owner of the goods to pay such expense.[4]

7. To Whom Payable — *a.* To Shipowner. — Freight is generally payable to the person who was the owner of the ship at the time when the contract of affreightment was made.[5]

Ship Owned by Several Persons. — When the ship is owned by several persons, freight is generally collected by a managing owner or ship's husband appointed by them.[6]

Rights as to Freight. — Part owners are tenants in common of a ship, jointly interested in her use and employment, and the law as to the earnings of a ship, whether as freight, cargo, or otherwise, follows the general law of partnership.[7]

the contract as altered bound the charterer to pay freight on the entire cargo taken in. Harrison *v.* One Thousand Bags of Sugar, 50 Fed. Rep. 116.

1. Usage as to Measurement. — Russian Steam Nav. Trading Co. *v.* Silva, 13 C. B. N. S. 610, 106 E. C. L. 610. See also Nielsen *v.* Neame, 1 Cababé & E. 288. *Compare* Moller *v.* Living, 4 Taunt. 102. And see *supra*, *Charter-parties — Construction — Admissibility of Usage.*

Upon a charter-party engaging to pay a certain rate per ton for goods shipped at Bombay for London, cotton to be calculated at fifty cubic feet per ton, it was held that evidence was admissible for the shipper of a usage to pay according to the measurement taken at Bombay before the loading of the goods. Bottomley *v.* Forbes, 5 Bing. N. Cas. 121, 35 E. C. L. 50.

2. By a charter-party it was agreed that a ship should load a cargo and proceed to a port in Great Britain and deliver the same on being paid freight "at and after the rate of 35*s.* * * * per 180 English cubic feet taken on board, as per Gothenburg custom." It was held that the freight was to be ascertained by measuring the cargo according to the method used at Gothenburg, and not according to the method used at the port of discharge. The Skandinav, 51 L. J. Adm. 93, *reversing* 50 L. J. Adm. 46.

3. Coulthurst *v.* Sweet, L. R. 1 C. P. 654.

4. Watts *v.* Grant, 26 Sc. L. Rep. 660.

5. The Shipowner Is Entitled to the Freight. — Carver on Carriage by Sea, § 588. See Atkinson *v.* Cotesworth, 3 B. & C. 647, 10 E. C. L. 209; Smith *v.* Plummer, 1 B. & Ald. 575; Guion *v.* Trask, 29 L. J. Ch. 337. And see the title Ships and Shipping.

Payment to the Master. — As the master of a ship is generally the person who acts as the shipowner's agent in receiving the freight, a payment to him, in the absence of any notice by the shipowner to the shipper not to pay him, is a good and valid payment. Atkinson *v.* Cotesworth, 3 B. & C. 647, 10 E. C. L. 209. See also Shields *v.* Davis, 6 Taunt. 65; Seeger *v.* Duthie, 8 C. B. N. S. 45, 98 E. C. L. 45; Shepard *v.* DeBernales, 13 East 565; Baker *v.* Ward, 3 Ben. (U. S.) 499. And see the title Master of a Vessel.

Other Agent Appointed. — If a person other than the master is designated by the owner to collect freight, the master no longer has the right to do so. The Edmond, Lush. 58.

Agent of Ship's Husband Not Entitled to Freight. — Freight to be earned by a ship on a homeward voyage belongs to the shipowner, so that an agent employed by a ship's husband to obtain a charter-party has no authority to cause it to be paid to himself for the purpose of setting it off against a debt due to him from the ship's husband. Walshe *v.* Provan, 8 Exch. 843.

Obligee of a Bottomry Bond. — The receipt of freight by the obligee of a bottomry bond is in law a receipt of it by the shipowner whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship. Benson *v.* Chapman, 2 H. L. Cas. 696.

Payable to a Third Person. — Where the bill of lading provides that freight shall be payable to a third party, and not to the shipowner, payment of freight to the master or shipowner affords no answer to an action by such third party in the name of the shipowner for nonpayment of freight. Kirchner *v.* Venus, 12 Moo. P. C. 361, 5 Jur. N. S. 395.

A Legatee under a Will Bequeathing to Him All the Ships of the Testator is not entitled to freight which is earned under a charter-party executed after the date of the will, and which does not become due until after the death of the testator. Stephenson *v.* Dowson, 3 Beav. 342.

6. Carver on Carriage by Sea, § 590. See also the title Ships and Shipping.

7. Green *v.* Briggs 6 Hare 395, 17 L. J. Ch. 323, 12 Jur. 326. See also the titles Partnership and Ships and Shipping.

Liability for Expenses — Part Owners. — The gross sum earned by a ship is liable, as be-

b. To Vendee, Mortgagee, or Assignee — (1) *To Vendee.* — Since the right to freight is incidental to the ownership of the vessel, when the vessel has been sold after a contract of affreightment has been made the purchaser has a right to the freight due under such contract.[1]

(2) *To Mortgagee.* — The mortgagee of a ship has no right to accruing freight unless he takes possession of the ship.[2] But when the mortgagee takes possession he becomes the owner of the ship, and from that time everything which represents the earnings of the ship which has not been paid before must be paid to the mortgagee.[3]

Time of Taking Possession. — The mortgagee need not take possession before or during the voyage, but if the freight is payable when the cargo is delivered he will be entitled to the freight if he takes possession before the delivery.[4]

tween the co-owners and before the division among them, to the expenses incurred in the fitting up, outfit, and repairs of the vessel necessarily made to enable her to proceed on the voyage in which the freight has been earned. Green *v.* Briggs, 12 Jur. 326, 17 L. J. Ch. 323, 6 Hare 395.

Of Mortgagee of Shares. — The rights of a mortgagee of shares are not greater than those of part owners, and therefore expenses necessarily incurred in earning the freight must be deducted in estimating the amount due him. Cato *v.* Irving, 21 L. J. Ch. 675, 10 Eng. L. & Eq. 17; Alexander *v.* Simms, 23 L. J. Ch. 721, 27 Eng. L. & Eq. 288. *Compare* Japp *v.* Campbell, 57 L. J. Q. B. 79.

Of Assignee of Freight upon Certain Shares. — One who is the assignee of the freight accruing upon certain shares is liable to contribute his proportion of the expenses incurred by the ship in earning the freight. Lindsay *v.* Gibbs, 22 Beav. 522.

1. Vendee Entitled to Freight. — Morrison *v.* Parsons, 2 Taunt. 407; Lindsay *v.* Gibbs, 22 Beav. 522; Pelayo *v.* Fox, 9 Pa. St. 489. See also Case *v.* Davidson, 5 M. & S. 79. And see the titles Sales and Ships and Shipping.

Action Brought in the Vendor's Name. — Formerly, in England, the vendee could not sue for the freight due under such contract, but the action therefor must have been brought in the name of the vendor. Morrison *v.* Parsons, 2 Taunt. 407; Splidt *v.* Bowles, 10 East 279. This matter is now regulated by statute. See Judicature Act 1873, § 24.

2. Willis *v.* Palmer, 7 C. B. N. S. 340, 97 E. C. L. 340, 6 Jur. N. S. 732; Gardner *v.* Cazenove, 1 H. & N. 423, 26 L. J. Exch. 17; Chinnery *v.* Blackburne, 1 H. Bl. 117, note *a*, *sub nom.* Chinnery *v.* Blackman, 3 Doug. 391, 26 E. C. L. 158; Cato *v.* Irving, 21 L. J. Ch. 675, 10 Eng. L. & Eq. 17. *Semble*, Merchants' Bank *v.* Graham, 27 Grant's Ch. (U. C.) 524. See also Alexander *v.* Simms, 27 Eng. L. & Eq. 288; Beynon *v.* Godden, 3 Exch. Div. 263; Kerswill *v.* Bishop, 2 Cromp. & J. 539, *per* Lord Lyndhurst.

Mortgagees of Shares. — It being impossible for the mortgagee of certain shares in a ship to take possession of her, he will be entitled to receive the freight accruing upon his shares if he gives notice to the owners who are in possession of the ship and requires payment to himself of his shares. Cato *v.* Irving, 5 De G. & Sm. 210, 10 Eng. L. & Eq. 17, 21 L. J. Ch. 675.

And in Beynon *v.* Godden, 3 Exch. Div. 263, it was held that the mortgagee of certain shares, by joining with the owners of the other shares in the ship in the appointment of a ship's husband, effectually intervened so as to entitle himself to the freight to be earned upon his shares.

3. Keith *v.* Burrows, L. R. 2 App. 636, *affirming* 2 C. P. Div. 163; Kerswill *v.* Bishop, 2 Cromp. & J. 529. See also Langton *v.* Horton, 5 Beav. 9; Gumm *v.* Tyrie, 6 B. & S. 298, 118 E. C. L. 298, *affirming* 4 B. & S. 680, 116 E. C. L. 680; Japp *v.* Campbell, 57 L. J. Q. B. 79. And see the titles Sales and Ships and Shipping.

Rule Not Changed by English Statute. — Accruing freight passes to the mortgagee who has taken possession of the vessel, notwithstanding 6 Geo. IV., c. 110, § 45, which enacts that the mortgagee shall not be deemed the owner except for the purpose of making a transfer. Dean *v.* M'Ghie, 4 Bing. 45, 13 E. C. L. 335.

Advances Not to Be Deducted for Freight. — By the terms of a charter-party it was provided that the charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount, at the port of loading. Previously, before entering into the charter-party, the owner had mortgaged the ship and freight. The charterers made advances for the ship's disbursements considerably in excess of the amount specified in the charter-party. Before the freight became due the mortgagee took possession of the ship and stopped the cargo for freight. It was held that the charterers were not entitled to deduct from the amount due for freight the advances made by them in excess of the sum provided by the charter-party. Tanner *v.* Phillips, 42 L. J. Ch. 125.

4. Before Delivery. — Cato *v.* Irving, 5 De G. & Sm. 210, 10 Eng. L. & Eq. 17, 16 Jur. 161, where Parker, V. C., declared that it was established "that mortgagees of a ship who take possession before the conclusion of the voyage are entitled to the freight then accruing," and proceeded: "It was contended that the present case did not come within this rule, because the plaintiffs did not take possession until the conclusion of the voyage. I consider that a mortgagee who takes possession before the cargo is delivered comes within the rule. The right to the freight does not accrue until the goods are delivered. Parties so taking possession must be as much within the reason

If, because the vessel is on a voyage, or for other reasons, it is not possible to take actual possession of the vessel, the mortgagee may intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property and to require the freight to be paid to him, provided he takes possession of the ship as soon as possible after giving such notice.[1]

(3) *To Assignee.* — Freight which is to be earned under contracts already made or to be made in the future may be assigned.[2]

(4) *Priority* — (a) **Between First and Second Mortgagees.** — Although a second mortgagee cannot take possession as against a first mortgagee, yet as against all other persons he has a right to take possession, and can enforce such right, if necessary, by obtaining the appointment of a receiver; and having taken possession, he is entitled to receive the freight afterwards accruing, subject to the rights of the first mortgagee.[3]

of the rule where the ship is in dock as where she is only on the way to the docks." See also Gibson *v.* Ingo, 6 Hare 112; Dean *v.* M'Ghie, 4 Bing. 45, 13 E. C. L. 335.

During Delivery. — A vessel was chartered to proceed to A., there take in a cargo to be shipped by the charterers, and return back to L. After the ship's arrival in the port of L., and while the cargo was in course of delivery, a mortgagee under an ordinary statutory mortgage made prior to the date of the charter-party took possession. It was held that he thereby acquired a right to the freight in priority to an assignee of the freight by a deed executed subsequently to the charter-party, notice of which had been given to the charterers. Brown *v.* Tanner, L. R. 3 Ch. 597, *reversing* L. R. 2 Eq. 806.

1. While on a Voyage. — Rusden *v.* Pope, L. R. 3 Exch. 269; Wilson *v.* Wilson, L. R. 14 Eq. 32.

2. Assignment of Freight. — Douglass *v.* Russell, 1 Myl. & K. 488, *affirming* 4 Sim. 524; Lindsay *v.* Gibbs, 22 Beav. 522. See also Boyd *v.* Mangles, 3 Exch. 387. *Compare* Robinson *v.* Macdonnell, 5 M. & S. 228.

A, in consideration of money advanced and to be advanced by B, assigned all the freight to arise from a ship under any existing or future charter-party or other contract, for or in respect of her intended voyage to I. and back to E. After the freight had been earned and ascertained, A became a bankrupt. It was held that such assignment of freight was good, and that the assignees of A were not entitled to sue for the freight. Leslie *v.* Guthrie, 1 Scott 683; 1 Bing. N. Cas. 697, 27 E. C. L. 550.

Assignment Carries Right to Immediate Possession as Against Assignor. — In Willis *v.* Palmer, 7 C. B. N. S. 340, 97 E. C. L. 340, it appeared that the agent of the owners of a ship, in order to secure advances which were necessary to enable the ship to perform its voyage, mortgaged the vessel to the plaintiffs. After the vessel had reached an intermediate point upon its voyage, it became necessary to secure further advances, and for this purpose the agent assigned to the plaintiffs the freight and passage money to be earned upon the voyage. Both the mortgage and the deed of assignment were executed under a power of attorney which gave the agent full authority to act in the premises. Subsequently, certain of the passengers on board the vessel having paid their passage money in advance by bills of exchange, these bills came into the possession of the shipowners before the arrival of the ship at the end of her voyage, and before, therefore, possession was taken by the mortgagees and assignees. To recover this advanced passage money, the plaintiffs brought this action against the shipowner, and it was held that they were entitled to recover; that the instrument of assignment, construing it according to the intention of the parties, as indicated by its language, and according to the circumstances of the case, it being intended as a further security beyond the mortgage of the ship, gave to the assignee as against the assignor an immediate right to the passage money before taking possession of the ship. See generally the title ASSIGNMENTS, vol. 2, p. 1076.

Assignment as Affecting Right to Set-off. — When the person from whom freight is due is entitled to a set-off against the shipowner, the right to the set-off is not taken away by an assignment of the freight to a third party, unless perhaps the person entitled to the set-off has placed the assignee in a worse position, as by standing by and permitting the assignment to him without informing him of the set-off. Wilson *v.* Gabriel, 4 B. & S. 243, 116 E. C. L. 243.

A person shipped goods on board of a vessel which was driven into a foreign port by stress of weather, and part of his goods were sold by the captain to defray the expenses of repairing the vessel. It was held that he was entitled to deduct from the demand for freight the sum for which the goods were sold, and that the fact of the shipowner having during the voyage assigned the freight to a third person made no difference in his rights. Campbell *v.* Thompson, 1 Stark. 490, 2 E. C. L. 187.

The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods who was also the assignor of the freight. Weguelin *v.* Cellier, L. R. 6 H. L. 286, 42 L. J. Adm. 758.

3. Rights of Second Mortgagee. — Keith *v.* Burrows, 1 C. P. Div. 722.

In Liverpool Marine Credit Co. *v.* Wilson, L. R. 7 Ch. 507, the facts were these: The owners of a ship mortgaged her to the plaintiffs, who registered their mortgage at once,

(b) **Among Several Assignees.** — While there is apparently no direct adjudication upon the question, it is probable that, as between successive assignees of freight, the general doctrine as to priorities applies in accordance with the maxim, *Qui prior est tempore prior est jure,* although in England and in some of the United States a subsequent assignee, by first giving notice to the debtor, may obtain a preference over a prior assignee who has given no notice.[1]

(c) **Between Assignee of Freight and Vendee or Mortgagee of Vessel** — *aa.* ASSIGNMENT PRIOR TO MORTGAGE. — A person to whom the freight of a ship has been assigned cannot set up any right to such freight in opposition to the right of a subsequent mortgagee of the ship who takes his mortgage without notice of the prior assignment of the freight.[2]

bb. ASSIGNMENT AFTER SALE. — As the right to freight passes with the sale of

and subsequently a second mortgage was executed by the owners of the vessel to the defendants, who also immediately registered their mortgage. The second mortgagees then advanced money on the security of an express charge on the freight then in the course of earning, and completed their title by giving to the charterers of the vessel notice in writing of their charge. In the meantime, the mortgagor, in order to obtain money to effect an insurance on the ship and freight, borrowed a certain sum, giving the lenders a charge on the freight, which the first mortgagees in writing agreed should be the prior charge thereon. The first mortgagees afterwards obtained a further express charge on both ship and freight. The first mortgagees had no notice, either actual or constructive, of the charge on the freight which the second mortgagees had obtained, nor had they any actual notice of the second mortgage itself. The first mortgagees took actual possession of the ship. The ship was sold, and the proceeds were not sufficient to discharge the first mortgage. A question arose as to the relative rights of the first and second mortgagees in respect of the freight. It was held that the first mortgagees, by taking possession of the vessel before the freight was completely earned, obtained a legal right to receive the freight and to retain out of it not only what was due on their first mortgage, but also the amount of any subsequent charge which they might have acquired on the freight in priority to every equitable charge of which they had no notice, and that it made no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. Sir W. M. James, L. J., delivering the opinion of the court, said: "What is the position of a second mortgagee of a ship with respect to the freight? He has no legal right to take actual possession, and cannot therefore by his own act give himself that which is equivalent to possession. But, as between himself and the mortgagor, the equitable right of the second mortgagee is the same as the legal right of the first mortgagee, just as in the case of land, if the first mortgagee declines to take possession, the second mortgagee may obtain a receiver, and so have the possession and the benefits of the possessory right. But this is to be understood only as between the second mortgagee and the mortgagor. As regards the intervening incumbrances, interests, and titles of every kind not requiring registration, the respective positions of the first and second mortgagees are essentially different, arising from the essential difference between a legal and an equitable title. The legal owner's right is paramount to every equitable charge not affecting his own conscience; the equitable owner, in the absence of special circumstances, takes subject to all equities prior in date to his own estate or charge. The courts of equity, in appointing a receiver, at the instance of an equitable incumbrancer, take possession in fact on behalf of all, and so as not to disturb any legal right or interfere with equitable priorities. If there be a legal mortgage of a ship, then a charge on the freight, then a second mortgage of the ship, the second mortgagee of the ship cannot by any act of his oust the incumbrance on the freight. And if the first mortgagee of the ship takes, under these circumstances, possession of the ship, his possession cannot be allowed to alter the equities of the parties. He takes both ship and freight by the same title; and there being one equitable owner of the ship, and another equitable owner of the freight, as between those equitable owners his charge must be considered as satisfied *pro rata*, just as if there was a first mortgage on Whiteacre and Blackacre belonging, subject to that mortgage, to several owners. A due consideration of the same principles shows how is to be solved the question before us, and the right of a legal first mortgagee in possession, being at the same time a puisne incumbrancer without notice on the freight. He has the paramount legal title, there is nothing to affect his conscience, and we are unable to find either on principle or authority any sound distinction between his case and that of the legal mortgagee of any other kind of property who has made further advances on the property itself, or on the timber or growing crops, without notice of intervening equitable charges or interests."

1. See Carver on Carriage by Sea, § 596. See also the title ASSIGNMENTS, vol. 2, p. 1077.

A different view is taken in some jurisdictions. Thus in *New York* it is held that the assignee who is prior in time is prior in right, although a subsequent assignee has first notified the debtor of the assignment. Muir *v.* Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Fairbanks *v.* Sargent, 104 N. Y. 108, 58 Am. Rep. 490. See also the title ASSIGNMENTS, vol. 2, p. 1077.

2. Wilson *v.* Wilson, L. R. 14 Eq. 32. See also the English Judicature Act, 1873, § 25 (6).

the vessel, a subsequent assignment of the freight is ineffectual.[1]

cc. Assignment After Mortgage. — And if the mortgagee takes possession of the vessel, an assignment of the freight subsequent to his mortgage gives the assignee no right to freight as against such mortgagee in possession.[2]

c. To Charterer — (1) *Charterer, Owner Pro Hac Vice.* — When the vessel has been chartered, the question sometimes arises as to whether the shipowner or the charterer is entitled to the freight due upon goods shipped by third persons. When the charterer under his contract becomes the temporary owner of the vessel, he only is entitled to the freight.[3]

(2) *General Owner, Owner for Voyage.* — When such is not the effect of the contract the shipowner is entitled to a sufficient amount of the freight due by third persons to pay the sum due him under the charter-party.[4]

(3) *Freight in Excess of Charter Freight.* — If the freight due upon bills of lading for the goods of third persons, or the freight under a sub-charter, amounts to more than the charter-party freight, such additional freight should be paid to the charterer.[5]

d. To Underwriters. — According to the English doctrine, the abandonment of a ship while upon a voyage, to her underwriters, entitles them to the whole freight earned by the completion of the voyage.[6] But the rule in the United States is to apportion the freight, the underwriters being entitled to that part which is earned after the abandonment, and the shipowner to that part which was earned previous to the abandonment.[7]

e. To Person Claiming Maritime Lien. — Freight is sometimes payable to a third person who has a maritime lien upon both vessel and freight, as, for instance, when the vessel in which the cargo is being carried collides with another vessel, and the value of the carrying vessel is insufficient to cover the damage done.[8]

f. To Captors. — The general rule is that captors are not entitled to freight unless the cargo is carried to the port of destination.[9] But if the cargo be ultimately bound to the place where the captors carry the ship, or

1. Lindsay *v.* Gibbs, 22 Beav. 522.

Registration of Transfer. — In Lindsay *v.* Gibbs, 22 Beav. 522, the vessel which had been previously chartered was sold in shares and the charter-party freight assigned after such sale. A distinction was made between the rights, as to freight, of a vendee who registered the transfer of his shares, and one who did not. But this distinction no longer exists, having been done away with by statute. 17 & 18 Vict., c. 104 (Merchants' Shipping Act, 1854). Keith *v.* Burrows, 1 C. P. Div. 722.

2. Brown *v.* Tanner, L. R. 3 Ch. 597; Keith *v.* Burrows, 1 C. P. Div. 722, 2 C. P. Div. 163.

3. Manter *v.* Holmes, 10 Met. (Mass.) 402. See also Marquand *v.* Banner, 6 El. & Bl. 232, 88 E. C. L. 232, 2 Jur. N. S. 708. See *supra*, this title, *Rights and Liabilities under the Charter-party.*

4. Christie *v.* Lewis, 2 Brod. & B. 410, 6 E. C. L. 206. See *infra*, this title, *Liens — Lien of the Shipowner — For Freight.*

Freight upon Cargo Carried in Reserved Space. — By charter-party it was "agreed that (the cabin and staterooms, and sufficient room for the cables, ship's stores, provisions, water, and crew, thr oughout this charter-party, being excepted, reserving, however, such room only for that purpose as the owners would were the ship to be loaded for their exclusive benefit) the said vessel shall immediately be made ready, and receive and take on board from the said charterers (who are to have the full reach of the vessel's hold from bulkhead to bulkhead, including the half-deck) a full and complete cargo," and thereupon proceed to H. It was held that under this charter-party the owners of the vessel, and not the charterers, were entitled to the freight for goods loaded on the deck of the vessel. Neill *v.* Ridley, 9 Exch. 677.

5. Michenson *v.* Begbie, 6 Bing. 190, 19 E. C. L. 51; The Maiden City, 33 Fed. Rep. 715; Damora *v.* Craig, 48 Fed. Rep. 736; Welch *v.* McClintock, 10 Gray (Mass.) 215.

6. Right of Underwriters to Freight — English Rule. — Case *v.* Davidson, 5 M. & S. 79. See also the title Abandonment and Total Loss, vol. 1, p. 40.

When, on the abandonment of the ship on the voyage, the cargo is taken to its destination in another vessel, hired by the captain, the underwriters of the ship are not entitled to the freight due on the delivery of the cargo. Hickie *v.* Rodocanachi, 4 H. & N. 455.

7. United States Rule. — Hammond *v.* Essex F. & M. Ins. Co., 4 Mason (U. S.) 196. See also the title Abandonment and Total Loss, vol. 1, p. 40.

8. The Orpheus, L. R. 3 Adm. & Eccl. 308. See also The Leo, 31 L. J. Adm. 78. And see the title Maritime Liens.

9. The Diana, 5 C. Rob. 67; The Ship Ann Green, 1 Gall. (U. S.) 274. See also The Fortuna, 4 Rob. Adm. 278; The Vrouw Anna Catharina, 6 Rob. Adm. 269.

the proceeds are to go there ultimately, direct communication being prohibited, freight is due the captors;[1] and freight is due when the cargo is brought to the country for which it was destined, though not to the very port named in the contract.[2]

8. By Whom Payable — *a.* In General. — The person who makes the contract of affreightment is, of course, usually liable for the freight. So, when there is a charter-party, the freight is due from the charterer, or the person for whose benefit the charter-party was executed; and when there is no charter-party, the shipper of the goods or the person on whose behalf they were shipped must pay the freight.[3]

b. Consignors. — The usual stipulation in a bill of lading providing for the delivery of the goods to a designated consignee or his assigns, "he or they paying freight," is inserted for the benefit of the shipowner, and not of the consignor, and, therefore, the consignor is not relieved from his liability to pay the freight due because the goods have been delivered to the consignee, when the freight has not been collected from him. But the consignor is bound for the freight by his express contract when he is also the charterer of the vessel, and by a contract implied by law when it appears that the goods, shipped under a bill of lading only, belonged to such consignor or were shipped for his benefit.[4]

1. The Ship Ann Green, 1 Gall. (U. S.) 274. In this case, Story, J., said: "The general rule undoubtedly is, that the captors are not entitled to freight, unless the goods are carried to their original destination, within the intent of the contracting parties. But it is argued that this is an intermediate case, and within the equity of the decision in The Diana, 5 C. Rob. 67. In that case the goods were destined to Amsterdam, with an intention that they should, *in specie* or in proceeds, ultimately be remitted to England; and the court held that as the goods were brought to London, to the port to which the claimant would have sent them directly if he had not been prevented by the policy of the Dutch government, which refused the exportation of the produce of its colonies to any but the mother country, the freight was due. It has been argued, on the other side, that the case is inapplicable, because New York would have been the port of destination if the parties could have lawfully pursued their voyage thither; and that Boston, being a port of another state, cannot be within the reason of the case any more than any other foreign port. I readily admit that the cases do not run upon all fours, but the principle strikes me as fully applicable. The parties would have brought the property directly into the United States if they could. They contemplated the remittance of the proceeds to the United States. I say to the United States, because it will hardly be contended that if the proceeds had been remitted to Boston for the use of the claimants, it would not have been as much within their intention as a remittance to New York. In a commercial view, these cities must be considered from their proximity almost as one. Nor can I consider Boston as a foreign port in any view connected with this question. It is as much a port of the same country as a port in Scotland is of Great Britain. And though Sir William Scott appears in The Diana to rely somewhat upon the circumstance that London was the port to which the claimants would have pointed as the destination, yet in The Vrouw Henrietta, 5 Rob. Adm. 75, note, he held that where the goods were unloaded at Plymouth, and the claimant resided at London, the freight was payable, and he overruled the distinction now contended for. For myself, I have no hesitation to declare, that independent of all authority, where the proceeds of the goods were ultimately intended for this country, and they had been saved from the grasp of the enemy by the capture, I should allow a full and complete freight."

2. 1 Parsons on Shipping and Adm. 216; The Vrouw Henrietta, 5 Rob. Adm. 75, note; The Ship Ann Green, 1 Gall. (U. S.) 274. See also The Racehorse, 3 C. Rob. 101.

3. **Who Must Pay Freight — In General.** — Carver on Carriage of Goods by Sea, p. 611, § 602; Fox *v.* Nott, 30 L. J. Exch. 259; Cawthorn *v.* Trickett, 33 L. J. C. P. 182; Dickinson *v.* Lano, 2 F. & F. 188; Holt *v.* Westcott, 43 Me. 445, 69 Am. Dec. 74.

A Consignee of goods carried under a charter-party, who by its terms is the *prima facie* owner of the goods, is liable for the freight. Dayton *v.* Parke, 142 N. Y. 391, *affirming* 67 Hun (N. Y.) 137.

4. **Consignor's Liability Not Terminated by Delivery of Goods.** — Christy *v.* Row, 1 Taunt. 300; Domett *v.* Beckford, 5 B. & Ad. 521, 27 E. C. L. 118; Allen *v.* Bareda, 7 Bosw. (N. Y.) 204; Hinsdell *v.* Weed, 5 Den. (N. Y.) 172, Burton *v.* Strachan, 3 E. D. Smith (N. Y.) 192, note; Spencer *v.* White, 1 Ired. L. (23 N. Car.) 236; Hayward *v.* Middleton, 3 McCord L. (S. Car.) 121, 15 Am. Dec. 615, 2 Nott & M. (S. Car.) 9. See also Perkins *v.* Hill, 2 Woodb. & M. (U. S.) 158; McEwen *v.* Jeffersonville, etc., R. Co., 33 Ind. 368, 5 Am. Rep. 216; Blanchard *v.* Page, 8 Gray (Mass.) 281; Davis *v.* Pattison, 24 N. Y. 317; Elwell *v.* Skiddy, 77 N. Y. 282; Layng *v.* Stewart, 1 W. & S. (Pa.) 222; Collins *v.* Union Transp. Co., 10 Watts. (Pa.) 386. But see Drew *v.* Bird, M. & M. 156, 22 E. C. L. 273; Moorsom *v.* Kymer, 2 M. & S. 303.

c. CONSIGNEES OR ASSIGNEES — **Effect of Receiving Goods. — In England** it is established that the taking of goods by the consignee named in a bill of lading, or by the assignee thereof, is evidence of a promise to pay the freight in con-

In Holt *v.* Westcott, 43 Me. 445, 69 Am. Dec. 74, the court said: "Without further citations, we think the general rule deducible from them to be, that in all cases where goods are shipped by a consignor under a contract, or for his benefit, he is originally liable for freight, and that the insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, etc., 'he or they paying freight,' will not, of itself, relieve him from that liability; that provision being designed for the benefit of the carrier, he may waive it if he choose so to do, and resort to his employer, the consignor, for his freight, unless there is some special stipulation by which that employer is to be exonerated."

Offer of Consignee to Pay Freight Refused. — The original shipper of goods upon a boat or vessel, for transportation under the ordinary bill of lading or its equivalent, remains liable to the master for freight money earned, although the latter delivers the consignment without exacting of the consignee payment for carriage; and this is so although the consignee offers to pay the freight, which the master refuses to receive because such consignee refuses to pay a claim for demurrage also. Gilson *v.* Madden, 1 Lans. (N. Y.) 172.

Particular Person Designated as Payee. — It is true that the customary clause in a bill of lading directing the payment of freight by the consignee or his assigns is a condition precedent intended only for the benefit of the carrier, and if he delivers goods without receiving freight he may recover it of the consignor if he were the owner of the goods, or a shipper under a charter-party. But when there is in the bill of lading an additional clause naming a special person as the payee of the freight, and when it is shown that at the time of the delivery of the cargo the assigns of the consignee were able and willing to pay the freight, but that neither the payee nor any one for him was present to receive it, the shipowner cannot recover the freight from the consignor, although by reason of the subsequent failure of the consignee's assigns it cannot be collected from them. Thomas *v.* Snyder, 39 Pa. St. 317.

Worthless Bill of Exchange Given by Consignee in Payment. — The charterer is not relieved from his primary liability to pay freight, because the shipowner has taken from the consignee of the cargo in payment of freight a bill of exchange which turns out to be of no value. Tapley *v.* Martens, 8 T. R. 451; Marsh *v.* Pedder, 4 Campb. 257; Taylor *v.* Briggs, M. & M. 28, 22 E. C. L. 238.

Bills Given for Captain's Convenience. — Where the master and part owner of a vessel, who had signed bills of lading making the cargo deliverable to the consignees or their assigns, he or they paying freight for the same, delivers the cargo to the consignees and takes a bill of exchange for the freight, which was afterwards dishonored, it was held, in an action commenced to recover the freight from the consignor, that the jury were properly directed to find for the defendants if they thought that the captain took the bill voluntarily and for his own convenience, and that the defendants were not bound to prove that an offer was made to pay in cash. Strong *v.* Hart, 6 B. & C. 160, 13 E. C. L. 130, *distinguishing* Marsh *v.* Pedder, 4 Campb. 257. To the same effect is Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162, *distinguishing and reconciling* Drew *v.* Bird, M. & M. 156, 22 E. C. L. 273. See also Anderson *v.* Hillies, 12 C. B. 499, 74 E. C. L. 499.

Payment by Worthless Check. — A clause in a bill of lading, which directs the carrier to collect the freight of the consignee of the goods on delivery, does not oblige the carrier to withhold the delivery of the goods in case of the refusal of the consignee to pay the freight; and if the carrier delivers the goods to the consignee without requiring him to pay the freight, or if he fails or neglects to collect the freight from him, this will not discharge the liability of the consignor to him for it, nor constitute any defense to an action for such freight. The taking of a check from the consignor, by the carrier, for the amount of the freight, and giving a receipt acknowledging the payment of the freight, will not amount to a satisfaction of the carrier's claim for freight, as against the consignor, where the drawer has no funds in the bank to meet the check, unless it is fairly inferable, from the evidence, that the carrier agreed that the check should be received as payment. Jobbitt *v.* Goundry, 29 Barb. (N. Y.) 509.

Consignor the Charterer of the Vessel. — The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, he or they paying freight for the said goods, is introduced for the benefit of the master only, and not for the benefit of the consignor, and, therefore, the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight, nor does it vary the case that the consignor was also the charterer of the ship. Shepard *v.* De Bernales, 13 East 565. To the same effect is Penrose *v.* Wilks, Abbott on Shipping 415.

Goods Shipped Must Belong to Consignor. — In Barker *v.* Havens, 17 Johns. (N. Y.) 234, 8 Am. Dec. 393, *approving* Shepard *v.* De Bernales, 13 East 565, Spencer, C. J., said: "I should clearly be of opinion that if it appeared that the goods were not owned by the consignor, and were not shipped on his account and for his benefit, that the carrier would not be entitled to call on the consignor for freight; and I should incline to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee."

Contrary Doctrine Called a Dictum. — In Wooster *v.* Tarr, 8 Allen (Mass.) 270, 85 Am. Dec. 707, Bigelow, C. J., said: "The dictum of Bayley, J., in Moorsom *v.* Kymer, 2 M. & S. 318, subsequently repeated by Lord Tenterden in Drew *v.* Bird, M. & M. 156, 22 E. C. L. 273, that in the absence of an express contract by the shipper to pay freight, when the goods are

sideration of the delivery of the goods; but that the question is one of fact to be decided by the jury in each case, and a promise to pay will not be implied as a matter of law from such conduct on the part of the consignee or assignee.[1]

In the United States the authorities as to the receipt of goods by the consignee are conflicting. The statements in some of the cases follow the English doc-

by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law."

1. Promise to Pay Inferred from Receiving Goods — England. — In Cock *v.* Taylor, 13 East 399, *disapproving* Artaza *v.* Smallpiece, 1 Esp. N. P. 23, it was held that the master of a ship having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by the purchaser and assignee of the bill of lading, without the freight having been paid, was evidence of a new contract and promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight, and he was liable for the amount in an action of *indebitatus assumpsit* brought against him by the shipowner. Lord Ellenborough, C. J., in the opinion delivered by him, said: "But it appears to me, that though there were no original privity of contract between these parties for payment of the freight, yet the taking of the goods from the ship by the purchaser under the bill of lading is evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in the bill, or their assigns, he or they paying freight for the said goods."

In Sanders *v.* Vanzeller, 4 Q. B. 260, 45 E. C. L. 260, it was held, commenting upon and explaining the case last cited, that the law would not upon such a state of facts imply a contract on the part of the consignee to pay the freight at the rate specified.

"No doubt, where a cargo is received under a bill of lading, that, though not necessarily raising a contract in law, is evidence from which a jury may infer a contract to pay freight in consideration of the captain giving up his lien on the goods. Sanders *v.* Vanzeller, 4 Q. B. 260, 45 E. C. L. 260." Parke, B., in Young *v.* Moeller, 5 El. & Bl. 755, 85 E. C. L. 755, 34 Eng. L. & Eq. 92, *reversing* 5 El. & Bl. 7, 85 E. C. L. 7, 30 Eng. L. & Eq. 345. See also Zwilchenbart *v.* Henderson, 9 Exch. 722.

Delivery of Goods the Consideration. — Where the indorsee of a bill of lading, or the consignee, other than the original charterer, becomes liable for freight, such liability results not from the original contract of affreightment, but from a new contract, the consideration for which is the delivery of the goods. Kemp *v.* Clark, 12 Q. B. 647, 64 E. C. L. 647.

Liability of Consignee by Custom. — In Roberts *v.* Holt, 2 Show. 443, it was held that the liability of the consignee by the custom of the port of destination to pay freight was a good custom.

Form Immaterial. — A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words, "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words, "freight for the said goods £4. 5*s.* per ton of 20 cwt. net, delivered, with primage and average accustomed," etc. It was held that the two forms of expression were in effect the same, and constituted the ordinary condition that the goods were to be deliverable only on paying freight. Weguelin *v.* Cellier, L. R. 6 H. L. 286.

Words Making Negotiable Omitted. — An indorsee of a Spanish bill of lading, to whom the goods have been delivered under it, is liable in assumpsit for the freight, although the bill of lading is for delivery to the consignees, without saying "or their assigns," such bills of lading appearing by evidence to be usually passed by indorsement. Renteria *v.* Ruding, M. & M. 511, 22 E. C. L. 370.

Freight Payable upon Shipowner's Goods. — Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order. Weguelin *v.* Cellier, L. R. 6 H. L. 286.

Other Charges. — If the consignee or his assignee receive goods which have been shipped under a bill of lading containing the clause, "and other conditions as per charter-party," such receipt is evidence going to show a promise on the part of such consignee or assignee to pay demurrage and other charges named in the charter-party as well as freight. Young *v.* Moeller, 5 El. & Bl. 755, 85 E. C. L. 755, *reversing* 5 El. & Bl. 7, 85 E. C. L. 7; Wegener *v.* Smith, 15 C. B. 285, 80 E. C. L. 285; Corteus *v.* Watney, 3 Q. B. Div. 534; Allen *v.* Coltart, 11 Q. B. Div. 782; Steamship County of Lancaster *v.* Sharp, 24 Q. B. Div. 158; Scaif *v.* Tobin, 3 B. & Ad. 523, 23 E. C. L. 139; Jesson *v.* Solly, 4 Taunt. 52. See also the title DEMURRAGE.

Early Cases. — In some of the early cases it is stated that a promise to pay arises by implication of law from the taking of the goods by the consignee or assignee; but this statement is inaccurate, and seems to have been founded upon a misconception of the doctrine of Cock *v.* Taylor, 13 East 399, which may be treated as the origin of questions of this nature. Christy *v.* Row, 1 Taunt. 300; Dougal *v.* Kembel, 3 Bing. 383, 13 E. C. L. 16; Bell *v.* Kymer, 1 Marsh. 146, 1 E. C. L. 162. See also Stindt *v.* Roberts, 12 Jur. 518; Moorsom *v.* Kymer, 2 M. & S. 303.

Canada. — For Canadian cases involving this principle, see Allen *v.* Chisholm, 33 U. C. Q. B. 237; Oldfield *v.* Hutton, 2 Rev. de Lég. 77.

trine,[1] while the rule that the law will imply a promise to pay freight from such an acceptance is supported by other cases.[2] And this seems to be the opinion of Chancellor Kent.[3] In some jurisdictions there is difficulty in reconciling the judicial expressions upon this point.[4]

Consignee Acting as Agent. — It does not matter whether the consignee is the owner of the goods, or only his agent. If he receives them, such receiving is evidence from which it may be inferred that he became personally liable for the freight,[5] unless the shipowner or master had notice of such agency.[6]

1. Blanchard *v.* Page, 8 Gray (Mass.) 281; Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162.

Bill of Lading as Security for Purchase-Money. — Where shippers have bought and shipped a cargo on speculation, and, not having the means to pay for the whole of it, have assigned the bill of lading to the vendors of the cargo as a security for a part of the purchase-money, the assignees of the bill of lading are not liable for the freight. Swett *v.* Black, 2 Sprague (U. S.) 49.

2. Promise Implied. — Shaw *v.* Thompson, Olc. Adm. 144; Smith *v.* Flowers, 6 Martin (La.) 12; Spencer *v.* White, 1 Ired. L. (23 N. Car.) 236; Hatch *v.* Tucker, 12 R. I. 501, 34 Am. Rep. 707; Hayward *v.* Middleton, 3 McCord. L. (S. Car.) 121, 15 Am. Dec. 615, 2 Nott & M. (S. Car.) 9. See also Pelayo *v.* Fox, 9 Pa. St. 489.

In Hatch *v.* Tucker, 12 R. I. 501, 34 Am. Rep. 707, the court, after an extensive review of the authorities, said: "The weight of authority, therefore, seems to be that where there is a bill of lading, and the acceptance by the consignee is proved and unexplained, the law will imply a promise to pay freight."

Assignee Surety for the Assignor. — The assignee of the bill of lading who received the goods is bound by an implied promise to pay the freight unless the assignor is bound by charter-party to pay it, or unless the assignee has bound himself by an express agreement to pay it as surety for the assignor. Trask *v.* Duvall, 4 Wash. (U. S.) 181.

3. In 3 Kent's Com. 222, note, the author, after stating the holding in Sanders *v.* Vanzeller, 4 Q. B. 260, 45 E. C. L. 260, 2 G. & D. 244, says: "Independent of this case, I should have thought that the law would have raised such a contract." And in the text on the preceding page it is said: "If the goods by the bill of lading were to be delivered to B. or his assigns, he or they paying freight, and the assignee receives the goods, he is responsible to the master for the freight under the implied undertaking to pay it."

This seems to be the view of Judge Story also. See Story on Bailments, § 589.

4. In New York, in the case of Elwell *v.* Skiddy, 77 N. Y. 282, the doctrine of Sanders *v.* Vanzeller, 4 Q. B. 260, 45 E. C. L. 260, is adopted, and this case may perhaps be considered as settling the New York law upon this subject, though earlier cases which apparently declare a contrary doctrine are not referred to or examined. As showing the uncertain state of the law on this point in this state, it may be stated that in an earlier appeal in the same case, Elwell *v.* Skiddy, 8 Hun (N. Y.) 73, the General Term of the Supreme Court held that, by accepting the freight, the assignee of the consignee became liable for the freight.

In Davison *v.* City Bank, 57 N. Y. 81, the New York Commission of Appeals, by Earl, C., said: "That the consignee who receives the cargo consigned under such a bill of lading as the one in question is liable to the carrier for the freight, is not questioned. Merian *v.* Funck, 4 Den. (N. Y.) 110; Hinsdell *v.* Weed, 5 Den. (N. Y.) 172; Davis *v.* Pattison, 24 N. Y. 317; Morse *v.* Pesant, 2 Keyes (N. Y.) 16; Merrick *v.* Gordon, 20 N. Y. 93. It matters not, under such a bill of lading, whether the consignee be the owner or not; the law implies a promise on his part to pay the freight."

See also Burton *v.* Strachan, 3 E. D. Smith (N. Y.) 192, note; Gilson *v.* Madden, 1 Lans. (N. Y.) 172.

Consignee Not Owner or a Mere Agent. — But, in the absence of a stipulation in the contract of transportation by which the consignee is to pay the freight, an agent is not liable for the freight of goods sent to or received by him when the agency is known to the carrier at the time of the delivery of the goods. Dart *v.* Ensign, 47 N. Y. 619, *reversing* 2 Lans. (N. Y.) 383.

And in the case of an intermediate consignee, not the owner of the goods, no contract to pay freight is raised by his merely receiving the goods, knowing them to be subject to a charge for freight. Dart *v.* Ensign, 47 N. Y. 619; Ackerman *v.* Redfield, 9 Hun (N. Y.) 378, where Talcott, J., said: "The consignee is *prima facie* the owner of the goods, and as such liable for the freight; but if he be not, in fact, the owner, he is not liable for the freight, *simpliciter* as consignee, but only upon a contract, express or implied, to pay the freight. It is not the mere receipt of goods by a person who is not the owner, with the knowledge that they are subject to a charge for freight, that will bind him to pay it; but if he receive the goods in pursuance of a bill of lading, making the payment of the freight a condition precedent to the delivery, or if he has notice from the master that if he takes the goods he must take them subject to the charge, he will be liable to pay it. But a person who is only agent for the consignor, and who is known to the master to be acting in that character, does not make himself personally answerable for the freight by receiving the goods." See also the notes following.

5. Agent Generally Liable. — Davison *v.* City Bank, 57 N. Y. 81. See also Kennedy *v.* Gouveia, 3 D. & R. 503, 16 E. C. L. 174; Dickinson *v.* Lano, 2 F. & F. 188.

6. Effect of Notice. — Ward *v.* Felton, 1 East 507; Hinsdell *v.* Weed, 5 Den. (N. Y.) 172; Spencer *v.* White, 1 Ired. L. (23 N. Car.) 236.

Effect of Assigning Bill of Lading. — When the consignee of goods, which by the bill of lading are deliverable to him or his order on the payment of freight, before receiving the goods assigns such bill of lading to another person, who receives them, such assignee becomes the substitute of the consignee as to the liability for freight, and no action can be brought against such consignee for the freight.[1]

Estoppel in Favor of Assignee. — When the shipowner has given a bill of lading by which freight appears to have been paid before the ship's departure from her port of loading, he is estopped as against the assignee of such bill of lading from claiming freight when the vessel arrives at her destination.[2]

Goods Received, but Not Under a Bill of Lading. — Where there is no bill of lading, the consignee is not generally liable for the freight, and the indorsee of a bill of lading does not become liable therefor when he does not receive the goods under the bill of lading, but by some other means, such as an order on the consignee. But in such cases, if it appears from prior dealings that the person receiving the goods was in the habit of paying the freight under similar circumstances, there is evidence from which a promise to pay the freight may be inferred.[3]

Agency Should Appear in the Bill of Lading. — "If a shipper or consignor would relieve the consignee, who is merely agent for the shipper, from personal liability to the carrier, he must do it by letting it appear so on the shipping bill, and thus caution the carrier to protect himself by holding on to his lien until he receives his compensation. The shipper must not throw the carrier off his guard by signing with and delivering to him a shipping bill which represents the agent as the real consignee. When they do so, and the agent is thereby enabled to obtain possession of the property as consignee, they must not be permitted to change his status to the injury of the carrier." Sheets *v.* Wilgus, 56 Barb. (N. Y.) 670.

In Amos *v.* Temperley, 8 M. & W. 798, it appeared that by the bill of lading the cargo was made deliverable "unto N. T. [the defendant] for the London Gas Company, or to his assigns, he or they paying freight for the said goods, etc." On the arrival of the vessel in London, the defendant produced the bill of lading and received the goods under it. It was held that the defendant was not personally liable, inasmuch as on the face of the bill of lading he was a mere agent to receive the goods for the company, the property vesting in them. See also Miner *v.* Norwich, etc., R. Co., 32 Conn. 91.

1. Gilson *v.* Madden, 1 Lans. (N. Y.) 172; Burton *v.* Strachan, 3 E. D. Smith (N. Y.) 192, note.

Stowing Goods in a Public Warehouse. — The doctrine of the text holds true, although the assignment of the bill of lading was made after the goods were sent to a public warehouse under a general order to discharge the ship. Merian *v.* Funck, 4 Den. (N. Y.) 110; New York, etc., Steam Nav. Co. *v.* Young, 3 E. D. Smith (N. Y.) 187.

Credit Given to Indorsee. — Goods were shipped at Bombay on board a ship of the plaintiff, a shipowner in Liverpool, and by the bill of lading were to be delivered "unto order, or to his or their assigns on paying freight for the said goods." The bill of lading was indorsed by the shipper, and forwarded to the defendants, East India agents in London, who indorsed it in blank to C. & Co., their factors in Liverpool. On the arrival of the goods at Liverpool, C. & Co. presented the bill of lading to the plaintiff, and received the goods; the plaintiff debited C. & Co. with the freight; C. & Co. became bankrupt without having paid the freight, whereupon the defendants claimed from them and took possession of the goods. It was held that the defendants were not liable to the plaintiff for the unpaid freight. Tobin *v.* Crawford, 5 M. & W. 235.

Indorsement Without Recourse. — The consignee of goods, before the arrival of the ship, indorsed over the bill of lading, but not so as to pass the property in the goods, to wharfingers, in these words: "Deliver to W. & K., or order, looking to them for all freight, dead freight, and demurrage, without recourse to us." The plaintiffs, the shipowners, accepted the indorsement, and in pursuance of it delivered the goods to W. & K. It was held that the shipowners were not entitled to sue the consignee for freight. Kelly, C. B., in the opinion delivered by him, said: "But I am of opinion that if the consignee of goods indorses over the bill of lading, and gives notice to the shipowner or the party entitled to freight, and in the indorsement states in express terms that the shipowner or party entitled to freight is to look to the indorsee without recourse to him, and that indorsement is accepted and acted upon without objection or qualification, that acceptance constitutes a defense to any action at law by the shipowner against the indorser." Lewis *v.* M'Kee, L. R. 2 Exch. 37, *affirmed* in L. R. 4 Exch. 58.

2. Howard *v.* Tucker, 1 B. & Ad. 712, 20 E. C. L. 478. See also Tamvaco *v.* Simpson, 34 L. J. C. P. 268, L. R. 1 C. P. 363.

3. **Prior Dealings as Evidence of a Promise to Pay.** — The consignee of goods, where there is no bill of lading, is not in general liable for the freight; but prior dealings with him, and payments by him of the freight on former occasions of the same kind, are evidence to show that in the particular case he contracted, on the receipt of the goods, to pay the freight. Coleman *v.* Lambert, 5 M. & W. 502.

Tender of the Freight. — While it is usually the duty of the cargo owner to make a tender of the freight due upon the cargo, the necessity for such tender is dispensed with when it appears that a larger sum than was due was demanded by the master of the vessel, and that the demand was so made as to amount to an announcement that it was useless to tender a smaller sum, as it would be refused.[1]

d. ENGLISH BILLS OF LADING ACT. — It is expressly provided by this enactment that nothing therein shall prejudice any right to claim freight against the original shipper or owner of the cargo.[2]

Consignees or Indorsees. — By this act the liability under a bill of lading to pay the freight is transferred to the consignee or indorsee of such bill, if the property in the goods mentioned therein has passed to such consignee or indorsee.[3]

9. Medium of Payment. — In the absence of any express agreement freight is generally payable in cash, but by agreement a bill or note may be taken in payment;[4] and in a particular trade it may be customary to pay freight by bill or note without an express agreement.[5]

10. Freight Payable Though the Contract Not Fully Executed — Time Stipulations Not Complied With. — When the voyage has been actually performed, although not begun or ended at the time agreed upon, it seems that the shipowner will be entitled to his freight, the cargo owner having an action for breach of covenant.[6]

Vessel Unseaworthy. — And even though the vessel is unseaworthy, if the charterer uses her he must pay for that use.[7]

Goods Obtained by Order of the Consignee. — Where the consignees of a West India cargo deliverable by bill of lading to them or their assigns, he or they paying freight for the same, indorsed it to the defendants, their brokers, for advances made by them, and the cargo on its arrival was landed at the West India docks in the names of the consignees, but was entered at the custom-house by the defendants in their own names; and afterwards the defendants obtained delivery from the West India docks under an order from the consignees for that purpose, and not under the bill of lading; it was held that the receipt of the cargo by the defendants under the order of the consignees was not a sufficient ground to raise an implied assumpsit on their part to pay the freight, and the entry at the custom-house made no difference; but as it appeared from previous dealings that the defendants had been in the habit of receiving goods in the same manner and paying the freight for them, that was considered sufficient to raise such an implied promise. Wilson *v.* Kymer, 1 M. & S. 157.

1. The Norway, Brown & L. Adm. 404, 11 Jur. N. S. 892.

2. English Statute. — 18 and 19 Vict., c. 111, § 2; Fox *v.* Nott, 6 H. & N. 630.

Canada Statute. — And the statute of Ontario is the same in its provisions. Ontario Act, 33 Vict., c. 19, § 2; Allen *v.* Chisholm, 33 U. C. Q. B. 237.

3. Carver on Carriage by Sea, p. 614, § 606. By the Bills of Lading Act, 18 and 19 Vict., c. 111, it was enacted as follows: "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The Ship Freedom *v.* Simmonds, L. R. 3 P. C. 594.

Under this act the consignee or indorsee of a bill of lading who had indorsed it over to a third person is no longer liable for freight. Smurthwaite *v.* Wilkins, 11 C. B. N. S. 842, 103 E. C. L. 842.

Advance Freight. — It seems doubtful whether by this act the consignee or indorsee is made liable for freight which by the contract of affreightment was payable in advance, but which has not, as a matter of fact, been paid. Carver on Carriage by Sea, p. 615, § 606, *citing* Neish *v.* Graham, 27 L. J. Q. B. 15.

4. Agreement to Accept a Bill or Note. — Tate *v.* Meek, 2 Moo. 278; Paynter *v.* James, L. R. 2 C. P. 348; The Bird of Paradise, 5 Wall. (U. S.) 545.

For a discussion of the effect of taking a bill or note in payment of freight, see *infra*, this title, *Liens — Lien of the Shipowner — How Lost.*

Master Must Draw the Bill. — Where freight is payable by a bill it is the duty of the master to draw such bill, and the offer to give the master the bill if he will draw it is a sufficient tender of the freight. Luard *v.* Butcher, 2 C. & K. 29, 61 E. C. L. 29.

5. Luard *v.* Butcher, 2 C. & K. 29, 61 E. C. L. 29.

6. Freight Due Though Time Stipulations Not Complied With. — Constable *v.* Cloberie, Palmer 397; Bornmann *v.* Tooke, 1 Campb. 377; Hall *v.* Cazenove, 4 East 477; Davidson *v.* Gwynne, 12 East 381. See *infra*, this title, *Dissolution and Excuses for Nonperformance — Conditions Precedent — Situation and Time of Loading and Sailing.*

7. Unseaworthy Vessel if Employed Earns Freight. — Work *v.* Leathers, 97 U. S. 379; Tebo *v.* Jordan, 62 Hun (N. Y.) 514. See also

Vessel of Less than Stated Capacity. — When a vessel which was chartered for a lump sum was stated to be of a greater capacity than she proved to be, but the charterer sent her on a voyage, it was held that the stipulated freight must be paid.[1]

IX. LIENS — 1. Lien of the Shipowner — *a.* FOR FREIGHT — (1) *In General.* — The owner of a vessel has, by the general maritime law, without any express stipulation, a lien for freight upon the cargo, and is not bound to part with his possession until such freight has been paid.[2]

Cook *v.* Gowan, 15 Gray (Mass.) 237. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Seaworthiness;* and *infra*, this title, *Dissolution and Excuses for Nonperformance — Conditions Precedent — Seaworthiness.*

In Forbes *v.* Rice, 2 Brev. (S. Car.) 363, 4 Am. Dec. 589, it was held that in a contract of affreightment there is no tacit or implied condition that the ship is seaworthy. The court said: "It seems clear, from all that can be collected from the works of these writers, and from the cases cited by counsel in arguing this case, that the owner of the goods cannot be entitled to vacate the charter-party or contract of affreightment on the ground of the unseaworthiness of the vessel; but that his claim for compensation or damages in case of loss, or waste, or damage to the goods, or for want of punctuality, care, or dispatch in the execution of the contract on the part of the owner or master of the ship, must be founded on the contract, or on an implied contract in law, to compensate for the service performed. There is no authority to support the position that the master shall not have his freight, although he carries the goods safely, and delivers them at the port of delivery, if the vessel be unworthy of sea in which he performs his contract."

Use for Part of the Agreed Time. — A covenant in a charter-party of affreightment that the owner shall, at his expense, forthwith make the ship tight and strong, etc., for a voyage for twelve months, etc., and keep her so, is not a condition precedent to the recovery of freight, after the freighter has taken the ship into his service and used her for a certain period; but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. Havelock *v.* Geddes, 10 East 555.

Freight Due for the Time When Vessel Was in the Charterer's Possession. — In Richardson's Case, 2 Ct. of Cl. 483, it was held that when a vessel which was chartered to the government was selected and inspected by an agent of the government, and there was no fraud or concealment on the part of the owner, the government was liable for the hire of the vessel while she was in the possession of the government, although she proved to be unfit for the service for which she was chartered.

1. Pust *v.* Dowie, 9 Jur. N. S. 1322. See *infra*, this title, *Dissolution and Excuses for Nonperformance — Conditions Precedent — Capacity.*

2. Shipowner Has a Lien for Freight — *England.* — Anonymous, 12 Mod. 447; Anonymous, 12 Mod. 511; Artaza *v.* Smallpiece, 1 Esp. N. P. 23; Black *v.* Rose, 2 Moo. P. C. N. S. 277.

United States. — Gracie *v.* Palmer, 8 Wheat. (U. S.) 605, *reversing* Palmer *v.* Gracie, 4 Wash. (U. S.) 110; Webb *v.* Anderson, Taney's Dec. (U. S.) 504; Nine Hundred, etc., Pieces of Lumber, 7 Ben. (U. S.) 389; One Thousand, etc., Vitrified Pipes, 14 Blatchf. (U. S.) 274; Eames *v.* Cavaroc, Newb. Adm. 528; Thatcher *v.* McCulloh, Olc. Adm. 365; The Enchantress, 58 Fed. Rep. 910.

Massachusetts. — Blanchard *v.* Page, 8 Gray (Mass.) 281.

New York. — Griswold *v.* New York Ins. Co., 3 Johns. (N. Y.) 322, 3 Am. Dec. 490; Davis *v.* Pattison, 24 N. Y. 317; Elwell *v.* Skiddy, 77 N. Y. 282.

Pennsylvania. — Cheraw, etc., R. Co. *v.* Broadnax, 109 Pa. St. 432, 58 Am. Rep. 733.

South Carolina. — Middleton *v.* Heyward, 2 Nott & M. (S. Car.) 9, 10 Am. Dec. 554. See also Miedbrodt *v.* Fitzsimon, L. R. 6 P. C. 306.

Ships Chartered to Government. — In The Undaunted, 2 Sprague (U. S.) 194, the court said: "It cannot be supposed that persons who charter vessels to the government as transports or supply-ships, especially in time of war, are to have a right to detain the public property put on board until their demands for freight are paid, or the right to arrest the goods under a libel in court. Not only is this inconsistent with public policy, but the government cannot allow it to be supposed that its own credit is not sufficient security."

Delivery of Goods and Payment of Freight Concomitant. — Where the owner of a vessel covenanted by charter-party to let the vessel on freight and to deliver the cargo in good condition, and the freighters covenanted to pay the freight on delivery of the cargo, part in money and the remainder by bill at a specified time, it was held that the owner might detain the cargo until payment of the freight, the delivery of the cargo and payment of the freight being concomitant. Tate *v.* Meek, 8 Taunt. 280, 4 E. C. L. 105. To the same effect are Yates *v.* Railston, 8 Taunt. 293, 4 E. C. L. 109; Yates *v.* Meynell, 8 Taunt. 302, 4 E. C. L. 112; Paynter *v.* James, L. R. 2 C. P. 348.

No Right to Detain Without Affording Consignee Opportunity to Examine. — The owner of a vessel has a lien on the cargo for the freight and may retain the goods after the arrival of the ship at the port of destination until the payment is made. He cannot, however, detain the goods on board the ship until the freight is paid, as the consignee or owner of the cargo would have no opportunity to examine their condition. The Eddy, 5 Wall. (U. S.) 493.

Form of Contract Immaterial. — And except when the charterer, by the terms of the charter-party, becomes the owner *pro hac vice*, as will be seen hereafter, this lien exists in favor of the shipowner, whatever the form of the contract under which the cargo is shipped.[1]

(2) *Origin and Nature of the Lien* — (a) **Origin.** — It is usually stated by the authorities that the right of the shipowner to retain the cargo until the freight is paid is derived from the general maritime law;[2] though the view has been taken that the lien for freight is in the nature of a common-law lien.[3]

(b) **Nature.** — But whatever its nature, it is well settled that this lien is not the privileged claim of the civil law, but arises merely from the right of the shipowner to retain the possession of the goods until the freight is paid.[4]

(3) *Vessel Chartered* — (a) **General Owner, Owner for the Voyage** — *aa.* As Against the Charterer. — The general owner who, by the terms of a charter-party, is also the owner for the voyage, has a lien upon the goods of the charterer for the full amount of the freight stipulated for in the charter-party.[5]

quoted and *approved* in The Ravensdale, 75 Fed. Rep. 413. To the same effect are The Schooner Treasurer, 1 Sprague (U. S.) 473; Wellman *v.* Morse, 76 Fed. Rep. 573.

Nor to Sell. — A common carrier by sea has, by the law merchant, a lien on goods carried by him for the payment of their freight; but he has no right to cause a sale to be made thereof, of his own mere motion, for the payment of the freight. Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387.

Lien for Full or Pro Rata Freight. — "As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo for all the freight which becomes due and payable to him, whether it be a full or *pro rata* freight." Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383.

1. In Case of a Chartered Ship as Well as a General One. — "The general right of the master and owner to retain the merchandise for the freight due upon it has not been denied. * * * Nor does there appear to be any difference in principle, nor is any recognized in law, whether the merchant takes the whole vessel by a charter-party, or sends his goods in a general ship. The lien of the owners is as perfect for the hire of the vessel stipulated in the charter-party as it is for the freight stipulated in the bill of lading." Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149. To the same effect are Certain Logs of Mahogany, 2 Sumn. (U. S.) 589; Raymond *v.* Tyson, 17 How. (U. S.) 53; Fox *v.* Holt, 36 Conn. 558. See *infra*, this section, *Vessel Chartered — Charterer Owner Pro Hac Vice.*

2. Maritime Lien. — Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149; Four Thousand, etc., Bags of Linseed, 1 Black (U. S.) 108. See also The Eddy, 5 Wall. (U. S.) 481; The Delaware, 14 Wall. (U. S.) 596; Dupon de Nemours *v.* Vance, 19 How. (U. S.) 171; Wellman *v.* Morse, 76 Fed. Rep. 573; The Laws of Wisbuy, art. 57; Beawes Lex Mercatorio, 118; Molloy De Jure Maritimo, Book 2, c. 4, § 12.

Usage of Trade. — "The right to retain the cargo for the freight has grown out of the usage of trade." Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

3. Common-law Lien. — See Van Bokkelin *v.* Ingersoll, 5 Wend. (N. Y.) 315.

Lien of a Bailee. — In Gracie *v.* Palmer, 8 Wheat. (U. S.) 605, the view was taken that the lien of the shipowner for freight was derived from the law of bailments. Johnson, J., said: "On what principles rests the general lien of goods for freight? The master is the agent of the shipowner to receive and transport; the goods are improved in value by the costs and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and shipowner, and the law will not suffer that possession to be violated until the laborer has received his hire."

4. The Bird of Paradise, 5 Wall. (U. S.) 545; The Eddy, 5 Wall. (U. S.) 481. See *infra*, this section, *How Lost — Waiver — By Delivery.*

Statement of the Rule. — In Four Thousand, etc., Bags of Linseed, 1 Black (U. S.) 108, Taney, C. J., delivering the opinion of the court, said: "But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the shipowner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party until his fare is paid; and if he delivers them, the incumbrance of the lien does not follow them in the hands of the owner or consignee. It is nothing more than the right to withhold the goods, and is inseparably associated with his possession, and dependent upon it. The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain the possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid."

5. Lien of the General Owner as Against the Charterer. — Tate *v.* Meek, 8 Taunt. 280, 4 E. C. L. 105; Saville *v.* Campion, 2 B. & Ald.

bb. As Against Other Persons — (*aa*) *Freight Actually Due by the Shipper.* — And upon all goods shipped by persons other than the charterer, whether a bill of lading has been issued for them by the master of the vessel or not, the shipowner certainly has a lien for the amount of freight due from such persons, and a lien for the same amount exists in favor of the shipowner upon goods covered by a bill of lading which has been transferred by the shipper of the goods to a stranger to the contract of affreightment.[1]

(*bb*) *Charter-party Freight and Charges* — aaa. When There Is a Bill of Lading — (*aaa*) *General Rule.* — A more difficult question arises in cases when a lien for the charter-party freight — that is, the freight due under the terms of the charter-party from the charterer to the shipowner — is claimed by the shipowner as against the goods of persons other than the charterer or goods covered by bills of lading which have been transferred to strangers, or when the shipowner seeks to detain such goods for demurrage, dead freight, or other charges stipulated for in the charter-party.[2]

(*bbb*) *As Against a Shipper Other than the Charterer.* — It seems that as against the shipper who is not a party to the charter-party, and who has no notice of the terms

503; Campion *v.* Colvin, 3 Bing. N. Cas. 17, 32 E. C. L. 19; Gracie *v.* Palmer, 8 Wheat. (U. S.) 625, 4 Wash. (U. S.) 110; Raymond *v.* Tyson, 17 How. (U. S.) 53; Clarkson *v.* Edes, 4 Cow. (N. Y.) 470.

Amount of the Lien Is Not Limited by the Penalty Clause. — The amount of the shipowner's claim on the goods of the charterer is not limited to the penal sum mentioned in the charter-party. The Salem's Cargo, 1 Sprague (U. S.) 389.

Damages Not Included. — The charterer of a vessel gave a lien on "all cargoes and all sub-freights for any amount due under this charter." It was held that the lien given by this clause would include charter hire up to the time when the vessel was withdrawn from the service of the charterer, and such other amounts also as were then actually due to the shipowners from the charterer for advances made for charterer's account for coal, provisions, port dues, and any other sums which the provisions of the charter required the charterer to pay; also, any sums then due and payable on account of short delivery or damage of cargo through default of the charterer, for which the charterer by the terms of the charter was bound to indemnify the shipowners; but that it would not include damages to the shipowners through the less profitable employment of the vessel by themselves during the residue of the charter period, after they had voluntarily and absolutely withdrawn the vessel from the charterer's service, thus terminating the charter from that time forward. Freights of The Kate, 63 Fed. Rep. 707.

Lien Expressly Reserved. — The charterer may covenant with the shipowner that whatever may be the legal operation of the charter-party as between themselves, the charterer's possession of the ship shall be the possession of the owner so far as the right of the latter to a lien on the cargo is in any way concerned, and if such a covenant is entered into, the owner of the ship has a lien upon her cargo, whatever be the effect of the charter-party in other respects. Small *v.* Moates, 9 Bing. 574, 23 E. C. L. 387.

Effect of Payment to Shipowner. — When the general owner continues to be the owner for the voyage, payment of the freight due by the shippers or their consignees to the master or his owners, in discharge of the lien of the owners, is a full defense to an action for the recovery of freight brought against the shippers by the charterers. Holmes *v.* Pavenstedt, 5 Sandf. (N. Y.) 97.

To Charterer. — Where the shipowner, by the terms of the charter-party, does not part with the ownership and possession of the vessel, a payment to the charterer, with notice of the shipowner's claim for freight, will not protect the consignee. Clarkson *v.* Edes, 4 Cow. (N. Y.) 470

1. Lien of General Owner as Against Persons Other than the Charterer. — Faith *v.* East India Co., 4 B. & Ald. 630, 6 E. C. L. 630; Christie *v.* Lewis, 2 Brod. & B. 410, 6 E. C. L. 206; Paul *v.* Birch, 2 Atk. 621; Small *v.* Moates, 9 Bing. 574, 23 E. C. L. 387; The Schooner Volunteer, 1 Sumn. (U. S.) 551; Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149; Adams *v.* Homeyer, 45 Mo. 545, 100 Am. Dec. 391; Holmes *v.* Pavenstedt, 5 Sandf. (N. Y.) 97. See also Ruggles *v.* Bucknor, 1 Paine (U. S.) 358; Welch *v.* McClintock, 10 Gray (Mass.) 215.

2. General Rule in Such Cases. — In Carver on Carriage by Sea (2d ed.), § 675, the author, after examining the authorities upon the subject, says: "The general result seems to be that where the master or agent of the shipowner gives a bill of lading which does not so incorporate the terms of the charter-party as to make the liens given by the charter-party — whether for freight, dead freight, or demurrage — part of the bill of lading contract, then those liens cannot be maintained (1) as against strangers to the charter-party who have shipped under the bill of lading; or (2) as against assignees for value of the bill of lading, whether from the charterers or from strangers to the charter-party, even though they had notice of the existence of the charter-party, unless the master had not authority to give the bill of lading, and they had notice of that, or unless they were put upon inquiry, and that would have shown the absence of authority."

thereof, the shipowner has a lien for the bill of lading freight only,[1] even though such shipper presumes and believes that a charter-party exists.[2]

(*ccc*) *Shipper Agent of the Charterer.* — When the shipper is the agent of the charterer, he is deemed to have notice of the terms of the charter-party as to freight and is bound thereby.[3]

(*ddd*) *Transferee Without Notice* — As against a *bona fide* transferee of a bill of lading without notice of the charter-party, the shipowner has a lien only for the freight mentioned in the bill of lading.[4]

(*eee*) *Transferee With Notice.* — But it would seem that transferees with notice of the terms of a charter-party are bound for the full freight called for in the charter-party.[5]

1. Kerford *v.* Mondel, 28 L. J. Exch. 303; The Peer of the Realm, 19 Fed. Rep. 216, *distinguishing* Grand *v.* The Bark Ibis, 3 Woods (U. S.) 28.

Ignorant Shipper. — If cargo is accepted by a general ship from one ignorant of the circumstances of the chartering of the vessel, or if bills of lading are signed inconsistent with the charter, the part of the cargo belonging to such ignorant shipper must be carried subject only to the freight specified in the bills of lading issued to him, notwithstanding it is stipulated in the charter-party that the owners of the vessel have an absolute lien on the cargo for all the freight due under the charter-party. The Karo, 29 Fed. Rep. 652.

A ship was chartered for a particular voyage for a gross sum by way of freight. The captain signed bills of lading for the cargo, which was the property of and consigned to a third person, at a rate of freight amounting to a less sum than that mentioned in the charter-party. It was held that the shipowner had no lien on the cargo beyond the freight specified in the bills of lading. Mitchell *v.* Scaife, 4 Campb. 298.

Only for Freight Due by Sub-freighters. — The general rule is that where a vessel is chartered for a voyage for a round sum, the charterer has the right to load the vessel himself, or allow others to do it under contract with him, and the goods so placed on board by third persons under such contract are liable only for their own freight, and not for the payment of the gross sum named in the charter-party; and this rule is not changed by inserting in the charter-party a clause whereby the master agrees to give bills of lading "without prejudice to this charter-party." Grand *v.* The Bark Ibis, 3 Woods (U. S.) 28. To the same effect is Four Hundred, etc., Hogsheads of Molasses, 4 Blatchf. (U. S.) 319.

New Contract Made by the Master. — After notice of the failure of the charterers, their agents who were loading the vessel refused to put any more cargo aboard her. It was held that the master of the vessel, acting in the interests of his owner, was authorized to enter into a new contract with the agents of the charterers, who then occupied the position of strangers to the contract, and that upon goods shipped under such new contract the shipowner had a lien for the freight agreed upon in the new contract only, and not for the freight mentioned in the original charter-party. Pearson *v.* Goschen, 17 C. B. N. S. 352, 112 E. C. L. 352.

2. O'Connell *v.* One Thousand, etc., Bales of Sisal Hemp, 75 Fed. Rep. 410.

3. See opinion of Burrough, J., in Christie *v.* Lewis, 2 Brod. & B. 441, 6 E. C. L. 219.

4. **Liability of Transferee Without Notice.** — Gilkison *v.* Middleton, 2 C. B. N. S. 134, 89 E. C. L. 134, *distinguishing* Marquand *v.* Banner, 6 El. & Bl. 232, 88 E. C. L. 232; Shand *v.* Sanderson, 4 H. & N. 381, *approving* Foster *v.* Colby, 3 H. & N. 705. See also Howard *v.* Tucker, 1 B. & Ad. 712, 20 E. C. L. 478.

Liability of Bona Fide Indorsee. — In Foster *v.* Colby, 3 H. & N. 705, Pollock, C. B., said: "A *bona fide* indorsee for value of the bill of lading, having no knowledge or notice of the charter-party or that the cargo was subject to lien for any freight except that mentioned in the bill of lading, and not acting collusively, is entitled to the goods on payment of the freight stipulated for in the bill of lading, and is not affected by the greater liability of the indorser, supposing such liability to exist." *Approving* Gilkison *v.* Middleton, 2 C. B. N. S. 134, 89 E. C. L. 134.

Lien Having Attached Cannot Be Divested. — In Small *v.* Moates, 9 Bing. 574, 23 E. C. L. 387, Tindal, C. J., said: "Where goods are put on board a general ship under a bill of lading, and the owner of the ship has by the charter-party reserved to himself a lien upon the goods laden on board the ship for his freight due under the charter-party, he has such lien to the extent of the freight due for these particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage, or are sold, before delivery, to a stranger; or, in other words, the extent of the shipowner's lien remains unaltered, whether the bill of lading is indorsed to a third person for a valuable consideration, or the goods are deliverable to the original consignee. And upon the same principle it would seem to follow that if the lading of the ship belongs to the charterer, and such lading is subject to the shipowner's lien for the freight reserved by the charter-party, such lading, if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the shipowner had before the sale." This statement of the law does not seem to be reconcilable with other decisions as to the rights of transferees of bills of lading, and should probably be confined to the facts of this particular case.

5. **Effect of Notice.** — Kern *v.* Deslandes, 10 C. B. N. S. 205, 100 E. C. L. 205, 30 L. J. C. P. 297, 8 Jur. N. S. 195, 5 L. T. 340; Gledstanes *v.* Allen, 12 C. B. 202, 74 E. C. L. 202. See also O'Brien *v.* One Thousand, etc., Bags of Guano, 48 Fed. Rep. 726. See the cases cited in note 4, *supra*.

Circumstances Putting upon Inquiry. — And if the form of the bill of lading and the circumstances under which it was given, such circumstances being known to the transferees of the instrument, should have put the transferees upon inquiry, the shipowner will have a lien for the full charter-party freight as against the transferees, even though they were actually ignorant of the provisions of the charter-party.[1]

(*fff*) *Transferee Agent of the Charterer.* — Where a person claiming under a bill of lading is nominally a transferee thereof, but is really the agent of the charterer, the goods covered by the bill of lading may be detained by the shipowner for the full amount of freight due under the charter-party.[2]

(*ggg*) *Charterers as Indorsees.* — When the indorsees of a bill of lading are also the charterers of a ship, they are bound by a stipulation in the charter-party as to a lien for freight.[3]

(*hhh*) *Charterer to Fix the Freight.* — It has been decided that when it is shown by the charter-party that it was intended that the charterer should fix the

Freight Paid. — The consignees of a cargo had notice of the existence of a charter-party. The captain of the vessel signed a bill of lading according to which freight for the goods was expressed to have been paid. It was held that notwithstanding this bill of lading, the shipowner had, even as against the consignees, a lien on these goods for the hire of the ship due under the charter-party. Campion *v.* Colvin, 3 Bing. N. Cas. 17, 32 E. C. L. 19. See also Gracie *v.* Palmer, 8 Wheat. (U. S.) 605. *Compare* Howard *v.* Tucker, 1 B. & Ad. 712, 20 E. C. L. 478.

1. If Circumstances Suspicious, Assignee Should Inquire. — In Small *v.* Moates, 9 Bing. 574, 23 E. C. L. 387, it appeared from the evidence that the bill of lading was signed by the master of the vessel, who, by its terms, appeared also to be the shipper, making the goods deliverable to his order upon the payment of a certain freight. It was held that the assignees of the bill of lading should, by its form and the circumstances under which it was issued, have been put upon inquiry, and that the goods covered by the bill of lading were liable to the shipowner for the full amount of the freight stipulated in the charter-party.

2. Agent's Liability the Same as His Principal's. — Kern *v.* Deslandes, 10 C. B. N. S. 205, 100 E. C. L. 205, 30 L. J. C. P. 297, 8 Jur. N. S. 194, 5 L. T. 349. See also Small *v.* Moates, 9 Bing. 574, 23 E. C. L. 387; Campion *v.* Colvin, 3 Bing. N. Cas. 17, 32 E. C. L. 19; Faith *v.* East India Co., 4 B. & Ald. 630, 6 E. C. L. 630.

Factors for Sale. — By a charter-party it was stipulated that the vessel should proceed to P., and there load a full and complete cargo of legal merchandise from the charterer's factors and proceed therewith to L., and there deliver the same on being paid a certain lump freight. At the end of the charter-party was the following clause: "The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Under this charter-party the charterers shipped at P. goods as their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in L., who were under a general engagement to honor bills drawn upon them by the charterers, upon the faith of consignments made to meet them, and who were largely in advance at the time of the shipment in question. It was held that the shipowner had a lien upon the goods for the entire lump freight. Cresswell, J., in the opinion delivered by him, said: "I am of the same opinion. I find it extremely difficult to put any sensible construction upon the last clause in the charter-party I am unable to discover what was the intention of the parties. It is clear, however, that they intended one thing — that the charter should sustain no prejudice from the master's signing bills of lading at rates of freight to be agreed on between him and the charterers. I should rather suppose it was contemplated that the captain should sign bills of lading for goods put on board by general shippers, and not for the charterers' own goods. In any event, I think the charterers' putting their own goods on board and getting the master to sign bills of lading for them could not affect the rights of the owners under their contract for the lump freight. They would have a right to detain them till the whole freight was paid. That being so, are the plaintiffs in any better position as assignees of the bills of lading than the charterers were? Their position seems from the special case to be this: they have entered into an agreement with S. & Co. to make advances upon the faith of future consignments; they stand, therefore, in the relation of consignees and factors for sale. No specific advances appear to have been made upon the particular goods; the plaintiffs were under advances generally, and were to receive the goods to sell on account of S. & Co., and to account for the proceeds, subject to their lien for the advances. What more could they take than the charterers themselves? According to the case of Small *v.* Moates, 9 Bing. 574 — in which I entirely concur — it is difficult to see how the lien which the owners clearly had at the time of the shipment couid be discharged." Gledstanes *v.* Allen, 12 C. B. 202, 74 E. C. L. 202, *distinguishing* Howard *v.* Tucker, 1 B. & Ad. 712, 20 E. C. L. 478.

3. M'Lean *v.* Fleming, L. R. 2 H. L. Sc. 128, 25 L. T. 317.

amount of freight, the shipowner has a lien for the freight named in the bill of lading, and no more.[1]

(iii) Effect of Reference to Charter-party. — When a reference is made in a bill of lading to the charter-party, the extent of the shipowner's lien for freight depends upon the language in which such reference is made.[2] Thus, when the charterer of a vessel shipped a part of a cargo under a bill of lading which stated freight to be payable "as per charter-party," it was held that only the rate of freight, and not the terms as to the lien mentioned in the charter-party, were incorporated in the bill of lading, and that therefore the shipowner had no lien as against a *bona fide* indorsee for value of such bill of lading for the whole charter freight, but only for the freight due on the goods as stipulated for in the bill of lading.[3] But it has been said that if the bill of lading uses such comprehensive words as "paying freight for the same goods and all other conditions as per charter-party," such bill of lading incorporates the terms of the charter-party, and the shipowner's lien on the goods for the charter freight is preserved.[4]

bbb. When There Is No Bill of Lading — *(aaa) Shipper Contracting Directly with the Charterer.* — Where the shipper of goods in a chartered vessel ships under a contract with the

1. Charterers Having Authority to Fix the Freight. — Goods were shipped under a sub-charter. The original charter gave the owners a lien "upon all cargoes and all sub-freights for any amounts due under this charter." The court said: "The charter-party shows that it was the intention of the parties to confer upon the charterers authority to fix the freight to be paid by cargo that might be shipped under bills of lading. The cargo in question was shipped under bills of lading signed by the purser, by which the freight to be paid on each shipment was fixed. These bills of lading were authorized contracts which, as between the shipper and the ship, fix the freight to be paid by each shipment, notwithstanding that provision is made in the charter-party for a shipowner's lien for the charter-money. By virtue of this provision the shipowner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more." The Albert Dumois, 54 Fed. Rep. 529.

2. Only Applicable Clauses Brought In. — A bill of lading was given to a person other than the charterer whereby freight was made payable at a certain sum per ton, and the bill of lading also contained a clause whereby it was provided that extra expenses should be borne by the receivers and "other conditions as per charter-party." It was held that the bill of lading did not incorporate the stipulation in the charter-party as to the payment of freight, that no right of lien existed for the freight mentioned in the charter-party, and that the shipper was entitled to deliver his goods upon payment of the freight specified in the bill of lading. Brett, M. R., said: "There are many cases as to what is brought into the bill of lading by this general reference to the charter-party. It brings in only those clauses of the charter-party which are applicable to the contract contained in the bill of lading; and those clauses of the charter-party cannot be brought in which would alter the express stipulations in the bill of lading; here there is an express stipulation that the goods shipped are to be delivered on payment of a specific amount of freight; and this sum is fixed upon without allusion to any other amount of freight. The general reference to the charter-party would bring in a lien for demurrage; but it does not allow a lien to be brought in as to the freight payable under the charter-party." Gardner *v.* Trechmann, 15 Q. B. Div. 154. See *supra*, this title, *Charter-parties — Construction — Charter-party Referred to in a Bill of Lading.*

3. Freight Payable "as per Charter-party." — Fry *v.* Chartered Mercantile Bank, L. R. 1 C. P. 689, *distinguishing* Kern *v.* Deslandes, 10 C. B. N. S. 205, 100 E. C. L. 205.

A charter-party provided for no rate of freight on goods transported, but that four hundred dollars a month for the use of the vessel should be paid in three days after her return to B. A bill of lading was issued to a person other than the charterer, who shipped goods upon the vessel, providing that he should pay freight as per charter-party. In determining the effect of these words, the court said: "It cannot be supposed that it was the intention of the parties that the whole hire of the ship under the charter-party was to be paid for the mere transportation of the small part of the outward cargo, and some effect is to be given to this clause in the bill of lading. The fair and rational construction is that a reasonable freight for the transportation of the goods named in the bill of lading should be paid and the payment be made as per charter-party, that is, in three days after the arrival of the vessel in B." Perkins *v.* Hill, 1 Sprague (U. S.) 123, *affirmed* in 2 Woodb. & M. (U. S.) 158.

Protest by the Shipper. — In Tharsis Sulphur, etc., Min. Co. *v.* Culliford, 22 W. R. 46, the owner of the vessel was given a lien on the cargo and freight for arrears of hire. It was held that when goods had been taken on board under a sub-charter, the owner was not entitled to a lien on these goods for the arrears of hire stipulated for in the charter-party, although the captain inserted under protest in the bills of lading given for these goods a provision for payment of freight as per the original charter.

4. "All Other Conditions as per Charter-party." — Carver on Carriage by Sea (2d ed.), § 669, *citing* Lamb *v.* Kaselack, 19 Sc. L. Rep. 336.

charterer only, and obtains no bill of lading or undertaking at all from the shipowner or his agents, it would appear that the right of the shipowner to maintain the liens given by the charter-party against the goods of such shipper would be unqualified.[1]

(*bbb*) *Shipper Contracting Directly with the Shipowner.* — Where the shipper places goods upon a chartered vessel in ignorance of the charter-party, under an arrangement he has made with the shipowner that his goods should be carried at a certain rate of freight, no lien can be enforced against his goods for the charter-party freight although he did not receive any bill of lading from the shipowner or his agent.[2]

(b) **Charterer, Owner Pro Hac Vice.** — But when the charterer is owner *pro hac vice*, the general owner loses his lien, and the charterer has the lien as against the sub-freighters.[3]

(4) *How Lost* — (a) **Waiver** — *aa.* By Delivery. — The lien for freight being but an incident to the possession with the right to retain the cargo, the delivery of the cargo without any condition or qualification annexed is a waiver of the lien;[4] but even where the cargo is delivered the lien may be

1. Carver on Carriage by Sea (2d ed.), § 676. See also Peek *v.* Larsen, L. R. 12 Eq. 378. *Compare* Paul *v.* Birch, 2 Atk. 621. See *supra*, this title, *Charter-parties — Construction — Charter-party Referred to in a Bill of Lading.*

2. The Stornoway, 51 L. J. Adm. 27.

3. **When the Charterer Has the Lien.** — Hutton *v.* Bragg, 2 Marsh. 339, 7 Taunt. 14; Paul *v.* Birch, 2 Atk. 621; Gracie *v.* Palmer, 8 Wheat. (U. S.) 625; Pickman *v.* Woods, 6 Pick. (Mass.) 248; Clarkson *v.* Edes, 4 Cow. (N. Y.) 470; Mactaggert *v.* Henry, 3 E. D. Smith (N. Y.) 390.

General Owner Has No Lien Where Charterer Is Owner Pro Hac Vice. — "In a charter-party of the second kind, not only the entire capacity of the ship is let, but the ship itself, and the possession is passed to the charterer. The entire control and management of it is given up to him. The general owner loses his lien for freight, but the lien itself is not destroyed; the charterer is substituted in his place, in whose favor the lien continues to exist when goods are taken on freight. But the general owner has no remedy for the charter of his vessel but his personal action on the covenants of the charter-party. It is a contract in which he trusts to the personal credit of the charterer." Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 149.

"The distinction which runs through all the cases is that where the possession and control of the ship are retained by the owner, and he covenants to carry the goods of the charterer in her for a stipulated freight, the lien for the freight remains. But where he transfers the ship to the charterer for the voyage, and the whole charge and control of her devolve upon the charterer, the owner can have no lien upon the cargo for the freight, but must have recourse to his covenant for his remedy in case of default of payment. Possession is essential to the existence of a lien." Lander *v.* Clark, 1 Hall (N. Y.) 355.

Where A. takes a charter-party of a vessel for a voyage to C. and back, at four hundred dollars per month, payable three days after her return, the owners furnishing officers, crew, and provisions, he has a right to load the vessel himself or allow others to do it under express contract with him. In such case no implied promise or obligation seems to arise in others who make such contract with him to pay freight to the captain or owners, but any liens or implied obligations which are raised were to him, or in his behalf, in aid of the express contract with him. More especially is this the case when at the bottom of the charter-party is a memorandum stipulating by the hirer of the vessel that the captain or owners may collect the freights on the voyage back towards payment of the sum due from the hirer in the charter-party; and the freight now in dispute is on goods carried out, and not back. Perkins *v.* Hill, 2 Woodb. & M. (U. S.) 158, *affirming* Perkins *v.* Hill, 1 Sprague (U. S.) 123.

Personal Credit of the Charterer. — Where personal credit is given to the charterer for the payment of the hire of the vessel, the shipowner has no lien for freight upon the goods carried. Belcher *v.* Capper, 4 M. & G. 502, 43 E. C. L. 262.

Insurable Interest in Goods of Sub-freighter. — A charterer who is owner *pro hac vice* has an insurable interest in the cargo put on board by a third person, though the vessel be lost before the voyage is completed, and though he has no freight to pay the owner himself. Clark *v.* Ocean Ins. Co., 16 Pick. (Mass.) 289.

4. **Lien Is Discharged by Absolute Delivery** — *England.* — Artaza *v.* Smallpiece, 1 Esp. N. P. 23; Anonymous, 12 Mod. 511.

United States. — Sears *v.* Four Thousand, etc., Bags of Linseed, 1 Cliff. (U. S.) 68; Kimball *v.* Ship Anna Kimball, 2 Cliff. (U. S.) 4; Cutler *v.* Rae, 7 How. (U. S.) 729; Dupont de Nemours *v.* Vance, 19 How. (U. S.) 171; Four Thousand, etc., Bags of Linseed, 1 Black (U. S.) 108; A Cargo of Brimstone, 8 Ben. (U. S.) 45; Wilcox *v.* Five Hundred Tons of Coal, 14 Fed. Rep. 49; The Giulio, 34 Fed. Rep. 909.

Kentucky. — Boggs *v.* Martin, 13 B. Mon. (Ky.) 239.

Hawaii. — Fessenden *v.* Cargo of Ship Charles 1 Hawaiian 94.

Delivery and Discharge Distinguished. — There is a difference in law between the discharge of a cargo and its delivery. It may be discharged, but cannot be delivered unconditionally without divesting the vessel's lien thereon for

preserved by an understanding between the parties that the transfer of the goods from the possession of the ship to the consignee shall not be regarded as a waiver of the lien.[1] Thus, the lien may be preserved by a special agreement, by notice that the delivery is made subject to the lien, or by local usage to that effect; but the mere intention of the master to retain his lien, not communicated to the consignee, is insufficient.[2]

The Mere Manual Delivery of the Cargo by the carrier to the consignee does not of itself operate necessarily to discharge the lien. The delivery must be made with the intent of parting with his interest in it, or under circumstances from which the law will infer such an intent.[3]

"He or They Paying Freight." — Where it is agreed by the contract of affreight

freight. Cranston *v.* A Cargo of Two Hundred, etc., Tons of Coal, 22 Fed. Rep. 614. See also Pioneer Fuel Co. *v.* McBrier, 84 Fed. Rep. 495.

Stipulation for Unconditional Delivery. — "Undoubtedly the shipowner has a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention and which displaces the lien. Text-writers usually state the rule as follows: *Le batel est obligé à la marchandise et la marchandise au batel.* Unquestionably the general rule of law is well expressed in that maxim, but it is subject to an important exception as applied to the cargo, that the lien may be displaced by an inconsistent and irreconcilable provision in the charter-party or bill of lading, making it the duty of the master to deliver the goods unconditionally before the consignee is required to pay the freight. Saving that exception, the rule is universal that the ship and freight are bound to the merchandise and the merchandise to the ship. Shipowner contracts for the safe custody, due transport, and right delivery of the merchandise, and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges. These are reciprocal duties, and the law creates reciprocal liens for their enforcement, but the lien of the shipowner may be displaced, as before explained, or it may be waived. Such a lien — that is, the lien of the shipowner — is not 'the privileged claim' of the civil law, but it arises merely from the right of the shipowner to retain the possession of the goods until the freight is paid, and therefore it is lost by an unconditional delivery of the goods to the consignee. Subject to this explanation, the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of all the obligations created by the contract of affreightment is the settled rule in all the federal courts." The Eddy, 5 Wall. (U. S.) 481.

1. The Eddy, 5 Wall. (U. S.) 481; Four Thousand, etc., Bags of Linseed, 1 Black (U. S.) 108.

2. The Tan Bark Case, 1 Brown Adm. 151.

Notice of Preservation of the Lien. — A delivery to a wharfinger or a warehouseman on the consignee's account, accompanied by a notice of lien, is no waiver, and the lien continues. The Giulio, 34 Fed. Rep. 909. See also Wilson *v.* Kymer, 1 M. & S. 157.

Storage in Warehouse of Shipowner. — When consignees do not appear to claim the goods at the port of discharge, and there is no suitable warehouse, it seems that the master may still land the cargo without losing his possession and control over it by placing the goods in a warehouse belonging to or hired for his owners, and so preserve his lien. Mors-le-Blanch *v.* Wilson, L. R. 8 C. P. 227. See also Erichsen *v.* Barkworth, 3 H. & N. 894; Meyerstein *v.* Barber, L. R. 2 C. P. 38.

Suitable Warehouse. — Under the English Merchant Shipping Act (1862), the shipowner is able in ports of that country to land goods and warehouse them subject to a stop for freight, which takes the place of his lien. Carver on Carriage by Sea (2d ed.), § 677. See also Mors-le-Blanch *v.* Wilson, L. R. 8 C. P. 227.

Notice Shortly After Delivery. — "It is clear that there was no intent to make an unconditional delivery of the cargo; the contrary intent seems to me manifest. Even if the actual service of the notice were an hour or two after the last bale was delivered on the 17th — which the evidence, however, does not show — so slight a delay as the mere fraction of a day in serving notice could not justly be deemed as indicative of any intent to make an unconditional delivery; and the situation of the consignee, of the warehouseman, and of the goods being unchanged, no waiver of the lien can be found." The Giulio, 34 Fed. Rep. 909.

3. The Steamer Santee, 2 Ben. (U. S.) 519; One Hundred, etc., Tons of Coal, 4 Blatchf. (U. S.) 368; Gring *v.* A Cargo of Lumber, 38 Fed. Rep. 528; Costello *v.* Seven Hundred, etc., Laths, 44 Fed. Rep. 105, *distinguishing* Egan *v.* A Cargo of Spruce Lath, 41 Fed. Rep. 830; Cuff *v.* Ninety-Five Tons of Coal, 46 Fed. Rep. 670; Gaughran *v.* One Hundred, etc., Tons of Coal, 18 How. Pr. (U. S. Cir. Ct.) 25.

Storage in Consignee's Warehouse. — By an understanding between the parties the cargo may be stored in the warehouse of the consignee and the lien of the shipowner still preserved. 4,885 Bags of Linseed, 1 Black (U. S.) 108.

Jury to Judge of Intent. — Where goods were forwarded to a commission merchant by a steamboat, unloaded and placed on the wharf, and the bill of lading sent to the owner, who removed part of the goods without paying freight, it was held that these facts did not amount to a delivery of all the goods, nor a waiver of the lien for freight, unless it was so intended, of which a jury is to judge. Boggs *v.* Martin, 13 B. Mon. (Ky.) 239.

ment that the cargo is to be delivered to a person named, or his assignees, "he or they paying freight," the shipowner may, if he sees fit, waive his right of lien and deliver the goods without the payment of freight, but, as hereinbefore stated, his right to resort to the shipper for compensation still remains.[1]

Partial Delivery of Cargo. — The lien of a shipholder for freight, being entire, is not lost or waived by allowing part of the goods to be taken away on payment of a portion only of the freight, without some express contract, with the express or implied authority of the shipowner.[2]

bb. By Inconsistent Stipulations. — The right of the shipowner to retain the goods of the freighter may be waived by inserting in the contract of affreightment special clauses as to the time and place of payment of the freight which are inconsistent with the exercise of this right.[3]

Payment After Delivery. — Thus the lien is destroyed when the shipowner by contract agrees to be paid his freight after the time of the delivery of the cargo instead of at the time.[4]

1. Waiver of Lien Does Not Relieve Shipper's Liability. — Christy *v.* Row, 1 Taunt. 300; Domett *v.* Beckford, 5 B. & Ad. 521, 27 E. C. L. 118; Shepard *v.* De Bernales, 13 East 565; Wooster *v.* Tarr, 8 Allen (Mass.) 270, 85 Am. Dec. 707, *disapproving* the dictum of Bayley, J., in Moorsom *v.* Kymer, 2 M. & S. 318, and Drew *v.* Bird, M. & M. 156, 22 E. C. L. 273; Collins *v.* Union Transp. Co., 10 Watts (Pa.) 384. See *supra*, *Freight — By Whom Payable.*

2. Perez *v.* Alsop, 3 F. & F. 188.

Part of Goods Bound for All the Freight. — A master may detain any part of the merchandise for the freight of all that is consigned to the same person. Sodergreen *v.* Flight, *cited* in Hanson *v.* Meyer, 6 East 622, *distinguished* in Birley *v.* Gladstone, 3 M. & S. 205; Sears *v.* Four Thousand, etc., Bags of Linseed, 1 Cliff. (U. S.) 68; Fox *v.* Holt, 36 Conn. 558; Fessenden *v.* Cargo of Ship Charles, 1 Hawaiian 94. And see Ward *v.* Felton, 1 East 507; and *supra*, this title, *Freight — When Payable — Upon Delivery.*

Effect of Delivery of One of Several Parcels. — Where several parcels of goods belonging to one owner are carried on the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight; but if there are two contracts to carry, with different termini to the voyage in each contract, no lien attaches to freight under the one contract for goods shipped under the other and improperly detained on board by the carrier. The goods are divested of a lien by a complete delivery. Bernal *v.* Pim, 1 Gale 17.

3. Stipulations Amounting to a Waiver. — The Kimball, 3 Wall. (U. S.) 37, *affirming* 2 Cliff. (U. S.) 4; Ruggles *v.* Bucknor, 1 Paine (U. S.) 363; The Eddy, 5 Wall. (U. S.) 481; The Bird of Paradise, 5 Wall. (U. S.) 545; Howard *v.* Macondray, 7 Gray (Mass.) 516. See also Thompson *v.* Small, 1 C. B. 328, 50 E. C. L. 328; Crawshay *v.* Homfray, 4 B. & Ald. 50, 6 E. C. L. 385; Fourteen Horses, 10 Ben. (U. S.) 358.

Place of Payment and Delivery Different. — When it was agreed by the charter-party that the owner of the vessel should receive the hire of the ship at intervals of six months and in the city of New York during the continuance of the charter-party, without reference to the place at which the cargo was to be delivered, it was held that the owner had waived his lien for freight. The court said: "If the owner of a ship stipulates to receive her freight at a time and place having no reference to the place for the delivery of the cargo, or at variance with such time and place, he is to be considered as having waived his lien." Raymond *v.* Tyson, 17 How. (U. S.) 53.

4. Effect of Giving Credit. — Walker *v.* Kirchner, 11 Moo. P. C. 21; Lucas *v.* Nockells, 4 Bing. 729, 15 E. C. L. 132; Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

Intention to Give Credit Is the Test. — The right of a lien for freight turns upon the question whether the parties to the charter-party intended that a personal credit should be given to the charterer for the payment of the hire of the vessel, or whether a right of stoppage of the goods was intended to be reserved to the owners as security for the pay of the contract price. Belcher *v.* Capper, 4 M. & G. 502, 43 E. C. L. 262.

Where it appears clearly from a charter-party that the intention of the owner of the ship and the charterer is that the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for the payment of the hire of the vessel. Thus, where it was agreed in a charter-party that a vessel should be chartered for fifteen months, at $2,000 per month, to be employed in the Pacific trade, and that the payments for the hire of the vessel should be made semi-annually in the city of New York, it was held that the owner of the vessel had lost his right of lien on the cargo for the nonpayment of the sum stipulated in the charter-party. Brown *v.* Howard, 1 Cal. 423.

Two Months' Credit. — There is no lien upon the cargo for freight which is payable two months after the vessel's report inwards. Foster *v.* Colby, 3 H. & N. 705; Alsager *v.* St. Katherine's Dock Co., 14 M. & W. 794.

Lien Not Lost Though Time Given. — The shipowner's lien for freight is not waived by a stipulation in the charter-party which provides for the payment of freight "within ten days after her [the schooner's] return to Boston, or in case of loss to the time she was last heard of." The Schooner Volunteer, 1 Sumn. (U. S.) 551.

In Neish *v.* Graham, 8 El. & Bl. 505, 92 E. C. L. 505, *approving* Gilkison *v.* Middleton, 2

cc. Presumption Is Against. — The lien for freight is favored by the courts, and as by the general rule the cargo is liable for the freight, it must be satisfactorily shown that the claim has been relinquished before the shipowner can be required to part with the cargo without the payment of freight.[1]

dd. Effect of Express Stipulation for Lien. — If there is an express stipulation for a lien for freight, such lien may be considered as preserved to the shipowner notwithstanding there are in the contract of affreightment provisions as to the time and place of the payment of freight which might otherwise be construed as showing an intention on the part of the shipowner to waive his lien.[2]

(b) **Effect of Payment by Bill or Note** — *aa.* Due Before Delivery of Cargo. — As by the general commercial law of both England and the United States a bill or note does not discharge a debt for which it is given unless such be the express agreement of the parties, when a bill or note which has been taken by the shipowner in payment of freight becomes due and is dishonored before the arrival of the vessel at her port of discharge, such shipowner has a right to stand upon his original contract for the freight and to detain the cargo until such freight is paid.[3]

C. B. N. S. 134, 89 E. C. L. 134, it was held that a clause in a bill of lading, "freight payable one month after sailing, ship lost or not lost," was not a waiver of the lien for freight. The doctrine of these cases was subsequently doubted in Kirchner *v.* Venus, 5 Jur. N. S. 395.

"Discharge" Refers to Unloading, and Not to Delivery. — A clause in a charter-party providing that the freight shall be paid "in five days after her [the brig's] return to and discharge in Boston" is not a waiver or displacement of the lien for freight, the word "discharge" merely referring to the unlading and not to the delivery of the cargo. Certain Logs of Mahogany, 2 Sumn. (U. S.) 589.

It was held that the lien of the owner of the ship upon the cargo for freight was not waived by clauses in the charter-party requiring the delivery of the cargo within reach of the ship's tackle, and providing that the balance of the charter-money remaining unpaid on the termination of the homeward voyage should be "payable one-half in five and one-half in ten days after discharge." The Kimball, 3 Wall. (U. S.) 37, *distinguishing* Foster *v.* Colby, 3 H. & N. 705; Alsager *v.* St. Katherine's Dock Co., 14 M. & W. 794.

1. Intention to Waive Must Clearly Appear. — Raymond *v.* Tyson, 17 How. (U. S.) 53; Ruggles *v.* Bucknor, 1 Paine (U. S.) 358; Pinney *v.* Wells, 10 Conn. 104; Howard *v.* Macondray, 7 Gray (Mass.) 516. See also Crawshay *v.* Homfray, 4 B. & Ald. 50, 6 E. C. L. 385; Neish *v.* Graham, 8 El. & Bl. 505, 92 E. C. L. 505.

Lien Favored. — "It is admitted that the lien of the owner of a ship upon its cargo for freight is favored by the courts and will not be displaced so long as the shipowner retains possession of the cargo, except by express contract or by stipulations in the charter-party inconsistent with its exercise." The Kimball, 3 Wall. (U. S.) 37. To the same effect is The Bird of Paradise, 5 Wall. (U. S.) 545.

2. Lien Preserved by Express Stipulation. — The Schooner Volunteer, 1 Sumn. (U. S.) 551, *disapproving* Birley *v.* Gladstone, 3 M. & S. 205; Pickman *v.* Woods, 6 Pick. (Mass.) 248; Fessenden *v.* Cargo of Ship Charles, 1 Hawaiian 94.

Statement of the Rule. — "Although it [the lien clause] may have no efficacy in securing a lien on the merchandise at the port of delivery, when by the terms of the contract the freight is to be paid elsewhere, and at a time different from the delivery of the cargo, yet [it] may have its full effect in reference to freight to be paid at the place of delivery of the goods, and may operate and have full effect under the new stipulations entered into by these parties as to the time and place of making the second payment for freight. It furnishes evidence, at least, that the parties to the charter-party intended to secure the usual maritime lien, which exists where not displaced by the existence of inconsistent stipulations, and should lead us very carefully to consider whether the usual maritime lien for freight did not exist upon this cargo at the port of delivery. It is to be borne in mind that such lien will exist unless clearly displaced by the terms of the contract between the parties as to the payment of freight." Howard *v.* Macondray, 7 Gray (Mass.) 516.

"While the agreement to pay freight by instalments at fixed intervals may, under some circumstances, show an intention to waive the ordinary maritime lien on the cargo therefor, * * * yet, where the charter by which the agreement for payment in instalments is made expressly pledges the vessel and cargo to each other for the performance of the charter-party, the maritime lien for the freight cannot be held to be waived, even though the instalments are payable at a place other than that at which the vessel will probably be when the time of payment arrives." Fourteen Horses, 10 Ben. (U. S.) 358.

3. The Kimball, 3 Wall. (U. S.) 37. See also Gilkison *v.* Middleton, 2 C. B. N. S. 134, 89 E. C. L. 134. See the title Payment.

Illustration. — In a charter-party there was, among others, this stipulation as to the payment of freight: "One-fourth by charterer's acceptance at six months from the final sailing of the vessel." The acceptance was delivered to the shipowners on the day the ship sailed from the port of departure. Before she arrived at her destination the acceptance became due and the charterers failed in business and be-

bb. Due After Delivery of Cargo. — But when the bill or note given in payment of freight does not mature until after the arrival of the vessel, the lien of the shipowner would seem to be lost.[1] When it is agreed that the freight or a part thereof shall be paid by a bill or note given after the arrival of the vessel at her port of discharge and the delivery of her cargo, which bill or note is payable at a certain time thereafter, it is evident that credit is intended to be given the owner of the cargo, and there is no lien for freight to the amount of said bill or note, even though the person liable therefor has become insolvent.[2]

Approval by Negotiation. — Where the owner of a ship having a lien on the goods until the delivery of good and approved bills for the freight takes a bill of exchange in payment, and, though he objects to it at the time, afterwards negotiates it, such negotiation amounts to an approval of the bill by him and a relinquishment of his lien on the cargo.[3]

cc. Due at Stated Times. — It seems that the lien for freight is waived if the shipowner takes notes payable at stated times during the season for the hire of the vessel, without regard to the time and place of the delivery of her cargo.[4]

(c) **Lien Acquired by Third Person.** — It would seem that if a lien is acquired by a third person the lien of the shipowner is thereby necessarily lost.[5]

(d) **Charterer Dispossessed by the Shipowner.** — Where, upon the arrival of the vessel at her port of unloading, the owner takes possession of her, claiming that the charterer has broken his contract, the charterer loses his lien for freight, for although he may retain the cargo until the freight is paid or tendered, yet he must be ready to deliver the cargo on payment or tender.[6]

(e) **Effect of Fraud.** — The master of a vessel cannot, at the instance of the charterer, by a collusive bargain with shippers who are not parties to the charter-party, permit them so to ship goods as to deprive the shipowner of his lien for freight.[7]

b. For Dead Freight. — In the absence of an express stipulation to that effect, the shipowner has no right, even as against the charterer, to retain goods for the amount of damages which he is entitled to recover for the non-completion of the cargo, commonly called dead freight.[8] But when there is in

came insolvent and bankrupt. It was held that a lien existed in favor of the shipowners for the instalment of freight covered by such acceptance. The Bird of Paradise, 5 Wall. (U. S.) 545.

1. Tamvaco *v.* Simpson, L. R. 1 C. P. 363.

2. The Bird of Paradise, 5 Wall. (U. S.) 545.

3. Horncastle *v.* Farran, 3 B. & Ald. 497, 5 E. C. L. 356; Bunney *v.* Poyntz, 4 B. & Ad. 568, 24 E. C. L. 118.

4. Sheriffs *v.* Pugh, 22 Wis. 273, 94 Am. Dec. 600.

5. **Lien of Shipowner Displaced by That of Third Person.** — In Mors-le-Blanch *v.* Wilson, L. R. 8 C. P. 227, Brett, J., delivering the opinion of the court, said: "I very much doubt whether, if the master were so to deposit the goods on shore as to give another person a lien upon them, he would not, as a matter of course, lose his own lien, even though such other person should undertake to the master not to deliver the goods to the consignee without being paid the master's claim for freight."

6. Lane *v.* Penniman, 4 Mass. 91.

7. **Lien Not Taken Away by Fraud.** — Faith *v.* East India Co., 4 B. & Ald. 630, 6 E. C. L. 630, *distinguished* in Shand *v.* Sanderson, 4 H. & N. 381; Reynolds *v.* Jex, 34 L. J. Q. B. 251; The Salem's Cargo, 1 Sprague (U. S.) 389; Gracie *v.* Palmer, 8 Wheat. (U. S.) 605.

8. **No Lien When No Stipulation.** — Birley *v.* Gladstone, 3 M. & S. 205. See also Pearson *v.* Goschen, 17 C. B. N. S. 352, 112 E. C. L. 352.

In Phillips *v.* Rodie, 15 East 547, Lord Ellenborough, C. J., said: "What is a lien for freight but a right to detain the goods on board until the freight which has been actually earned upon them, which is always capable of being calculated and ascertained, has been paid, and where the owner of the goods knows what he is to tender? but here the claim to retain is for the amount of damages unascertained, which the parties are entitled to recover for the non-completion of the cargo, commonly called dead freight; but it is that term *freight* which has misled the defendants; for it is not freight, but an unliquidated compensation for the loss of freight, recoverable in the absence and place of freight. The covenant is in effect to load the vessel fully, or if not, to indemnify the shipowner by paying so much in addition as the vessel would have carried; the covenant, in the event of no loading, is to pay full freight for the vessel (not for goods not loaded), as if she had been loaded with goods of the description before mentioned; that must depend on the tonnage of the vessel. In order to found the argument, the covenant should have been to pay full freight as if the goods had been actually loaded on board, and that the master should have the same lien upon the goods actually on board as if the ship had been fully laden with all the goods

a charter-party an express stipulation binding the cargo for dead freight, a more difficult question arises, and the cases upon the subject do not appear to be in perfect harmony. The rule to be deduced from them would seem to be that as against the charterer, when such a stipulation exists, the shipowner has a lien for short loading whether the damages for such short loading are liquidated or not; but that, as against a third person claiming the cargo under a bill of lading, such lien can be enforced only when the damages are definite in amount or are capable of being ascertained on or before the arrival of the vessel at her destination, and when the liability for dead freight is clearly imposed by plain words in the bill of lading.[1]

c. For Advance Freight. — Sums stipulated in charter-parties to be paid in advance, and not dependent on the carrier's contract, do not have the incidents of freight, and are not protected by the lien of the shipowners unless by usage or special contract.[2]

d. For Extra Freight for Transshipment. — When it becomes impossible to convey the cargo to its destination in the original ship, and it therefore becomes necessary for the master of the vessel, in the discharge of his duty to the owner of the cargo, to forward it in a substituted ship at an increased freight, such increased freight is a charge upon the cargo.[3]

covenanted to be loaded. But if we were to put this construction upon the contract as it now stands, it would be making a new contract for the parties. There is no pretense or color for the lien now claimed; it is a lien to attach upon a nonentity."

1. Sometimes a Lien When There Is a Stipulation. — Leggett on Charter Parties 542; Gray *v.* Carr, L. R. 6 Q. B. 522; McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, remarking upon Pearson *v.* Goschen, 17 C. B. N. S. 352, 112 E. C. L. 352, and *distinguishing* Birley *v.* Gladstone, 3 M. & S. 205.

"Freight as Agreed." — In an action of trover by a freighter against a shipowner to recover the goods, the charter-party giving a lien for dead freight, but the master to sign bills of lading which bound the goods for "freight as agreed," the freighter when he demanded the goods being prepared to pay the freight for carriage, and the shipowner having refused to deliver the goods except on the payment of dead freight, it was held that the freight for carriage alone was due. Watson, B., in the opinion delivered by him, said: "The real question agitated between these parties is whether there was a lien for dead freight under the circumstances. Now, in the original charter there was a lien for dead freight. But the master was to sign bills of lading for goods shipped on board the vessel, and the goods were shipped on board the vessel; and in the bill of lading there is no lien for a dead freight at all, but merely for freight (*i. e.*, freight for carriage) as agreed. It is perfectly clear that does not apply to dead freight. The price is for the carriage of goods. It would be a monstrous supposition that a man who shipped £100 worth of goods on board a vessel should be held responsible for £1,500 of dead freight.' Kerford *v.* Mondel, 5 H. & N. 931.

2. No Lien for Advance Freight. — Leggett on Charter Parties 461; Maclachlan on Shipping 383; Andrew *v.* Moorhouse, 5 Taunt. 435; How *v.* Kirchner, 11 Moo. P. C. 21; Kirchner *v.* Venus, 12 Moo. P. C. 361; The Bird of Paradise, 5 Wall. (U. S.) 545. See also *Ex p.* Nyholm, 43 L. J. Bk. 21. See *supra*, this title, *Freight — Advance Freight.*

Excess Over Charter Freight. — A charter-party provided that the excess of the amount estimated to be earned by the charter-party over the freight payable under the bills of lading was to be paid immediately before the ship sailed, upon the demand of the captain. It was held that the shipowner had no right of lien for that excess, even against the charterer. Gardner *v.* Trechmann, 15 Q. B. Div. 154.

Freight Payable "Ship Lost or Not Lost." — When money for the carriage of goods by sea is payable at the port of destination, "ship lost or not lost," and the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage is described as freight in the bills of lading. Nelson *v.* Association, etc., 43 L. J. C. P. 218.

3. Lien for Extra Freight. — Mumford *v.* Commercial Ins. Co., 5 Johns. (N. Y.) 262; Ogden *v.* General Mut. Ins. Co., 2 Duer (N. Y.) 204; Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595; The Maggie Hammond, 9 Wall. (U. S.) 435; Sumner *v.* Walker, 30 Fed. Rep. 261; Hugg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425; Dodge *v.* Union Marine Ins. Co., 17 Mass. 471; *Compare* Matthews *v.* Gibbs, 7 Jur. N. S. 186; Shultz *v.* Ohio Ins. Co., 1 B. Mon. (Ky.) 336.

Amount of Extra Freight. — Where a ship puts into an intermediate port, in distress, and is condemned as unseaworthy, and it becomes necessary for the transportation of the cargo saved to its destined port to hire another ship, the cargo, on its arrival at the port of destination, is chargeable with the increase of freight arising from the charter of the new ship; that is, the extra freight beyond what the freight would have been under the original charter-party, if the necessity of hiring another ship had not intervened. The owner of the goods is not responsible both for the old and new freight. To ascertain such extra freight, the proper rule seems to be to determine the difference

c. FOR DEMURRAGE. — When there is an express provision in a charter-party that the shipowner shall have a lien for demurrage, the charterer is, of course, bound by such provision. But whether the shipowner can detain the goods as against a third person claiming under a bill of lading, or not, depends upon the language of the latter instrument.[1]

f. FOR OTHER CHARGES — (1) *Port Charges.* — There is no lien for port charges in favor of the shipowner unless by the terms of the charter-party such lien clearly exists.[2]

(2) *Wharfage.* — And the cargo cannot be retained for wharfage if the freight is tendered.[3]

(3) *Reconditioning Cargo.* — Expenses incurred in reconditioning the cargo are a lien upon the cargo when such expenditure was not occasioned by the fault of the vessel.[4]

(4) *General Average Charges.* — The shipowner also has a lien upon the cargo for general average charges.[5]

2. Lien of the Shipper. — Even when it is not so stipulated by an express provision, the vessel is by implication of law bound to the shipper for the performance of the contract of affreightment, whatever is its form, and the shipper may proceed *in rem* against the vessel in case of a failure of the shipowner in any respect to transport and deliver the cargo safely.[6]

between the amount of the freight under the original charter-party and the ratable freight for the goods saved to the port of necessity, adding the freight of the new ship hired to carry on the goods. Searle *v.* Scovell, 4 Johns. Ch. (N. Y.) 218.

1. Lien for Demurrage — "Other Conditions as Per Charter." — When the bill of lading provided for the payment of freight and "other conditions as per charter-party," it was held that the shipowner might detain the goods for demurrage as provided in the charter-party as against the consignee. Wegener *v.* Smith, 15 C. B. 285, 80 E. C. L. 285; Gray *v.* Carr, L. R. 6 Q. B. 522; Straker *v.* Kidd, 3 Q. B. Div. 223, 534.

Paying Freight as per Charter-party. — But a provision in a bill of lading as follows: "Paying for the said goods as per charter-party," was held merely to ascertain the rate of freight and to give the shipowner no lien for demurrage. Smith *v.* Sieveking, 4 El. & Bl. 945, 82 E. C. L. 945; Chappel *v.* Comfort, 10 C. B. N. S. 802, 100 E. C. L. 802.

For a Full Discussion of this subject see the title DEMURRAGE.

2. Faith *v.* East India Co., 4 B. & Ald. 630, 6 E. C. L. 630.

"Port Charges" Include Light Duties. — In a charter-party providing for the payment of port charges, the expression "port charges" must be taken to mean all charges which a vessel is to pay before she gets her clearance from a port, and therefore to include whatever light duties she may be required to pay at such port. Newman *v.* Lamport, (1896) 1 Q. B. 20.

And Tonnage Dues. — In Smith *v.* Drew, 10 Ben. (U. S.) 614, it was held that where a charter-party stipulated that the charterer was to pay port charges at the port of discharge, he was liable for tonnage dues payable there.

3. Bishop *v.* Ware, 3 Camph. 360.

4. Payne *v.* Ralli, 74 Fed. Rep. 563. See also Notara *v.* Henderson, L. R. 7 Q. B. 225; Wellman *v.* Morse, 76 Fed. Rep. 573.

5. Huth *v.* Lamport, 16 Q. B. Div. 735, *affirming* 16 Q. B. Div. 442; Svendsen *v.* Wallace, L. R. 10 App. 404; Cutler *v.* Rae, 7 How. (U. S.) 729; Wellman *v.* Morse, 76 Fed. Rep. 573. And see the title GENERAL AVERAGE.

6. Shipper's Lien on Vessel. — Cleirac, Us et Coutumes de la Mer, 72; Cons. del Mare, c. 104, 105, 106; Molloy, De Jure Maritimo, bk. 2, c. 3, § 9.

England. — The Blenheim, 10 Prob. Div. 167.

United States. — Thatcher *v.* McCulloh, Olc. Adm. 365; The Flash, 9 Fed. Cas. No. 4857, Abb. Adm. 67; The Hendrik Hudson, 11 Fed. Cas. No. 6358; The Gold Hunter, 1 B. & H. Adm. 300; The Schooner Volunteer, 1 Sumn. (U. S.) 551; The Schooner General Sheridan, 2 Ben. (U. S.) 294; Higgins *v.* U. S. Mail Steamship Co., 3 Blatchf. (U. S.) 284; The Bird of Paradise, 5 Wall (U. S.) 563; The Maggie Hammond, 9 Wall. (U. S.) 435; The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182; The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7; The T. A. Goddard, 12 Fed. Rep. 174; The Enchantress, 58 Fed. Rep. 910.

See also Clark *v.* Barnwell, 12 How. (U. S.) 272; Rich *v.* Lambert, 12 How. (U. S.) 347 See *supra*, this title, *Rights and Liabilities under the Charter-party.*

Form of the Contract Immaterial. — The liability of the vessel to answer for the nonexecution of a contract of affreightment entered into by the master is not controverted; and it makes no difference, in this respect, whatever be the form of the contract, whether it be by charter-party or by bill of lading, or whether the contract be in writing or by parol. By the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel, and gives the creditor a lien upon it for his security. The Paragon, 1 Ware (U. S.) 322. To the same effect is The Casco, Davies (U. S.) 184.

Ship Bound for Authorized Acts of Master. — In The Waldo, Davies (U. S.) 161, Ware, D. J., said: "If the goods of the shipper are lost, or receive any damage through the fault or neglect of the master or of the crew, his

3. When Liens Take Effect — *a.* IN GENERAL. — By the general maritime law there is no lien in favor of either the shipowner or the shipper for the breach of a contract wholly executory. Such lien does not attach until the cargo or a part thereof has been loaded upon the ship, or delivered into the custody of the master or some other person who is rightfully acting as the agent of the shipowner.[1]

remedy is not confined to a personal action against the master or owners. The ship *in specie* stands as his security, and is by the maritime law hypothecated to him for his indemnity. But then it is not every wrongful act of the person who acts as master that will bind the owners, or will operate an hypothecation of the ship. It is only those which fall within the legitimate range of his authority, as master, that have this effect. While acting within these limits he binds the owners, because he is their authorized agent, and he binds the ship directly, because the policy of the maritime law has given to the shipper this additional security. The duties of the master as carrier extend to all that relates to the lading, transportation, and delivery of the goods. But when they are carried to the place of destination and delivered, his duties and responsibilities as carrier terminate. His functions as master are then accomplished." To the same effect is Wood *v.* Canal Boat Wilmington, 5 Hughes (U. S.) 205.

Preferred Lien. — A merchant who ships merchandise in a vessel, on freight, has a lien on the vessel for the loss of his goods, or any damage they may sustain from the fault or neglect of the master, or the insufficiency of the vessel. He may enforce his lien by process *in rem* against the vessel, in the admiralty. In such a case the vessel is, by the marine law, hypothecated to the merchant for his damages from the time that the misfortune happens, and his claim against it is preferred to the right of the general creditors of the owners. The Rebecca, 1 Ware (U. S.) 188.

Freight Advanced. — In The Ship Panama, Olc. Adm. 343, Betts, J., said: "The ship becomes answerable for the safe keeping and safe delivery of the cargo from the time it is placed on board. * * * The freight, when advanced, may reasonably be regarded as constituting part of the value of the cargo which the ship is thus bound to deliver to the freighter; and the two united would compose the incumbrance or lien for which a freighted vessel stands responsible."

Lien Transferred to Proceeds of Sale of Ship. — In The Amelie, 6 Wall. (U. S.) 18, it was held that the enforced sale of a ship, made necessary by reason of damage done her by the perils of the sea, divested the lien of the shipper of the cargo upon the vessel for nondelivery of goods, and transferred his lien to the proceeds of the ship, which, in the sense of the admiralty law, became the substitute for the ship.

Goods Sold to Pay for Repairs. — The shippers of goods on board a general ship have a lien on her for their value at the port of destination if they have been disposed of by the master on the voyage for necessary repairs and refitment to the vessel. The Boston, 1 B. & H. Adm. 309.

Vessel Bound by Contract of One in Possession Under Color of Title. — A contract of affreightment made by a person who is in possession of a vessel under a contract for its purchase, but who has refused to fulfil his contract, binds the vessel for the fulfilment of such contract. Jackson *v.* The Schooner Julia Smith, Newb. Adm. 61.

1. Part of Cargo Must Be in the Shipowner's Custody — *England.* — Tindal *v.* Taylor, 4 El. & Bl. 219, 82 E. C. L. 219; The Blenheim, 10 Prob. Div. 167.

United States. — The Pauline, 1 Biss. (U. S.) 390; The Steamboat William Fletcher, 8 Ben. (U. S.) 537; The Lady Franklin, 8 Wall. (U. S.) 325; The Delaware, 14 Wall. (U. S.) 579; The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182; Vandewater *v.* Mills, 19 How. (U. S.) 82; Scott *v.* The Ira Chaffee, 2 Fed. Rep. 401; The Asa Eldridge, 8 Fed. Rep. 720; The Monte A., 12 Fed. Rep. 331; The City of Baton Rouge, 19 Fed. Rep. 461, *distinguishing* The Pacific, 1 Blatchf. (U. S.) 569; The J. F. Warner, 22 Fed. Rep. 342; The Missouri, 30 Fed. Rep. 384; Clark *v.* Five Hundred, etc., Feet of Lumber, 65 Fed. Rep. 236. See also The Ship Panama, Olc. Adm. 343; Thatcher *v.* McCulloh, Olc. Adm. 365; The Prince Leopold, 9 Fed. Rep. 333.

Ohio. — Newhall *v.* Barque R. C. Winslow, 3 West. L. Month. (Ohio) 78. See also Hannah *v.* Schooner Carrington, 2 West. L. Month. (Ohio) 456.

Compare The Pacific, 1 Blatchf. (U. S.) 569; Oakes *v.* Richardson, 2 Lowell (U. S.) 173; The J. C. Stevenson, 17 Fed. Rep. 540.

And see the title CARRIERS OF GOODS, vol. 5, p. 414; and *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Termination of Liability.*

Actual Contact of Cargo with Ship Unnecessary. — Where, pursuant to a contract of affreightment, the master of a vessel had taken part of the cargo into his custody at M., and conveyed it a distance of several miles in a steam lighter to a ship, but it was destroyed by the bursting of a boiler while alongside and before it was taken on board, it was held that the owner of the cargo was entitled to recover for the damage sustained and had a lien therefor upon the ship. Mr. Justice Nelson, delivering the opinion of the court, said: "In the present case the cargo was delivered in pursuance of the contract, the goods in the custody of the master and subject to his lien for freight as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it. The argument urged against this lien of the shipper seems to go the length of maintaining that in order to uphold it there must be a

b. STATUTORY LIENS. — But by a state statute a lien for the nonperform-

physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. * * * We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view, we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual, possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf." Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, *affirming* The Bark Edwin, 1 Sprague (U. S.) 477, *distinguishing* The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 189. To the same effect is The Williams, 1 Brown Adm. 208. *Compare* The Schooner General Sheridan, 2 Ben. (U. S.) 204, *disapproving* The Pacific, 1 Blatchf. (U. S.) 569.

A shipper loaded a cargo of wheat upon a barge belonging to a transportation company, without the knowledge or consent of said company, for the purpose of carrying the wheat to be loaded upon a steamer belonging to said transportation company. The barge was not delivered to the custody of the transportation company or to any one of its authorized agents. While on the barge, the wheat was damaged. It was held that the shipper had no lien upon the steamboat for damages. Davis, J., speaking for the court, said: "It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it." The Keokuk, 9 Wall. (U. S.) 517, *distinguishing* Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386.

Bill of Lading Obtained by Fraud. — Where a bill of lading acknowledging the shipment of a certain cargo upon a certain vessel is obtained by fraud, and in fact no such cargo is shipped upon the vessel, the consignees of the cargo have no lien upon the vessel for the nondelivery of the cargo. The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182.

Bill of Lading Given by Mistake. — By mistake, a person who was acting as the agent of several vessels gave a bill of lading which stated that certain flour had been shipped upon a certain vessel, when in fact the flour had been previously shipped by another vessel. It was held that the owners of the flour had no lien upon the vessel named in the bill of lading for the nondelivery of the flour. The Lady Franklin, 8 Wall. (U. S.) 325.

Effect of Shipper's Unloading the Cargo. — The lien upon the cargo attaches as soon as the cargo is put on board the vessel, and therefore the shipowner has a lien if the charterer puts a cargo on board and then takes it off again, claiming that the contract has been violated by the shipowner. The Hermitage, 4 Blatchf. (U. S.) 474.

Cargo Owner's Lien Terminated by Unloading After Giving Notice. — In Salmon Falls Mfg. Co. *v.* The Tangier, 1 Cliff. (U. S.) 396, *following* Richardson *v.* Goddard, 23 How. (U. S.) 28, which in effect *reversed* Salmon Falls Mfg. Co. *v.* The Tangier, 21 L. R. 6, 6 Am. Law Reg. 504, the consignee libeled the vessel to satisfy a claim for the value of certain bales of cotton which had been destroyed by fire, after being unloaded in Boston upon a wharf designated by the consignee. Due notice was given to the consignee of the arrival of the vessel and of her readiness to deliver the consignment, and the unloading was actually begun and part of the cargo received by the consignee; but further unloading had to be suspended because the wharf became blocked up, and was not resumed on the next day for the same reason, but was resumed on the following day, which was the day appointed by the governor of Massachusetts as the annual day of fasting and prayer, commonly called Fast Day. The unloading was prosecuted until one o'clock P. M. of that day. It was contended by the libelant that such a delivery as would relieve the shipowner and ship from liability could not be made on a holiday such as Fast Day; that there should have been a new notice to the consignee prior to the resumption of work on such holiday, after it had been suspended because of the blocking up of the wharf; and further, that as the work of unloading was not completed until one o'clock, and as that was the usual dinner time of the truckmen, the unloading was not at a proper time. None of these contentions were sustained, it being held that the work of unloading begun before such holiday and necessarily suspended might be resumed and concluded on the holiday; that no new notice was necessary because of a temporary suspension; and that delivery need not be suspended during the hours when it was usual for those to whom goods were to be delivered to go to their meals; and that, therefore, a proper delivery of the cotton having been made, neither the vessel nor her owner was liable for the loss. To the same effect is Salmon Falls Mfg. Co. *v.* The Tangier, 3 Ware (U. S.) 110.

Refusal to Allow Complete Loading. — An action

ance of an executory contract may be provided for, which lien will be enforced in a federal court.[1]

X. Dissolution and Excuses for Nonperformance — 1. Dissolution by Mutual Consent. — Contracts of affreightment, like other contracts, may be dissolved by the consent of both contracting parties.[2]

2. Alteration. — As has been already stated, they will be avoided by a material alteration, if unauthorized.[3]

3. Mistake. — And the power of the court to relieve the parties thereto from the performance of such contracts, when made under a mutual mistake of fact, has been previously discussed.[4]

4. Fraud. — A contract for the charter of a ship, if obtained by the fraud of the shipowner or his agent, cannot be enforced.[5]

5. Illegality — *a.* In General. — If the contract of affreightment was illegal when entered into, it cannot be enforced by either party.[6] And this is also true if the performance of such a contract, which was lawful when made, has subsequently become unlawful.[7]

Ignorance of the Illegality. — Though a charter-party be void for illegality, and therefore not capable of being enforced, yet, if the parties made it with the belief that it was valid, it will not infect and vitiate any other contract between the parties made on the faith of its validity.[8]

b. Partial Illegality of Consideration. — If any part of the consideration of a charter-party is illegal, the whole charter-party is void, though such illegal consideration is not expressed in the instrument.[9]

in rem will lie if, after having received part of the cargo, the shipowners refuse to receive the balance. The Flash, Abb. Adm. 67.

Nonperformance of Voyage. — Where the ship was loaded and cleared at the custom-house, but the freight was not paid in advance as stipulated for, and the captain did not, therefore, sign bills of lading, and the ship never started on a voyage, it was held that the ship never having earned or commenced to earn freight no lien arose. *Exp.* Nyholm, 43 L. J. Bk. 21, 29 L. T. 634.

Commencement of the Voyage. — In some of the earlier cases it was said that the shipowner's lien did not attach until the ship had broken ground for the voyage. Curling *v.* Long, 1 B. & P. 634; Burgess *v.* Gun, 3 Har. & J. (Md.) 225; Bailey *v.* Damon, 3 Gray (Mass.) 92; Clemson *v.* Davidson, 5 Binn. (Pa.) 392. See also Keyser *v.* Harbeck, 3 Duer (N. Y.) 373.

1. The J. F. Warner, 22 Fed. Rep. 345.

2. See Tindal *v.* Taylor, 4 El. & Bl. 219, 82 E. C. L. 219, 28 Eng. L. & Eq. 210; Reed *v.* U. S., 11 Wall. (U. S.) 591. And see *supra*, this title, *Charter-parties — Execution — Modification and Alteration.*

3. See *supra*, this title, *Charter-parties — Execution — Modification and Alteration.*

4. See *supra*, this title, *Charter-parties — Execution — Mistake.*

5. Hendricksson *v.* Wright, 14 Phila. (Pa.) 590. See also Ashburner *v.* Balchen, 7 N. Y. 262.

Vessel Inspected by the Charterer. — Fraud cannot be imputed where the owner of a vessel makes no representation of her seaworthiness and affords the agents of the defendants ample facilities for inspection, and where the vessel is chartered upon the faith of their examination and report. Richardson's Case, 2 Ct. of Cl. 483.

6. Illegality Makes the Contract Void. — Carver on Carriage by Sea, § 237; Blanck *v.* Solly, 1 Moo. 531; Waugh *v.* Morris, L. R. 8 Q. B. 202. See also Muller *v.* Gernon, 3 Taunt. 394; Cunard *v.* Hyde, 29 L. J. Q. B. 6. See the title Illegal Contracts.

Without License. — A commissioned B to get a charter-party effected on his ship, Russian built and British owned. She was accordingly chartered to go to America and take in there a cargo of permitted goods, rice and cotton being specified, and to sail therewith to Cadiz, Lisbon, or Gottenburgh, as directed by a previous agreement; it appeared to have been in the contemplation of the party to carry the goods to some port in the United Kingdom, and that the ship should carry no license. It was held that this was not an illegal contract so as to deprive A of his right to his commission for procuring the charter-party to be effected. Haines *v.* Busk, 1 Marsh. 191, 5 Taunt. 521.

Effect of Reference to, in an Illegal Contract. — A charter-party duly executed under seal is not made void by being referred to in another later agreement, not under seal, which is illegal. Ogden *v.* Barker, 18 Johns. (N. Y.) 87.

7. Esposito *v.* Bowden, 27 L. J. Q. B. 17; Barker *v.* Hodgson, 3 M. & S. 270; Atkinson *v.* Ritchie, 10 East 534.

Reception of Prohibited Goods. — A shipowner is not relieved from his obligation to transport to the agreed port of destination goods which can be legally delivered there, because other goods have been taken on board which would expose his vessel to seizure and condemnation at that port. Fernandez *v.* Silva, 1 La. 269. See also Patron *v.* Silva, 1 La. 275.

8. Wilson *v.* Le Roy, 1 Brock. (U. S.) 447. See also Waugh *v.* Morris, L. R. 8 Q. B. 202.

9. Unexpressed Illegal Consideration Vitiates. — Where a charter-party was entered into during the war between England and the United States, the shipowners having in fact a British

c. ILLEGAL CONTRACT CAPABLE OF LEGAL PERFORMANCE. — If by the contract of affreightment it is agreed to do an act which was really illegal at the time when the contract was made, but such contract was not knowingly entered into by the parties thereto with the intention to violate the law, and it can be and is performed without in fact violating the law, it is not void.[1]

d. CONTRACTS FOR TRADE IN CONTRABAND. — It seems that a contract of affreightment made by a neutral with a belligerent for trade in contraband of war is not illegal.[2]

e. CONTRACTS FOR VOYAGE TO A BLOCKADED PORT. — A contract made by a neutral is not illegal because the port of destination is blockaded, when there is no premeditated intention of breaking the blockade if it should be found to continue in force when the ship arrives off the port.[3] And it seems that a contract made for the express purpose of blockade running is not illegal.[4]

f. PERFORMANCE ILLEGAL BY THE LAW OF THE PORT OF LOADING. — It seems that the nonperformance of a contract of affreightment is not excused because the performance thereof would necessitate the violation of the law of the foreign country in which the port of loading is situated.[5]

license, which fact was known to the shippers but was not mentioned in the charter-party, and it appeared by proof that this entered into the consideration of the contract, it was held that the procurement of such license vitiated the whole contract. Wilson *v.* Le Roy, 1 Brock. (U. S.) 447. See generally the title CONSIDERATION, vol. 6, p. 757.

1. Intention to Violate the Law Must Be Shown. — By a charter-party made by the defendant's agent in France, the defendant chartered the plaintiff's ship, and it was stipulated that the ship should load a cargo of hay in France and proceed direct to London. The defendant's agent verbally told the master of the ship that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port, the master was unable to land the hay at the wharf specified by reason of an order of council forbidding French hay to be landed in the United Kingdom. The order had been made before the charter-party was entered into, but neither party knew of it. After some delay the hay was legally disposed of. The plaintiff having brought an action for the detention of the ship, the defendant contended that the contract was for an illegal purpose and void. It was held that the defendant was liable for the demurrage claimed. Blackburn, J., in the opinion delivered by him, said: "We agree that a contract lawful in itself is illegal if it be entered into with the object that the law should be violated. * * * But in the present case the shipowner never did even contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods, which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods. We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance." Waugh *v.* Morris, L. R. 8 Q. B. 202. See also Duncan *v.* Koster, L. R. 4 P. C. 171; Gaudet *v.* Brown, L. R. 5 P. C. 162.

2. Carver on Carriage by Sea, § 245. See *Exp.* Chavasse, 34 L. J. Bk. 17. See also the title INTERNATIONAL LAW.

3. Medeiros *v.* Hill, 8 Bing. 231, 21 E. C. L. 284. See also The Shepherdess, 5 Rob. Adm. 262; Naylor *v.* Taylor, 9 B. & C. 718, 17 E. C. L. 480. See the title INTERNATIONAL LAW.

4. Carver on Carriage by Sea, § 246; The Helen, L. R. 1 Adm. & Eccl. 1.

5. Bright *v.* Page, 3 B. & P. 295, note *a*; Kirk *v.* Gibbs, 26 L. J. Exch. 209; Sturgis *v.* Gairdner, 2 Brev. (S. Car.) 233. See also Jacobs *v.* Crédit Lyonnais, 12 Q. B. Div. 589; Planché *v.* Fletcher, 1 Doug. 251.

Loading Prevented by Quarantine Regulation. — The charterer of a ship covenanted to send a cargo alongside at a foreign port, but because of the prevalence of an infectious disorder at the port, in consequence of which all public intercourse was prohibited by law at that port, was prevented from so doing. It was held that the charterer was liable. Lord Ellenborough, C. J., said: "If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the nonperformance of it, and not liable to damages. But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages." Barker *v.* Hodgson, 3 M. & S. 267.

In a charter-party there was no exception as to restraints of princes or rulers. The char-

6. Difficulty or Improbability of Performance as an Excuse. — There is a general principle applicable to contracts of affreightment, as well as to other contracts, that if what is agreed to be done is possible and lawful, it must be done. The parties thereto are not excused from the performance of the contract by the difficulty or improbability of accomplishing it. It must be shown that the thing agreed to be done cannot by any means be effected. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation.[1]

7. Temporary Obstruction. — A contract of affreightment is not dissolved by a temporary obstruction to navigation, such as the shallowness of the water in a river upon which the agreed voyage is to be performed,[2] or the closing of the season of navigation because of the weather.[3]

8. Temporary Prohibition. — A temporary prohibition of commerce will not dissolve a contract of affreightment.[4]

terer had the agreed cargo ready for loading, but the vessel was prevented from taking on the same by a regulation of the port of loading, which was in a foreign country, as to quarantine. It was held that the vessel, and not the charterer, must bear the loss. Holyoke *v.* Depew, 2 Ben. (U. S.) 334, *distinguishing* Barker *v.* Hodgson, 3 M. & S. 267.

1. Necessity for Express Stipulation Relieving from Nonperformance. — In Paradine *v.* Jane, Alleyn 26, the doctrine of the text is stated as applicable to all classes of contracts. See the titles CONTRACTS, *ante*, p. 88; IMPOSSIBLE CONTRACTS.

Application to Contracts of Affreightment. — In the following cases the principle has been expressly applied to the class of contracts under discussion:

England. — Bright *v.* Page, 3 B. & P. 295, note *a*; Touteng *v.* Hubbard, 3 B. & P. 300; Barker *v.* Hodgson, 3 M. & S. 267; Adams *v.* Royal Mail Steam-Packet Co., 5 C. B. N. S. 492, 94 E. C. L. 492; Kirk *v.* Gibbs, 1 H. & N. 810; Hills *v.* Sughrue, 15 M. & W. 253; Atkinson *v.* Ritchie, 10 East 533; Sjoerds *v.* Luscombe, 16 East 201; Spence *v.* Chodwick, 10 Q. B. 517, 59 E. C. L. 517; Medeiros *v.* Hill, 8 Bing. 231, 21 E. C. L. 284.

United States. — Ye Seng Co. *v.* Corbitt, 9 Fed. Rep. 423.

Maryland. — Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611.

Massachusetts. — Tirrell *v.* Gage, 4 Allen (Mass.) 245.

South Carolina. — Sturgis *v.* Gairdner, 2 Brev. (S. Car.) 233.

Compare The Onrust, 6 Blatchf. (U. S.) 536; Morgan *v.* Insurance Co. of North America, 4 Dall. (Pa.) 455.

Unforeseen difficulties or obstacles, however great, will not excuse the parties to a charter-party. They should have been guarded against by express conditions or qualifications in the contract. The B. F. Bruce, 50 Fed. Rep. 118.

Scattering of Fleet for Which the Cargo Was Destined. — In The Harriman, 9 Wall. (U. S.) 161, *affirming* 5 Sawy. (U. S.) 611, it was decided that the vessel owner was not relieved from the performance of his contract because the fleet to which the vessel had been chartered to carry goods during the progress of a war had become scattered and sailed for parts unknown.

Completion Within Specified Time Impossible. — In Poland *v.* Maryland Coal Co., 14 Blatchf. (U. S.) 519, it was held that where the charter-party was for a series of voyages, to be made before a certain date, the owner of the vessel could not be required to receive or the charterer to furnish a cargo under the charter, unless there was reasonable cause to believe that the voyage, which was the last to be attempted, could be completed in the usual and ordinary way before the date specified in the charter-party.

Fulfilment Rendered Impossible by the Charterer. — When the charter-party provides for the continuous employment of the ship upon a series of voyages, and the charterer by his conduct makes the fulfilment of this agreement impossible, the owner of the ship is justified in terminating the charter-party. Bradford *v.* Williams, L. R. 7 Exch. 259. See also The Prometheus, 1 Lowell (U. S.) 491.

Fulfilment Rendered Impossible by Sea Perils. — But when a series of voyages to be made by a certain date is agreed upon, the shipowner is not excused for performing only a part of them because during the voyages made the vessel sustained damages by excepted perils and could not be repaired by the date named for the completion of the contract. Pope *v.* Bavidge, 10 Exch. 76.

The Difficulty of Obtaining a Master and Crew is not generally one of those contingencies implied in a contract of affreightment which will excuse the shipowner for a nonperformance of his contract. The Eliza, 8 Fed. Cas. No. 4348.

Death of the Master. — The death of the master of the vessel, happening after the making of the contract but before the loading of the vessel is completed, is no ground for the nonfulfilment of the contract. The Flash, Abb. Adm. 119.

Financial Condition No Excuse. — The charterer of a vessel is not absolved from his obligation to accept the same because when the vessel is tendered he finds himself in a straitened financial condition. Prentice *v.* U. S., etc., Steamship Co., 58 Fed. Rep. 702.

2. Schilizzi *v.* Derry, 4 El. & Bl. 873, 82 E. C. L. 873.

3. The B. F. Bruce, 50 Fed. Rep. 118.

4. Quarantine Regulations are among the most frequent temporary prohibitions. Holyoke *v.* Depew, 2 Ben. (U. S.) 334; Duff *v.* Lawrence, 3 Johns. Cas. (N. Y.) 162. See also Barker *v.* Hodgson, 3 M. & S. 267. And see *infra*, this section, *Effect of Embargo*.

9. Effect of War. — A declaration of war between the country to which the ship belongs and the country of her agreed destination dissolves the contract of affreightment.[1]

10. Effect of Blockade — Port of Destination. — A hostile blockade of the port of destination will dissolve a contract of affreightment.[2] But to have this effect the blockade must be real and effective.[3]

A Blockade of the Port of Loading appears not to dissolve the contract.[4]

11. Effect of Embargo. — It has generally been held that an embargo is only a temporary interruption which does not dissolve a contract of affreightment, but merely suspends its performance.[5]

1. Contract Dissolved by War. — Abb. on Ship. (5th ed.) 427; 1 Parsons on Shipping & Admiralty 329; Barrick *v.* Buba, 2 C. B. N. S. 563, 89 E. C. L. 563; The Ship Francis, 1 Gall. (U. S.) 448; Brown *v.* U. S., 8 Cranch (U. S.) 110; Brown *v.* Delano, 12 Mass. 370. See also Reid *v.* Hoskins, 6 El. & Bl. 953, 88 E. C. L. 953; The Hoop, 1 C. Rob. 196; Esposito *v.* Bowden, 7 El. & Bl. 763, 90 E. C. L. 763, *reversing* 4 El. & Bl. 963, 82 E. C. L. 963; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92. *Compare* Clementson *v* Blessig, 11 Exch. 135, 32 Eng. L. & Eq. 544. See also the title International Law.

War Between Country of Ship and Country of Destination Necessary. — In the charter-party of an English ship chartered to proceed to Odessa, it was agreed that in case of war having commenced previous to, and continuing on, the ship's arrival at Constantinople, the defendant was bound to load said ship at the latter port. The court held that the word "war" meant such a war as would render the voyage of an English ship from Constantinople to Odessa unlawful, and would, without this clause, have dissolved the contract, and that only a war between England and Russia would have this effect. Avery *v.* Bowden, 5 El. & Bl. 714, 85 E. C. L. 714; 6 El. & Bl. 953, 88 E. C. L. 953.

Stipulation as to "Prohibition of Export" — Upon the margin of a charter-party were the words: "In the event of war, blockade, or prohibition of export preventing loading, this charter-party to be canceled." After the vessel had sailed, it was found that because of the war between Russia and Turkey the ports of loading mentioned in the charter-party were closed. The court held that, according to the true construction of the charter-party, the act of closing the ports by the Russian government was a prohibition of export preventing loading, and that upon the happening of that event the charter-party came to an end without any election by either party. Adamson *v.* Newcastle Steam-Ship Freight Ins. Assoc., 4 Q. B. Div. 462.

2. Port of Destination Blockaded. — The Tutela, 6 C. Rob. 177; Geipel *v.* Smith, L. R. 7 Q. B. 404; The Spartan, 25 Fed. Rep. 44; Scott *v.* Libby, 2 Johns. (N. Y.) 336, 3 Am. Dec. 431; Palmer *v.* Lorillard, 16 Johns. (N. Y.) 348, *reversing* Lorillard *v.* Palmer, 15 Johns. (N. Y.) 14; Burrill *v.* Cleeman, 17 Johns. (N. Y.) 72. See also Morgan *v.* Insurance Co. of North America, 4 Dall. (Pa.) 455. *Compare* The Friends, Edw. Adm. 246.

Knowledge of the Shipowner. — If, at the time of making the contract, the shipowner knew that the port of destination was blockaded, he will have no defense in an action on a charter-party for not sailing on the voyage towards the port agreed upon. Leggett on Charter Parties 583; The Tutela, 6 C. Rob. 177; Medeiros *v.* Hill, 8 Bing. 231, 21 E. C. L. 284.

3. Medeiros *v.* Hill, 8 Bing. 231, 21 E. C. L. 284; The Spartan, 25 Fed. Rep. 44.

4. Blockade of Port of Loading. — It has been held, however, that a hostile investment or blockade of the port of departure does not dissolve a contract or charter-party, and the owner of the vessel has a right to retain the goods until he can prosecute the voyage with safety or the shipper tenders the whole freight and demands the goods. Palmer *v.* Lorillard, 16 Johns. (N. Y.) 356; Ogden *v.* Barker, 18 Johns. (N. Y.) 87. *Quære*, Stoughton *v.* Rappalo, 3 S. & R. (Pa.) 559. See also the title International Law.

5. Effect of Embargo. — See Odlin *v.* Pennsylvania Ins. Co., 2 Wash. (U. S.) 312; Duff *v.* Lawrence, 3 Johns. Cas. (N. Y.) 162; M'Bride *v.* Marine Ins. Co., 5 Johns. (N. Y.) 299. *Compare* The Isabella Jacobina, 4 C. Rob. 77. See also the title International Law.

Embargo for Two Years. — In Hadley *v.* Clarke, 8 T. R. 259, it was held that an embargo lasting two years did not result in dissolving a charter-party. Lord Kenyon, C. J., said: "It is admitted that an embargo being imposed during the war was a legal interruption of the voyage; but it would be attended with the most mischievous consequences if a temporary embargo were to put an end to such a contract as this; because it if were to have that effect, it must also have the effect of putting an end to all contracts for freight and for wages."

A charter-party entered into by a British merchant with the owner of a foreign vessel is terminated by an embargo laid by the British government on foreign ships in the nature of reprisals and partial hostilities. Touteng *v.* Hubbard, 3 B. & P. 291, *distinguishing* Hadley *v.* Clarke, 8 T. R. 259.

Blockade and Embargo Distinguished. — "In case of a blockade of the port of destination, especially where, as in this case, the very place of discharge is subject to the major force of the blockading squadron, and in the absence of any alternative provisions in the charter, the English and American authorities apparently sustain the respondents' contention that the obligations of the charter-party, as a strict common-law contract, are dissolved. The blockade operates on both parties alike. It is a major force that prevents each from performing his own part of the contract. If it

12. Effect of Capture. — The capture of a ship and her cargo, if afterwards restitution is decreed, does not dissolve a contract of affreightment, but only suspends it.[1]

13. Conditions Precedent — *a.* By Express Contract. — A contract of affreightment sometimes contains an express stipulation that it shall be void upon the happening or not happening of a certain event.[2]

b. By Construction of Law — (1) *General Rule.* — Certain conditions implied by law in all contracts of affreightment are to be construed as conditions precedent, as are also certain express stipulations. The general rules to be applied when it is doubtful whether a descriptive statement in such a contract is a representation or a condition precedent have been heretofore stated.[3]

(2) *Seaworthiness.* — The warranty of seaworthiness, whether express or implied, is a condition precedent to the performance of the contract on the part of the charterer or shipper.[4]

disables the ship from delivering the cargo as agreed, it equally disables the consignee from receiving it as agreed. The obligations on the one side to deliver the cargo, and on the other side to receive it, are concurrent obligations; and neither party being able to perform his own part of the contract through a major force and without any fault of his own, neither can maintain any action against the other for the nonperformance of it. * * * If this major force were temporary only, the effect would be only a suspension of the obligations of the contract till this superior force were withdrawn; as in the case of an embargo of the port of departure, where the vessel, as it is held, may retain the cargo, unless perishable, till the embargo is removed, and then complete her voyage and earn the stipulated freight. But, by the English and American law, a blockade of the port of destination is regarded as a permanent obstacle to the completion of the contract on either side. * * * This distinction between the effects of an embargo and of a blockade is well settled in the English and American law, though not in accord with the provisions of the majority of the continental codes on the same subject. The effect of such a blockade under our law is therefore to relieve each party from the obligation to deliver the cargo or to receive it at the specific place designated in the charter, without any liability for damages by either to the other; and this, in substance and effect, is a dissolution of the specific contract as a common-law obligation." Brown, J., in The Spartan, 25 Fed. Rep. 44.

1. Vessel Captured. — Molloy, De Jure Maritimo, bk. 2, c. 4, § 13; Carver on Carriage by Sea, § 242; The Newport, Swab. 335; Beale *v.* Thompson, 3 B. & P. 420; The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542; Spafford *v.* Dodge, 14 Mass. 66. *Compare* The Racehorse, 3 C. Rob. 101; The Martha, 3 C. Rob. 106; The Hoffnung, 6 C. Rob. 231. See the title International Law.

Seizure and Detention by a Stranger. — A charter-party is not determined because the vessel has been unlawfully seized and detained by a stranger. Muggridge *v.* Eveleth, 9 Met. (Mass.) 233.

2. Adamson *v.* Newcastle Steam-Ship Freight Ins. Assoc., 4 Q. B. Div. 462; Patterson *v.* Knight, 4 Quebec L. Rep. 187. See also Avery *v.* Bowden, 5 El. & Bl. 714, 85 E. C. L. 714, 6 El. & Bl. 953, 88 E. C. L. 953, 26 L. J. Q. B. 3. See *supra*, this title, *Charter-parties — Contents — Cancellation Clause.*

Expressly Void upon Condition. — The charterers of a ship for a voyage from C. to St. B., and thence to G. to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from G., with a proviso that in the event of the non-arrival of the first-mentioned ship at G., then the second charter should be void. It was held that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. Soames *v.* Lonergan, 2 B. & C. 564, 9 E. C. L. 179.

3. See *supra*, this title, *Charter-parties — Construction — Conditions Precedent.*

4. Seaworthiness Is a Condition Precedent. — The Vesta, 6 Fed. Rep. 532; The Director, 34 Fed. Rep. 57; McAdams *v.* Leverich, 35 Fed. Rep. 305. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Seaworthiness.*

When, before the ship begins her voyage, she is so badly damaged as to become unseaworthy and incapable of earning freight without being repaired at a cost which would exceed her value when repaired, and when it does not appear that her owners intend to repair her, the contract of affreightment is dissolved. The Tornado, 108 U. S. 342.

Suspicion of Unseaworthiness. — "Questions of seaworthiness arise mostly after a loss has happened. But where a well-grounded suspicion of unfitness arises before loading, under a warranty of seaworthiness, a merchant is not required to put his cargo on board and run the risk of her foundering, before determining whether the ship is seaworthy or not, or whether the warranty in the charter-party is complied with. The question must be determined beforehand upon the judgment of those most competent to decide. Such a warranty, moreover, has reference to the necessities of business, and to the universal if not necessary practice of insuring cargoes. Prac-

Failure to Keep Seaworthy. — When it is agreed in a charter-party that the owner of the vessel shall keep her stanch and strong, a failure so to do is such a breach of contract as will give the charterer the right to rescind the same.[1]

(3) *Situation and Time of Loading and Sailing* — (a) **Stipulations** — *aa.* In General. — Stipulations in a contract of affreightment as to the situation of the vessel when chartered, and the time that she shall load and sail, have frequently been held to be conditions precedent, which, if not fulfilled, entitle the charterer to repudiate the contract.[2]

tically, therefore, the warranty of seaworthiness is a warranty that the vessel is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved as seaworthy in the judgment of impartial, competent, and experienced men versed in that business. There is no other possible way in which the charterer can determine such a question, or decide whether he may safely load the vessel, or whether he is bound to load her. Such is the practical test which the charterer has the right to apply, and which the ship must bear, or else the charter may be rightly thrown up." Premuda *v.* Goepel, 23 Fed. Rep. 410. To the same effect is Svendsen *v.* Stursberg, 31 Fed. Rep. 86.

There is no undertaking on the part of a shipowner that his vessel, if really fit, shall be free from suspicion of unfitness to receive a cargo on board. Towse *v.* Henderson, 19 L. J. Exch. 163.

Unfitness of Ship for the Cargo. — Where a ship was rendered unseaworthy by loading her with a cargo of wet sugar, with which under the terms of the charter-party the charterer had a right to load her, it was held that the charterer was entitled to have a ship provided which was fit for such cargo, and that for a failure on the part of the shipowner to provide such a ship the charterer was entitled to terminate the charter-party. Stanton *v.* Richardson, 45 L. J. C. P. 78.

Insurable Quality Diminished. — A vessel which is rated as "100 A 1" at the time the charter-party is made, before reaching the port of loading, which she is required by the terms of the charter-party to reach by a certain time, receives a slight injury which does not affect her seaworthiness or her rating. In order to repair this injury, it would have been necessary to go into dock and suffer such a delay as would give the charterer a right to cancel the charter-party. Because of this accident, the insurable quality of the vessel was diminished. It was held that the charterer had no cause of action for a breach of condition, but was released from the charter-party. Card *v.* Hine, 39 Fed. Rep. 818.

Must Load if Reasonably Fit. — A vessel was chartered for the transportation of certain cattle. It was provided by the charter-party that the cattle fittings were to be furnished by the owners of the vessel, the charterer to approve the ventilation. It was held that this provision did not confer upon the charterer the right to refuse to load the vessel if all that could be reasonably required for ventilation was furnished, merely because he elected arbitrarily not to approve. Russell *v.* Allerton, 108 N. Y. 288.

Drunken Master. — Although a vessel must have a competent master and crew to be seaworthy, and although seaworthiness is a condition precedent to the performance of the contract of affreightment, the charterer of a vessel will not be relieved from liability to furnish a full and complete cargo, on account of the drunkenness of the master of the vessel when the vessel was in charge of a person fully competent for the service. McQuade *v.* McNaughton, 49 Fed. Rep. 284.

1. Strong *v.* U. S., 154 U. S. 632.

2. **Stipulation as to Time and Place — Conditions Precedent.** — Croockewit *v.* Fletcher, 1 H. & N. 893; Ollive *v.* Booker, 1 Exch. 416; Schiller *v.* Finlay, 8 Bengal L. Rep. 544; McShane *v.* Henderson, 1 Montreal L. R. Q. B. 264; McShane *v.* Hall, 2 Montreal L. R. Q. B. 42; Deshon *v.* Fosdick, 1 Woods (U. S.) 286; Gray *v.* Moore, 37 Fed. Rep. 266; The B. F. Bruce, 50 Fed. Rep. 123. *Compare* Elliot *v.* Von Glehn, 13 Q. B. 632, 66 E. C. L. 632; Deffel *v.* Brocklebank, 4 Price 36, 3 Bligh 561.

Delay of One Month. — A charter-party stipulated that the vessel was to "proceed without delay." It was held that neglect to sail for a month excused the charterers from the performance of their contract. Antola *v.* Gill, 5 Hughes (U. S.) 284, 5 Fed. Rep. 128, *affirmed* in 7 Fed. Rep. 487.

To Proceed "with All Possible Dispatch." — A vessel, while on a voyage to Melbourne, was chartered at Boston for a voyage from Calcutta to a port in the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible dispatch." Before the master was advised of this engagement the vessel had sailed from Melbourne to Manilla, which is out of the direct course between Melbourne and Calcutta, and did not arrive at Calcutta either directly or as soon as the parties had contemplated. The defendants refused to load; and upon suit to recover damages for a breach of the charter-party it was held that the charterers might rightly claim to be discharged. Lowber *v.* Bangs, 2 Wall. (U. S.) 728. To the same effect is Olsen *v.* Hunter-Benn, 54 Fed. Rep. 530.

Stipulation as to Place of Unloading Before Voyage Not a Condition Precedent. — By a charter-party it was agreed that the ship having unloaded her outward cargo at St. T. should directly sail for D., where the charterer should load a homeward cargo. The charterer refused to load, on the ground that the ship did not unload her outward cargo at St. T. It was held that the unloading at St. T. was not a condition precedent, and that the charterer was liable in damages for a breach of the charter-party. Ohlsen *v.* Drummond, 4 Doug. 356, 26 E. C. L. 402.

bb. Illustrations. — The breach of a stipulation that the vessel shall be ready to load or shall sail, on or before a certain day, has been held to justify the charterer in refusing to comply with his contract.[1] A stipulation in a charter-party that a vessel has sailed, or is about to sail, has been held to be a condition precedent.[2] And so has a stipulation that the vessel is now in a certain port.[3]

To Sail Within Reasonable Time. — But it has been held that a stipulation in a charter-party that the vessel shall sail with convenient speed, or within a reasonable time, is not a condition precedent to the performance of the contract of affreightment.[4]

1. Behn *v.* Burness, 9 Jur. N. S. 620; Corkling *v.* Massey, L. R. 8 C. P. 395; Shadforth *v.* Higgins, 3 Campb. 385.

"Guaranteed to Sail On or Before." — In a charter-party the vessel was described as "now at B., loading for P., guaranteed to sail on or before December 10th." In passing upon this stipulation the court said: "The stipulation as to time of sailing was a condition precedent which, if not fulfilled, entitled the respondents to reject the vessel. It is not a question of fault or reasonable excuse for not sailing within the time provided. The vessel, under such a stipulation, takes upon herself the risks of all causes that may prevent a compliance with the condition. Pedersen *v.* Pagenstecher, 32 Fed. Rep. 841.

"To Sail from E., On or Before." — A charter-party contained this stipulation: "The vessel to sail from England on or before the 4th day of February next." It was held that the sailing of the vessel from England on or before the day named was a condition precedent to the owner's right to sue the charterers for not providing a cargo. Glaholm *v.* Hayes, 2 M. & G. 257, 40 E. C. L. 359.

Readiness to Receive Cargo at a certain time is a condition precedent, and a failure in that respect is a defense for not loading a cargo. Oliver *v.* Fielden, 18 L. J. Exch. 353, 4 Exch. 135. In Seeger *v.* Duthie, 8 C. B. N. S. 45, 98 E. C. L. 45, it was held that a stipulation that the ship should be ready for loading on or before the 10th of November was a condition precedent. The court said: "Where a charter-party contains a stipulation that the ship shall sail on a particular day, time is of the essence of the contract. To sail on another and a later day is to substitute a different contract. The weather may be different; the ship may arrive at a totally different market."

Intermediate Voyage. — A ship, after being chartered and having agreed to proceed to the port of loading with all convenient speed and to be ready at a stipulated time, may undertake an intermediate voyage if she be ready at the time stipulated. The Harbinger, 50 Fed. Rep. 941, *affirmed* in Gill *v.* Browne, 53 Fed. Rep. 394. *Compare* M'Andrew *v.* Adams, 1 Bing. N. Cas. 29, 27 E. C. L. 297.

2. **"Now Sailed or About to Sail."** — "That the stipulation in the charter-party that the vessel is 'now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia,' is a warranty, or a condition precedent, is, we think, quite clear. It is a substantive part of the contract, and not a mere representation, and is not an independent agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor." Davison *v.* Von Lingen, 113 U. S. 40. To the same effect are The March, 25 Fed. Rep. 106; Bentsen *v.* Taylor, (1893) 2 Q. B. 274.

A charter-party contained this statement: "Now about ready to sail from the United Kingdom, in ballast." The court said: "The stipulation as to the steamer's condition with regard to her readiness to sail was therefore a substantive part of the contract; and as, in my view of the meaning of the language used, that stipulation was broken, it follows that the respondents had a right to refuse to load the steamer." The Orsino, 24 Fed. Rep. 918.

3. **"Now in the Port of Amsterdam."** — In Behn *v.* Burness, 3 B. & S. 751, 113 E. C. L. 751, 9 Jur. N. S. 620, it was held that the words "now in the port of Amsterdam," in the charter-party, imported a warranty, and that as the ship was not in the port of Amsterdam at the time when the charter-party was made, the charterer was justified in saying that there had been a failure of performance of a condition precedent and in refusing altogether to carry out the contract.

Question for the Jury. — A charter-party contained the following stipulation: "Ship now at Rangoon." There was evidence to show that it was of importance that the vessel should be at the port named. It was left to the jury to say whether such a clause amounted to a warranty justifying the defendant in saying that there had been a failure of performance of a condition precedent, and in refusing to carry out the contract, when it appeared that as a matter of fact the vessel was at some other port. Oppenheim *v.* Fraser, 3 Asp. M. L. C. N. S. 146.

4. Dimech *v.* Corlett, 12 Moo. P. C. 199; Clipsham *v.* Veitue, 5 Q. B. 265, 48 E. C. L. 265; Carvill *v.* Schofield, 9 Can. Sup. Ct. Rep. 370.

Distinction Betweeen a Fixed Day and a Reasonable Time. — In Tarrabochia *v.* Hickie, 1 H. & N. 183, Pollock, C. B., says: "It is not a condition precedent that the vessel should sail with convenient speed, or in a reasonable time. Where, indeed, the charter-party provides that the vessel shall sail on a particular day, that is a condition precedent. The distinction is obvious: where a particular day is named it is obviously the intention of the parties that the vessel shall sail on that day; and if the shipowner refuses to do so the merchant may decline to load, for the voyage is thereby altered, and the success of the adven-

cc. Waiver. — A charterer may by his conduct waive the right to repudiate the contract on account of the breach of such a condition precedent, and he will then be liable for the freight under the charter-party, with a right to recover such damages as he can prove that he has sustained by reason of the breach of such condition.[1]

dd. Time of Essence in a Time Charter. — In a charter for a stipulated time, time is of the essence of the contract, and the charterer is not bound to take the vessel for a time substantially different from that specified in the charter-party.[2]

ee. Effect of Exceptions. — The failure of the vessel to start for the loading port, or to arrive there at the date agreed, will not, it seems, subject the shipowner to an action for damages if such failure was occasioned by an excepted peril;[3] but the right of the charterer or other shipper to repudiate the contract is not affected thereby, whether such right is given by an express cancellation clause,[4] or arises by implication from an agreement as to the date of sailing or arrival.[5]

(b) **Implied Obligation as to Loading and Sailing.** — The obligation to load and sail without unnecessary delay, which is implied by law in the absence of an express stipulation, is not a condition precedent which, if broken, will justify the repudiation of the contract, unless by such delay the object of the adventure is entirely frustrated;[6] but if such is the result of the delay, the contract may be treated as dissolved and at an end by the charterer,[7] or by the shipowner, if the delay

ture may depend on the vessel sailing on the day named. In Abbott on Shipping, pt. 4, c. 1, § 5, it is said: 'Whether or not a particular covenant by one party be a condition precedent the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them. An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed.'" *Quoted* and *approved* in Seeger *v.* Duthie, 8 C. B. N. S. 45, 98 E. C. L. 45.

1. Waiver of Conditions Precedent. — Bentsen *v.* Taylor, (1893) 2 Q. B. 274; Wencke *v.* Vaughan, 60 Fed. Rep. 448; La Compagnie Commerciale, etc., *v.* Gomila, 36 La. Ann. 280.

2. The plaintiff agreed to charter a ship for twelve months, after the completion of the voyage which the vessel was then making. After the completion of the voyage, and when the plaintiff was ready to load the ship, she was detained as unseaworthy and the repairs were not finished until more than two months after the completion of the voyage. It was held that the plaintiff was entitled to throw up the charter-party. Tully *v.* Howling, 2 Q. B. Div. 182.

3. Failure to Be at Port of Lading Due to Excepted Peril. — Carver on Carriage by Sea 156; Leggett on Charter Parties 565; Croockewit *v.* Fletcher, 1 H. & N. 893; Harrison *v.* Garthorne, 26 L. T. 508. See also Jackson *v.* Union Marine Ins. Co., L. R. 10 C. P. 142, *affirming* L. R. 8 C. P. 572.

4. Right to Repudiate. — Carver on Carriage by Sea, 156; Leggett on Charter Parties, 565; Smith *v.* Dart, 14 Q. B. Div. 105. See also Jackson *v.* Union Marine Ins. Co., L. R. 10 C. P. 143, *affirming* L. R. 8 C. P. 572; Pedersen *v.* Pagenstecher, 32 Fed. Rep. 841.

5. Croockewit *v.* Fletcher, 1 H. & N. 893.

6. Not Generally a Condition Precedent. — Fearing *v.* Cheeseman, 3 Cliff. (U. S.) 91, *distinguishing* Lowber *v.* Bangs, 2 Wall. (U. S.) 728; Wood *v.* Hubbard, 62 Fed. Rep. 753. See also Jones *v.* Holm, L. R. 2 Exch. 335. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Delay.*

7. Object Frustrated. — In Jackson *v.* Union Marine Ins. Co., L. R. 10 C. P. 125, *affirming* L. R. 8 C. P. 572, Bramwell, B., said: "The question turns on the construction and effect of the charter. By it the vessel is to sail to N. with all possible dispatch, perils of the seas excepted. It is said this constitutes the only agreement as to time, and, provided all possible dispatch is used, it matters not when she arrives at N. I am of a different opinion. If this charter-party be read as a charter for a definite voyage or adventure, then it follows that there is necessarily an implied condition that the ship shall arrive at N. in time for it. * * * If the charter be read as for a voyage or adventure not precisely defined by time or otherwise, but still for a particular voyage, arrival at N. in time for it is necessarily a condition precedent. It seems to me it must be so read. I should say reason and good sense require it. The difficulty is supposed to be that there is some rule of law to the contrary. This I cannot see; and it seems to me that in this case the shipowner undertook to use all possible dispatch to arrive at the port of loading, and also agreed that the ship should arrive there 'at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterers should not be at an end, but in existence.' That latter agreement is also a condition precedent. Not arriving at such a time puts an end to the contract; though, as it arises from an excepted peril, it gives no cause of action." To the same effect are Brown *v.* Lamont, 32 U. C. Q. B. 167, *reversing* 30 U. C. Q. B. 392:

was occasioned by causes for which he was not responsible.[1]

Delay for Repairs. — The contract of affreightment is not dissolved by a delay occasioned by the necessity for making repairs upon the vessel, but is only suspended while such repairs are being made.[2]

When the Contract May be Repudiated Because of a Deviation. — Since a delay by deviation is the same as a delay in starting, the contract of affreightment cannot be repudiated unless because of such deviation the whole benefit of the contract is lost or the object thereof defeated.[3]

(4) *Capacity.* — Whether the statement of the ship's measurement amounts to a condition precedent, depends upon the circumstances under which and the manner in which it was made.[4]

Carvill *v.* Schofield, 9 Can. Sup. Ct. Rep. 370.

Intention of Both Parties Must Be Frustrated. — In Hudson *v.* Hill, 43 L. J. C. P. 273, Brett, J., said: "When the delay is so long as to frustrate the mercantile adventure as at first contemplated by both parties, the original contract is determined and cannot be enforced. In the present case the mercantile adventure on the part of the charterers was to send a cargo of sugar from B. to E. during the proper season, but the adventure on the part of the owners of the ship was that she should earn freight. The mere failure of the vessel to arrive in time to carry out the charterers' intention did not frustrate her owners' purpose in entering upon the contract of affreightment. They were not bound to recognize the charterers' object. It was no part of the owners' intention that their ship should be loaded at a profit to the charterers, and therefore the contract remains in force, although no profit from putting a cargo on board can accrue to the charterers."

1. Jackson *v.* Union Marine Ins. Co., L. R. 10 C. P. 125, *affirming* L. R. 8 C. P. 572.

2. The Star of Hope, 22 Fed. Cas. No. 13312.

Illustration. — While a ship was being loaded it accidentally caught fire, and a portion of the cargo already on board was so injured that the master necessarily sold it. After the ship was repaired, the owner tendered it to the agents of the charterer and required them to load the rest of the cargo, which they refused to do. It was held that the charterer was not exonerated by the circumstances from his obligation to complete the loading of a full and complete cargo. Jones *v.* Holm, L. R. 2 Exch. 335, 16 L. T. 794.

When Charterer May Abandon. — When a shipowner has agreed by charter-party that the ship shall proceed to a port of discharge and there deliver the cargo unless prevented by the excepted perils, and the ship has to put into a port of refuge for repairs, the shipowner is liable in damages for abandoning the voyage at that port without the consent of the charterers, unless the effect of the excepted perils proves to have been such as to make it either physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view. The Assicurazioni Generali *v.* S. S. Bessie Morris Co., (1892) 2 Q. B. 652.

A charter-party provided that the vessel should sail with all convenient speed, and no deviation was provided for, nor detention for any cause, save the necessary delay of unloading. The vessel was injured without fault on the part of the owner, and had to be taken into dry-dock for repairs. It appeared from the evidence that the whole object of the charterer in engaging the ship was frustrated by the delay. It was held that the charterers were justified in terminating the charter-party. Porteous *v.* Williams, 115 N. Y. 116.

3. Potter *v.* Burrell, (1897) 1 Q. B. 97; Pickman *v.* Woods, 6 Pick. (Mass.) 248; Lander *v.* Clark, 1 Hall (N. Y.) 355. See *supra*, this title, *Rights and Liabilities Common to All Contracts of Affreightment — Deviation.*

Deviation the Same as a Delay. — It seems to be now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this court, that a delay or deviation which, as it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter. MacAndrew *v.* Chapple, L. R. 1 C. P. 643. To the same effect is Freeman *v.* Taylor, 8 Bing. 124, 21 E. C. L. 246.

4. Carver on Carriage by Sea, § 141; Leggett on Charter Parties 169. See Hunter *v.* Fry, 2 B. & Ald. 421. See *supra*, this title, *Charter-parties — Contents — Capacity.*

Illustrations. — Where, by a charter-party, the charterer undertook to load a vessel described in the instrument as "of the measurement of 180 to 200 tons or thereabouts," it was held that he was not exonerated from loading her because she happened to be of 257 tons burden. Barker *v.* Windle, 6 El. & Bl. 675, 88 E. C. L. 675, 25 L. J. Q. B. 349.

Where a charter-party describes the vessel as "of the burden of 109 tons or thereabouts," it is descriptive, and not a warranty, and if there was no fraud, the fact only that her burden is 142 tons will not avoid the contract, though it may not be so easy to obtain shipments by or insurance upon vessels of her size. Ashburner *v.* Balchen, 7 N. Y. 262.

Where, by a charter-party made at Liverpool for a voyage from Liverpool to Sidney, the charterer agreed to pay, for the use and hire of the ship in respect of the voyage, a certain sum in full on condition of her taking a cargo of not less than 1,000 tons of weight and measurement, it was held that the stipulation or condition of the ship taking a cargo of not less than 1,000 tons of weight and measurement was not a condition precedent, and that even if it was so originally, the charterer, having

(5) *Description* — (a) Classification. — Words in a contract of affreightment descriptive of the quality of a vessel, as that she is A 1, amount to a warranty and are a material part of the contract. If the vessel turns out not to be of the class stated, the charterer may consider the contract at an end.[1]

Time of the Warranty. — Generally, a statement that a vessel belongs to a particular class is not a continuous warranty, but applies only to her classification at the time the contract was made.[2] But the statement as to classification may be made in such words as to warrant the vessel to be of that class at the time of tendering her at the port of loading.[3]

(b) Nationality. — It seems that an untrue statement as to the nationality of a vessel may become a ground for a refusal on the part of the shipper to load the vessel.[4]

XI. MEASURE OF DAMAGES — 1. In General. — The same rules which determine the amount of the liability of carriers by land for loss or damage to the cargo intrusted to them for transportation, or for failure or delay in carrying and

had a substantial part of the consideration for his promise to pay, could not plead it in bar. Pust *v.* Dowie, 9 Jur. N. S. 1322, 8 L. T. 244, *affirmed* in 5 B. & S. 20, 117 E. C. L. 20, 34 L. J. Q. B. 127.

The charterers in Bombay chartered a ship from her owners which was described in the charter-party as of the measurement of about 2,700 to 2,800 tons net register. The ship had never been in Bombay, and was wholly unknown to the charterers. Evidence was given that in the negotiations for the charter-party the shipowners stated to the charterers that the ship was certainly not more than 2,800 tonnage register. She, however, turned out to be of the registered tonnage of 3,045 tons. It was held that the statement in the contract as to her tonnage was a condition precedent, and that the charterers were justified in repudiating the contract. Oceanic S. Nav. Co. *v.* Soonderdas Dhurumsey, I. L. R. 15 Bombay 389.

In Watts *v.* Camors, 115 U. S. 353, Gray, J., delivering the opinion of the court, said: "In the charter-party the ship is described as the 'Steamship Highbury, of the burthen of 1100 tons, or thereabouts, registered measurement;' and the owner agrees to receive on board, and the charterer engages to provide, 'a full and complete cargo, say about 11,500 quarters of wheat in bulk.' In fact, her registered tonnage was 1,203 tons, a little more than nine per cent. above that stated in the charter; but this was not known to either party at the time of entering into the contract, and her actual carrying capacity corresponded to the cargo which the charterers engaged to furnish, and the owner agreed to receive on board. The statement in the charter-party concerning the registered tonnage of the ship clearly does not constitute a warranty or condition precedent that she is of 1,100 tons registered measurement. The intention and the agreement of the parties, as apparent upon the face of their written contract, were that the steamship Highbury should receive and carry a full and complete cargo of about 11,500 quarters of wheat in bulk. There being no wilful or fraudulent misrepresentation, the description 'of the burthen of 1,100 tons, or thereabouts, registered measurement' (if it could under other circumstances be held a warranty), is controlled by the designation of the ship by name, and by the unequivocal stipulations regarding the cargo to be carried."

A vessel was guaranteed to be of 1,000 tons burden, but proved to have a capacity of only 925 tons. It was held that such guaranty was a condition precedent, and the charterer was not bound to load the vessel. Simonetti *v.* Foster, 2 Fed. Rep. 415.

1. Classification of a Vessel. — Carver on Carriage by Sea, 140; Leggett on Charter Parties, 156; Ollive *v.* Booker, 17 L. J. Exch. 21.

A guaranty in a charter-party that the vessel chartered is first class means that she shall be so classified in either the English, French, or American Lloyds. Baetjer *v.* Bors. 7 Ben. (U. S.) 280. See *supra*, this title, *Charter-parties — Contents — Description of Vessel.*

2. French *v.* Newgass, 3 C. P. Div. 163, 38 L. T. 164; Hurst *v.* Usborne, 18 C. B. 144, 86 E. C. L. 144, 25 L. J. C. P. 209; Routh *v.* Macmillan, 2 H. & C. 750, 10 Jur. N. S. 158.

3. A charter-party contained the following words: "Guaranteed to class A 1¼ in Am. Lloyds'." It was held that this meant that the vessel should be in that condition and class when tendered upon the charter-party at her port of loading. Ahrenberg *v.* Wright, 30 Hun (N. Y.) 75, *affirmed* in 100 N. Y. 613, *distinguishing* Hurst *v.* Usborne, 18 C. B. 144, 86 E. C. L. 144, 25 L. J. C. P. 209.

4. British Ship with Swedish Papers. — A ship was denominated in the memorandum for charter: "The Swedish ship or vessel called the Maria." In an action of assumpsit by the owner against the freighter for not loading and dispatching her on a voyage the defense was that the ship, instead of being Swedish, was British built, whereby the defendant had been prevented from sending her to a Swedish port. Lord Ellenborough, delivering the opinion of the court, said: "I should hold that the ship must correspond with the description in the written contract; but she is Swedish in one sense, being furnished with Swedish papers, and in a condition to navigate as a Swedish ship. Although the expression in the memorandum for charter be ambiguous, I think it was enough that she had a Swedish national character imposed upon her, and that she was Swedish within the meaning of the parties to the contract." Reusse *v.* Meyers, 3 Campb. 475.

delivering the same, are generally applicable to carriers by sea.[1]

Cargo Lost. — The measure of damages for the loss of a cargo which has been loaded upon a vessel for transportation is the value of the goods at the port of delivery at the time when they should have been delivered, with interest from that time, less the freight due.[2]

Cargo Damaged. — When the cargo has been damaged merely, the carrier is entitled to have the value of the goods in their injured condition deducted in estimating the damages.[3]

1. General Rule as to Measure of Damages Applicable. — The statement of these rules and the discussion of the cases arising thereunder will be found in the title CARRIERS OF GOODS, vol. 5, p. 373 *et seq.*

General Object of Damages. — The object of the law in actions for damages under a contract of affreightment is to make the parties to the contract as nearly whole as possible for the damages sustained by reason of the breach of the contract. The Lillie Hamilton, 18 Fed. Rep. 327.

Profits. — The cases in which the loss or probable profits upon the goods may be recovered by the shipper are rare. Oakes *v.* Richardson, 2 Lowell (U. S.) 173.

Excepted profits are not proper items of damage. The Schooner Tribune, 3 Sumn. (U. S.) 144.

Where goods are shipped on board a vessel advertised to sail for a particular port, and a bill of lading is signed for their delivery at that port, the shipowners are bound to carry the goods by that ship to the port of destination, unless prevented by some event beyond their control; and a refusal to perform the voyage, without any legal justification, renders them liable to damages for their breach of contract. The opportunity which offered of shipping the goods by another vessel, without any additional cost or risk to the owners of them, cannot be used as a bar or in mitigation of damages. The damage to the owner of the goods is the difference in value between the goods at the port of shipment and the price they would have commanded at the port of destination if the contract had been performed; profits that the shippers might have made by ulterior speculations, or by shipping them from the port of destination to other places and better markets, are too remote to be taken into consideration in estimating the damages arising from the breach of the contract. Harrison *v.* Stewart, Taney's Dec. (U. S.) 485. See generally the titles CARRIERS OF GOODS, vol. 5, p. 392; DAMAGES.

2. Loss of Cargo — *England.* — Brandt *v.* Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214.

Canada.— Young *v.* Laidlaw, 12 U. C. C. P. 612.

United States. — The Columbus, Abb. Adm. 37; The Ship Patrick Henry, 1 Ben. (U. S.) 292; Bazin *v.* Liverpool, etc., Steamship Co., 5 Am. L. Reg. 459.

California. — Ringgold *v.* Haven, 1 Cal. 108; Hart *v.* Spalding, 1 Cal. 213.

Louisiana. — Henderson *v.* Maid of Orleans, 12 La. Ann. 352.

Massachusetts. — Spring *v.* Haskell, 4 Allen (Mass.) 112.

Pennsylvania. — Warden *v.* Greer, 6 Watts (Pa.) 424; Gillingham *v.* Dempsey, 12 S. & R. (Pa.) 183.

Tennessee. — Dean *v.* Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744.

Hawaii. — La Motte *v.* Angel, 1 Hawaiian 136.

See also The Assicurazioni Generali *v.* S. S. Bessie Morris Co., (1892) 2 Q. B. 652.

Cargo Sold at Less than Market Price. — In Rodocanachi *v.* Milburn, 18 Q. B. Div. 67, *reversing* 17 Q. B. Div. 316, an action was brought upon a charter-party for the non-delivery of a cargo of cotton seed. It appeared that the charterers had sold the cargo "to arrive" at a price less than the market value of the goods at the port of discharge at the time when the cargo should have arrived. It was held that, in estimating the damages, such market value must be looked to, and not the price at which the charterers had sold the cargo.

Cargo Lost in a Collision. — The proper rule of damages where a cargo is lost *in transitu* by a collision or other tort is the value of the goods at the time and place of shipment. Smith *v.* Condry, 1 How. (U. S.) 28; The Vaughan, 14 Wall. (U. S.) 258, *affirming* 2 Ben. (U. S.) 47.

And it has been stated that to this sum should be added the expense of lading the cargo on board and of navigating the vessel to the place of collision, with interest from the date of the collision. Leggett on Charter Parties, p. 624, *citing* The Ocean Queen, 2 Asp. M. L. C. 419.

3. Damaged Cargo — Deduction for Injured Goods. — Hamilton *v.* Bark Kate Irvine, 5 Fed. Rep. 630; The Mangalore, 9 Sawy. (U. S.) 71, 23 Fed. Rep. 463; Western Mfg. Co. *v.* The Guiding Star, 37 Fed. Rep. 641; Franklin Sugar Refining Co. *v.* Steamship Earnwood, 37 Am. L. Reg. N. S. 51; Greenwood *v.* Cooper, 10 La. Ann. 796; Henderson *v.* Maid of Orleans, 12 La. Ann. 352; McGregor *v.* Kilgore, 6 Ohio 358, 27 Am. Dec. 260.

How Value Determined. — The proper method of determining the value of the damaged cargo is by a fair auction sale of such cargo. Franklin Sugar Refining Co. *v.* Steamship Earnwood, 37 Am. L. Reg. N. S. 51. See also Greenwood *v.* Cooper, 10 La. Ann. 796; Henderson *v.* Maid of Orleans, 12 La. Ann. 352.

How and When Sale Should Be Made. — The sale should be made with careful regard for the interest of all parties concerned, after the expiration of a sufficient time to give due notice to intended purchasers. Franklin Sugar Refining Co. *v.* Steamship Earnwood, 37 Am. L. Reg. N. S. 51. See also The Marinin S., 28 Fed. Rep. 664; Greenwood *v.* Cooper, 10 La. Ann. 796.

Immediate Sale Unnecessary. — In Morrison *v.* I. & V. Florio Steamship Co., 36 Fed. Rep. 569, Wales, J., said: "Nor have the respondents any just cause to complain of the post-

Delivery Delayed. — When the delivery of the cargo has been delayed by the fault of the carrier, the charterer or other shipper is entitled to recover as damages the difference between the fair market value on the day when the vessel should have delivered her cargo and the value at the time when she in fact arrived and made, or was in readiness to make, such delivery.[1]

Failure or Refusal to Carry. — When the carrier has become liable for a failure or refusal to carry the cargo tendered, the measure of damages is the difference between the value of such cargo at the port of loading and the port of delivery at the time when it would have arrived there, less the cost of carriage.[2]

ponement of the sale of the damaged prunes. The interval of time that elapsed between the day of delivery and the day of sale was not long. It was the duty of the libelant to prevent a sacrifice of his property and to obtain the best market price; and this course was equally advantageous to the respondents, for if the damaged prunes had been sold immediately on their arrival, it is quite probable that they would have sold for less than they did. There is no evidence that they might have brought more. Moreover, it is questionable whether the libelant would have been justified in making an immediate sale and without any endeavor to secure the highest attainable price."

Additional Loss Caused by Delay. — If during the interval between the time of the arrival of the vessel and sale of the damaged cargo, such cargo declines in price, this loss can be recovered by the cargo owner. Franklin Sugar Refining Co. *v.* Steamship Earnwood, 37 Am. L. Reg. N. S. 51.

Auctioneer's Expenses and Wharfage Charges should be allowed for. Franklin Sugar Refining Co. *v.* Steamship Earnwood, 37 Am. L. Reg. N. S. 51.

Sale of Damaged Goods at Intermediate Port. — In Acatos *v.* Burns, 3 Exch. Div. 282. it was held that a master of a vessel cannot at an intermediate port sell goods which are damaged and cannot be carried to the port of discharge, without communicating with their owner; and when such a wrongful sale has been made the measure of damages is not what the cargo realized at the sale, but what it would be worth to the owner if it had not been sold.

1. Delay in Delivery. — The Success, 7 Blatchf. (U. S.) 551; Rowe *v.* The Steamer City of Dublin, 1 Ben. (U. S.) 46; Page *v.* Munro, 1 Holmes (U. S.) 232; The Golden Rule, 9 Fed. Rep. 334; The Suffolk, 31 Fed. Rep. 835; The Giulio, 34 Fed. Rep. 909; Monteith *v.* Merchants' Despatch, etc., Co., 9 Ont. App. 282. See also Arthur *v.* The Schooner Cassius, 2 Story (U. S.) 81; The Rossend Castle, 30 Fed. Rep. 462.

Expenses. — And the shipper may recover the cost of storing and caring for the cargo and other expenses made necessary by such delay. The Giulio, 34 Fed. Rep. 909; The J. C. Stevenson, 17 Fed. Rep. 540.

Additional Insurance. — He may also recover the additional insurance premium he had to pay because of the lateness of the season. The J. C. Stevenson, 17 Fed. Rep. 540.

Delayed to Seek Other Vessels. — When the owner of a vessel which has been chartered refuses to receive the cargo, the charterer may recover from him the fall in the market price, if any, during the delay while the charterer is seeking other vessels to transport the cargo. Wheelwright *v.* Walsh, 44 Fed. Rep. 380.

No Damages for Accidental Fall in Price. — Where, on account of defects in the ship, the voyage had been protracted beyond the time reasonably allowed, and in the meantime the market price of the goods shipped had fallen, it was held that the consignee could not recover damages for such decline in price. Mellish, L. J., delivering the opinion of the court, said: "There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived and the time when they did arrive — no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, and by reason of delay on the part of the carrier they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if by reason of breach of contract they do not arrive in time, damages for loss of market may be recovered. Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower." The Parana, 2 Prob. Div. 118, 1 Prob. Div. 452, *followed* in The Notting Hill, 9 Prob. Div. 105. See also Morrison *v.* I. & V. Florio Steamship Co., 36 Fed. Rep. 569.

2. Failure or Refusal to Carry. — Bracket *v.* M'Nair, 14 Johns. (N. Y.) 170, 7 Am. Dec. 447; Parker *v.* McCaldin, 3 N. Y. Misc. Rep. (Brooklyn City Ct.) 14; O'Conner *v.* Forster, 10 Watts (Pa.) 418. See also Oakes *v.* Richardson, 2 Lowell (U. S.) 173.

Ship Unable to Carry the Stipulated Cargo. — Where the defendant contracted to carry fifty tons of the plaintiff's hay to a distant port for sale, the hay to be delivered at the ship's side, and after receiving twenty-four tons on board

2. Vessel Chartered — *a.* AMOUNT RECOVERABLE BY THE CHARTERER — **Increased Freight.** — When the shipowner fails or refuses to furnish the ship or to receive the cargo as agreed in the charter-party, the amount recoverable by the charterer is generally the increased freight which he paid or would have had to pay for another vessel,[1] with interest from the time when the vessel first chartered ought, under ordinary circumstances, to have arrived at her destination.[2]

No Substitute Obtainable. — Unless no other vessel was obtainable; when, as has been heretofore stated, the measure of damages is the difference in value of the cargo at the port of loading and the port of delivery, less the cost of transportation.[3]

Increase in Price of Cargo. — When, by the default of the shipowner, the charterer is obliged to substitute another vessel, and when, during the time necessarily elapsing while such other vessel is being procured, the commodity, for the transportation of which the ship was chartered and which cannot be procured until the time when a vessel is actually in readiness to receive it, increases in price, the charterer is entitled to recover the extra price of the cargo as well as the extra freight if any.[4]

declined taking any more because the ship was full, it was held that the rule of damages was the difference between what the plaintiff in fact received, or with due diligence and prudence might have obtained, for the hay left in his hands, and the price at the port of destination, deducting freight and expenses. Nourse *v.* Snow, 6 Me. 208.

Damages Paid for Not Loading a Cargo Not Recoverable. — A ship's husband agreed that his ship should at one port take in a quantity of brandy and convey it to another and there receive a cargo of fruit which the freighters of the ship agreed to supply. The ship did not take the brandy, and the freighters did not furnish a full homeward cargo, for which failure on the part of the freighters damages were recovered against them. The freighters afterwards brought an action to recover damages for the breach of the ship's husband's agreement. It was held that the damages were the loss in consequence of not shipping the brandy and all such damages as were the necessary and natural consequences, but that the freighters could not recover either the damages they had paid for their failure to furnish the homeward cargo or the costs they had incurred in defending the action therefor, although they were prevented from obtaining the homeward cargo by the neglect of the ship's husband in not taking the brandy. Walton *v.* Fothergill, 7 C. & P. 392, 32 E. C. L. 553.

Failure to Carry Passengers. — It appeared from the evidence that two hundred passengers at fourteen dollars apiece had been procured for the ship, and that after deducting the necessary expenses for transporting them the charterer stood to make twenty-eight hundred dollars net profit on the venture, and was only prevented from doing so by the failure of the shipowner to keep his contract and make the promised voyage. Deady, J., delivering the opinion of the court, said: "The libelants have at least sustained a loss of twenty-eight hundred dollars in gains prevented by this failure of the defendants to keep their contract, and in my judgment they are such damages as arise naturally from the breach of the contract, and must also be considered as within the contemplation of the parties thereto when they made it, and are, therefore, recoverable in this suit." Ye Seng Co. *v.* Corbitt, 9 Fed. Rep. 423.

Difference in Market Price Between the Agreed Port and Port to Which Carried. — When, because of the refusal of the ship to receive the cargo, the charterer is obliged to ship his cargo to another port than the one agreed upon in the charter-party, the charterer may recover the difference, if any, between the market of the port named in the charter-party and the port to which the cargo was actually carried. The Rossend Castle, 30 Fed. Rep. 462.

1. **Increased Freight Recoverable.** — Featherston *v.* Wilkinson, L. R. 8 Exch. 122; Oakes *v.* Richardson, 2 Lowell (U. S.) 173; The Schooner Tribune, 3 Sumn. (U. S.) 144; The J. C. Stevenson, 17 Fed. Rep. 540; The Rossend Castle, 30 Fed. Rep. 462; Lumberman's Min. Co. *v.* Gilchrist, 55 Fed. Rep. 677, *affirming* 50 Fed. Rep. 118; The Oregon, 55 Fed. Rep. 666; Sanders *v.* Munson, 74 Fed. Rep. 649, *affirming* 61 Fed. Rep. 504; Higginson *v.* Weld, 14 Gray (Mass.) 165; Ogden *v.* Marshall, 8 N. Y. 340, 59 Am. Dec. 497; Parker *v.* McCaldin, 3 N. Y. Misc. Rep. (Brooklyn City Ct.) 14. See also Horne *v.* Hough, L. R. 9 C. P. 135; McEwan *v.* McLeod, 9 Ont. App. 239.

Larger Ship Substituted. — If the chartered vessel fails or refuses to receive the cargo, and the charterer cannot get a ship of the same kind or size, he is entitled to take the best reasonable substitute which is available, and if necessary he may charter a larger vessel. The damages in that case would be the difference between the freight on the whole cargo of the substituted ship and that which would have been payable for the agreed ship; but giving credit for any profit made on the surplus cargo carried to fill up the larger ship. Carver on Carriage by Sea, p. 750, § 723, *citing* Mitchell *v.* Kahl, 2 F. & F. 709.

2. **Interest.** — Higginson *v.* Weld, 14 Gray (Mass.) 165.

3. Parker *v.* McCaldin, 3 N. Y. Misc. Rep. (Brooklyn City Ct.) 14. See *supra*, this section, paragraph *Failure or Refusal to Carry*.

4. Featherston *v.* Wilkinson, L. R. 8 Exch. 122.

Freight upon Goods of Third Persons. — When, by the terms of the charter-party, the whole cargo capacity of the vessel belongs to the charterer for the voyage, if the master of the vessel, without the permission of the charterer, express or implied, uses the vessel during the voyage for carrying the goods of third persons, the charterer is entitled to recover the freight earned upon such goods, less the cost of earning it.[1]

b. AMOUNT RECOVERABLE BY THE SHIPOWNER — (1) *Nonperformance, Total or Partial.* — When the charterer wholly fails or refuses to load the cargo stipulated for, upon the vessel, the shipowner may recover as damages for such breach on the charterer's part the total amount of the agreed freight less the cost of earning it; and if the charterer loads only a part of the stipulated cargo, he is liable to the shipowner for the difference between the freight upon the cargo furnished and the freight upon the full cargo agreed upon, less the additional cost which would have been incurred in transporting the part of the cargo not furnished. As it is sometimes concisely expressed, the charterer must pay "empty for full." [2]

1. The Port Adelaide, 62 Fed. Rep. 486, *modifying* 59 Fed. Rep. 174.

2. **Damages for Failure to Furnish Stipulated Cargo** — *England.* — Smith *v.* McGuire, 3 H. & N. 554; Barker *v.* Hodgson, 3 M. & S. 267; Aitken *v.* Ernsthausen, (1894) 1 Q. B. 773; Potter *v.* New Zealand Shipping Co., 64 L. J. Q. B. 689.

Canada. — Lomer and Cox, 11 Rev. Leg. 339; Lord *v.* Davidson, 13 Can. Sup. Ct. Rep. 166.

United States. — Giles *v.* The Brig Cynthia, Pet. Adm. 203; Kleine *v.* Catara, 2 Gall. (U. S.) 73; Clarke *v.* Crabtree, 2 Curt. (U. S.) 87; The Gazelle, 128 U. S. 474.

California. — Utter *v.* Chapman, 43 Cal. 279, 38 Cal. 659.

New York. — Ashburner *v.* Balchen, 7 N. Y. 264; Rupp *v.* Lobach, 4 E. D. Smith (N. Y.) 69; Stone *v.* Woodruff, 28 Hun (N. Y.) 534; Nelson *v.* Odiorne, 45 N. Y. 489.

See also De Angelis *v.* Mayappa Setty, I. L. R. 5 Calcutta 578; Prentice *v.* U. S., etc., Steamship Co., 58 Fed. Rep. 702.

See *supra*, this title, *Charter-parties — Contents — Cargo Space, Quantity and Kind of Cargo.*

"Shortage." — "The term 'shortage,' used in charter-party, may be used, and is intended to apply to either short loading or short delivery. In the latter the ship pays a stipulated sum for the amount of cargo received and not delivered. In the former, where the charterer has stipulated for a full cargo, and any agreement is made as to what a full cargo is, the charterer pays and the ship receives, as stipulated damages for noncompliance with the terms of the charter-party in not furnishing a full cargo, the amount agreed upon, stipulated for, or proven in evidence." The Ira B. Ellems, 50 Fed. Rep. 934, *affirming* 48 Fed. Rep. 591.

Difference in Value Between Original and Substituted Cargo. — When the cargo specified in the charter-party cannot be furnished by the charterer, and the vessel is re-chartered for another cargo at a different rate, the shipowner is entitled to recover damages to the extent of the difference in value between the original cargo and the second cargo. Chamberlain *v.* Pettit, 49 Fed. Rep. 109.

Freight Due for a Full Cargo. — Where the whole of a vessel is chartered to take a cargo at certain specified rates, if the freighter does not furnish a full cargo the owner of the vessel is entitled to freight not only for the cargo actually put on board, but also for what the vessel could have taken had a full cargo been furnished. Belmont *v.* Tyson, 3 Blatchf. (U. S.) 530; Duffie *v.* Hayes, 15 Johns. (N. Y.) 327.

No Agreement. — If the entire ship be chartered and the burden thereof expressed in the charter-party, and the charterer agrees to pay a certain sum for every ton of goods which he shall lade on board, but does not agree to furnish a complete cargo, the owners of the vessel can only demand payment for the quantity of goods actually put on board. Lady James *v.* East India Co., Abbott 553.

Vessel Leased — Liability of Lessors. — When shippers have contracted for the lease of a vessel for use in their business, at a fixed price and for a definite time, they are not at liberty to recede from their engagement at will, and decline to accept delivery of the vessel if tendered seasonably; and, having declined to accept the delivery of the vessel when formally tendered to them, they become liable to the owners of the vessel in the full amount of the price stipulated in the contract. Orr, etc., Co. *v.* Wilson, 48 La. Ann. 1313.

Attempt of the Charterer to Vary the Contract. — Where the charterer of a ship covenanted to load her with a complete cargo of sugar and to pay freight for the same at a certain rate, and his agent at the port of loading tendered a complete cargo to the captain, but insisted on his signing bills of lading for it at a less rate, which the captain refused to do, it was held that the covenant to load a complete cargo had been broken in the same manner as if none had been offered, and that the charterer was liable for dead freight. Hyde *v.* Willis, 3 Campb. 202.

No Deduction for Expenses. — When, by the fault of the charterer, the ship is prevented from making the voyage agreed upon, she can recover the gross freight less what it would have cost to earn it; and when she is detained under expenses as great as she would have incurred on the stipulated voyage, there is nothing to deduct. Wood *v.* Hubbard, 62 Fed. Rep. 753.

Cargo to Consist of Various Articles. — When, by the terms of the charter-party, different articles which are to be furnished as cargo are to be paid for at different rates of freight, and the charterer is at liberty to supply which of these articles he pleases, an average value of freight, calculated upon the various rates of freight in the proportion of such different articles usually carried on such a voyage, is the proper measure of damages.[1] But when it is agreed in the charter-party that the quantity of each of the enumerated articles is not to exceed a certain amount, and that a certain rate of freight is to be paid for such articles, the charterer is bound to pay freight as if the stipulated quantity of the enumerated goods had been shipped.[2]

(2) *Diminution of Damages* — (a) **General Rule.** — The damages to which the shipowner is entitled are to be reduced, in the case of a total nonperformance, by the net freight which was or could have been earned during the period for which the vessel was chartered, and, in the case of a partial nonperformance, by the net freight upon goods which were or might have been carried in the space reserved for such unsupplied cargo.[3]

Question for the Jury. — In an action for damages for the violation of a charter-party by the freighter in not supplying a cargo, the law leaves the amount to be ascertained by a jury according to the liberal principles of interpretation usually applied to commercial contracts upon consideration of all the circumstances and of the real injury sustained by the owners. Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611.

No Damages When a Full Cargo Once Loaded.— If the loading of the cargo has once been completed, the charterer is relieved from all liability, and if, because of an accident to the vessel, or for any other reason, it should become necessary to unload the cargo, he cannot be compelled to reship it or pay damages for failing to do so. General Steam Nav. Co. *v.* Slipper, 31 L. J. C. P. 185; Strugnell *v.* Friedrichsen, 12 C. B. N. S. 452, 104 E. C. L. 452.

1. Quantity of Various Articles Not Stated. — Thomas *v.* Clarke, 2 Stark. 450, 3 E. C. L. 484.

2. Quantity of Various Articles Stated. — Cockburn *v.* Alexander, 6 C. B. 791, 60 E. C. L. 791.

3. Damages Lessened by Earnings. — Wilson *v.* Hicks, 26 L. J. Exch. 242; Smith *v.* McGuire, 3 H. & N. 554, 27 L. J. Exch. 465; Dalbeattie Steamship Co. *v.* Card, 59 Fed. Rep. 159; Wood *v.* Hubbard, 62 Fed. Rep. 753; Utter *v.* Chapman, 43 Cal. 279, 38 Cal. 659; Ashburner *v.* Balchen, 7 N. Y. 262; Stone *v.* Woodruff, 28 Hun (N. Y.) 534. See also Four Hundred, etc., Hogsheads of Molasses, 4 Blatchf. (U. S.) 319; Bailey *v.* Damon, 3 Gray (Mass.) 92; Bartlett *v.* Carnley, 6 Duer. (N Y.) 194.

Goods of Third Persons. — Where a party contracts to load a ship to a given amount of tons, at a stipulated price per ton, and falls short in shipping the whole number of tons, the owner or master of the vessel is entitled to recover, in the nature of damages, freight for the deficiency; but where in such case goods are offered by a third person, to be shipped to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at the current prices, the owner or master of the vessel is bound to receive such goods, and place to the credit of the original charterer the net earnings of such substituted cargo, after making all reasonable deductions resulting from the circumstances of the case. Heckscher *v.* McCrea, 24 Wend. (N. Y.) 304, *distinguishing* Bell *v.* Puller, 2 Taunt. 285.

Substituted Cargo Lost. — A. chartered a vessel from I. to L. with a full cargo of petroleum. A. being unable to supply the cargo, the owners of the vessel agreed to cancel the charter-party and seek for another cargo on A.'s guaranteeing the vessel a certain gross freight home. The owners procured the cargo, whose estimated freight would have amounted to less than the freight guaranteed, but the vessel was lost on its way home. It was held that the owners were at any rate entitled to recover from A. the difference between the estimated and guaranteed freight, if not the whole freight guaranteed. Carr *v.* Wallachian Petroleum Co., L. R. 2 C. P. 468.

Nominal Damages. — The damages to be recovered for not loading a cargo are only nominal when, after deducting all expenses, the freight upon the substituted cargo amounts to the freight stipulated for in the charter-party. Staniforth *v.* Lyall, 7 Bing. 169, 20 E. C. L. 88. See also Puller *v.* Staniforth, 11 East 232.

Collateral Benefit. — Damages for the breach of a charter-party cannot be mitigated by showing that by reason of the breach the shipowner made a profit from the use of his other ship. See Jebsen *v.* East, etc., India Dock Co., L. R. 10 C. P. 300.

Failure or Refusal to Replace Burned Cargo. — When part of the cargo having been loaded was destroyed by fire, and the charterers then refused to furnish more, no deduction should be made for freight upon goods put in the space which had been occupied by the burned goods. Aitken *v.* Ernsthausen, (1894) 1 Q. B. 773.

No Deduction Allowed Under Circumstances for Other Cargo. — A ship was let to freight for the voyage, to take out a small cargo of lead to P., and to bring home a return cargo, for which freight was to be paid at eleven guineas a ton for the whole ship's admeasurement. If, from political circumstances, she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum less than the amount of the freight per ton. The ship being prevented from discharging, and the freighter supplying no

(b) **Obtaining Other Cargo** — *aa.* Right and Duty of Master. — When the master of the vessel has ascertained that the cargo stipulated for cannot or will not be supplied by the charterer, he may seek a cargo elsewhere.[1] And since the charterer has a right to have the amount of damages recoverable against him reduced by the freight upon a substituted cargo, it is not only the right but the duty of the master to avail himself of the ordinary means and of all proper opportunities to obtain another cargo, and a failure on his part in this regard must be taken into consideration in determining the amount of damages to be awarded.[2]

bb. Time of Waiting for Original Cargo. — The master of the vessel should not accept another cargo until the charter-party has been broken;[3] but if the charterer positively refuses to furnish the cargo, or if the master upon his arrival is advised or ascertains that the cargo stipulated for cannot be obtained, he may seek another cargo at once, without waiting the number of lay days agreed upon in the charter-party.[4]

(c) **Shipowner's Right to Damages Not Forfeited.** — An effort on the part of the owner of a vessel, after the charterer's default, to use the vessel so as to reduce the damages to a minimum, is not to be regarded as an acquiescence in the charterer's breach of the contract, and the right of the owner to recover damages is not defeated thereby.[5]

(d) **Other Employment Resulting in a Loss.** — If during the time for which the vessel was chartered she obtains other employment which results in a loss, or sustains a loss while seeking other employment, the charterer is not liable for such loss.[6]

homeward cargo, the master took in goods on freight, and brought them home together with the lead. The court held that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned. Bell *v.* Puller, 2 Taunt. 285; Puller *v.* Staniforth, 11 East 232.

Charterer Cannot Claim Freight for Substituted Cargo. — If in a charter-party there is a covenant to proceed to a foreign port and take in a cargo there on account of the charterer, and return therewith to the United States, for a stipulated hire, and the ship goes to the foreign port, and the charterer declines to put any cargo on board, the owner of the ship is not bound to come home empty, but may engage in another voyage, and take another cargo for the United States, on freight, and the freight so earned cannot be claimed by the charterer. Kleine *v.* Catara, 2 Gall. (U. S.) 61.

1. **Right to Receive Another Cargo.** — Laurie *v.* Jamieson, Abbott on Shipping 3; Bell *v.* Puller, 2 Taunt. 285; Kleine *v.* Catara, 2 Gall. (U. S.) 61; Clarke *v.* Crabtree, 2 Curt. (U. S.) 87; Heckscher *v.* McCrea, 24 Wend. (N. Y.) 304; Stone *v.* Woodruff, 28 Hun (N. Y.) 534; Johnson *v.* Meeker, 96 N. Y. 93, 48 Am. Rep. 609. See also Robertson *v.* Bethune, 3 Johns. (N. Y.) 342.

2. **Duty to Receive Another Cargo.** — The Blenheim, 10 Prob. Div. 167; Gabarron *v.* Kreeft, L. R. 10 Exch. 274; Wilson *v.* Hicks, 26 L. J. Exch. 242; Pearson *v.* Goschen, 33 L. J. C. P. 265; Harries *v.* Edmonds, 1 C. & K. 686; Gilchrist *v.* Lumberman's Min. Co., 65 Fed. Rep. 1005; Murrell *v.* Whiting, 32 Ala. 54. See also Watts *v.* Camors, 115 U. S. 353. *Compare* Hudson *v.* Hill, 43 L. J. C. P. 273.

3. Harries *v.* Edmonds, 1 C. & K. 686; Dimech *v.* Corlett, 12 Moo. P. C. 199.

4. Hall *v.* Hurlbut, Taney's Dec. (U. S.) 589; Clarke *v.* Crabtree, 2 Curt. (U. S.) 87; Baetjer *v.* Bors, 7 Ben. (U. S.) 280; Wilkie *v.* Schultz, 35 La. Ann. 491; Stone *v.* Woodruff, 28 Hun (N. Y.) 534.

5. Orr, etc., Co. *v.* Wilson, 48 La. Ann. 1313. See also Wilkie *v.* Schultz, 35 La. Ann 491.

6. **Charterer Not Liable for Losses While Employed by Others.** — In Utter *v.* Chapman, 43 Cal. 279, 38 Cal. 659, it was held that when the charterers have failed to furnish the cargo agreed upon, the proper measure of damages is the difference between the contract price and what it would have cost the plaintiff to perform the contract, less what the vessel actually earned or might have earned with reasonable diligence during the time which would have been consumed in performing the contract; but when during such time the vessel has been employed at a loss, the charterer is not liable to pay this loss. Crockett, J., delivering the opinion of the court, said: "But we did not decide, nor intend to intimate, that the defendant stood in the relation of a guarantor, incurring the hazard of whatever loss the plaintiffs might sustain by reason of a fruitless effort to obtain a profitable employment for the boat and barge. It was incumbent on the defendant to show, if he could, that a profit had been or might have been realized by the boat and barge; and, failing in this, the only result would have been that the plaintiffs would have recovered the difference between the contract price and the cost of performing the contract. But if a person should charter a ship for a number of months or for a long voyage, and should immediately thereafter repudiate the contract and refuse to perform it, no one, I apprehend, would seriously contend that the owner could send the vessel on a long and expensive voyage, in a fruitless effort to obtain profitable employ-

c. LIQUIDATED DAMAGES. — It has been said that when a sum named is clearly and unequivocally stated to be liquidated damages for the breach of a contract of affreightment, when the actual damages are difficult of ascertainment and when the amount named does not very greatly exceed the amount of the probable injury, the party injured may recover the amount named in the contract.[1]

d. PENALTY. — The stipulation in a contract of affreightment that either party shall be liable to the other in a certain penal sum upon a failure to perform any part of the agreement, is not intended in contemplation of law as a measure of damages, but as a penalty to be enforced only to the amount of the actual damages sustained by such failure, and, therefore, the amount of the recovery for a breach of such contract may be less than, or in excess of, such penalty.[2]

ment for her during the term of the charter-party, without the consent of the charterer, and thereby fasten upon the latter the whole expense of the voyage. In such a case the proper measure of damages would be the difference between the contract price and the cost which the owner would have incurred if the contract had been performed, subject only to such a reduction as the charterer would have been entitled to on his proving affirmatively that the ship had, or might by a reasonable effort have earned a profit during the term of the charter-party."

1. See the title LIQUIDATED DAMAGES.

Illustrations. — A charter-party stipulated that the cargo should be delivered to the consignees "to whom the vessel is to be addressed, inwards and outwards, paying a commission of two and one-half per cent. on total amount of freights; * * * the captain to employ charterers or their nominees at ports of loading and discharge, for business, on usual terms; failing which, they or their agents shall be at liberty to deduct from the freight the sum of fifty guineas liquidated damages." In construing this stipulation, the court said: "It is unnecessary to enter upon the learning respecting 'liquidated damages.' Where the sum named is intelligently and unequivocally stated to be the ascertained or liquidated damages for breach of a contract, and the language is not qualified or rendered doubtful by other expressions contained in the paper, and especially where the actual extent of damage is difficult of ascertainment, and the sum named is not very greatly in excess of the probable injury, the amount will be treated as 'liquidated damages.' Such are the circumstances here; and the fifty guineas, in addition to the two undisputed sums before referred to, must be deducted from the freight." Nielson *v.* Read, 12 Fed. Rep. 441.

The defendant having guaranteed that, in consideration of the plaintiff's shipping goods by his ship, she should sail with or before any other vessel in the berth, under penalty of forfeiting half the freight, and another ship having sailed before her, and the only plea being payment into court, it was held that the sailing of the vessel with or before any other was the event intended to be secured; that the half freight was therefore recoverable as liquidated damages; and that it was unnecessary for the plaintiff to give evidence of any actual damage sustained by him. Sparrow *v.* Paris, 7 H. & N. 594, 31 L. J. Exch. 137, 8 Jur. N. S. 391, 5 L. T. 799.

When a contract was made in the following terms: "We undertake to ship for you by the Warrior Queen, guaranteeing that she sails not later than the first week in July, or forfeit 2*s.* 6*d.* per ton, 300 or 400 packages, one-third yarn, at a through rate of 42*s.* 6*d.*, free of commission, provided they are forwarded per M. & Co. on or before the 29th inst.;" and the defendant, in answer to a declaration for breach of the contract by reason of the non-shipment of a portion of the packages so sent, pleaded the payment of 2*s.* 6*d.* per ton on the packages as and for the forfeit according to the agreement. It was held that the plea was good. Heugh *v.* Escombe, 4 L. T. 517.

"Estimated Damages" Mean "Liquidated Damages." — The charter-party stipulated that the vessel on arrival at M. should be entered by the respondent's agent, or in default thereof that the libelant should pay £20 estimated damages. This stipulation was not complied with, and it was held that the charterer could recover the amount named in such stipulation. Brown, J., delivering the opinion of the court, said: "The term 'estimated damages' is equivalent to the words 'liquidated damages' more frequently found in contracts. Upon such a stipulation, where the act for which the damages are given is one that is calculated to produce injury to the plaintiff and does so, and the damages are of a nature not susceptible of easy proof, the settled law is to enforce payment according to the contract if not clearly unreasonable." Gallo *v.* McAndrews, 29 Fed. Rep. 715.

2. Effect of Stipulation for a Penalty. — Dimech *v.* Coriett, 12 Moo. P. C. 199; Harrison *v.* Wright, 13 East 343; Godard *v.* Gray, L. R. 6 Q. B. 139; Watts *v.* Camors, 115 U. S. 353; The Salem's Cargo, 1 Sprague (U. S.) 389; Ye Seng Co. *v.* Corbitt, 9 Fed. Rep. 423; Higginson *v.* Weld, 14 Gray (Mass.) 165. See also the title PENALTIES.

In Abbott on Shipping (Shee's ed.), pt. 4, c. 2, § 2, it is said: "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect, recover more than the

XII. JURISDICTION. — Contracts of affreightment, whatever their form, are within the jurisdiction of courts of admiralty.[1]

damage actually sustained." This passage is quoted as a correct exposition of the law on this subject, in Godard *v.* Gray, L. R. 6 Q. B. 147, and in Watts *v.* Camors, 115 U. S. 361.

Merely Formal Unless Under Seal. — The penalty in a charter-party is not regarded as liquidated damages, and where the charter-party is not under seal the penal clause is merely formal. Swain *v.* U. S., Dev. Ct. of Cl. 35.

Technical Violation. — A technical violation of a charter-party otherwise fully executed will not entitle either party to claim the full benefit named therein. The Cyprus, 20 Fed. Rep. 144.

Penalty for Not Signing Bills of Lading. — A charter-party provided that the captain should sign the charterer's bills of lading as presented, without qualification, within a certain time after the cargo was loaded, or pay a certain amount for every day's delay as and for liquidated damages. It was held that the clause imposed a penalty and not liquidated damages, and that the charterer was only entitled to recover nominal damages. Jones *v.* Hough, 5 Exch. Div. 115; Rayner *v.* The Rederiaktiebolaget Condor, (1895) 2 Q. B. 289.

Shipowner Not Really Damaged. — Although the charter-party stipulates for the payment of a penalty in case of the abandonment of the contemplated voyage by the charterer, the shipowner cannot recover the penalty when a more profitable voyage than the one contemplated was made by the ship after the breach of the charter-party. Staniforth *v.* Lyall, 7 Bing. 169, 20 E. C. L. 88.

Doctrine Under the Louisiana Civil Code. — A shipowner agreed by a charter-party to proceed with a cargo from Cadiz to Havana, and thence to New Orleans, and the parties to the instrument bound themselves in the penal sum of $5,000 for the fulfilment of this engagement. Instead of proceeding directly to Havana, the vessel went into Porto Rico, and the charterer brought an action to recover the penal sum mentioned in the charter-party, on account of the breach which this deviation constituted. It was held that he was not entitled to recover the penalty mentioned, the breach being partial only. M'Nair *v.* Thompson, 5 Martin (La.) 525. In delivering the opinion of the court, Derbigny, J., after quoting the provisions of the Louisiana Civil Code, stated the effect of the enactments as follows: "Taking the whole of that doctrine together, it amounts to this: where the parties appear to have themselves assessed the value of the damages, which they may respectively suffer, in consequence of the nonperformance of the contract, those damages can neither be reduced nor increased, because the assessment is itself a part of the agreement. But this, it is evident, must be confined to the case of the absolute failure of performing the contract; for, when it has been performed in part, the proportion of damages is different, and no previous estimation can be supposed to have taken place."

1. Benedict's Adm. (2d ed.), § 287, p. 170; Raymond *v.* Tyson, 17 How. (U. S.) 59; Morewood *v.* Enequist, 23 How. (U. S.) 491; The Augustine Kobbe, 37 Fed. Rep. 696. See the title ADMIRALTY JURISDICTION, vol. 1, p. 661.

CONTRACTS OF HIRE (LAW OF BAILMENTS).

By Joseph R. Long.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the title BAILMENTS, vol. 3, p. 733, *and the references there given.*

I. DEFINITION. — A contract of hire is a bailment of a personal chattel, in which compensation is to be given for the use of the thing, or for labor or services about it.[1] A contract of hire is a bailment for the mutual benefit of both parties, and is subject to the law governing that class of bailments.[2]

II. CONTRACTS OF HIRE GENERALLY — 1. In General. — Contracts of hire are divisible into several classes, each presenting its own peculiar features, and requiring, therefore, a separate treatment. There are, however, certain features common to all, which are most advantageously discussed in a general way before proceeding to the consideration of the law relating more particularly to the specific classes of such contracts.

2. Essentials of the Contract — *a.* GENERALLY. — A contract of hire, to be valid, must satisfy the general requirements common to all contracts.[3] It will be necessary in this article to consider specifically only the subject-matter and the consideration of the contract.[4]

b. SUBJECT-MATTER. — **Personal Property of Whatever Kind**, whether corporeal or incorporeal, may be made the subject-matter of a contract of hire, but real estate is not properly the subject of such bailments as these contracts are ordinarily understood.[5]

1. **Definition of Contract of Hire.** — Story on Bailments, § 368; 2 Kent Com. 585; Wingate *v.* Wingate, 11 Tex. 430.

In the Roman law a contract of this sort is called *locatio* or *locatio-conductio*, the terms being equivalent. Story on Bailments, §§ 368-369.

Locatio is in general defined to be a contract, by which the temporary use of a subject, or the work or service of a person, is given for an ascertained time. 1 Bell Com., §§ 198, 385 (4th ed.).

A contract of hire arises when goods are left with the bailee to be used by him for hire. Coggs *v.* Bernard, 2 Ld. Raym. 909.

The Relation Between the Parties created by a contract of hire is that of bailor and bailee. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169.

2. See the title BAILMENTS, vol. 3, p. 732.

3. **The Essential Features of a Contract of Hire** are thus summarized by Judge Story. (1) There must be a thing *in esse* which may be the subject of the contract. (2) It should be a thing capable of being let. (3) The bailee should have a right to use, enjoy, and possess it during the period for which it is let. (4) There should be a price for the hire. (5) There should be a contract possessing a legal obligation between the parties. Story on Bailments, § 372.

There must be (1) a chattel or chattels as the subject-matter; (2) a recompense; (3) mutual assent to accomplish a specific bailment purpose towards such chattel or chattels for such recompense. Schouler's Bailments and Carriers, § 88.

See generally the title CONTRACTS, *ante*, p. 88.

Title of Bailor. — In cases of bailment for hire the question of title is not usually a matter of importance; the bailee cannot resist the enforcement of the contract merely by proof that the title of the property was not in the bailor at the time of the hiring. To enable him to do so he must show further that the bailor had no right of possession, or that there was a failure of consideration. Grooms *v.* Rust, 27 Tex. 231.

See the title BAILMENTS, vol. 3, p. 732.

As to the effect of the contract of hire being made on Sunday, see the title SUNDAY.

4. See the two succeeding subdivisions.

5. Story on Bailments, § 373; Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169.

By the Roman and Continental law real estate as well as personal property might be the subject of a contract of hire. Story on Bailments, § 373.

Slaves were the subjects of bailment for hire in *Texas* until June 19, 1865, when emancipation became an accomplished fact in that state. Johnston *v.* Davis, 32 Tex. 250. See also Tobler *v.* Stubblefield, 32 Tex. 188.

So in *Alabama* slaves were the subject of

c. COMPENSATION — **Compensation Essential.** — It is essential that a recompense be paid for the hiring. It is this that distinguishes this class of bailments from a bailment for the sole benefit of one or the other of the parties, and renders it a bailment for their mutual advantage.

The Amount of Recompense need not be specifically agreed upon, but it must be capable of being definitely ascertained. If no price is fixed it will be presumed that a compensation reasonable under all the circumstances is to be paid.

Form of Payment. — The compensation is ordinarily payable in money, but this is not essential. It may be payable in some other manner, as in goods, labor, or services, or by some other benefit or advantage.[1]

bailment until May, 1865. Leslie *v.* Langham, 40 Ala. 524.

Boiler. — One who has hired and used a boiler is liable to the owner for compensation, although the boiler was in the building of a third person, and it is immaterial whether the boiler be a fixture or not. Raddin *v.* Kidder, 111 Mass. 44.

Sawmill. — For a case involving the bailment of a sawmill, see Felton *v.* Hales, 67 N. Car. 107.

1. Compensation. — Story on Bailments, §§ 374–377; Schouler's Bailments and Carriers, § 90.

One of the distinguishing features of a contract of hire is that it is always for a reward or compensation. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169.

Compensation Need Not Be in Money. — Thus the keeper of sheep for hire may receive his pay in a part of their wool or increase. Parker *v.* Marquis, 64 Mo. 38; Robinson *v.* Haas, 40 Cal. 474.

Or the keeper of a horse may be paid by the use of it. Chamberlain *v.* Cobb, 32 Iowa 161. See the title AGISTMENT, vol. 23, p. 3.

So also the use of a horse is a sufficient consideration for breaking it to service. Francis *v.* Shrader, 67 Ill. 272; Neel *v.* State, 33 Tex. Crim. Rep. 408.

Or the board and clothes of a slave, for his services. Upson *v.* Raiford, 29 Ala. 188.

Where A delivers cattle to B, which B promises to redeliver within one year, with the natural increase, and paying for such as were lost, this is a letting for a valuable consideration. Putnam *v.* Wyley, 8 Johns. (N. Y.) 432.

Contingent or Incidental Benefit Sufficient. — Where the proprietor of a liquor store permitted an order box of an expressman to be kept in his store, and allowed people to leave packages there to be taken away by the expressman, it was held that he was a bailee for hire, and liable as such, his compensation being the advantage the arrangement afforded in bringing him business. Newhall *v.* Paige, 10 Gray (Mass.) 366. The court, by Bigelow, J., said: "A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial. The law will not inquire into its sufficiency or the certainty of its being realized by the bailee. * * * The general rule as to the consideration of a contract is well understood, and is the same in case of bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may enure to the benefit of the party making the promise."

The Safer Rule, it has been held, is to hold a bailment to be for hire, when no hire is paid, in such cases only as it is a necessary incident of a business in which the bailee makes a profit, as in the case of property left by a customer in the store of a merchant while making a purchase. Woodruff *v.* Painter, 150 Pa. St. 91, 30 Am. St. Rep. 786. See also, to the effect that a merchant in such case is a bailee for hire, Bunnell *v.* Stern, 122 N. Y. 539, 19 Am. St. Rep. 519. And see Osgoodby *v.* Liemberner, 22 Alb. L. J. 114.

The proprietor of a barber shop is a bailee for hire of a customer's hat. Dilberto *v.* Harris, 95 Ga. 571.

In Carpenter *v.* Branch, 13 Vt. 161, 37 Am. Dec. 587, it was held that a person using another's carriage at the request of the owner, neither deriving any benefit from such use other than the amusement and recreation arising therefrom to both, was liable for an injury happening thereto through his want of ordinary care and prudence.

A Bank or Merchant Accepting Commercial Paper for Collection, in the usual course of business, is a bailee for hire, and not a gratuitous bailee. Dyas *v.* Hanson, 14 Mo. App. 363; Gerhardt *v.* Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289. See the title BANKS AND BANKING, vol. 3, p. 787.

An Agricultural Society holding public fairs and receiving the property of others for purposes of exhibition is a bailee for hire of such property. Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 52 Am. Rep. 657. See also Hardegg *v.* Willards, 12 Misc. Rep. (N. Y. C. Pl.) 17; Prince *v.* Alabama State Fair, 106 Ala. 340. And see the title AGRICULTURAL SOCIETIES, vol. 2, p. 18.

A Carrier Who Is Also a Wharfinger receiving goods to be kept at his warehouse without charge until shipped by him to their destination is a bailee for hire. White *v.* Humphrey, 11 Q. B. 43, 63 E. C. L. 43, 12 Jur. 417. See the title CARRIERS OF GOODS, vol. 5, p. 154.

The Purchaser of a Barge Load of Coal, who, according to usage, is bound to take care of the barge until called for, is not a gratuitous depositary but a bailee for hire, and is bound to take ordinary care of the barge, and is responsible if he permits it to be taken away by the wrong person. Gaff *v.* O'Niel, 2 Cinc. Super. Ct. Rep. 246.

3. Standard of Diligence Required of the Bailee — *a.* DUTY TO USE ORDINARY CARE. — The bailee for hire of a chattel is required to exercise ordinary diligence in respect to the thing hired, and is responsible only for ordinary negligence; that is, he must employ that degree of diligence which a man of ordinary prudence and discretion would, under the circumstances, exercise in reference to his own property of the same kind, and he is answerable for failure to employ such diligence.[1]

What Is Ordinary Diligence in a particular case depends upon the nature and value of the thing hired and the circumstances of the bailment.[2]

Negligence a Question for Jury. — The question as to whether a bailee for hire has been guilty of negligence is ordinarily a question of fact to be determined by the jury.[3]

Act of God — Irresistible Force. — A bailee for hire is not liable for the loss of the thing bailed, without his fault, by the act of God,[4] or by irresistible force.[5]

A Vendor Retaining Possession of Goods was held to be a bailee for mutual benefit, and bound to use ordinary care. Cloyd *v.* Steiger, 139 Ill. 41.

Presumption as to Compensation. — Where the bailment is in the usual course of the bailee's business the presumption is that he is to be paid. Graves *v.* Smith, 14 Wis. 5, 80 Am. Dec. 762.

1. Bailee Must Exercise Ordinary Care. — Batson *v.* Donovan, 4 B. & Ald. 21, 6 E. C. L. 373; Maxwell *v.* Eason, 1 Stew. (Ala.) 514; McGregor *v.* McDevitt, 64 Ill. 261; Lobenstein *v.* Pritchett, 8 Kan. 213; Maynard *v.* Buck, 100 Mass. 40; Cowles *v.* Pointer, 26 Miss. 253; Archer *v.* Sinclair, 49 Miss. 343; Illinois Cent. R. Co. *v.* Tronstine, 64 Miss. 834; State *v.* Meagher, 44 Mo. 356, 100 Am. Dec. 298; Johnson *v.* Ruth, 34 Mo. App. 659; McLoughlin *v.* New York Lighterage, etc., Co., 7 Misc. Rep. (N. Y. C. Pl.) 119; Briggs *v.* Taylor, 28 Vt. 180. See also succeeding sections of this article in which the liabilities of particular classes of bailees for hire are discussed.

A bailee for hire is liable for injury to property occasioned by his negligence. Wise *v.* Freshley, 3 McCord L. (S. Car.) 547.

Ordinary Diligence or care means that degree of care, attention, or exertion which, under the circumstances, a man of ordinary prudence and discretion would exercise in reference to the particular thing, were it his own property. Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Jackson *v.* Robinson, 18 B. Mon. (Ky.) 1; Haas *v.* Taylor, 80 Ala. 459; Russell *v.* Koehler, 66 Ill. 459; Johnson *v.* Ruth, 34 Mo. App. 659; Heathcock *v.* Pennington, 11 Ired. L. (33 N. Car.) 640; Swann *v.* Brown, 6 Jones L. (51 N. Car.) 150, 72 Am. Dec. 568; Briggs *v.* Taylor, 28 Vt. 180.

Ordinary diligence is that measure of diligence ordinarily employed in a given business, which is a question to be determined from the evidence. Zell *v.* Dunkle, 156 Pa. St. 353. See cases *supra*, and the titles BAILMENTS, vol. 3, p. 732; NEGLIGENCE.

Usage. — It is competent to show a usage of trade to qualify a bailee's liability. Kelton *v.* Taylor, 11 Lea (Tenn.) 264, 47 Am. Rep. 284. See also Maynard *v.* Buck, 100 Mass. 40.

Assent of Bailor to Degree of Care Employed. — A bailee for hire cannot absolve himself from liability for failure to take reasonable care of the thing intrusted to him, simply by showing that the bailor knew and acquiesced in the degree of care employed; and if he was ignorant of material facts in relation to the manner in which the thing was kept, and also informed the bailee that such manner was unsafe, a jury would not be warranted in finding a waiver by the bailor of due care on the part of the bailee. Conway Bank *v.* American Express Co., 8 Allen (Mass.) 512.

The Bailee Is Liable for a Conversion of the property irrespective of the question of negligence. Graves *v.* Smith, 14 Wis. 5, 80 Am. Dec. 762.

A Person Not a Party to the Contract of hiring is not responsible in an action brought on the contract for a breach thereof, although the injury to the thing hired result from his carelessness and negligence. Graves *v.* Moses, 13 Minn. 335.

2. Ordinary Diligence Determined by Circumstances. — Line *v.* Mills, 12 Ind. App. 100; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Perry *v.* Beardslee, 10 Mo. 568; Johnson *v.* Ruth, 34 Mo. App. 659; Chase *v.* Boody, 55 N. H. 574; Heathcock *v.* Pennington, 11 Ired. L. (33 N. Car.) 640; Kelton *v.* Taylor, 11 Lea (Tenn.) 264, 47 Am. Rep. 284; Pridgen *v.* Buchannon, 24 Tex. 655.

The care required of a bailee for hire must be graduated according to the character of the property, its value, the convenience of its being made secure, and the facility for its being stolen and the temptations thereto. State *v.* Meagher, 44 Mo. 356, 100 Am. Dec. 298.

3. Negligence a Question for Jury. — Maxwell *v.* Eason, 1 Stew. (Ala.) 514; West *v.* Blackshear, 20 Fla. 457; Hambleton *v.* McGee, 19 Md. 43; Perry *v.* Beardslee, 10 Mo. 568; Rose *v.* Newman, 26 Tex. 131, 80 Am. Dec. 646.

4. Loss by Act of God. — A bailee for hire is not answerable for a loss caused by the act of God, as where boats in charge of a bailee for hire are swept away in an ice gorge. Jones *v.* Gilmore, 91 Pa. St. 310. See the title ACT OF GOD, vol. 1, p. 584.

5. Loss by Irresistible Force. — Where property in the possession of a bailee for hire is destroyed by duress of threats, or actual irresistible violence, as where the bailee has been

Special Contract. — The liability of the bailee may be increased or diminished by special agreement between the parties.[1]

b. NEGLIGENCE — BURDEN OF PROOF — **Burden of Proof Rests upon Bailor.** — In general the burden of proof rests upon the bailor for hire to show the negligence of the bailee, and not upon the latter to establish affirmatively that he has exercised ordinary care.[2] The law will not ordinarily presume negligence from the mere fact that the property was lost or was returned in a damaged condition. When such is the case it is the duty of the bailee to account for such loss or injury, and this, when done, throws upon the bailor the burden of showing that the loss or injury was occasioned by the negligence of the bailee.[3]

compelled to burn cotton under threats of officers commanding Confederate forces, there is no conversion, and the bailee is not liable. Waller *v.* Parker, 5 Coldw. (Tenn.) 476.

1. Special Contract. — A bailee for hire, not a common carrier, may relieve himself from the obligation to use ordinary care and skill, by special contract. Alexander *v.* Greene, 3 Hill (N. Y.) 9.

But where property bailed was destroyed by fire resulting from the negligence of the bailee for hire, it was held that an exemption in the contract from "damage or loss by fire" did not exonerate him from liability. Lamb *v.* Camden, etc., R., etc., Co., 46 N. Y. 271, 7 Am. Rep. 327.

The reception of goods by a bailee for hire under an invoice stating that such goods are at the risk of the bailee against loss by fire or otherwise until returned, no other agreement appearing, conclusively implies a promise on the part of the bailee to assume such risk, and the bailment is a sufficient consideration for such promise. Reinstein *v.* Watts, 84 Me. 139. See also as to the effect of special contract, *infra*, this title, *Hire of Things — Duties and Liabilities of the Hirer — Effect of Special Contract; Hire of Labor and Services — Duties and Obligations of the Bailee — In General.* And see the titles CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF PASSENGERS, vol. 5, p. 474.

2. Burden of Proving Negligence Rests upon Bailor. — Hambleton *v.* McGee, 19 Md. 43; Trotter *v.* McCall, 26 Miss. 410; Newton *v.* Pope, 1 Cow. (N. Y.) 109; Lamb *v.* Camden, etc., R., etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; Stewart *v.* Stone, 127 N. Y. 500; Browne *v.* Johnson, 29 Tex. 40.

In an action on the case against the hirer of a horse for injury thereto, the burden of proof lies on the bailor. It is not enough for him to prove the injury; he must show that it was due to the negligence of the hirer. Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

3. 2 Parsons on Contracts 125; Clark *v.* Spence, 10 Watts (Pa.) 335; Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487; Winthrop Sav. Bank *v.* Jackson, 67 Me. 571, 24 Am. Rep. 56.

Bailee Must Account for Loss or Injury of Thing Bailed. — After the bailor has proved the contract and delivery of the property, the burden of proof is on the bailee to show its loss and the manner thereof, and when he has done so this throws the burden of proving negligence of the bailor. Beckman *v.* Shouse, 5 Rawle (Pa.) 179, 28 Am. Dec. 653; Clark *v.* Spence, 10 Watts. (Pa.) 335; Runyon *v.* Caldwell, 7 Humph. (Tenn.) 134.

As a general rule when a bailee fails on demand to redeliver the property, and the goods cannot be found, the imputation of negligence arises, but such *prima facie* case may be overcome by proof that the loss was occasioned without the fault of the bailee, and the onus continues upon the bailor to prove that the loss was due to the bailee's want of care; and although the evidence of the bailee explanatory of the nondelivery of the property may justify or require the inference of negligence on his part, the affirmative of the issue is not shifted, but remains with the plaintiff throughout the trial. Stewart *v.* Stone, 127 N. Y. 500.

But where the evidence makes out a *prima facie* case against the bailee it is incumbent upon him to offer evidence to rebut this presumption. J. Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121; Wintringham *v.* Hayes, 144 N. Y. 1, 43 Am. St. Rep. 725. See also Higman *v.* Camody, 112 Ala. 267.

In Order to Make Out a Prima Facie Case of Negligence on the part of the bailee there must be something to throw suspicion on the conduct of the bailee. Perry *v.* Beardslee, 10 Mo. 568, 14 Mo. 88.

When the Circumstances Indicate Culpable Negligence on his part the bailee must show such facts as will exonerate him. Arnot *v.* Branconier, 14 Mo. App. 431.

Proof that the defendant hired a horse and buggy of the plaintiff to take a drive, that he failed to return them, and that they were subsequently found in the suburbs of the city in a badly damaged condition, makes a *prima facie* case in an action by the bailor for damages. Arnot *v.* Branconier, 14 Mo. App. 431.

Proof that a yacht left with a bailee for hire to be taken care of during the winter is found in the spring to be damaged beyond what would result from ordinary wear and tear affords a presumption of negligence against the bailee, requiring him to offer evidence to rebut the presumption. Wintringham *v.* Hayes, 144 N. Y. 1, 43 Am. St. Rep. 725.

Where the return of the chattel in a damaged state raises a presumption of negligence, the presumption may be rebutted by proof that the damage was not caused by the negligence of the bailee. McLoughlin *v.* New York Lighterage, etc., Co., 7 Misc. Rep. (N. Y. C. Pl.) 119.

The Mere Fact that a Hired Horse Became Sick or diseased while in the possession of the hirer raises no presumption of negligence on his part, but the presumption is the other way. Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296.

Where a hired horse was returned to the letter with his knees broken in consequence of a fall, it was held in an action by the letter

Contrary Doctrine. — In some jurisdictions, however, it is held that upon proof of the loss or injury of the thing hired the burden of proof is on the bailee for hire to show that he has exercised due diligence.[1]

4. Character of the Bailee's Possession.[2] — A bailee to whom a personal chattel has been delivered under a contract of hire acquires by the bailment a special qualified property therein for the purposes of the bailment which will enable him to maintain an action against any one who violates his right of possession or commits a trespass upon the thing bailed.[3]

against the hirer that the plaintiff could not recover without giving some evidence of negligence. Cooper *v.* Barton, 3 Campb. 5, note.

But where a horse hired in a sound condition was returned badly foundered so that he died, it was held competent for the jury to infer negligence from the evidence in the case. Hambleton *v.* McGee, 19 Md. 43.

No Presumption of Negligence Arises from the mere fact that the loss of goods delivered to a bailee to be manufactured resulted from the destruction of his factory by fire. Stewart *v.* Stone, 127 N. Y. 500.

Failure of Bailee to Account for Loss. — If the bailee of goods for hire fails to return them, or returns them in a damaged state, and gives no explanation of how the loss or injury occurred, the burden of proof is on him to show that it was not occasioned by his negligence. Seals *v.* Edmondson, 71 Ala. 509; Logan *v.* Mathews, 6 Pa. St. 417.

The Rule Is Founded upon Necessity, and upon the presumption that a party who from his situation must have peculiar if not exclusive knowledge of facts if they exist, is best able to prove them. If the bailee, in whose possession and under whose care and control goods are, will not account for the refusal or failure to deliver them on demand of his principal, it is not a violent presumption that he has wrongfully converted or wrongfully retains them. Or if there was injury to or loss of them during his possession, it is for him to show the circumstances, acquitting himself of a want of the care in keeping them that it was his duty to bestow. *Per* Brickell, C. J., in Seals *v.* Edmondson, 71 Ala. 509.

A bailee for hire who fails to give any such explanation of his failure to return the property intrusted to him as will enable the bailor to test his good faith ought to be held to proof that he exercised ordinary diligence in the care of it. The bailee is entitled to the benefit of any inferences fairly deducible from his conduct on the demand of the property, but such inferences are for the jury. Woodruff *v.* Painter, 150 Pa. St. 91, 30 Am. St. Rep. 786. See also Koch *v.* National Express Co., 1 Lack. Leg. N. (Pa.) 289.

1. Contrary Doctrine — *England.* — In Mackenzie *v.* Cox, 9 C. & P. 632, 38 E. C. L. 263, it was held that if a dog in charge of a bailee for hire was lost, the onus was on the bailee to show that the loss occurred without his fault.

Alabama. — In an action against a cotton ginner for the conversion of cotton seed on which he had a lien for his charges, and which was not forthcoming on demand after the lien had been discharged, it was held that the burden was on the defendant to show that it perished, was destroyed, lost, or stolen notwithstanding he had employed ordinary diligence in preserving it. Haas *v.* Taylor, 80 Ala. 459.

Georgia. — In all cases of bailments after proof of loss, the burden of proof is on the bailee to show proper diligence. Georgia Code 1882, § 2064; Central R., etc., Co. *v.* Anderson, 58 Ga. 393; Western Union Tel. Co. *v.* Fontaine, 58 Ga. 433; Hawkins *v.* Haynes, 71 Ga. 40.

"Loss" in this section does not mean merely a casual losing of things bailed, but means loss in the sense of injury or damage. Hawkins *v.* Haynes, 71 Ga. 40.

Illinois. — It is held in Illinois that where goods are placed in the hands of a bailee in good condition, and are returned in a damaged state, or not returned at all, the law will presume negligence on the part of the bailee, and impose on him the burden of showing that he exercised such care as was required by the bailment. Bennett *v.* O'Brien, 37 Ill. 250; Cumins *v.* Wood, 44 Ill. 416, 92 Am. Dec. 189; Funkhouser *v.* Wagner, 62 Ill. 59; Burlingame *v.* Horne, 30 Ill. App. 330.

Massachusetts. — Where a bailee for hire fails to return the property, alleging that it has been stolen from him, he must show that he used due and reasonable care of it. Brown *v.* Waterman, 10 Cush. (Mass.) 117; Cass *v.* Boston, etc., R. Co., 14 Allen (Mass.) 448. But he need not show the precise manner in which the loss occurred. Lichtenhein *v.* Boston, etc., R. Co., 11 Cush. (Mass.) 70.

See also in *Nevada*, Donlan *v.* Clark, (Nev. 1896) 45 Pac. Rep. 1; and in *New York*, Nichols *v.* Balch, 8 Misc. Rep. (N. Y. Super. Ct.) 452; and in *Vermont*, Gleason *v.* Beers, 59 Vt. 581, 59 Am. Rep. 757.

A Full Discussion of this branch of the subject as applicable to common carriers and depositaries for hire will be found under the appropriate titles. See the titles AGISTMENT, vol. 2, p. 3; CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; INNS AND INNKEEPERS; WAREHOUSEMEN; WHARVES, etc.

2. For the rights of the bailee in the thing bailed in the specific classes of contracts of hire, see elsewhere in this article.

3. Bailee May Sue for Violation of Possession. — Knight *v.* Davis Carriage Co., 71 Fed. Rep. 662, 30 U. S. App. 664; Magee *v.* Toland, 3 Port. (Ala.) 36; Hare *v.* Fuller, 7 Ala. 717; Stoker *v.* Yerby, 11 Ala. 322; Cox *v.* Easley, 11 Ala. 362; McGraw *v.* Patterson, 47 Ill. App. 87; Engel *v.* Scott, etc., Lumber Co., 60 Minn. 39; Boyle *v.* Townes, 9 Leigh (Va.) 158. See the titles TRESPASS; TROVER AND CONVERSION.

The bailee of goods may maintain trover or trespass against every one but the legal owner,

The General Property in the thing bailed, however, remains in the bailor, and the bailee is not authorized by the bailment to sell or dispose of the chattel so as to defeat the right of the bailor.[1]

An Unauthorized Disposition or Use by the bailee of the thing bailed may terminate the bailment and restore the bailor to all his rights in the property.[2]

III. The Several Kinds of Contracts of Hire — 1. General Classification.— Contracts of hire are divisible into two general classes: First, *locatio rei*, or the hire of a thing, where the bailee acquires a temporary use of the thing hired for a consideration to be paid by him. Secondly, *locatio operis*, or the hire of labor and services, where the bailee is hired by the bailor to bestow some work or care on the thing hired, the consideration in this case being paid by the bailor. Bailments of the second class are further divisible into *locatio operis faciendi*, where the labor or attention is to be bestowed upon the chattel, and *locatio operis mercium vehendarum*, or the hire of carriage, where the bailee is hired to convey the goods from place to place. The former of these subdivisions consists of the *locatio operis faciendi*, strictly so called, and *locatio custodiæ*, or the hire of custody, where the bailee is to keep the thing bailed for reward.[3]

2. Hire of Things — *a.* In General. — The first class of bailments for hire to be considered is the *locatio rei*, or the hire of a thing, in which the bailee, or hirer, receives a chattel from the bailor, or letter, to be used by him for a consideration to be paid to the letter.

and if his possession is coupled with an interest he may maintain trespass even against the owner for tortiously taking the goods out of his possession. Jones *v.* M'Neil, 2 Bailey L. (S. Car.) 466.

A bailee for hire who delivers goods to a common carrier to be carried to their destination may maintain an action in his own name against the carrier for negligence in consequence of which the bailee lost his reward and was compelled to pay damages to the owners of the goods. McGill *v.* Monette, 37 Ala. 49.

Though a bailee for hire may maintain an action of detinue against mere wrongdoers, yet persons who claim under the will of the bailor are not to be considered as wrongdoers against whom the bailee may maintain an action. Green *v.* Harris, 3 Ired. L. (25 N. Car.) 210.

Bailee Having Lien. — A bailee of goods has a qualified property in the thing bailed; and a bailee having a lien on the goods may defend his possession against the claim of the owner. Darter *v.* Brown, 48 Ind. 395. See *infra*, this title, *Hire of Labor and Services — Rights of the Bailee — Right to Lien.*

Where the Bailee Is Not Liable Over to the Bailor it has been held that he could not recover for an injury to the thing bailed. Thus the bailee of a horse was not permitted to recover for injuries to the animal by a third person, since without his negligence he was not liable over to the bailor. Claridge *v.* South Staffordshire Tramway Co., (1892) 1 Q. B. 422.

Damages — Evidence. — Evidence as to how much a bailee for hire paid to have the damages resulting to the property from the defendant's negligence repaired is admissible in an action for damages. Schoenholtz *v.* Third Ave. R. Co., 14 Misc. Rep. (N. Y. City Ct.) 461.

1. Bailee Cannot Dispose of Thing Bailed. — Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Robinson *v.* Haas, 40 Cal. 474; Montague *v.* Ficklin, 18 Ill. App. 99; Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249; Ingersoll *v.* Emmerson, 1 Ind. 76; Conable *v.* Lynch, 45 Iowa 84; Chism *v.* Woods, Hard. (Ky.) 540, 3 Am. Dec. 740; Vaughn *v.* Hopson, 10 Bush (Ky.) 337.

A purchaser of property from a bailee hired to transport it who represents himself to be the owner acquires no title. Carmichael *v.* Buck, 12 Rich. L. (S. Car.) 451; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508. See the title Sales.

Where a person by fraudulent representations obtains goods to sell to an alleged customer, with authority to sell them to that customer only, and instead of so selling them pawns them to a pawnbroker, the latter acquires no title. Heilbronn *v.* McAleenan, (Supreme Ct.) 1 N. Y. Supp. 875. See also Citroen *v.* Adams, (Supreme Ct.) 5 N. Y. Supp. 669.

The mere delivery of a nonnegotiable instrument to a bailee for the purpose of carriage does not clothe such bailee with an apparent title which, if transferred, will defeat the right of the true owner. Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549.

The bailee of personal property cannot subject it to a lien for repairs as against the owner, without his consent. Small *v.* Robinson, 69 Me. 425, 31 Am. Rep. 299.

2. Breach of Contract Terminates Bailment. — Emerson *v.* Fisk, 6 Me. 200, 19 Am. Dec. 206.

Where a horse-trainer who had received a mare to be kept, trained, and exhibited, did not comply with one of the terms of the contract, and used the mare on other occasions and for other purposes than for training, it was held that the owner might terminate the bailment and recover possession of the mare. Barringer *v.* Burns, 108 N. Car. 606.

See *infra*, this section, *Hire of Things — Termination of the Contract.*

3. Story on Bailments, §§ 370, 421, 422; 2 Parsons on Contracts 121.

b. RIGHTS AND OBLIGATIONS OF THE PARTIES — (1) *Of the Letter* — (a) **Rights of the Letter** — *aa.* AGAINST THE HIRER. — Since the rights of the letter against the hirer are determined entirely by the liability of the latter to the former, a separate treatment of this branch of the subject is unnecessary, and the law relating thereto will be found in a subsequent section of this article.[1]

bb. AGAINST THIRD PERSONS. — As a general rule the letter cannot maintain trespass or trover against third persons for any injury to or conversion of the thing hired during the time it is so hired;[2] but if the hirer do any act inconsistent with the bailment, and calculated to defeat the rights of property of the owner, the latter may treat the bailment as ended and maintain an action.[3] So, also, the letter may maintain an action against a third person for a permanent injury to the chattel during the term.[4]

(b) **Duties and Obligations of the Letter** — *aa.* IN GENERAL. — The principal obligations of the letter to hire, deduced from the nature of the contract, are: to deliver the thing hired to the hirer; to refrain from every obstruction to the use of it by him during the period of the bailment; to do no act which shall deprive him of the thing; to warrant the title and right of possession to him in order to enable him to use the thing hired; with certain qualifications to keep the thing in suitable order and repair for the purposes of the bailment; and to warrant it to be free from any fault inconsistent with the proper use or enjoyment of it.[5]

bb. WARRANTY OF THING HIRED — **Of Character and Condition.** — The letter, by the bailment, impliedly warrants that the thing hired is of a character and in a condition to be used as contemplated by the contract, and he is liable for damages occasioned by the faults or defects of the article hired.[6]

1. See *infra*, this section, *Of the Hirer — Duties and Liabilities of the Hirer.*

2. **Letter Cannot Sue Third Persons — General Rule.** — Gordon *v.* Harper, 7 T. R. 9; Pain *v.* Whittaker, R. & M. 99, 21 E. C. L. 390; Lexington, etc., R. Co. *v.* Kidd, 7 Dana (Ky.) 245; Wyman *v.* Dorr, 3 Me. 183; Steele *v.* Williams, Dudley L. (S. Car.) 16, 31 Am. Dec. 546; Clarke *v.* Poozer, 2 McMull. L. (S. Car.) 434; Bell *v.* Monahan, Dudley L. (S. Car.) 38, 31 Am. Dec. 548; Caldwell *v.* Cowan, 9 Yerg. (Tenn.) 262; Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

If the Hirer Decline to Sue, and request the owner to do so, the latter may maintain an action against a third person for the possession of the chattel during the term. Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540.

Where the Bailment Is Terminable at the Option of the Letter, he, since he has the right of resuming the property at any time, may maintain an action against a stranger for any tortious dispossession of the property from the hirer. Drake *v.* Redington, 9 N. H. 243.

3. Sargent *v.* Gile, 8 N. H. 325; Clark *v.* Poozer, 2 McMull. L. (S. Car.) 434; Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197; Briggs *v.* Bennett, 26 Vt. 146; Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216.

Wrongful Sale by Hirer. — The letter of goods may recover in trover against a *bona fide* purchaser to whom the hirer has wrongfully sold them. Cooper *v.* Willomatt, 1 C. B. 672, 50 E. C. L. 672, 9 Jur. 598; Marner *v.* Bankes, 16 W. R. 62, 17 L. T. N. S. 147; Sanborn *v.* Colman, 6 N. H. 14, 23 Am. Dec. 703.

So, also, he may recover from a person with whom the hirer has made an unauthorized exchange, the bailment being thus terminated. Atkinson *v.* Jones, 72 Ala. 248.

4. **Permanent Injury.** — Mears *v.* London, etc., R. Co., 11 C. B. N. S. 850, 103 E. C. L. 850.

In Smith *v.* Kurrus, 31 Ill. App. 276, it was held that the owner of a hired vehicle, and not the hirer, was the proper person to bring suit against a third person for an injury to the vehicle while hired.

5. Story on Bailments, § 383; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

The Letter of a Traction Engine Is Not Liable to Third Persons for injuries received through the negligence of the hirer while using the engine on a highway. Smith *v.* Bailey, (1891) 2 Q. B. 403.

6. **Warranty of Thing Hired.** — Story on Bailments, §§ 390–391*a*; 2 Parsons on Contracts 126; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Sims *v.* Chance, 7 Tex. 561.

The letter of a horse is answerable to the hirer for injuries resulting from the unfitness of the horse. Fowler *v.* Lock, L. R. 10 C. P. 90; Horne *v.* Meakin, 115 Mass. 326.

The letter of a coach, with horses and driver, is liable to a person riding therein at the invitation of the hirer, for injuries to him resulting from defects in the coach. Glenn *v.* Winters, 17 Misc. Rep. (N. Y. Supreme Ct.) 597.

The hirer of a horse may recoup his expenses incurred in consequence of the failure of the horse to perform the service contracted for, without the fault of the hirer, against the value of his hire. Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

Hidden Defects. — One who lets a horse does not warrant that it is free from defects which he does not know of, and which could not have been discovered by the exercise of due care. Copeland *v.* Draper, 157 Mass. 558, 34 Am. St. Rep. 314.

Of Title. — So, also, a hiring implies a warranty of title, and should the thing hired be taken from the hirer by one having a paramount title, it seems that the hirer is entitled to a *pro tanto* abatement of the price of hire.[1]

Of Full and Useful Service. — It has been held that a contract of hiring does not imply a guaranty of a full and useful service of the thing hired for the entire term, and the hirer is not entitled to an abatement if the thing hired perishes or is lost or destroyed during the term.[2] It seems doubtful, however, whether the doctrine thus established would be observed in all cases.[3]

cc. DUTY TO REPAIR. — The authorities are not entirely settled as to the obligation of the letter to maintain the thing hired in good order during the bailment. The question is liable also to be affected by the usages of trade, the local customs, or the express or implied agreement of the parties. In general the rule seems to be that independently of special agreement, express or implied, the letter is not bound to make such repairs as are rendered necessary by ordinary wear and tear, but he is ordinarily bound to provide that the article hired shall be in good condition to last during the time for which it is hired, and beyond that he is liable only for extraordinary expenses arising from unexpected causes.[4]

Fraudulent Concealment of Defects. — Where the letter of a slave fraudulently concealed his unsoundness, it was held that the hirer, on discovering it, might return the slave and the owner could not recover for the hire. James *v.* Neal, 3 T. B. Mon. (Ky.) 369; Reading *v.* Price, 3 J. J. Marsh. (Ky.) 61, 19 Am. Dec. 162. See also Story on Bailments, § 391*a*.

Hirer Using Chattel with Knowledge of Defects. — Where the defendants contracted to pay a certain sum per day for the use of a pump and for the services of a man to operate it, it was held in an action to recover on such contract that the plaintiff's right to recover was not defeated by the defendant's counterclaim for damages upon an alleged warranty, where it appeared that the pump was defective when received, and that the defendant, with full knowledge of this fact, put it in operation. Nye *v.* Iowa City Alcohol Works, 51 Iowa 129, 33 Am. Rep. 121.

The hirer of a barge represented by the letter to be in good condition has no right to rely upon such representations in continuing to use the barge after discovering it to be unseaworthy. Higman *v.* Carmody, 112 Ala. 267.

The hirer of a horse has a right to rely on its suitability for the work for which it was hired, but it is his duty, on discovering its unfitness for the work, and its liability to injury by further use, to stop using it, unless the owner consent to the use. Bass *v.* Cantor, 123 Ind. 444.

1. A Hiring Implies a Warranty of Title, consequently, should the title fail from any legal cause, by either an eviction by superior title, or authorized act of the government, then there is so far a failure of consideration, and the hirer is entitled to a *pro tanto* abatement of the price of hire. Mundy *v.* Robinson, 4 Bush (Ky.) 342; Hughes *v.* Todd, 2 Duv. (Ky.) 189.

Thus, in the case of the hire of slaves, where the bailment was interrupted by the abolishment of slavery, it has been held that the hirer was not required to pay the hire for the unexpired portion of the term. Mundy *v.* Robinson, 4 Bush (Ky.) 342; Wilkes *v.* Hughes, 37 Ga. 361. *Compare* Leslie *v.* Langham, 40 Ala. 524.

2. No Warranty of Continued Enjoyment. — Hughes *v.* Todd, 2 Duv. (Ky.) 189. Thus it was held that the hirer of a slave was not entitled to an abatement of the hire on account of the slave's running away during the term. Janes *v.* Buzzard, Hempst. (U. S.) 240; Hughes *v.* Todd, 2 Duv. (Ky.) 189; Scherer *v.* Upton, 31 Tex. 617. See also Alston *v.* Balls, 12 Ark. 664; Ellett *v.* Bobb, 6 Mo. 323; Perkins *v.* Reeds, 8 Mo. 33.

It was so held in some states in the case of the sickness or death of the slave during the term. Outlaw *v.* Cook, Minor (Ala.) 257; Perry *v.* Hewlett, 5 Port. (Ala.) 318; Ricks *v.* Dillahunty, 8 Port. (Ala.) 134; Harrison *v.* Murrell, 5 T. B. Mon. (Ky.) 360; Harmon *v.* Fleming, 25 Miss. 135; Dickinson *v.* Cruise, 1 Head (Tenn.) 258; Hicks *v.* Parham, 3 Hayw. (Tenn.) 224, 9 Am. Dec. 745; Young *v.* Forgey, 4 Hayw. (Tenn.) 10. *Compare*, in other states, Dudgeon *v.* Teass, 9 Mo. 867; Bacot *v.* Parnell, 2 Bailey L. (S Car.) 424; McLemore *v.* McClellan, 17 Tex. 122; Townsend *v.* Hill, 18 Tex. 422; Birge *v.* Wanhop, 21 Tex. 478; George *v.* Elliott, 2 Hen. & M. (Va.) 5.

Where the hirer killed the slave he was held liable for the hire for the entire term. Callihan *v.* Johnson, 22 Tex. 596.

But in Muldrow *v.* Wilmington, etc., R. Co., 13 Rich. L. (S. Car.) 69, it was held that if a slave hired for a term die during the term the hire must be apportioned, although his death was caused by the hirer's negligence.

3. See Story on Bailments, §§ 417, 417*a*, and contrary decisions in last note.

Where the Property Has Been Unlawfully Attached during the term by a creditor of the letter, the hirer is, notwithstanding, liable for the hire. Hartford *v.* Jackson, 11 N. H. 145.

4. Duty of Bailor to Repair. — There seems to have been very little direct litigation as to the duty of the letter to keep the thing hired in repair. The early authorities on this subject relate mostly to the lease of real estate. See 2 Parsons on Contracts 127.

The Rule of the Civil Law that the bailor for

(2) *Of the Hirer* — (a) **Rights of the Hirer — Right to Possession and Enjoyment.** — While the general property in the thing hired remains in the owner, the hirer acquires by the bailment a special property therein, and is entitled to the exclusive use and control of it during the period of hire.[1] He may, therefore, maintain an action for any injury to the property, or tortious dispossession thereof, or any other invasion of his rights during the continuance of the bailment, whether by a stranger[2] or by the letter himself.[3]

The Letter Is Not Permitted to Interfere with, nor in any way to obstruct, the hirer in the use of the thing hired.[4] He cannot forcibly repossess himself of the chattel, even though the hirer misuses it, but he must resort to his legal remedy.[5]

hire was bound to keep the thing hired in order is not recognized by the common law. Whether the bailor or the bailee is to keep the article hired in a state of repair while in the custody of the bailee, seems to depend largely on custom and usage and the character of the article, when the matter is not regulated by express contract between the parties. Central Trust Co. *v.* Wabash, etc., R. Co., 50 Fed. Rep. 857.

The Rule as to the Repair of Cars, as established by the usage of the railroads in this country, is that a railway company receiving cars from another company for hire shall repair such cars at its own expense, unless they are inspected and branded as defective when received. Central Trust Co. *v.* Wabash, etc., R. Co., 50 Fed. Rep. 857.

Where the Letter of a Carriage Agreed to Keep It in Repair without cost to the hirer, it was held that the hirer was not liable for repairs made necessary by accident, and not by the fault of the hirer. Reading *v.* Menham, 1 M. & Rob. 234.

Agreement by Hirer to Pay for Repairs. — Where the hirer of a wagon and team has agreed to pay for repairs to the wagon while in his service, the fact that the damage was occasioned by a defect in the harness is no defense to an action on the contract. Riley *v.* Lowry, (Supreme Ct.) 18 N. Y. Supp. 299.

Extraordinary Expenses — Sick Horse. — If a hired horse be taken sick while hired, without the fault of the hirer, the letter must bear the necessary expenses incurred in caring for him, whether he dies or recovers. Pothier, Contrat de Louage, n. 129; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

The hirer of a horse is not liable for the expenses in taking care of the animal if it becomes sick without his fault while in his hands, but the owner is liable to a third person employed by the hirer, with the knowledge of the owner, to care for the horse. Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296.

1. Hirer's Property in Thing Hired. — Hartford *v.* Jackson, 11 N. H. 145; Hickok *v.* Buck, 22 Vt. 149.

A claim for the use of a chattel by the defendant is supported by proof that he had it in his possession, with the right to use it whenever he pleased. Reilly *v.* Rand, 123 Mass. 215.

Property Bailed for Hire for a Specific Term Is Not Subject to Attachment for debts of the bailor during the term. Hartford *v.* Jackson, 11 N. H. 145.

Nor can the property be attached for the debts of the bailee. Thus where one man let personal chattels to another for an indefinite time, and the latter, for the purpose of using them to better advantage, put them with chattels of his own, and, while thus in possession, the whole were attached as his property and sold, it was held that the letter of the chattels might maintain trespass against the attaching officer. Sibley *v.* Brown, 15 Me. 185.

2. Hirer's Right of Action Against Third Persons. — Croft *v.* Alison, 4 B. & Ald. 590, 6 E. C. L. 614; Magee *v.* Toland, 8 Port. (Ala.) 36; Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372 (*citing* 2 AM. AND ENG. ENCYC. OF LAW (1st ed.) 61; St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169; Little *v.* Fossett, 34 Me. 545, 56 Am. Dec. 671; American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Am. St. Rep. 479.

The hirer of a chattel may maintain an action of tort against a third person for injury thereto, although he has not paid the letter for repairs made by him and charged to the hirer at his request. Brewster *v.* Warner, 136 Mass. 57, 49 Am. Rep. 5.

The hirer of a horse may recover full damages for an injury thereto while in his possession, beyond the particular loss which he, by reason of his possession, has sustained, and a judgment in his favor is a bar to an action by the bailor for the same injury. Jatho *v.* Green, etc., St. Pass. R. Co., 4 Phila. (Pa.) 24.

3. Right of Action Against Letter. — M'Connell *v.* Maxwell, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428; Bowen *v.* Coker, 2 Rich. L. (S. Car.) 13.

If the letter of a horse for a specified time takes it away before the expiration of the time, the hirer may recover in trover damages for the loss of the use of the horse during the residue of the term. Hickok *v.* Buck, 22 Vt. 149.

4. 2 Parsons on Contracts 126.

A Temporary Repossession of the chattel for the purpose of making repairs, where the owner is bound to repair, is not an obstruction of the hirer's rights, but the chattel must be returned. Story on Bailments, § 385.

Where the hirer of a slave refused to provide necessary medical attendance for him, and insisted on his laboring when physically unable to do so, it was held that the owner might take possession of the slave for the purpose of caring for him, and upon the refusal of the hirer to receive him again when restored to health, the entire amount of hire was recoverable. Hogan *v.* Carr, 6 Ala. 471.

5. Misuse by Hirer. — If the hirer of a horse to ride to a designated place ride to another

Hirer Cannot Sell. — The hirer of a chattel has no such property therein as will authorize him to sell the chattel, and a sale by him without the consent of the owner passes no title even to a purchaser in good faith.[1]

(b) **Duties and Liabilities of the Hirer.** — *aa.* In General. — The obligations of the party taking a thing to hire are: to put the thing to no other use than that for which it is hired; to use it well; to take care of it; to restore it at the time appointed; to pay the price of hire; and, generally, to observe whatever is prescribed by the contract, by law, or by custom.[2]

bb. Duty to Exercise Ordinary Care. — The hirer of a chattel is bound to exercise ordinary diligence in the use and care of the property, but his liability extends no further, and if the property be lost or injured while in his possession without negligence or fault on his part, the loss falls upon the owner and not on the hirer.[3]

place, without the consent of the letter, the letter, notwithstanding such misuser, cannot retake the horse by force, but must resort to his action. Lee *v.* Atkinson, Yelv. 172.

Right to Sublet. — In the absence of a contrary agreement the hirer of a slave for a term might sublet him for a portion of the term, being responsible to the owner for the negligence or default of the subhirer. Seay *v.* Marks, 23 Ala. 532; Alabama, etc., Rivers R. Co. *v.* Burke, 27 Ala. 535; Harris *v.* Maury, 30 Ala. 679.

The subhirer for the residue of a term is bound to redeliver the property to the owner, and not to his immediate bailor, and is liable to the owner for negligence. Adams *v.* Gardiner, 13 B. Mon. (Ky.) 197.

1. Hirer Cannot Sell Thing Hired. — Cooper *v.* Willomatt, 1 C. B. 672, 50 E. C. L. 672, 9 Jur. 598; Marner *v.* Bankes, 16 W. R. 62, 17 L. T. N. S. 147; Shelley *v.* Ford, 5 C. & P. 313, 24 E. C. L. 336; Bridget *v.* Cornish, 1 Mackey (D. C.) 29; Russell *v.* Favier, 18 La. 585, 36 Am. Dec. 662.

Where the hirer of a piano sent it to an auctioneer to be sold, it was held that both he and the auctioneer, who refused to deliver it up unless the expenses incurred were first paid, were guilty of conversion. Loeschman *v.* Machin, 2 Stark. 311, 3 E. C. L. 423.

If a bailee for hire for a limited time, with an option to purchase the property, sells it without having paid therefor, he is guilty of a breach of contract and the bailment is thereby terminated, and the owner may maintain replevin for the property. Partridge *v.* Philbrick, 60 N. H. 556. But see Bridget *v.* Cornish, 1 Mackey (D. C.) 29.

Sale of Personalty Converted into Realty. — Where the hirer of personal property wrongfully converted it by annexing it to and making it a part of his real estate, and then sold the real estate to a third person without notice of the facts, it was held that the party injured could not reclaim the property, but his only remedy was against the hirer. Fryatt *v.* Sullivan Co., 5 Hill (N. Y.) 116, 7 Hill (N. Y.) 529.

2. General Duties of Hirer. — Story on Bailments § 397; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

Among the engagements of a person taking a thing to hire are, to use it well, to take care of it, to return it, and to pay the price of hire; and even if these engagements are not express, the law implies them, and a breach of any of them is a breach of the contract between the letter to hire and the hirer, for which the former is entitled to damages. Graves *v.* Moses, 13 Minn. 335.

3. Hirer Bound to Use Ordinary Care. — Jones on Bailments 88; Reeves *v.* The Ship Constitution, Gilp. (U. S.) 579; Columbus *v.* Howard, 6 Ga. 213; Jackson *v.* Robinson, 18 B. Mon. (Ky.) 1; Millon *v.* Salisbury, 13 Johns. (N. Y.) 211; Phillips *v.* Hughes, (Tex. Civ. App. 1895) 33 S. W. Rep. 157; Stacy *v.* Knickerbocker Ice Co., 84 Wis. 614.

The hirer of goods must take at least that degree of care that is exercised by a prudent man about his own affairs. Barber *v.* Anderson, 1 Bailey L. (S. Car.) 358.

If the thing hired is lost through the negligence of the hirer he is liable for its value. U. S. *v.* Yukers, 23 U. S. App. 292; Sterling Bridge Co. *v.* Baker, 75 Ill. 139.

But the owner cannot recover without proving want of ordinary care. Clark *v.* U. S., 95 U. S. 539.

The hirer of musical instruments to be used in an opera house was held not liable for their loss by fire. Longman *v.* Calini, Abb. Ship. 270, note.

A bailee for hire may be chargeable both with the hire of the thing bailed and its value, if lost by his negligence, and a charge and receipt for the hire is no waiver nor settlement of a claim for damages for the loss of the thing hired. Bigbee *v.* Coombs, 64 Mo. 529.

Where the Loss Results from an Intrinsic Defect in the thing hired, unknown to the hirer, and against which he could not guard by reasonable skill, care, and diligence, he is not liable. Stewart *v.* Western Union R. Co., 4 Biss. (U. S.) 362.

The Hirer of a Slave was bound to take ordinary care of him. Alabama, etc., Rivers R. Co. *v.* Burke, 27 Ala. 535; Jones *v.* Fort, 36 Ala. 449; Tallahassee R. Co. *v.* Macon, 8 Fla. 299; Columbus *v.* Howard, 6 Ga. 213; Ewing *v.* Gist, 2 B. Mon. (Ky.) 465; Swigert *v.* Graham, 7 B. Mon. (Ky.) 661; Hawkins *v.* Pythian, 8 B. Mon. (Ky.) 517; Adams *v.* Gardiner, 13 B. Mon. (Ky.) 197; Carney *v.* Walden, 16 B. Mon. (Ky.) 397; Trotter *v.* McCall, 26 Miss. 410; Couch *v.* Jones, 4 Jones L. (49 N. Car.) 402; Woodhouse *v.* McRae, 5 Jones L. (50 N. Car.) 1; Heathcock *v.* Pennington, 11 Ired. L. (33 N. Car.) 640; Yeatman *v.* Hart, 6 Humph. (Tenn.) 375; Angus *v.* Dickerson, Meigs (Tenn.) 459; Mills *v.* Ashe, 16 Tex. 295;

Duty of Hirer of a Horse. — One of the most familiar instances of bailments of this class is found in the case of the hiring of horses. In accordance with the principle just stated, the hirer of a horse is bound to use it moderately, and to treat it as carefully as any man of common discretion would treat his own. If the horse is injured while in his possession, the hirer is not liable unless the injury was occasioned by his negligence, unskilfulness, or misconduct.[1] If a

Rose *v.* Newman, 26 Tex. 131, 80 Am. Dec. 646; Sims *v.* Chance, 7 Tex. 562; Randolph *v.* Hill, 7 Leigh (Va.) 383.

The hirer of a slave who killed him unjustifiably was held liable for his value. Callihan *v.* Johnson, 22 Tex. 596.

The hirer of a slave was not liable for his escape when without fault. Beverly *v.* Brooke, 2 Wheat. (U. S.) 100; Perry *v.* Beardslee, 10 Mo. 568; De Fonclear *v.* Shottenkirk, 3 Johns. (N. Y.) 170.

But if the slave ran away through the fault of the hirer, the latter was liable for the value of the slave and the price of the hire. Robinson *v.* Varnell, 16 Tex. 382.

See generally, as to the rights, duties, and liabilities of the hirers of a slave, Mecker *v.* Childress, Minor (Ala.) 109; Williams *v.* Taylor, 4 Port. (Ala.) 234; Gibson *v.* Andrews, 4 Ala. 66; Sims *v.* Knox, 18 Ala. 236; Seay *v.* Marks, 23 Ala. 532; Foster v. Sykes, 23 Ala. 796; Nelson *v.* Bondurant, 26 Ala. 341; Alabama, etc., Rivers R. Co. *v.* Burke, 27 Ala. 535; Harris *v.* Maury, 30 Ala. 679; Hall *v.* Goodson, 32 Ala. 277; Tillman *v.* Chadwick, 37 Ala. 317; Redding *v.* Hall, 1 Bibb (Ky.) 536; Craig *v.* Lee, 14 B. Mon. (Ky.) 96; Overton *v.* Bigelow, 10 Yerg. (Tenn.) 48; Mims *v.* Mitchell, 1 Tex. 443; McGee *v.* Currie, 4 Tex. 217; Mitchell *v.* Mims, 8 Tex. 6; Philips *v.* Wheeler, 10 Tex. 536; Echols *v.* Dodd, 20 Tex. 190; Isbell *v.* Norvell, 4 Gratt. (Va.) 176.

1. Hirer of Horse Must Use Ordinary Care. — Dean *v.* Keate, 3 Campb. 4; West *v.* Blackshear, 20 Fla. 457; Thompson *v.* Harlow, 31 Ga. 348; Hawkins *v.* Haynes, 71 Ga. 40; Eastman *v.* Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677; Perham *v.* Coney, 117 Mass. 102; Hofer *v.* Hodge, 52 Mich. 372, 50 Am. Rep. 256; Johnson *v.* Ruth, 34 Mo. App. 659; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380; Millon *v.* Salisbury, 13 Johns. (N. Y.) 211; Malaney *v.* Taft, 60 Vt. 571, 6 Am. St. Rep. 135; Savage *v.* Davis, 18 Wis. 608.

Illustrations. — The hirer of a horse is bound to use such prudence and foresight in its care as is usual under the circumstances, and no more; and whether it would be prudent to intrust it to an innkeeper without further attention depends upon the circumstances. Ruggles *v.* Fay, 31 Mich. 141.

Where the hirer of a horse drove it into a swollen stream, intending to cross, and the horse was drowned, and it appeared that the bridge had been washed away, and a bystander had given warning that the crossing was dangerous, it was held that the hirer was liable for the value of the horse. United Telephone Co. *v.* Cleveland, 44 Kan. 167.

Where horses hired by an ice company became frightened and unmanageable while being used on the ice, and ran on to thin ice and were drowned, it was held that the ice company was not negligent in failing to fence in the thin portion of the ice and to notify the drivers of its location, where these precautions would not have prevented the accident, nor in failing to provide ropes and appliances for getting the horses out of the water. Stacy *v.* Knickerbocker Ice Co., 84 Wis. 614.

If the hirer of a horse wilfully and intentionally drove it at such an immoderate and violent rate as seriously to endanger its life, knowing of the danger, he is liable to the owner for the consequent death of the animal. Wentworth *v.* McDuffie, 48 N. H. 402.

The hirer of a horse is liable if by improperly feeding and watering it he makes it sick and it dies; and it is immaterial that the treatment of the owner and his employees, while in good faith attempting to cure it, contributed to its death. Eastman *v.* Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677.

The hirer is not liable for injury caused by the insufficiency or fault of the harness. Perham *v.* Coney, 117 Mass. 102.

Responsibility for Skill in Driving. — The hirer of a horse is liable for the want of reasonable care and skill in driving, and it is immaterial whether the letter expected or had reason to expect that he would be careless or unskilful or not, unless the hirer was manifestly without skill. Mooers *v.* Larry, 15 Gray (Mass.) 451.

Rule as to Carrying Baggage. — The hirer of a horse to ride is authorized to put on the horse, in addition to his own weight, a reasonable amount of baggage. M'Neill *v.* Brooks, 1 Yerg. (Tenn.) 75.

Number of Persons Riding in Hired Carriage. — When both parties are silent as to the number of persons to be permitted to ride in a hired carriage, the hirer is authorized to carry such number as the vehicle was made for, not exceeding, of course, the ordinary load adapted to the team drawing the same. Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

No Recovery for Loss Incurred in Pursuance of Contract. — The letter of a horse for a particular journey to be made in a certain time cannot recover for its loss while being driven in the given time, by the way and by the driver agreed upon, if its death results from its being overdriven to accomplish the task contracted for. Ruggles *v.* Fay, 31 Mich. 141.

Where a Hired Horse Becomes Sick. — The hirer is not responsible for the mistakes of a farrier whom he calls in to treat the horse, but he is liable for its death from his own unskilfulness and negligence in prescribing for it. Dean *v.* Keate, 3 Campb. 4.

Sick Horse — Duty of Bailor. — The bailor is required, in case a horse let to hire be made sick by the misconduct or neglect of the hirer, to use all reasonable exertions to cure it and prevent its death, and for the expense to which he is put, and the trouble and attention which he is obliged to bestow for this

hired horse becomes sick while on a journey, it is the duty of the hirer, on discovering its condition, to stop using it, and if he continues to use it and the horse dies in consequence, the hirer is liable to the owner.[1]

Expense of Feeding Horse. — It is generally understood, in the absence of a contrary agreement, that the hirer of a horse should, when necessary, provide it with suitable food at his own expense.[2]

cc. EFFECT OF SPECIAL CONTRACT — **Rule of Construction.** — The liability of the hirer may be increased by special contract between the parties,[3] but contracts in

purpose, he is entitled to recover damages. Graves *v.* Moses, 13 Minn. 335.

Hirer Violating Contract. — Where the hirer of a horse to go to a certain place agreed to put it in a barn there, but failed to do so, it was held that he was liable, without previous demand, for the loss of the horse by theft. Line *v.* Mills, 12 Ind. App. 100.

Liability of Joint Hirers. — Where several persons jointly hire a carriage, horses, and driver, it being understood that the driving shall be done by the driver alone, and one of the hirers assumes the office of driver, and an injury is done to the carriage and a horse by his negligence or want of skill, all of the hirers are liable therefor. O'Brien *v.* Bound, 2 Spears L. (S. Car.) 495, 42 Am. Dec. 384.

One Who Hires a Horse for the Benefit of Another, to whom the horse is delivered, is not liable to the owner for damages for its death caused by the negligence of the beneficiary, but only for the hire. Wallace *v.* Langeland, 66 Mich. 365.

1. **Driving Sick Horse.** — Thompson *v.* Harlow, 31 Ga. 348; Hawkins *v.* Haynes, 71 Ga. 40; Marshall *v.* Bingle, 36 Mo. App. 122.

If a hired horse is exhausted and has refused its feed the hirer ought not to use it, and if he continues to do so, and the horse dies in consequence, he is liable for its value. Bray *v.* Mayne, 1 Gow. 1; Edwards *v.* Carr, 13 Gray (Mass.) 234. See also Malone *v.* Robinson, 77 Ga. 719.

If a Horse Becomes Lame the hirer may abandon it and notify the owner, whose duty it is to send for it. Chew *v.* Jones, 10 L. T. Ex. 231.

2. Handford *v.* Palmer, 2 Brod. & B. 359, 6 E. C. L. 182, 5 Moo. 74; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

3. **Liability Determined by Special Contract.** — Where the hirer of a lighter agreed with the owner to return the same in as good condition as when received, ordinary wear and tear not excepted, and, should said lighter be lost or damaged to the extent that it could not be put in the same good condition as when received, to pay a stipulated sum therefor, there being no provision or qualification in the contract as to the manner or cause of such loss, it was held that the hirer was liable absolutely for the loss of the vessel, though caused by a storm; the fact that the loss was caused by no act, negligence, or default of the hirer, but by the act of God and the elements, being no defense. Wilmington Transp. Co. *v.* O'Neil, 98 Cal. 1.

Where Sleeping Cars Were Furnished by a Sleeping-car Company to a railroad company, under a contract by which the railroad company assumed responsibility for damages to the cars occasioned by "accident or casualty," it was held that the railroad company was liable for the loss of such cars, while in its possession, by fire originating from a cause unknown. Chicago, etc., R. Co. *v.* Pullman Southern Car Co., 139 U. S. 79.

A Written Contract by the Lessee of Sheep to keep them in the best possible manner was held not to permit him to employ others to care for the sheep and release him from all obligations to see that they took such care as he had bound himself to do. Rohrabacher *v.* Ware, 37 Iowa 85.

A Hirer of Horses who contracts to feed and care for them well and work them moderately is liable for damage resulting from violation of such contract. Chafee *v.* Postal Tel. Co., 35 S. Car. 372.

Where the hirer of an ass for the standing season stipulated with the letter that he would be responsible for any accident that might befall the animal and would return him safe and sound at the close of the season, or pay one thousand dollars if damage should be done to him, injuries from sickness, lightning, and accident excepted, and in an action upon this contract it was alleged as breach that soon after the season commenced the defendant returned the ass to the plaintiff diseased, and that, of the disease contracted while in the defendant's possession and through his negligence, the ass died, and the evidence showed that soon after the hiring the ass was poisoned and his spermatic cord pierced with a sharp instrument, whereby he became impotent, there being no evidence of negligence or misconduct on the part of the defendant, it was held that by a fair construction of this contract the defendant was not liable. Conwell *v.* Smith, 8 Ind. 530.

A Naked Verbal Promise to Return the thing hired at a specified time does not, as a matter of law, import a contract on the part of the hirer to insure it against inevitable casualties or losses occurring without his fault. Field *v.* Brackett, 56 Me. 121; Harris *v.* Nicholas, 5 Munf. (Va.) 483. See also Jenkins *v.* National Village Bank, 58 Me. 275; Murphey *v.* Goin, 1 Humph. (Tenn.) 440; National Village Bank, 58 Me. 275.

Thus the hirer of a slave who agreed to return him at the expiration of the term was not liable for his value if he escaped without the hirer's fault. Ellett *v.* Bobb, 6 Mo. 323; Perkins *v.* Reeds, 8 Mo. 33; Graham *v.* Swearingin, 9 Yerg. (Tenn.) 276. *Compare* Curry *v.* Gaulden, 17 Ga. 72, in which the hirer gave a bond obligating himself to return the slave. See also Alston *v.* Balls, 12 Ark. 664.

Covenant to Insure. — Where the hirer of an organ agrees to keep it insured against loss by fire and water, and has not done so, he is

which it is sought to enlarge the liability of the hirer should not be construed unfavorably to him beyond the obvious scope of the terms of the agreement.[1]

Contract in Writing. — The mere fact that the contract has been reduced to writing does not vary the liability of the hirer where the written contract expresses merely what would be implied from the relation of the parties.[2] Thus an agreement to return the thing hired in as good condition as when received, ordinary wear and tear excepted, does not render the hirer an insurer of the property so as to make him responsible for losses occurring without negligence on his part.[3]

dd. Hirer Transcending Contract of Hire. — There is on the part of the hirer an implied obligation not only to use the thing hired with due care and moderation, but also not to apply it to any other use than that for which it was hired; and if the hirer of an animal or other chattel, without the consent of the letter, uses it for a different purpose or in a different manner from that contemplated by the contract of hiring, or in any other way transcends the contract, and the thing hired is lost, destroyed, or injured while being so used, the hirer is liable absolutely, although without fault.[4] Such a misuser is

liable for its loss in a general conflagration amounting to the act of God. Smith American Organ Co. *v.* Abbott, 11 Pa. Co. Ct. Rep. 319, 1 Pa. Dist. Rep. 174. See also, as to the construction of a contract to insure, Young *v.* Leary, 135 N. Y. 569.

1. Story on Bailments, § 35; Ames *v.* Belden, 17 Barb. (N. Y.) 513.

2. Ames *v.* Belden, 17 Barb. (N. Y.) 513; Hyland *v.* Paul, 33 Barb. (N. Y.) 241.

3. **Agreement to Return in Good Order.** — Seevers *v.* Gabel, 94 Iowa 75; Ames *v.* Belden, 17 Barb. (N. Y.) 513; Hyland *v.* Paul, 33 Barb. (N. Y.) 241.

Where a barge was hired by a steamboat under an agreement that the barge should be given up on notice "in good order, the usual wear and tear excepted," and the barge was destroyed by the ice in the Mississippi without fault of the hirer, it was held that the hirer was not liable under the terms of the contract for the value of the barge. McEvers *v.* Steamboat Sangamon, 22 Mo. 187.

But in Harvey *v.* Murray, 136 Mass. 377, where the hirer of a piano agreed "to return it in as good order as when received, customary wear and tear excepted," is was held that he was liable for an injury to the piano caused by inevitable accident.

4. Beach *v.* Raritan, etc., R. Co., 37 N. Y. 457.

Hirer of Slave Transcending Contract. — The doctrine stated in the text has been applied in the following cases to the hiring of slaves: Hooks *v.* Smith, 18 Ala. 338; Seay *v.* Marks, 23 Ala. 532; Fail *v.* McArthur, 31 Ala. 26; Pensacola, etc., R. Co. *v.* Nash, 12 Fla. 497; Columbus *v.* Howard, 6 Ga. 213; Collier *v.* Lyons, 18 Ga. 648; Collins *v.* Hutchens, 21 Ga. 270; King *v.* Shanks, 12 B. Mon. (Ky.) 410; Kelly *v.* White, 17 B. Mon. (Ky.) 124; Strawbridge *v.* Turner, 9 La. 213; Wallace *v.* Seales, 36 Miss. 53; Duncan *v.* South Carolina R. Co., 2 Rich. L. (S. Car.) 613; Butler *v.* Walker, Rice L. (S. Car.) 182; Angus *v.* Dickerson, Meigs (Tenn.) 459; Horsely *v.* Branch, 1 Humph. (Tenn.) 199; Sims *v.* Chance, 7 Tex. 562; Pridgeon *v.* Buchannon, 24 Tex. 655; Spencer *v.* Pilcher, 8 Leigh (Va.) 565; Harvey *v.* Skipwith, 16 Gratt. (Va.) 405. See also Harvey *v.* Epes, 12 Gratt. (Va.) 153.

If the hirer of a slave engages to return him in a particular manner and the slave is lost by being returned in a different manner, the hirer is liable unless the master, after the engagement, gave inconsistent orders to the slave. Clagett *v.* Speake, 4 Har. & M. (Md.) 162.

If the Hirer of a Horse for a specified journey drives it to a different place, or beyond the place designated, or uses it for a longer time than contracted for, he is liable for all damages, although caused by inevitable accident. Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576; Welch *v.* Mohr, 93 Cal. 371; Farkas *v.* Powell, 86 Ga. 800; Murphy *v.* Kaufman, 20 La. Ann. 559; Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Perham *v.* Coney, 117 Mass. 102; Fisher *v.* Kyle, 27 Mich. 454; Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397; Martin *v.* Cuthbertson, 64 N. Car. 328; Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Lane *v.* Cameron, 38 Wis. 603; De Voin *v.* Michigan Lumber Co., 64 Wis. 616, 54 Am. Rep. 649. See also Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18.

It is immaterial in such case that the damages arise from the fault of the horse. Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Perham *v.* Coney, 117 Mass. 102. So also in the case of a slave. Collier *v.* Lyons, 18 Ga. 648; Harvey *v.* Skipwith, 16 Gratt. (Va.) 393. *Compare* Pensacola, etc., R. Co. *v.* Nash, 12 Fla. 497.

Where the hirer of a mule used it in a prohibited way in violation of an express contract as to the manner of use, and against the protest of the letter's servant, he was held liable for an injury resulting therefrom, although the letter sent his own servant in charge of the animal. Fox *v.* Young, 22 Mo. App. 386.

The Mere Fact of Misuser by the hirer of a chattel, and subsequent loss, do not render the hirer liable where the loss does not result from such improper use. Parker *v.* Thompson, 5 Sneed (Tenn.) 349; Cullen *v.* Lord, 39 Iowa 302.

The injury must occur in the very act of misapplication. Horsely *v.* Branch, 1 Humph. (Tenn.) 199.

a conversion of the thing hired for which the letter may maintain an action against the hirer.[1]

ee. DUTY TO PAY PRICE OF HIRE. — The hirer is bound to pay the letter for the use of the thing hired. If a fixed price be agreed upon, this will ordinarily be the price to be paid; if no price be fixed, he ought to pay a compensation reasonable under all the circumstances.[2]

Infancy Is No Defense to an action for tortiously misusing a hired horse. Burnard *v.* Haggis, 14 C. B. N. S. 45, 108 E. C. L. 45, 9 Jur. N. S. 1325. *Compare*, in case of an action on contract, Jennings *v.* Rundall, 8 T. R. 335.

Negligence Must Be Shown — Vermont. — In an action against the hirer of a horse for immoderately driving and improperly using it, where it appeared that the defendant drove a greater distance than he had contracted for, and that the horse was sound when hired, but injured when returned, it was held that negligence was the gist of the action, and that the plaintiff could not recover unless the jury found that the horse was injured by improper care, use, or driving. Malaney *v.* Taft, 60 Vt. 571, 6 Am. St. Rep. 135.

1. Misuser of Thing Hired Is Conversion. — Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; Horsely *v.* Branch, 1 Humph. (Tenn.) 199; Hart *v.* Skinner, 16 Vt. 138, 42 Am. Dec. 500; Spencer *v.* Pilcher, 8 Leigh (Va.) 565; See also Cain *v.* Kelly, 4 Humph. (Tenn.) 472; M'Neill *v.* Brooks, 1 Yerg. (Tenn.) 73.

If the hirer of a horse to drive to a designated place drive beyond that place, or to a different place, he is guilty of a conversion for which trover will lie. Malone *v.* Robinson, 77 Ga. 719; Wheelock *v.* Wheelwright, 5 Mass. 104; Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Perham *v.* Coney, 117 Mass. 102; Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Homer *v.* Thwing, 3 Pick. (Mass.) 492; Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Dec. 310; Freeman *v.* Boland, 14 R. I. 39, 51 Am. Rep. 340.

Doctrine of Conversion Qualified. — In Harvey *v.* Epes, 12 Gratt. (Va.) 153, after an exhaustive review of the authorities, Moncure, J., said: "Upon the whole, I am of opinion that in the case of a bailment upon hire for a certain term, * * * the use of the property by the hirer during the term, for a different purpose or in a different manner from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned; or, at least, unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. * * * The hirer may be restricted in the use of the property by the terms of the hiring, and will be liable for all damages arising from a violation of his contract. * * * But a bailment upon hire is not conditional in its nature, any more than any other contract; and, in the absence of an express provision to that effect, the bailee will not, in general, forfeit his estate by a violation of any of the terms of the bailment." See extensive note to De Tollenere *v.* Fuller, 1 Mill (S. Car.) 117, 12 Am. Dec. 616.

In Parker *v.* Thompson, 5 Sneed (Tenn.) 349, it was held that the mere fact that the hirer of a slave exacted immoderate service of him in the business authorized by the contract did not make him guilty of a conversion, though for any injury resulting from such immoderate service the hirer was liable in an action on the case.

Substitution of Driver of Team. — If the hirer of a team and driver substitute his own driver for the one furnished, he is guilty of a conversion, and liable for damages to the team regardless of the question of negligence, and it is immaterial whether he directed the substitution or simply permitted it. Kellar *v.* Garth, 45 Mo. App. 332.

A Mere Delay by the hirer of a horse hired to drive to and from a certain place without stopping is not in itself sufficient evidence of a conversion of the property. Evans *v.* Mason, 64 N. H. 98.

Unintentional Deviation No Conversion. — If the hirer of a horse to drive to a particular place and return loses his way and so unintentionally returns by a longer and different route, he is not guilty of a conversion of the horse. Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514.

The Infancy of the Defendant is no defense to an action of trover for the conversion of a hired horse by misuser. Malone *v.* Robinson, 77 Ga. 719; Homer *v.* Thwing, 3 Pick. (Mass.) 492; Freeman *v.* Boland, 14 R. I. 39, 51 Am. Rep. 340. See the title INFANTS.

Ratification by Owner. — Where the hirer of a horse to go a specified distance goes farther he is liable in trover, but if the owner receives payment for the whole distance traveled he thereby ratifies the hirer's act, and trover will not lie; and if the hirer has injured the horse by ill usage, the owner's remedy is an action on the case for misfeasance. Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414.

2. Price to Be Paid. — In the absence of an agreement to the contrary, the law implies a contract to pay a reasonable price for the hire. Cullen *v.* Lord, 39 Iowa 302.

Under a contract to pay a certain sum per day for the use of oxen and to feed and take care of them until returned, the pecuniary compensation is limited to the days they were used, but the obligation to feed and care for them continues until they are returned. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169.

Permissive Use. — Where one uses personal property of another with the permission of the owner, the law will not imply a promise to pay for the use. Davis *v.* Breon, 1 Arizona 240.

In an action for hire a contract of hire must be proved; proof of a loan of property is not sufficient. Dunham *v.* Kinear, 1 Watts (Pa.) 130.

Unfitness of Thing Hired. — If the letter rep-

ff. Duty to Return Thing Hired. — It is the duty of the hirer at the termination of the bailment to restore the thing bailed to the letter or the person authorized to receive it.[1]

The Time, Place, and Manner of Restitution, as well as the person to whom restitution is to be made, are to be determined by the circumstances of each particular case.[2]

Redelivery Impossible. — In all cases, whether the contract to redeliver the thing hired be express or merely implied from the contract of hiring, there is an implied condition of the continued existence of the thing hired, and if it perish without the fault of the hirer, so that redelivery becomes impossible, the hirer is excused.[3]

resents that the chattel is suitable for the purpose specified when in fact it is not, he cannot recover for the hire. See Sheffer *v.* Harmon, (Supreme Ct.) 3 N. Y. Supp. 591.

Breach of Contract for Compensation — Waiver — Burden of Proof. — Where the bailee of a stallion agreed to remit to the owner one-half the service fees by a certain time, but failed to do so, it was held in an action to recover possession on account of the breach of contract, where there was no controversy as to the ownership of the animal and the fact of breach, that the burden of establishing the defense of waiver was on the defendant. Treacy *v.* Barclay, (Ky. 1888) 6 S. W Rep. 433.

Wrongful Repossession by Letter. — In the case of an entire contract for the hire of two or more slaves, if the letter wrongfully retook one of them he could not recover for the hire of any. Perry *v.* Hewlett, 5 Port. (Ala.) 318; Nesbitt *v.* Drew, 17 Ala. 379; Harris *v.* Maury, 30 Ala. 679. See also Hawkins *v.* Humble, 5 Coldw. (Tenn.) 531.

The letter wrongfully retaking the chattel loses his right to compensation. McNeill *v.* Easley, 24 Ala. 455.

Where a Hired Carriage Was Sent Back to the Letter before the term for which it was hired had expired, it was held that he could recover for the hire; though he could not have done so if he had sold the carriage during the term. Wright *v.* Melville, 3 C. & P. 542, 14 E. C. L. 438.

A Written Contract to Pay for the Hire of chattels at a certain rate merely regulates the matter of compensation, and it is not contradicted by parol evidence as to other matters connected with the bailment, which is therefore admissible in action on the contract. Jeffery *v.* Walton, 1 Stark. 267, 2 E. C. L. 108; Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; Harvey *v.* Skipwith, 16 Gratt. (Va.) 410. See also Howell *v.* Cowles, 6 Gratt. (Va.) 393; Towner *v.* Lucas, 13 Gratt. (Va.) 705.

1. **Duty to Redeliver.** — Ewing *v.* Gist, 2 B. Mon. (Ky.) 465; Nims *v.* Mitchell, 1 Tex. 443; Manning *v.* Norwood, 2 Treadw. (S. Car.) 374.

Where the Hirer Refuses to Redeliver the property at the expiration of the term he becomes liable for all loss, irrespective of the question of negligence. Young *v.* Lewis, 9 Tex. 73

Return by Agent. — The return of a hired horse by an agent to another agent who is to return it to the owner is not a want of ordinary care in returning the horse. Colton *v.* Wise, 7 Ill. App. 395. See also Garvey *v.* Scott, 9 Ill. App. 19.

Where an agent of the letter applies to the hirer for the property, the hirer is justifiable in refusing to redeliver it if he is not satisfied as to the agent's authority. Blankenship *v.* Berry, 28 Tex. 448.

Misrepresentations by Letter Defense to Action for Failure to Return. — In an action against a lessee of sheep for failure to return them where it was alleged that the plaintiff misrepresented to the defendant that the sheep were healthy, an instruction that if the defendant knew, or by the use of ordinary diligence could have known, that the sheep were diseased, then such diseased condition of the animals or subsequent loss therefrom is no defense to the action, is erroneous. Labbe *v.* Corbett, (Tex. 1888) 6 S. W. Rep. 808.

The Attachment and Sale of hired sheep by a creditor of the hirer, and the replevy of them by the owner, who afterwards dismissed the suit, was held no defense to an action by the owner against the hirer on a contract to pay a stipulated sum for sheep not returned. Armijo *v.* Abeytia, 5 N. Mex. 533.

The Recovery of Damages for Failure to Return a hired chattel does not, as a matter of law, vest the title thereto in the hirer. Ewing *v.* Gist, 2 B. Mon. (Ky.) 465.

Hirer Holding Over. — The hirer of personal property can acquire no other rights than are given him by the terms of the bailment; and if he retains possession after the period stipulated by the bailment, he holds the property as bailee subject to the demand and disposal of the owner; and after a demand and refusal, trover or replevin will lie against him. Chamberlain *v.* Pratt, 33 N. Y. 47; Zule *v.* Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600.

The rule that a tenant holding over by consent after the expiration of his term is to be regarded as a tenant from year to year has no application to personalty, but applies only to real estate. Chamberlain *v.* Pratt, 33 N. Y. 47.

As a general rule it is the duty of the hirer of a chattel, in the absence of any express stipulation, to return the same when the bailment is determined; and on his failure to do so the bailor may either treat the bailment as ended, and bring his action, or, where the hiring is from year to year or a less term, he may consider the bailment as continuing or renewed; and in this class of cases the question whether the bailment continues is for the jury to determine. Benje *v.* Creagh, 21 Ala. 151.

2. See the cases generally.

3. Young *v.* Leary, 135 N. Y. 569.

It was so held in the case of the death of a hired horse. Williams *v.* Lloyd, W. Jones 179;

gg. Liability of Hirer for Acts of Agents. — The general rule that the principal is liable for the negligence of his agents, when acting under his direction or in the course of their employment, is applicable to the case of hirer and agents.[1] If the agents are not actually in the employ of the hirer, but are the agents of the letter, any loss resulting from their negligence or incapacity falls on the letter and not on the hirer.[2]

c. Termination of the Contract. — The contract of hire may be terminated by the expiration of the time, if a time be fixed by the contract; by the accomplishment of the object of the hiring; by the loss or destruction of the subject-matter; by the voluntary agreement of both parties at any time, or by either party within a reasonable time if no time be specified; or by the operation of law, as where the hirer becomes the owner of the subject-matter.[3]

Breach Terminates Contract. — So, also, any violation of the contract by the hirer

American Preservers' Co. *v.* Drescher, 4 N. Y. Misc. Rep. (Buffalo Super. Ct.) 482. So also in the case of a hired slave. Perry *v.* Hewlett, 5 Port. (Ala.) 318; Young *v.* Bruces, 5 Litt. (Ky.) 325.

The Destruction by Fire of the Thing Hired, without the fault of the hirer, is a good excuse for failure to redeliver it. Hyland *v.* Paul, 33 Barb. (N. Y.) 241.

1. Hirer Liable for Acts of Agents. — Craig *v.* Lee, 14 B. Mon. (Ky.) 96; Kelly *v.* Wallace, 6 Fla. 690; Hawkins *v.* Hayne, 71 Ga. 40; Rohrabacher *v.* Ware, 37 Iowa 85; Hofer *v.* Hodge, 52 Mich. 372, 50 Am. Rep. 256; Hall *v.* Warner, 60 Barb. (N. Y.) 198; Mims *v.* Mitchell, 1 Tex. 443; Mills *v.* Ashe, 16 Tex. 295; Echols *v.* Dodd, 20 Tex. 190.

The hirer of a horse and carriage is liable for injuries resulting thereto from the negligence of his coachman, although the latter, instead of returning them to the stable, as is his duty to do, drives them elsewhere for his own purposes. Coupé Co. *v.* Maddick, (1891) 2 Q. B. 413, 65 L. T. 489.

One who charters scows from one person and a tug to tow the same from another is liable if, through the negligence of the persons in charge of the tug, the scows are run aground and lost. Smith *v.* Bouker, 1 U. S. App. 80.

The United States is liable for the value of a pile-driver lost by the negligence of persons in the government employ who had hired it for use in public works. U. S. *v.* Yukers, 60 Fed. Rep. 641.

Where the hirer of a horse stopped at an inn and intrusted the horse to a hostler to be fed, and owing to the neglect of the hostler to put the bit back in the horse's mouth, the horse became unmanageable and ran away, it was held that the hirer was liable for the damages thereby occasioned. Hall *v.* Warner, 60 Barb. (N. Y.) 198.

The hirer of horses who provides his own driver is liable for the negligence of such driver only, and not for that of a hostler or innkeeper to whom the driver has, without negligence, intrusted them. Ruggles *v.* Fay, 31 Mich. 141.

Mere Ignorance of Hirer No Excuse. — Where the lessee of sheep agreed to keep them in the best possible manner, his ignorance of the manner in which they were kept by his employees will not excuse him from liability for negligence or ill-treatment of the sheep. Rohrabacher *v.* Ware, 37 Iowa 85.

Declarations of the Driver of a hired horse, who was the agent of the hirer, made after the death of the horse on the journey and after the return of the hirer, are not admissible against the hirer. Anthony *v.* Estabrook, 1 Colo. 75, 91 Am. Dec. 702.

Wanton and Malicious Acts. — For the principles governing the liability in the case of wanton and malicious acts on the part of the agent, see the titles Agency, vol. 1, p. 1156; Master and Servant.

2. Hirer Not Liable for Acts of Letter's Servant. — The hirer of a horse and carriage is not liable for injuries sustained through immoderate driving, where the owner sends his own driver, unless such injury is occasioned by some act or interference of his. Hughes *v.* Boyer, 9 Watts. (Pa.) 556.

The rule is the same in the case of injuries to third persons. Crockett *v.* Calvert, 8 Ind. 127.

For a Full Discussion of the liability of both letter and hirer to each other and to third persons for the acts of their agents, as well as the liability of the agents themselves, see the titles Agency, vol. 1, p. 930; Master and Servant.

3. Termination of the Hiring. — 2 Parsons on Contracts 129; Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435. See the title Bailments, vol. 3, p. 764.

Where the bailee of property was to keep it "until called for, and was to pay a fixed sum by the year for the use" of it, it was held that the bailment was terminable at the option of the bailor. Drake *v.* Redington, 9 N. H. 243.

Where the Duration of the Contract Is Not Expressed, the bailment is terminable at the will of either party. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169.

A Hiring for a Specified Time may be terminated by mutual consent. Conwell *v.* Smith, 8 Ind. 530.

A hiring by the month is a hiring from month to month, each party having a right to terminate it at the expiration of a month, but not after another month has commenced to run. Young *v.* Lewis, 9 Tex. 73.

A Fraudulent Sale of the Property by the Letter to the hirer does not operate to extinguish a valid contract of hiring. Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282.

The Bailor Has No Right of Action Against the Bailee until the termination of the hiring; but after this he may recover the property without a demand. Felton *v.* Hales, 67 N. Car. 107.

will justify the letter in treating the contract as at an end.[1]

Death of Either Party. — It would seem that if the hiring was for a specific time, which time had not expired at the death of either party, the hiring would continue until the expiration of the period stipulated, and that when no time is named for its continuance, it is determined by the death of either party to the contract.[2]

3. Hire of Labor and Services[3] — *a.* IN GENERAL. — The next class of bailments for hire to be considered is that in which the bailor delivers a chattel to the bailee, and employs him to do some work upon or about it for a reward, as where a chattel is delivered to the bailee to be repaired or altered, or where materials are furnished to be manufactured.[4]

b. RIGHTS, DUTIES, AND OBLIGATIONS OF THE PARTIES — (1) *Of the Bailor* — (a) **Rights of the Bailor.** — As in other cases of contracts of hire, the rights of the bailor of work are best considered in connection with the duties and obligations of the bailee.[5]

(b) **Duties and Obligations of the Bailor.** — The principal obligations resting upon the bailor, or employer, are: to pay the price of the labor; to pay for all proper accessorial materials; to do everything on his part to enable the workman to carry out his engagement; to accept the work when finished; and in all things to exercise good faith and honesty, and to conform to the special stipulations of the contract.[6]

(2) *Of the Bailee* — (a) **Rights of the Bailee** — *aa.* RIGHT TO POSSESSION. — The bailee of a chattel employed to do work thereon, like other bailees, has a special property in the chattel, and may maintain an action against any one who wrongfully takes it from his possession;[7] but he cannot dispose of it in violation of the rights of the owner,[8] nor is it subject to

1. **Breach of Contract by Hirer Terminates Bailment.** — Bryant *v.* Wardell, 2 Exch. 479; Rasco *v.* Willis, 5 Ala. 38; Trotter *v.* McCall, 26 Miss. 410; Horsely *v.* Branch, 1 Humph. (Tenn.) 199. See also Fenn *v.* Bittleston, 7 Exch. 152; Wilson *v.* Press Pub. Co., 14 Misc. Rep. (N. Y. C. Pl.) 514; Freeman *v.* Boland, 14 R. I. 39, 51 Am. Rep. 340.

An Unauthorized Sale of the property by the hirer determines the bailment. Cooper *v.* Willomatt, 1 C. B. 672, 50 E. C. L. 672; Sanborn *v.* Colman, 6 N. H. 14, 23 Am. Dec. 703. So also of an unauthorized exchange of the property. Atkinson *v.* Jones, 72 Ala. 248.

2. Wingate *v.* Wingate, 11 Tex. 430.

Where the bailment terminates at the death of the bailor the statute of limitations begins to run in favor of the hirer from that time. Wingate *v.* Wingate, 11 Tex. 430.

3. Strictly speaking, the general designation here adopted properly includes the hire of custody and the hire of carriage, as well as the hire of work to be done upon a chattel; but it is customary and convenient to restrict its application to the latter, as is done in this discussion.

4. **The Essentials of a Contract for Work** are: (1) That there should be work to be done; (2) that it should be done for a price or reward; (3) that there should be a lawful contract between parties capable and intending to contract. Story on Bailments, § 424; Pothier, Contrat de Louage, n. 395, 401, 403.

Distinction from Sales. — As to the distinction between contracts for manufacture and sales, see the titles BAILMENTS, vol. 3, p. 732; and SALES.

5. See *infra*, this section, *Duties and Obligations of the Bailee.*

6. Story on Bailments, § 425; Pothier, Contrat de Louage, n. 405-417.

7. Eaton *v.* Lynde, 15 Mass. 242.

Bailee May Maintain Trover. — A person to whom raw materials are delivered to be manufactured may maintain trespass against one carrying them away, and recover according to his interest. Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

Injury to Property. — Where property was left by the owner with another to be repaired, it was held that the bailee could not recover for injuries thereto by negligent blasting. Buddin *v.* Fortunato, 16 Daly (N. Y.) 195.

Bailee Has No Right to Action After Termination of Bailment. — A bailee of goods to perform work upon them for hire has only a special property therein, which terminates when he has performed the work and delivered the goods. Thus where such a bailee had completed the work and delivered the goods to a common carrier to be transported to the bailor, it was held that he could not maintain an action against the carrier for their loss or injury. Morse *v.* Androscoggin R. Co., 39 Me. 285.

8. **Bailee Cannot Sell or Pledge Chattel.** — A watchmaker to whom watches have been delivered to be repaired cannot pledge them so as to vest a good title in the pledgee as against the true owner. Hildeburn *v.* Nathans, 1 Phila. (Pa.) 567. Nor can he sell the watch after the owner's death for a debt not constituting a lien on the watch. Moore *v.* Williams, (Albany City Ct.) 26 N. Y. Supp. 766.

If a mechanic pawn a chattel put in his possession to be repaired, the owner may maintain trover against the pawnee without tendering the sum for which it was pawned. Gallaher *v.* Cohen, 1 Browne (Pa.) 43.

attachment for his debts.[1]

bb. RIGHT TO LIEN. — Whenever a workman or artisan, by his labor or skill, increases the value of personal property placed in his possession to be worked upon for hire, he has a lien upon it for his proper charges until paid,[2] and his right to a lien is equally good whether there be an agreement for a stipulated price or only an implied contract to pay a reasonable compensation.[3]

An Unauthorized Sale of the property by a bailee hired to cut timber terminates the bailment, and the owner may replevy the property. Emerson *v.* Fisk, 6 Me. 200, 19 Am. Dec. 206.

Conversion by Bailee. — If a bailee to whom logs have been delivered to be sawed for hire convert them to his own use, he will be liable in assumpsit for their value. Barker *v.* Cory, 15 Ohio 9.

When Statute of Limitations Begins to Run in Favor of Bailee. — The statute of limitations will not begin to run in favor of the bailee until he denies the bailment and converts the property to his own use. Thus where a watch was left with a jeweler for repairs and safekeeping, and was not demanded by the owner for ten years, when it was demanded and delivery was refused, it was held that the statute began to run at the time of demand and refusal. Reizenstein *v.* Marquardt, 75 Iowa 294, 9 Am. St. Rep. 477.

1. Raw materials delivered to a manufacturer to be manufactured are not subject to attachment for his debts. King *v.* Humphreys, 10 Pa. St. 217. Swift *v.* Barnum, 23 Conn. 523.

2. Right to Lien. — Bevan *v.* Waters, 3 C. & P. 520, 14 E. C. L. 424; Scarfe *v.* Morgan, 4 M. & W. 270, 1 H. & H. 292; Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410; Wilson *v.* Martin, 40 N. H. 88; White *v.* Smith, 44 N. J. L. 105; Morgan *v.* Congdon, 4 N. Y. 552; M'Intyre *v.* Carver, 2 W. & S. (Pa.) 392, 37 Am. Dec. 519; Hensel *v.* Noble, 95 Pa. St. 345, 40 Am. Rep. 659; Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588. And see cases cited *infra*.

Illustrative Examples. — Some of the services for which the workman has been allowed a lien are the following: For sawing logs into lumber, Holderman *v.* Manier, 104 Ind. 118; Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379; Morgan *v.* Congdon, 4 N. Y. 552; Pierce *v.* Sweet, 33 Pa. St. 151; Arians *v.* Brickley, 65 Wis. 26, 56 Am. Rep. 611. Converting barley to malt, Hazard *v.* Manning, 8 Hun (N. Y.) 613; White *v.* Hoyt, 7 Daly (N. Y.) 232. Rendering lard, Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410. Slaughtering and packing hogs, East *v.* Ferguson, 59 Ind. 169; Shaw *v.* Ferguson, 78 Ind. 547. Repairing wagon, Hensel *v.* Noble, 95 Pa. St. 345, 40 Am. Rep. 659; White *v.* Smith, 44 N. J. L. 105; see Gregory *v.* Stryker, 2 Den. (N. Y.) 628. Manufacturing tobacco into cigars, Mathias *v.* Sellers, 86 Pa. St. 486, 27 Am. Rep. 723. Tanning hides, Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588. Making cloth into coat, Cowper *v.* Andrews, Hob. 43; Hillsburg *v.* Harrison, 2 Colo. App. 298. Dyeing cloth, Green *v.* Farmer, 4 Burr. 2221. Manufacturing cloth from materials furnished, Townsend *v.* Newell, 14 Pick. (Mass.) 332. Threshing grain, Nevan *v.* Roup, 8 Iowa 207. Oiling harness, Wilson *v.* Martin, 40 N. H. 88. Making brick from material furnished, Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292. Grinding corn, Chase *v.* Westmore, 5 M. & S. 180. Keeping and training horse, Bevan *v.* Waters, 3 C. & P. 520, 14 E. C. L. 424; see Forth *v.* Simpson, 13 Q. B. 680, 66 E. C. L. 680, and the title AGISTMENT, vol. 2, p. 3. Curing lame horse, Lord *v.* Jones, 24 Me. 439, 41 Am. Dec. 391. Manufacturing starch, Ruggles *v.* Walker, 34 Vt. 468. Engraving plates, Marks *v.* Lahee, 3 Bing. N. Cas. 408, 32 E. C. L. 181. Exchanging stock for bonds, Chappell *v.* Cady, 10 Wis. 111. On printed sheets for printing, Montieth *v.* Great Western Printing Co., 16 Mo. App. 450. Raising a sunken vessel, Buffalo *v.* Yattan, 1 Sheld. (N. Y.) 483; Baker *v.* Hoag, 7 Barb. (N. Y.) 113. Repairing ship, Scott *v.* Delahunt, 5 Lans. (N. Y.) 372; Williams *v.* Allsup, 10 C. B. N. S. 417, 100 E. C. L. 417. Repairing hack, Hammond *v.* Danielson, 126 Mass. 294. Manufacturing railroad ties on land of another, Douglass *v.* McFarland, 92 Cal. 656. Manufacturing salt, Montreal Bank *v.* J. E. Potts Salt, etc., Co., 91 Mich. 342.

Lien on Part for Charges on Whole. — Where there is an entire contract for making or repairing several articles for a gross sum, the workman has a lien on any one or more of the articles for the whole amount. Blake *v.* Nicholson, 3 M. & S. 167; Chase *v.* Westmore, 5 M. & S. 180; Holderman *v.* Manier, 104 Ind. 118; Morgan *v.* Congdon, 4 N. Y. 552; Hensel *v.* Noble, 95 Pa. St. 345, 40 Am. Rep. 659.

No Lien on One Article for Charges on Another. — Where patterns are sent to an artisan for repairs he has a lien on them for the repairs, but not on the patterns for the price of castings made thereon. Walton *v.* Gould, 2 N. J. L. J. 52. See also Nevan *v.* Roup, 8 Iowa 207.

Redelivery to Owner Before Completion of Work. — One who has bailed goods to an artisan to have work done upon them may reclaim them before the work is completed, and the artisan has a lien only for what he has done. Lilly *v.* Barnsley, 2 M. & Rob. 548.

Lien Strictly Personal. — The common-law lien of a bailee for work done does not, as against the bailor, extend to employees of the bailee for their labor. Wright *v.* Terry, 23 Fla. 160.

Lien as Counterclaim in Trover. — A bailee, converting goods on which he has bestowed labor and acquired a lien, may set up his lien claim in reduction of damages in an action of trover brought by the owner. Longstreet *v.* Phile, 39 N. J. L. 63.

The Workman Is Bound to Take Ordinary Care of a chattel on which he has a lien for work done. Haas *v.* Taylor, 80 Ala. 459.

3. 2 Kent Com. 635; Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410; Morgan *v.* Congdon, 4 N. Y. 552; Hensel *v.* Noble, 95 Pa. St. 345, 40 Am. Rep. 659; Mathias *v.* Sellers, 86 Pa. St. 486, 27 Am. Rep. 723; Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

Waiver of Lien. — A voluntary and unconditional delivery of the chattel to the owner by one who has acquired a lien thereon for services operates as a waiver and extinguishment of the lien.[1] So, also, the lien is defeated by any contract between the parties inconsistent with the idea of a lien.[2]

(b) **Duties and Obligations of the Bailee** — *aa.* In General. — The obligations of a workman undertaking to perform some labor upon a chattel are, to do the work in a proper manner and in the time agreed upon, or, if no time be specified, in a reasonable time; to use the materials furnished by the employer in the right way; and to exercise reasonable diligence in safely keeping the thing delivered to him.

Employment of Agents. — He may employ others to do the work if it be of such a kind as may properly be delegated, but where it is to be presumed that the skill and ability of a particular workman are contracted for, he should perform the work himself.[3]

bb. Duty to Exercise Ordinary Care. — As in other cases of bailments of this class the bailee of work for hire is bound to exercise ordinary diligence and is answerable for ordinary negligence.[4] The bailee is not liable for a loss or

1. **Forfeiture of Lien by Delivery of Property.** — Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410; Nevan *v.* Roup, 8 Iowa 207; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Sensenbrenner *v.* Mathews, 48 Wis. 250, 33 Am. Rep. 809.

The lien for work performed upon a chattel is lost by a delivery of the chattel to a common carrier for the owner. Morse *v.* Androscoggin R. Co., 39 Me. 285.

So by a conditional delivery of the property to the owner the workman may lose his lien as against third persons. McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467.

The lien of the proprietor of a sawmill on lumber sawed by him is not lost by mere permission to an employee of the owner to pile the lumber up in the mill yard for its better preservation. Holderman *v.* Manier, 104 Ind. 118.

2. The Lien May Be Lost by Special Agreement as to payment. Trust *v.* Pirsson, 1 Hilt. (N. Y.) 292; Bailey *v.* Adams, 14 Wend. (N. Y.) 201.

Where goods are delivered to have work performed on them, which is to be paid for at a future day, the bailee has no lien upon the goods bailed. Tucker *v.* Taylor, 53 Ind. 93; Fieldings *v.* Mills, 2 Bosw. (N. Y.) 489.

A Lien Expressly Reserved is not impliedly waived by the giving of credit or the taking of security. Montieth *v.* Great Western Printing Co., 16 Mo. App. 450.

For a Full Discussion of the law of workmen's liens, see the title Mechanic's Liens.

3. 2 Parsons on Contracts 131; Zell *v.* Dunkle, 156 Pa. St. 353. See the title Agency, vol. 1, p. 930.

The Storage of the Chattel received until the work upon it is completed is a necessary incident of the workman's undertaking. Zell *v.* Dunkle, 156 Pa. St. 353.

Contract Limiting Bailee's Liability. — Upon a bailment of goods to do work upon them for a reward the contract implied by law that the work shall be done with due care and skill arises immediately upon the delivery of the goods to the bailee, and stipulations or conditions qualifying or abridging this implied contract, to be valid and binding, must be contained in the original contract; notice by the bailee with the return of the goods, or with the bill for the work done, containing conditions qualifying his liability for defective workmanship, is not a valid contract, although the bailor accept the goods with knowledge of the notice. Thus where a manufacturer sent braids to a dyer to be dyed, and on bills presented by the dyer for the work done was a printed notice that all claims for deficiency or damage must be made within a certain time, to be allowed, it was held that such notice, although brought to the knowledge of the manufacturer, was not binding on him. Dale *v.* See, 51 N. J. L. 378, 14 Am. St. Rep. 688.

Where a dyer receiving goods from a customer to be dyed gave a ticket, "No goods delivered without return of this ticket — good for one year," it was held that the contract for delivery was not binding after the expiration of the year, and the liability of the dyer was not then that of a bailee for hire. Lance *v.* Griner, 53 Pa. St. 204.

4. Bailee Must Exercise Ordinary Care. — 2 Parsons on Contracts 130; Gleason *v.* Beers, 59 Vt. 581, 59 Am. Rep. 757.

A workman for hire is not only bound to guard the thing bailed against ordinary hazards, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed. Leck *v.* Maestaer, 1 Campb. 138.

Where a workman takes the same care of the bailed property that he does of his own he is not generally liable for its loss in a disaster which destroys both. Zell *v.* Dunkle, 156 Pa. St. 353.

Where a floating bath-house left with a bailee to be repaired went adrift through the negligence and default of the bailee in not properly securing it, it was held that the bailee was bound to indemnify the owner for salvage. The Public Bath No. 13, 61 Fed. Rep. 692.

A Cotton Ginner receiving cotton to be ginned is bound to use ordinary care and is answerable for ordinary neglect. Maxwell *v.* Eason, 1 Stew. (Ala.) 514; Foster *v.* Taylor, 2 Brev. (S. Car.) 348; M'Caw *v.* Kimbrel, 4 McCord L. (S. Car.) 220; Kelton *v.* Taylor, 11 Lea (Tenn.) 264, 47 Am. Rep. 284.

In an action against a cotton ginner for cotton lost by fire, the plaintiff may prove the

injury to the property occasioned by unavoidable accident.[1]

Liability for Acts of Servants. — The bailee is responsible for loss resulting from the negligence or misconduct of his servants while acting in the course of their employment.[2]

cc. RESPONSIBILITY FOR SKILL — (*aa*) *When Professing Skill.* — Where the work to be done requires skill as well as care, and the workman professes to have such skill, he is bound to exercise due and ordinary skill in the performance of the work. What is ordinary skill in each case depends, of course, upon the character of the work to be done and the nature of the materials to be operated upon, but in all cases the workman is bound to employ that skill which prudent workmen engaged in similar work usually employ in such cases, and he will be answerable for failure to exercise such skill.[3]

usual custom of ginners as to carrying fire about the gin-houses, and also the custom of the defendant if conformable to the general usage. Maxwell *v.* Eason, 1 Stew. (Ala.) 514.

A Person Undertaking to Break a Horse for hire is bound to use ordinary care. Francis *v.* Shrader, 67 Ill. 272.

A Watchmaker receiving a watch to repair for hire is bound to use ordinary diligence in keeping it. Clarke *v.* Earnshaw, 1 Gow. 30; Halyard *v.* Dechelman, 29 Mo. 459, 77 Am. Dec. 585. And where the watch has been stolen through his negligence the owner may sue without previous demand. Halyard *v.* Dechelman, 29 Mo. 459, 77 Am. Dec. 585.

The Delivery of a Land Warrant to be Located is a *locatio operis faciendi*, and the bailee is bound to use ordinary care in making the location. Smith *v.* Frost, 1 Bibb (Ky.) 375. The bailee is not responsible for the loss of the warrant in the absence of negligence or fraud. Clay *v.* Smith, 1 Bibb (Ky.) 522.

A Person Engaging to Repair a Boat is bound to use at least ordinary care for its preservation, and if he launches it into the river at a time and under circumstances of great danger which he ought to have foreseen, and which results in its destruction, notwithstanding the use of all proper care by the owner, he is liable although the loss occurred on the breaking up of the ice some days later. Smith *v.* Meegan, 22 Mo. 150, 64 Am. Dec. 259.

Public Millers should be held to a high degree of care and diligence in respect to grain delivered to them to be ground, but they are not held to the same degree of diligence as innkeepers and common carriers. This class of bailments comes under the head of *locatio operis faciendi*, and the bailee is bound to use his best endeavors for the preservation of the property, but he is not liable for its loss unless he is guilty of some imprudence, negligence, or fault. Wallace *v.* Canaday, 4 Sneed (Tenn.) 364, 70 Am. Dec. 250. See Cox *v.* Reynolds, 7 Ind. 257.

A Bailee Contracting to Manufacture Leaf Tobacco for hire is liable for only ordinary neglect, and this does not embrace a case of accidental destruction of the tobacco by fire without default on the part of the bailee. Henderson *v.* Bessent, 68 N. Car. 223

Manufacturer of Cheese and Butter. — The rule is the same in the case of a bailee receiving milk to be manufactured into cheese and butter. Stewart *v.* Stone, 127 N. Y. 500.

Bailee Violating Contract Liable Absolutely. — A bailee for hire, so long as he keeps within the terms of his contract, is liable only for such acts as prudence could have guarded against and prevented; but if he violates his contract, he becomes liable for the thing bailed in any event. Thus, where a ginner, having received cotton to gin and bale in preference to all other cotton, ginned other cotton, leaving unginned a part of the cotton to which he had promised preference, it was held that he was liable for the loss of the cotton by the accidental burning of the gin, though negligence could not be imputed to him. Pattison *v.* Wallace, 1 Stew. (Ala.) 48.

1. Loss by Unavoidable Accident. — A bailee taking a carriage to repair for hire is responsible for only ordinary care, and is not answerable for its loss by a fire against which no ordinary prudence could guard, as in the case of the great Chicago fire. Russell *v.* Koehler, 66 Ill. 459.

2. Bailee Liable for Acts of Servants. — Where cotton sent to be ginned was destroyed by a fire that burned the gin-house through the negligence of the ginner's servants, he was held liable to the owner. M'Caw *v.* Kimbrel, 4 McCord L. (S. Car.) 220. See also Maxwell *v.* Eason, 1 Stew. (Ala.) 514.

If the servants of a miller use or dispose of wheat left to be ground, assumpsit will lie against the miller without a previous demand, and it is immaterial that the miller had no personal knowledge that the wheat was left to be ground. Cox *v.* Reynolds, 7 Ind. 257.

A bailee of goods to perform work upon them is bound to exercise ordinary care to protect them from depredations by his servants. Clarke *v.* Earnshaw, 1 Gow. 30.

3. Workman Answerable for Skill. — Jones on Bailments 91; Story on Bailments, §§ 431-434; Schouler's Bailments and Carriers, § 104.

Every mechanic who takes any materials to work up for another in the course of his trade, as where a tailor receives cloth to be made up into a coat, or a jeweler a gem to be set or engraved, is bound to perform it in a workmanlike manner. 2 Kent Com. 588.

A bailee for hire undertaking to manufacture goods out of materials furnished by the bailor is bound to apply an adequate degree of skill, and if he fails to do the work in a workmanlike manner this will constitute a breach of the undertaking. Keith *v.* Bliss, 10 Ill. App. 424.

A Collier contracting to coal wood is bound to exercise ordinary skill, care, and diligence. Gamber *v.* Wolaver, 1 W. & S. (Pa.) 60.

A Dressmaker who receives cloth to be made into a dress is held to that degree of skill and

(*bb*) *When Not Professing Skill.* — A workman ordinarily ought not to undertake a piece of work if he cannot succeed therein, and it is his duty to know whether or not he can succeed;[1] but if the bailor with full knowledge of all the circumstances intrusts him with the work, and he exercises reasonable care therein, without any pretension to particular skill, he is not liable for any loss or injury resulting from his unskilfulness.[2]

c. THE DOCTRINE OF ACCESSION. — Where material is delivered by the owner to a workman to be worked up, together with some additional materials to be furnished by the workman, into a manufactured article, the general doctrine is that the property in the finished product, including the accessorial material furnished, remains in the original owner.[3] So, also, where a damaged or worn-out article is left by the owner with another to be repaired and renewed by the labor and materials of the latter, the property in the article, together with the accessorial additions, is all along in the original owner, and not in the workman, and it is immaterial in such case that the value of the labor and materials greatly exceeds the value of the original article.[4]

d. EFFECT OF DESTRUCTION OF CHATTEL BEFORE COMPLETION OF WORK— **General Rule.** — Where a chattel left by the owner with another, who is to perform some labor upon it, is destroyed by accident without the fault of either party, before the work is completed, or after it is completed but before the chattel has been delivered to the owner, it becomes important to consider upon whom the loss, both as to the chattel and the services already rendered about it, shall fall. By the foreign, as well as by the common law, it seems that ordinarily in such cases the loss falls entirely upon the employer; that is, he loses not only the chattel, but must also compensate the workman *pro tanto* for the work done, and also for any materials furnished by him.[5]

The Rule Qualified. — While the foregoing is the general rule, it is liable to be controlled by special agreement or the usages of trade. Thus where the understanding is that the workman shall perform the work for a stipulated price payable upon completion of the whole job, and the chattel perishes or is destroyed before the work is completed, without either party being in fault, the doctrine seems to be well settled that the loss should be apportioned, the owner losing his property, and the workman his labor.[6]

care which would enable her to do the work properly, and she is liable if she unskilfully decides that the cloth should be made up wrong side out. Lincoln *v.* Gay, 164 Mass. 537. To the same effect, Parish *v.* Gilmore, 33 Wis. 608.

Where the Work Has Not Been Done Properly the bailor of materials to be manufactured into goods is not precluded from contesting the bailee's claim for compensation by the fact that he failed to inspect the work upon delivery and did not notify the bailee of defects in the first instalment received. Mack *v.* Snell, 140 N. Y. 193, 37 Am. St. Rep. 534.

1. Story on Bailments, § 431.

2. Jones on Bailments 63; Story on Bailments, § 435.

3. Schouler's Bailments and Carriers, § 99; Arnott *v.* Kansas Pac. R. Co., 19 Kan. 95; Mack *v.* Snell, 140 N. Y. 193, 37 Am. St. Rep. 534. See the title ACCESSION, vol. 1, p. 247.

4. Gregory *v.* Stryker, 2 Den. (N. Y.) 628. It was so held in the case where the value of the completed product was ninety dollars and the cost of repairs seventy-eight dollars and fifty cents.

5. Story on Bailments, §§ 426, 426*a*; 2 Kent's Com. 590; Wilson *v.* Knott, 3 Humph. (Tenn.) 473. See Gillett *v.* Mawman, 1 Taunt. 137.

Where a ship on the dock of a shipwright, undergoing repairs, was accidentally destroyed by fire, it was held that the shipwright was entitled to compensation for the work already done and for the materials furnished by him. Menetone *v.* Athawes, 3 Burr. 1592.

Where cloth delivered to a bailee to be manufactured into garments was destroyed by fire, without the fault of the bailee, before the work was finished, it was held that the bailee was entitled to compensation for the work already done. Labowitz *v.* Frankfort, 4 Misc. Rep. (N. Y. City Ct.) 275; Labowitz *v.* Solomon, (City Ct.) 23 N. Y. Supp. 1040. But the rule is otherwise where the bailee is in fault. Cohen *v.* Moshkowitz, (Supreme Ct.) 39 N. Y. Supp. 1084, 17 Misc. Rep. (N. Y. Supreme Ct.) 389.

Where the Work Has Been Completed and Accepted, but is destroyed by fire while still in the possession of the manufacturer before delivery, the loss falls on the employer, and the workman may recover for his services. Central Lithographing, etc., Co. *v.* Moore, 75 Wis. 170, 17 Am. St. Rep. 186.

6. 4 Kent's Com. 591; Story on Bailments, § 426*b*; 2 Parsons on Contracts 131; Gillett *v.* Mawman, 1 Taunt. 137; Brumby *v.* Smith, 3 Ala. 123.

In Appleby *v.* Myers, L. R. 2 C. P. 651, the

But if the Workman Is to Furnish the Materials as well as the labor, the entire loss falls on him, the contract being here one of sale and not of bailment, the workman remaining the owner of the property until it is delivered to and accepted by the other party.[1]

If Either Party Be in Fault, the principles above stated do not apply, but it seems that the entire loss would ordinarily fall upon the party by whose fault the loss was occasioned.[2]

c. FAILURE OF BAILEE TO COMPLETE THE WORK. — Where a workman has received an article to be repaired or otherwise worked upon, and abandons the work before completing it, it is held that he cannot recover for the work already done if the contract be entire,[3] but if the contract be severable[4] the rule is otherwise.

Damages for Delay. — It is the duty of the workman to complete the work in the time agreed upon,[5] and if he fails to do so he may be held liable for damages occasioned thereby.[6]

4. Hire of Custody. — The law applicable to that class of bailments for hire known as *locatio custodiæ*, or the hire of care and attention about a chattel, does not differ in general from that governing the other classes of bailments for hire. The bailee is bound to exercise ordinary diligence in the care of the property committed to his custody, and is answerable for only ordinary

plaintiffs had contracted to erect certain machinery on the defendant's premises, at specified prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished and while others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by fire, and it was held that both parties were excused from further performance, but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not. See the title WORKING CONTRACTS.

1. Story on Bailments, § 427*a*; McConihe *v.* New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 420.

2. Schouler's Bailments and Carriers, § 111.

3. **Recovery for Work Partially Performed — Entire Contract.** — Where an artisan undertook for a specific sum to repair a given article, and did repair it in part, but did not complete the work, and delivered it unfinished, it was held that, the contract being entire, he could not recover in assumpsit for the value of the work done and materials furnished. Sinclair *v.* Bowles, 9 B. & C. 92, 17 E. C. L. 340. See the title CONTRACTS, *ante*, p. 88.

4. **Severable Contracts.** — A contract to repair a vessel was held to be not entire, and where the work was interrupted by a dispute of the contracting parties the workman was allowed compensation for the work already performed. Baeder *v.* Carnie, 44 N. J. L. 208; Roberts *v.* Havelock, 3 B. & Ad. 404, 23 E. C. L. 105. See the title CONTRACTS, *ante*, p. 88.

There Is Very Little Direct Authority as to the effect of the hired bailee's leaving the work incomplete or executing it in a manner different from that contracted for. The cases cited by the text-writers apply almost exclusively to other forms of working contracts, and not to contracts of hire.

Professor Parsons' Summary of the law is substantially as follows: If the thing be left imperfect and unfinished, by the fault of the workman, he can recover nothing; but if not by his fault, then he should have compensation *pro tanto*, subject to set-off for damages. If the contract be rescinded by the act or assent of both parties, the workman may recover *pro tanto*. So, also, if the workman, by a deviation from his instructions, makes his work of no use, he can claim no compensation. If it be still of some use, and is received by the employer, the workman may claim *pro tanto*, his claim being open to a set-off for damages. 2 Parsons on Contracts 137. See Story on Bailments, §§ 441–441*d*; Schouler's Bailments and Carriers, §§ 111–112. See the titles CONTRACTS, *ante*, p. 88; WORKING CONTRACTS.

5. Henderson *v.* Bessent, 68 N. Car. 223. See *supra*, this title, *Duties and Obligations of the Bailee — In General.*

6. **Damages for Delay.** — Where a ship was delivered to a shipbuilding company to be repaired, and before the repairs were completed an order was made for winding up the company, and the official liquidator, with the assent of the ship-owners, was permitted to complete the work, and did so, and delivered the ship long after the time agreed upon, it was held that the owners were entitled to damages for the delay, the measure of the damages in such case being *prima facie* the sum the ship would have earned during the time of the delay. *In re* Trent, etc., Co., L. R. 4 Ch. 112.

Where personal property was delivered to a bailee to be repaired, and before the repairs were completed the owner demanded the property, but the bailee refused to surrender it until paid for work already done, and afterwards finished the work, it was held, in an action by the owner to recover possession, that the bailee's right to full compensation was not defeated by his delay in completing the work, where it appeared that the owner had suffered no loss, and had acquiesced in the delay. Shailer *v.* Corbett, (Supreme Ct.) 15 N. Y. Supp. 875, 61 Hun (N. Y.) 626.

neglect.[1] A detailed treatment of the specific instances of bailments of this

1. A Depositary for Hire is bound only to ordinary diligence and answerable only for ordinary negligence. Foster *v.* Essex Bank, 17 Mass. 500, 9 Am. Dec. 168; Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131; Platt *v.* Hibbard, 7 Cow. (N. Y.) 497.

A Ticket Agent who, for the convenience of passengers, receives and stores their baggage, is not liable except for losses of such baggage occasioned by his want of ordinary care. Green *v.* Birchard, 27 Ind. 483.

Goods Received at the Cloak-Room of a Railway Company are not received by them in the capacity of carriers, but simply as bailees for hire. Van Toll *v.* South Eastern R. Co., 31 L. J. C. P. 241, 12 C. B. N. S. 75, 104 E. C. L. 75.

A railroad company storing goods after transportation is bound to use reasonable care, and keeping large quantities of gunpowder in the same warehouse is not such care. White *v.* Colorado Cent. R. Co., 5 Dill. (U. S.) 428, 3 McCrary (U. S.) 559.

The Owners of a Boom are not liable for the loss of logs secured thereon unless negligent. Penobscot Boom Corp. *v.* Baker, 16 Me. 233.

A Herder taking care of cattle for hire is bound to take only such care of the animals as a prudent man, mindful of his own interests, would take of his own property. Waldo *v.* Beckwith, 1 N. Mex. 97.

Where Property Is Left with an Innkeeper by one not a guest of the inn, the liability of the innkeeper is merely that of an ordinary bailee for hire. Healey *v.* Gray, 68 Me. 489, 28 Am. Rep. 80; Ingallsbee *v.* Wood, 33 N. Y. 577, 88 Am. Dec. 409; Lynar *v.* Mossop, 36 U. C. Q. B. 231. See the title INNS AND INNKEEPERS.

A Restaurant Keeper is liable for the loss of a customer's apparel placed in charge of himself or of his employees. Ultzen *v.* Nicols, (1894) 1 Q. B. 92; Buttman *v.* Dennett, 9 Misc. Rep. (N. Y. C. Pl.) 462. But he is not an insurer of such property, and is liable only for the want of ordinary care. Simpson *v.* Rourke, 13 Misc. Rep. (N. Y. C. Pl.) 230.

An Agistor must notify his customers of any peculiar or unusual risk to which their cattle are exposed in his pasture. McLain *v.* Lloyd, 5 Phila. (Pa.) 195.

An Agricultural Society is liable for the loss of property exhibited at its fairs, where the loss is caused by its negligence. Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 52 Am. Rep. 607; Prince *v.* Alabama State Fair, 106 Ala. 340.

The Keeper of a Dog for hire is not responsible for its loss if he exercised reasonable care. MacKenzie *v.* Cox, 9 C. & P. 632, 38 E. C. L. 263.

The Proprietor of a Bathing Establishment open to the general public is bound to exercise ordinary care to prevent the loss by theft of a patron's apparel, and the failure to provide suitable watchmen to guard against such loss is want of ordinary care. Bird *v.* Everard, 4 Misc. Rep. (N. Y. C. Pl.) 104. So, also, he is liable for negligently delivering valuables belonging to a bather to the wrong person. Tombler *v.* Koelling, 60 Ark. 62, 46 Am. St. Rep. 146.

The Proprietor of a Barber Shop kept for public patronage is liable to a customer for the value of his hat, which was deposited on a hat-rack in the shop, and which, while the customer was being shaved, disappeared from the shop and was thus lost, such proprietor being a bailee for hire of the hat. (Bleckley, C. J., *dissenting*.) Dilberto *v.* Harris, 95 Ga. 571. But where the barber provides a place for keeping the apparel of customers, and an attendant to receive it, he is not liable for the loss of the overcoat of a customer who, in disregard of this provision, hung his overcoat on a peg near the door, from which it was stolen. Trowbridge *v.* Schriever, 5 Daly (N. Y.) 11.

The Proprietor of a Skating Rink is bound to preserve skates delivered to him by his patrons and for which he has given a check, and his failure to deliver the same to the owner, on demand and presentation of the check, because they were lost, is a conversion for which he is liable in trover. Donlin *v.* McQuade, 61 Mich. 275.

Where a Customer Entered a Retail Store for the Purpose of Buying a Cloak, and took off her old cloak to try on a new one and laid it on a counter in front of a clerk, there being no other place to put it, and after trying on the new cloak went to get her own, which could not be found, it was held that the proprietors of the store, as voluntary custodians for profit to themselves, were bound to use some care of the customer's property which she had laid aside by their implied invitation, and since the evidence showed an omission to exercise such care, they were liable for the loss. Bunnell *v.* Stern, 122 N. Y. 539, 19 Am. St. Rep. 519.

So, also, a shopkeeper is liable for the loss of a customer's watch, placed in a drawer at the suggestion of a salesman, if it is stolen through the want of ordinary care, but not if such care was exercised. Woodruff *v.* Painter, 150 Pa. St. 91, 30 Am. St. Rep. 786.

Negligence Must Appear. — The plaintiff cannot recover in such cases unless it appears from the circumstances that the defendant has not exercised ordinary care. Thus where it appeared from the plaintiff's testimony that she, while examining goods in the defendant's store, laid her purse on the counter, and could not find it a few minutes later, and the saleswoman and floor-walker were immediately notified, but the purse could not be found, there being no one in the store besides the plaintiff and the defendant's employees, and there being no evidence that any of the latter had ever seen the purse, it was held that the plaintiff could not recover. Powers *v.* O'Neill, 89 Hun (N. Y.) 129.

So, also, where a person entered the saloon of a hotel to get refreshments, between twelve and one o'clock at night, and when he went out, just as the place was being closed, left his opera-glass behind, but it did not appear where, and the next morning when he called for it, it could not be found, it was held that the hotel-keeper was not responsible for the loss, since it appeared that neither he nor any of his employees ever received or saw the glass. Carpenter *v.* Taylor, 1 Hilt. (N. Y.) 193.

For evidence held insufficient to sustain an action for the value of contents of trunks

class will be found elsewhere in this work.[1]

5. Hire of Carriage. — The *locatio mercium vehendarum* is the most important of all classes of bailments, and the law relating thereto greatly exceeds in intricacy the law governing the classes of bailments already considered in this article. There are two general classes of carriers of goods: First, private carriers; secondly, public or common carriers. In respect to the former class, or contracts of carriage entered into by private persons not engaged in the business of common carriers, there is in general no difference in the law as to the rights and obligations of the parties from that applicable to other bailments for hire.[2] The law of common carriers differs widely from this, and will be found discussed elsewhere in this work.[3]

CONTRARY. — See note 4.

stolen from the storeroom of an apartment house, see Davis *v.* Gay, 141 Mass. 531.

Liability for Theft by Servants. — A depositary of goods for hire is bound to take the same care of them as he would of his own; but if they are stolen by his servants he is not liable without gross negligence. Finucane *v.* Small, 1 Esp. N. P. 315. See the titles BANKS AND BANKING, vol. 3, p. 787; SAFE DEPOSIT COMPANIES.

A Depositary for Hire Failing to Redeliver the Property on demand is liable for the whole. The owner is not bound to seek to recover it if stolen, but if he does recover any portion of it the hirer is entitled to credit *pro tanto* after allowing expenses incurred in its recovery. Jones *v.* Morgan, 90 N. Y. 4, 43 Am. Rep. 131.

Necessity for Demand. — Where a bailee receives property to be kept for reward until demanded, no cause of action can arise until a reasonable demand has been made and there has been a failure to redeliver, or until the bailee has converted the property to his own use or it has been lost through his negligence. Browne *v.* Johnson, 29 Tex. 40. See also Hagood *v.* Elson, 21 Tex. 506.

No Compensation in Absence of Contract. — A person has no right to keep the property of another and charge him therefor unless there was a previous bargain between him and the owner or his authorized agent. Buxton *v.* Baughan, 6 C. & P. 674, 25 E. C. L. 591. See also Abbott *v.* Curtis, etc., Mfg. Co., 25 Fed. Rep. 402.

A bailee of hogs who has refused to redeliver them cannot recover for the subsequent expense of care and feeding. Crigler *v.* Gaff, 7 Cinc. Wkly. L. Bul. 17.

Lien. — A person not engaged in warehousing as a business has no lien for compensation on property deposited with him on storage. Alt *v.* Weidenberg, 6 Bosw. (N. Y.) 176.

A landlord not an innkeeper has, in general, no lien on goods left by an outgoing tenant for storage charges, though he is entitled to a reasonable compensation for storage. Preston *v.* Neale, 12 Gray (Mass.) 222; Field *v.* Roosa, 159 Mass. 128.

In Singer Mfg. Co. *v.* London, etc., R. Co., (1894) 1 Q. B. 833, it was held that a railway company in whose cloak-room a sewing machine had been deposited by a bailee had a lien on the machine for storage charges as against the owners after the termination of the bailment.

1. See the appropriate titles.

As to the custody of animals, see the titles AGISTMENT, vol. 2, p. 3; LIVERY STABLE KEEPERS.

As to the custody of money and other valuables, see the titles BANKS AND BANKING, vol. 3, p. 787; SAFE DEPOSIT COMPANIES. See also the titles FACTORS; FORWARDING MERCHANTS; WAREHOUSEMEN; WHARVES.

2. Story on Bailments, § 457; Schouler's Bailments and Carriers, § 331; Coggs *v.* Bernard, 2 Ld. Raym. 917.

A Private Carrier for reward is bound to exercise ordinary diligence and is responsible for ordinary negligence. Lobenstein *v.* Pritchett, 8 Kan. 213.

A person not a common carrier, who agrees to carry goods for hire, thereby engages to make good losses arising from the negligence of his own servants, although he is not liable for any loss by thieves or from any taking by force, or if the owner accompanies the goods to take care of them and was himself guilty of negligence. Brind *v.* Dale, 8 C. & P. 207, 34 E. C. L. 355.

One hired to drive to a certain place a team belonging to another, in whose hands they are injured, is liable only for negligence, unskilfulness, or wilful misconduct. Newton *v.* Pope, 1 Cow. (N. Y.) 109. Such bailee is liable for damage caused to the team by the negligence of his agent. American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Am. St. Rep. 479.

For a Full Discussion of this branch of the subject, see the titles CARRIERS OF GOODS, vol. 5, p. 154; COMMON CARRIERS, vol. 6, p. 236.

3. See the titles BAGGAGE, vol. 3, p. 528; CARRIERS OF GOODS, vol. 5 p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; CARRIERS OF PASSENGERS, vol. 5, p. 474; CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES, *ante*; EXPRESS COMPANIES; FERRIES; SHIPS AND SHIPPING; TELEGRAPHS AND TELEPHONES, etc.

4. Contrary to Law — Revenue Laws. (See also the title REVENUE LAWS.) — In U. S. *v.* Kee Ho, 13 Sawy. (U. S.) 143, it was held that the offense of bringing merchandise into the United States, ***contrary*** to law, did not include frauds or illegalities concerning the invoicing of the same, or the payment of duties thereon, such as could only occur after the importation is complete. See also U. S. *v.* Claflin, 13 Blatchf. (U. S.) 184.

Contrary to Law — State Lands. (See the title STATE LANDS; and see LAW.) — A statute provided that a grant of land if issued ***contrary*** to law should be void. In construing

CONTRIBUTE, ETC. — See note 1.

this statute, Caldwell, J., in Randolph *v.* Adams, 2 W. Va. 526, said: "Now the question arises, what is the purport and effect of the terms in the statute, '*contrary* to law'? Grants for land in Virginia were obtained by making due entry of the land proposed to be taken up, obtaining a plat and certificate of survey thereof within the time prescribed by law, and returning the same to the register of the land office in the manner required by the statute. If these steps have not been fully taken the grant would be adjudged as having issued *contrary* to law. But I do not understand that where a grant of land may conflict with the claim of any other land proprietor, such grant having been obtained regularly, all the requirements of the statute being fully complied with, it should therefore be determined to have been issued *contrary* to law in the sense properly to be given, in my opinion, to the terms of the statute under consideration."

Contrary Intention. — Statutes frequently provide certain rules of construction unless a *contrary* intention be expressed. For such provisions, see such titles as DEEDS; WILLS, etc. The effect of the provision has been discussed in the following English cases: *In re* Dickson, 29 Ch. Div. 331, 54 L. J. Ch. 510; *In re* Thatcher, 53 L. J. Ch. 1050, 26 Ch. Div. 426; Cecil *v.* Langdon, 54 L. J. Ch. 313; *In re* Fleck, 57 L. J. Ch. 943, 37 Ch. Div. 677; Harrison *v.* Harrison, 58 L. J. P. D. & A. 28; *In re* Portal, 54 L. J. Ch. 1012, 30 Ch. Div. 50; *In re* Marsh, 57 L. J. Ch. 639, 38 Ch. Div. 630; *In re* Phillips, 41 Ch. Div. 417; *In re* Tarrant, W. N. 89; *In re* Wells, 42 Ch. Div. 646; Wilson *v.* Eden, 21 L. J. Q. B. 385, 5 Exch. 752.

Contrary Intent in Trust Deed. — A trust deed which omits to provide for filling a vacancy in the number of trustees upon the happening of an event not contemplated by the parties to that instrument, does not, by that mere omission, show an intention *contrary* to an appointment of a new trustee in the mode provided by the English Conveyancing Act of 1881 (44 and 45 Vict., c. 41), § 31, subsecs. 1, 3, 6, 7. *In re* Coates, 34 Ch. Div. 370.

Verdict Contrary to Law. — See ENCYC. OF PLEADING AND PRACTICE, title NEW TRIAL.

Contrary to the Form of the Statute in Such Case Made and Provided. — See ENCYC. OF PLEADING AND PRACTICE, title INDICTMENTS.

1. Where parties subscribed and *contributed* sums for a designated purpose, the court said that the very terms "subscribed and *contributed*" implied that the donations of each were parts, the whole of which were to form a common fund. Murray *v.* McHugh, 9 Cush. (Mass.) 166.

Contributing to the Support of a Church. (See the title RELIGIOUS SOCIETIES.) — A statute provided that a person, in order to be a qualified voter of a church, must *contribute* to the support of such church. It was held that this meant substantial aid. The court said: "He must *contribute* to its support, according to the usages and customs thereof; this undoubtedly means substantial and vital aid and support. Personal attendance and countenance might in one sense *contribute* to the support of such an organization; but that is not the contribution intended by this provision of the statute. The statute means the necessary, material support, without which the organization cannot exercise its ordinary functions, and perform its customary and appropriate duties and ministrations. It means the parting with, and *contribution* of, a portion of one's worldly substance, in the usual and customary way, to be used in meeting and defraying the expenses incurred by the church, congregation, or society, in the support of public and divine worship. Merely attending as a worshiper, or taking a leading or a subordinate part in the exercises, or rendering some special gratuitous service, will not answer this requirement of the statute." People *v.* Tuthill, 31 N. Y. 561.

English Statute — Contributory Distinguished from Member. — In *In re* Anglesea Colliery Co., L. R. 2 Eq. 379, the term *contributory* is distinguished from the word "member," as used in an English statute providing for the winding up of companies. And upon the definition of the word *contributory*, as used in this Act, see Norris *v.* Cottle, 2 H. L. Cas. 647; Hutton *v.* Upfill, 2 H. L. Cas. 674.

Contribution — Gaming. (See the title GAMING.) — The plaintiff and the defendant agreed to ride a race, each on his own horse, both the horses ridden to become the property of the winner. It was held that the horses could not be regarded as a *contribution* towards a prize within the meaning of an English statute against gaming. Coombes *v.* Dibble, L. R. 1 Exch. 248.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles: ACCOMMODATION PAPER, vol. 1, p. 334; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *GENERAL AVERAGE; INDEMNITY CONTRACTS; PARTNERSHIP; SUBROGATION; SURETYSHIP.*

I. DEFINITIONS — Contribution. — A payment made by each or by any one of several having a common interest or liability, of his share in a loss suffered, or in an amount necessarily paid, by one of their number in behalf of all.[1]

Exoneration. — A payment made to one or more who have suffered loss or necessarily paid money on an obligation to which they were secondarily liable, by another or others who were primarily liable to the same obligation.[2]

The Word "Indemnity" is frequently used to signify "exoneration," and the two terms will be used interchangeably in this article.

II. GENERAL PRINCIPLES — 1. Of Contribution. — Where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them are compelled to pay the whole, or more than his or their share, those paying may recover from those not paying the aliquot proportion which they ought to pay.[3]

Foundation of Doctrine. — The doctrine does not rest on the express contract between the parties, but on the common obligation resting upon them, and on the broad principle of justice that where one has discharged a debt or obligation which others were equally bound with him to discharge and has thus removed the common burden, the others, who have received an equal benefit, ought in conscience to refund to him a ratable proportion.[4]

1. See the Century Dictionary; Webster's International Dictionary.

2. **"The Equities of Contribution and Exoneration** arise where several persons are bound by a common charge not arising *ex delicto*, and their order of liability has been accidentally deranged. If the liabilities be joint, he who has paid more than his share is entitled to contribution from the rest. If some are liable in priority to the rest, the parties secondarily liable, if compelled to discharge the claim, are entitled to exoneration." Adams's Equity *267.

3. 1 Parsons on Contracts, *31; Harbert's Case, 3 Coke 11; Aspinwall *v.* Sacchi, 57 N. Y. 337; Stirling *v.* Forrester, 3 Bligh 590.

4. **Basis of Doctrine — Equality Is Equity** — *England.* — Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270; Cowell *v.* Edwards, 2 B. & P. 268; Stirling *v.* Forrester, 3 Bligh 590; Craythorne *v.* Swinburne, 14 Ves. Jr. 164; Lingard *v.* Bromley, 1 Ves. & B. 117.

Ireland. — Hartley *v.* O'Flaherty, 1 Beatty 77.

Alabama. — White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283; Owen *v.* McGehee, 61 Ala. 445; Broughton *v.* Wimberly, 65 Ala. 549; Handley *v.* Heflin, 84 Ala. 600; Bragg *v.* Patterson, 85 Ala. 233.

California. — Chipman *v.* Morrill, 20 Cal. 135.

Connecticut. — Bulkeley *v.* House, 62 Conn. 467.

Florida. — Hayden *v.* Thrasher, 28 Fla. 162; West *v.* Chasten, 12 Fla. 315.

Illinois. — Drummond *v.* Yager, 10 Ill. App. 382.

Indiana. — Falley *v.* Gribling, 128 Ind. 110.

Kentucky. — Thomas *v.* Thomas, 2 J. J. Marsh. (Ky.) 64; Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky.) 271; Lansdale *v.* Cox, 7 T. B. Mon. (Ky.) 404; Breckinridge *v.* Taylor, 5 Dana (Ky.) 110.

Maryland. — Smith *v.* Anderson, 18 Md. 520.

Massachusetts. — Chaffee *v.* Jones, 19 Pick. (Mass.) 264; Mason *v.* Lord, 20 Pick. (Mass.) 449.

Missouri. — Van Petten *v.* Richardson, 68 Mo. 380.

New Hampshire. — Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497.

New York. — Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; Cuyler *v.* Ensworth, 6 Paige (N. Y.) 32; Norton *v.* Coons, 3 Den. (N. Y.) 130; Aspinwall *v.* Sacchi, 57 N. Y. 331; Rindge *v.* Baker, 57 N. Y. 215, 15 Am. Rep. 475; Wells *v.* Miller, 66 N. Y. 255.

North Carolina. — Moore *v.* Moore, 4 Hawks (11 N. Car.) 358, 15 Am. Dec. 523; Sherrod *v.* Woodard, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714; Moore *v.* Isley, 2 Dev. & B. Eq. (22 N. Car.) 372; Allen *v.* Wood, 3 Ired. Eq. (38 N. Car.) 386.

Ohio. — Russell *v.* Failor, 1 Ohio St. 329, 59 Am. Dec. 631; Camp *v.* Bostwick, 20 Ohio St. 347, 5 Am. Rep. 669; Oldham *v.* Broom, 28 Ohio St. 41; Corrigan *v.* Foster, 51 Ohio St. 225, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 1.

Oregon. — Durbin *v.* Kuney, 19 Oregon 71, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 1.

Pennsylvania. — Horbach *v.* Elder, 18 Pa. St. 33.

South Carolina. — Harris *v.* Ferguson, 2 Bailey L. (S. Car.) 397; Screven *v.* Joyner, 1 Hill Eq. (S. Car.) 260, 26 Am. Dec. 199; McKenna *v.* George, 2 Rich. Eq. (S. Car.) 17.

Virginia. — Wayland *v.* Tucker, 4 Gratt. (Va.) 268, 50 Am. Dec. 76.

Relations to Which Applicable.—It matters not whether parties are principal debtors,[1]

1. Several Principal Debtors — *England.* — Lanchester *v.* Thicker, 1 Bing. 201, 8 E. C. L. 472; Holmes *v.* Williamson, 6 M. & S. 158; Edger *v.* Knapp, 5 M. & G. 753, 44 E. C. L. 393; Burnell *v.* Minot, 4 Moo. 340, 16 E. C. L. 375; Batard *v.* Hawes, 2 El. & Bl. 287, 75 E. C. L. 287; Boulter *v.* Peploe, 9 C. B. 493, 67 E. C. L. 493.

Canada. — Woodruff *v.* Glassford, 4 U. C. Q. B. O. S. 155; Allen *v.* Coy, 7 U. C. Q. B. 419.

Alabama. — Thomas *v.* Hearn, 2 Port. (Ala.) 262; Bragg *v.* Patterson, 85 Ala. 233; Crayton *v.* Johnson, 27 Ala. 503.

Georgia. — Green *v.* Mann, 76 Ga. 246.

Illinois. — Gillilan *v.* Nixon, 26 Ill. 50; Hoyt *v.* Lock, 41 Ill. 119; Hodgson *v.* Baldwin, 65 Ill. 532; Harvey *v.* Drew, 82 Ill. 606.

Indiana. — Judd *v.* Small, 107 Ind. 398.

Kentucky. — Minnis *v.* Johnson, 1 Duv. (Ky.) 171; Dupuy *v.* Johnson, 1 Bibb (Ky.) 562.

Maryland. — Owens *v.* Collinson, 3 Gill & J. (Md.) 25.

Massachusetts. — Packard *v.* Nye, 2 Met. (Mass.) 47.

Missouri. — Snyder *v.* Kirtley, 35 Mo. 423; Van Petten *v.* Richardson, 68 Mo. 380; Labeaume *v.* Sweeney, 17 Mo. 157.

New York. — Parker *v.* Ellis, 2 Sandf. (N. Y.) 223; Ransom *v.* Keyes, 9 Cow. (N. Y.) 128; McCready *v.* Van Antwerp, 24 Hun (N. Y.) 322; Weed *v.* Calkins, 24 Hun (N. Y.) 582; Coburn *v.* Wheelock, 34 N. Y. 440.

Pennsylvania. — Finlay *v.* Stewart, 56 Pa. St. 183.

Texas. — Morris *v.* Davis, (Tex. Civ. App. 1895) 31 S. W. Rep. 850; Graves *v.* Smith, 4 Tex. Civ. App. 537.

Illustrations. — "When several persons desire to bring about the same result, one which will be of pecuniary advantage to each, and agree to unite and make common cause each with all others in the undertaking, and join in the appointment of the same agent for the accomplishment of their purpose, as between themselves each is bound to contribute his proportion to the consequent expense; that proportion to be determined by the number uniting, or by a rule established by themselves, or by such equities as may arise from the circumstances attending the transaction. And if one of them pays, either upon the judgment of a court or voluntarily, a claim justly due from all, each of the others is under obligation so to contribute to his repayment as that the final result shall be that each solvent person has paid his proportion." Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 244.

Where four persons sign an agreement with a fifth to care for her in sickness and defray the expenses of her sickness and funeral, two, who have rendered the agreed services, may recover such proportion from the others as to make the burden equal to all. Odiorne *v.* Moulton, 64 N. H. 211.

Where, at the request of the defendants, the plaintiff employed counsel to defend his and their common rights and was afterwards compelled to pay the entire expense, he can recover the aliquot part from each of the defendants. Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky.) 269; Prior *v.* Hembrow, 8 M. & W. 873.

Two of three assignees of a bankrupt themselves became bankrupt. The other, having settled the indebtedness of the three to the estate, can recover contribution from the estates of the other two. *Ex p.* Hunter, Buck. 552.

An administrator who has paid a judgment against the intestate cannot obtain contribution from the estate of a deceased co-administrator; the latter estate is liable only for such funds as came into the hands of the deceased while in office. Conner *v.* McIlvaine, 4 Del. Ch. 30.

Where a judgment founded on contract is rendered against two and paid by the survivor, he is entitled to contribution from the estate of the other. Erwin *v.* Dundas, 4 How. (U. S.) 78.

Several parties against whom a joint judgment for debt and costs has been rendered are liable to contribute to one of their number who has paid the entire judgment; but not to contribute to expenses of defense incurred by one without the consent of the others. Hayes *v.* Morrison, 38 N. H. 90.

The mere fact that the plaintiff paid an execution which ran against him and the defendant is not enough; the relations which make it the defendant's duty to share the payment must appear. Kirkpatrick *v.* Murphy, 2 N. J. L. 508.

One divorced parent can sue the other for contribution to the support of a child, in chancery, if the divorce court left the question of custody and support of the child undetermined. Rogers *v.* Rogers, 51 Ill. App. 683.

One of several parties who agreed to share the expenses of process to protect their joint interest cannot recover contribution for expenses unless they were incurred reasonably and in the common interest. Norris *v.* Leavitt, 61 N. H. 109.

Of several makers of a joint obligation, each is principal as to his part, and surety for the others as to their respective parts. Goodall *v.* Wentworth, 20 Me. 322; Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Bragg *v.* Patterson, 85 Ala. 233. And one of two administrators who gave a joint bond is a surety for the other as to his part, and therefore co-surety with the sureties on the bond, and bound to contribute with them. Collins *v.* Carlisle, 7 B. Mon. (Ky.) 13.

Several borrowed a sum jointly, but received different portions for their several uses. One borrower became insolvent. The others should contribute to pay his share, in proportion to the amount received by each. Kincaid *v.* Hocker, 7 J. J. Marsh. (Ky.) 333.

Where it simply appears that the plaintiff and the defendant hired a pasture together, and it is not proven what part each was to pay, or what part each used, a verdict for equal contribution cannot be sustained. Sharpe *v.* Cummings, 2 D. & L. 504.

Where there is an entire debt or duty owed equally by several, the solvent debtors must share equally in any burden thrown upon them by the insolvency of one of their number, though the doctrine is not applicable to a

co-sureties,[1] co-owners of property[2] and in that capacity subject to common obligations, partners,[3] or parties jointly liable for a tort, without intentional guilt;[4] in any of these cases, if the parties stand *in equali jure* the law requires equality, which is equity, and one of them shall not be obliged to bear the burden alone.[5]

Jurisdiction in Equity and at Law. — The remedy of contribution was of equitable origin,[6] and rests on equitable principles;[7] after it had become firmly estab-

case where there was no such entire duty, but it was specifically limited and restricted. North *v.* Brace, 30 Conn. 72.

Where a judgment obtained by several was appealed from, and one of the parties defended the appeal successfully, by which the judgment was saved for all, he can recover contribution to his costs of defense. Hamilton *v.* Synge, 4 Ir. Ch. Rep. 551.

Where a joint maker with others of a note paid it, and then assigned the note to the plaintiff, the remedy of the plaintiff against the other makers is for proportional contribution, though he paid the face of the note, received full interest from his assignor, and presented the full claim against his estate, on which he received a dividend. Dillenbeck *v.* Dygert, 97 N. Y. 303, 49 Am. Rep. 525.

1. See *infra*, this title, *Application to Particular Relations — Contribution Between Co-sureties.*

2. See *infra*, this title, *Application to Particular Relations — Contribution Between Co-owners of Property.*

3. See *infra*, this title, *Application to Particular Relations — Contribution Between Partners.*

4. See *infra*, this title, *Application to Particular Relations — Contribution and Exoneration Between Tortfeasors.*

5. Not Restricted to Particular Relations. — "The right to contribution being founded in natural justice is not restricted to any special relation, but applies to original contractors, or any other relation where equity between the parties is equality of burden, and one discharges more than his share of the common obligation." Bragg *v.* Patterson, 85 Ala. 235; Aspinwall *v.* Sacchi, 57 N. Y. 331.

There may be contribution among fraudulent grantees of land when the land conveyed to one of them is taken to pay the grantor's debts, such contribution to be adjusted according to the equities existing between the several grantees. Janvrin *v.* Curtis, 63 N. H. 312; Chamberlayne *v.* Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786; Brice *v.* Myers, 5 Ohio 121. See Cornish *v.* Clark, L. R. 14 Eq. 184.

Where two or more are under a common obligation involving expense, and one performs the duty, he is entitled to contribution, which, in the absence of agreement or special equities, will be of an equal share. The case is one of railroad companies bound to repair a crossing. Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577.

6. Origin of Remedy of Contribution. — In Offley *v.* Johnson, 2 Leon. 166, in an action for contribution by one co-surety to another who had paid the debt, both of whom were citizens of London, it was said by the court that "no action lieth by the course of the common law, but only by custom in such cities," and the cause was remanded by the King's Bench to the Court of the City of London, "for otherwise the plaintiff should be without remedy." In Layer *v.* Nelson, 1 Vern. 456, the action for contribution is declared to be by custom of the city of London. "In ancient times no action could be maintained at law where a surety had paid the debt of his principal, and the first case of the kind in which the plaintiff succeeded * * * was decided on equitable grounds." Buller, J., in Toussaint *v.* Martinnant, 2 T. R. 105. The earliest chancery cases were Peter *v.* Rich, 1 Ch. Ca. 34; Morgan *v.* Seymour, 1 Ch. Rep. 120; and Swain *v.* Wall, 1 Ch. Rep. 149.

The equitable foundation of the doctrine of contribution was first carefully examined and clearly stated in Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270, 1 White & T. L. Cas. 114, which has ever since been regarded as the leading case.

7. Administered on Equitable Principles. — "It is an unyielding principle of equity that the action of contribution shall never be used to enforce an unjust and inequitable demand." Bulkeley *v* House, 62 Conn. 468.

Must Come into Equity with Clean Hands. — It is necessary that the plaintiff's hands should be clean, and where in bad faith he has so conducted himself as to permit a joint judgment against himself and the defendant, he cannot recover contribution. Flanagan *v.* Duncan, 133 Pa. St. 373.

Nor where the debt resulted from the plaintiff's fraudulent neglect to pay a previous debt, and is one which he ought in conscience to pay. McCrory *v.* Parks, 18 Ohio St. 1.

If the surety in an official bond aids the principal in a breach thereof, he cannot recover contribution from a co-surety. Scofield *v.* Gaskill, 60 Ga. 277; Healey *v.* Scofield, 60 Ga. 450; Crisfield *v.* Murdock, 127 N. Y. 315.

But in Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270, it was held an insufficient defense that the plaintiff had encouraged the original debtor in gaming, and had been privy to his disobedience of orders from his superiors, Ld. Ch. B. Eyre saying: "A man must come into a court of equity with clean hands, but when this is said it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense."

If the default of the principal, a corporation, is caused by the misapplication of funds by its manager, who is also a surety for its debts, he cannot, on paying, have contribution from other sureties. Simmons *v.* Camp, 71 Ga. 54.

It has been held no defense that the plaintiff was in collusion with the principal, a guardian, and that the ward's estate was sacrificed by their acts. Shepard *v.* Pebbles, 38 Wis. 373. Nor that the plaintiff signed an agree-

lished in equity, the courts of law took jurisdiction on the ground of an implied contract arising from the equitable obligation; and the courts of law, along with the jurisdiction, have taken the doctrine that equality is equity.[1] But

ment that the principal (a guardian) should use the trust funds in his business, paying interest thereon, upon which agreement the court passed an order permitting such use. Berton *v.* Anderson, 56 Ark. 470.

Where one surety applied Confederate money, raised to pay the debt, to his own purposes, and was afterwards compelled to pay good money, he cannot have contribution for the loss. Torrance *v.* Cook, 63 Ga. 598.

Where the plaintiff was attorney of an administrator and made unauthorized deposits, which were lost, he cannot require the defendant, who was co-surety with him, to contribute to the loss. Eshleman *v.* Bolenius, 144 Pa. St. 269.

But in Marsh *v.* Harrington, 18 Vt. 150, it was held no bar to the action that the plaintiff, one of four executors who had been compelled to pay for the default of another, was by agreement the acting executor, it appearing that the others had actually taken part in the execution.

So it is no defense that the plaintiff, one of several assignees in bankruptcy, took by agreement the entire duties upon himself. Lingard *v.* Bromley, 1 Ves. & B. 114.

That the plaintiff had agreed with the principal debtor to pay the debt, in consideration of a lease, which consideration failed, is no defense to his recovering contribution from his cosureties. Brindle *v.* Page, 21 Vt. 94.

But where the plaintiff was both deputy sheriff and surety on the sheriff's bond, and the latter was held liable for a wrongful act of the plaintiff as his deputy, he cannot, on paying the judgment, recover contribution from the other sureties. Block *v.* Estes, 92 Mo. 318.

Where the plaintiff was jointly interested with the principal, and received half the proceeds of the bond without the knowledge of the other sureties, he cannot recover contribution from them. McPherson *v.* Talbott, 10 Gill & J. (Md.) 499, 32 Am. Dec. 191; Roberson *v.* Tonn, 76 Tex. 535.

Where One Became Surety at the Other's Request. — If one surety became such at the request of another, he is not liable to contribute to that other, but is entitled to indemnity from him. Turner *v.* Davies, 2 Esp. N. P. 478; Byers *v.* McClanahan, 6 Gill & J. (Md.) 250; Daniel *v.* Ballard, 2 Dana (Ky.) 296; Blake *v.* Cole, 22 Pick. (Mass.) 67; Taylor *v.* Savag, 12 Mass. 102; Cutter *v.* Emery, 37 N. H. 567. See also Baxter *v.* Moore, 5 Leigh (Va.) 219.

But the mere fact that the defendant became surety at the plaintiff's request is not sufficient to release him from liability, though such a request is a good consideration for a promise of indemnity. Hendrick *v.* Whittemore, 105 Mass. 23; Burnett *v.* Millsaps, 59 Miss. 333; McKee *v.* Campbell, 27 Mich. 497; Shaw *v.* Knox, 98 Mass. 214; Bagott *v.* Mullen, 32 Ind. 332, 2 Am. Rep. 351, where, Turner *v.* Davies 2 Esp. N. P. 478, and the cases following it are carefully *reviewed*, *criticised*, and *distinguished*.

Where one surety signed at the request of the other, who had agreed, for a consideration, to get the note discounted, the former is not liable to contribute to the latter. Martin *v.* Marshall, 60 Vt. 321.

The plaintiff cannot recover when the defendant signed the note at his request and on his promise that he, the defendant, should suffer no loss. Mickley *v.* Stocksleger, 10 Pa. Co. Ct. Rep. 345.

1. Jurisdiction in Courts of Law. — "The equitable doctrine, in progress of time, became so well established that parties were presumed to enter into contracts of suretyship upon its knowledge; and consequently upon a mutual understanding that if the principal failed, each would be bound to share with the others a proportionate loss. Courts of common law thereupon assumed jurisdiction to enforce contribution between the sureties, proceeding on the principle that from their joint undertaking there was an implied promise on the part of each surety to contribute his share, if necessary, to make up the common loss. * * * This jurisdiction of the common-law courts did not, however, impair the concurrent jurisdiction of equity. Indeed, in many cases, especially where the sureties were numerous, and some of them insolvent, or where some of the sureties had died, courts of equity were alone adequate to afford complete remedy." Chipman *v.* Morrill, 20 Cal. 135, by Field, C. J. The same doctrine is stated in the following cases:

England. — Craythorne *v.* Swinburne, 14 Ves. Jr. 169; Kemp *v.* Finden, 12 M. & W. 421; Dunn *v.* Slee, 1 Moo. 2, 4 E. C. L. 385.

Illinois. — Golsen *v.* Brand, 75 Ill. 148; Drummond *v.* Yager, 10 Ill. App. 382.

Kentucky. — Lansdale *v.* Cox, 7 T. B. Mon. (Ky.) 401; Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky.) 271.

Maine. — Howe *v.* Ward, 4 Me. 200; Goodall *v.* Wentworth, 20 Me. 322; Powers *v.* Nash, 37 Me. 322.

Maryland. — Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283.

Massachusetts. — Chaffee *v.* Jones, 19 Pick. (Mass.) 264; Mason *v.* Lord, 20 Pick. (Mass.) 447; Johnson *v.* Johnson, 11 Mass. 359; Warner *v.* Morrison, 3 Allen (Mass.) 566.

Missouri. — Singleton *v.* Townsend, 45 Mo. 380; Van Petten *v.* Richardson, 68 Mo. 380; Jeffries *v.* Ferguson, 87 Mo. 245; Hanna *v.* Hyatt, 67 Mo. App. 308.

New Hampshire. — Odlin *v.* Greenleaf, 3 N. H. 270; Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497; Boardman *v.* Paige, 11 N. H. 432.

New York. — Norton *v.* Coons, 3 Den. (N. Y.) 130, 6 N. Y. 33; Rindge *v.* Baker, 57 N. Y. 209, 15 Am. Rep. 475.

Ohio. — Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

Oregon. — Durbin *v.* Kuney, 19 Oregon 71.

Pennsylvania. — Horbach *v.* Elder, 18 Pa. St. 33.

South Carolina. — Harris *v.* Ferguson, 2 Bailey L. (S. Car.) 397.

Texas. — Faires *v.* Cockerell, 88 Tex. 428.

the jurisdiction of equity has not been lost, and in many respects it can so frame its decrees as to do more ample justice between all the parties than can be done in an action at law.[1]

2. Of Exoneration. — Whenever several parties are liable to the same obligation, but by the contract from which the liability arises or by the relations between them the primary duty of discharging the obligation rests upon one or more of the number, and the liability of the others is only secondary, if those secondarily liable are compelled to discharge the obligation they have a right to reimbursement from those primarily liable for the loss which they have incurred.[2]

This Right May Arise from an express contract of indemnity;[3] from the relationship of principal and surety;[4] from that of successive parties to commercial paper;[5] from common liability for a tort, as to which the party sought to be charged was the one really guilty of fault, while the other, without guilty responsibility, has become legally liable to the injured party and has discharged the liability;[6] or from the implied contract arising from any state of facts which makes it the equitable duty, as between themselves, of one to bear the obligation which has been cast upon the other.[7]

Vermont. — Foster *v.* Johnson, 5 Vt. 60.

In North Carolina the common-law courts declined jurisdiction in cases of contribution until it was conferred on them by statute. Carrington *v.* Carson, Conf. Rep. (3 N. Car.) 216; Sherrod *v.* Woodard, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714.

Legal Rights and Duties Are Co-extensive with Equitable Obligations, and are imposed whether parties are held under the same instrument or not, with knowledge of each other's engagements or not, as in equity. Sherrod *v.* Woodard, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714; Bezzell *v.* White, 13 Ala. 422; Morrison *v.* Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Mason *v.* Lord, 20 Pick. (Mass.) 447; Fletcher *v.* Grover, 11 N. H. 369, 35 Am. Dec. 497; Agnew *v.* Bell, 4 Watts (Pa.) 31; Harris *v.* Ferguson, 2 Bailey L. (S. Car.) 397.

1. **Equitable Jurisdiction Still Exists.** — Story's Equity Jur., § 496; Pomeroy's Eq. Jur., § 1418; Chipman *v.* Morrill, 20 Cal. 135, *quoted* above; Wayland *v.* Tucker, 4 Gratt. (Va.) 268, 50 Am. Dec. 76; Adams *v.* Hayes, 120 N. Car. 383; Thomas *v.* Hearn, 2 Port. (Ala.) 262; Couch *v.* Terry, 12 Ala. 228; Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky.) 270; Becker *v.* Farwell, 25 Ill. App. 432; Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; Rynearson *v.* Turner, 52 Mich. 7; Walker *v.* Cheever, 35 N. H. 339; Neilson *v.* Williams, 42 N. J. Eq. 291; Black *v.* Shreeve, 7 N. J. Eq. 440; Baxter *v.* Moore, 5 Leigh (Va.) 219; Moore *v.* Baker, 34 Fed. Rep. 1; Cowell *v.* Edwards, 2 B. & P. 268; Wright *v.* Hunter, 5 Ves. Jr. 792; Lefroy *v.* Gore, 7 Ir. Eq. R. 228, 1 Jones & L. 571.

2. See Adams's Equity *267.

3. See the title INDEMNITY CONTRACTS.

4. See *infra*, this title, *Application to Particular Relations — Exoneration of Sureties by Principal.*

5. See *infra*, this title, *Application to Particular Relations — Contribution and Exoneration Between the Parties to Commercial Paper.*

6. See *infra*, this title, *Application to Particular Relations — Contribution and Indemnity Between Tortfeasors.*

7. See the titles MISTAKE; PAYMENT.

Vendee Assuming Mortgage. — A grantee who assumes a mortgage is liable to the grantor, if the latter is compelled to pay it. Comstock *v.* Drohan, 71 N. Y. 10; Wilcox *v.* Campbell, 106 N. Y. 325; Dorr *v.* Peters, 3 Edw. Ch. (N. Y.) 132; Blyer *v.* Monholland, 2 Sandf. Ch. (N. Y.) 478; Flagg *v.* Thurber, 14 Barb. (N. Y.) 196; Marsh *v.* Pike, 1 Sandf. Ch. (N. Y.) 210; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Townsend *v.* Ward, 27 Conn. 610; Scott *v.* Featherston, 5 La. Ann. 306; Schlatre *v.* Greaud, 19 La. Ann. 125; Thompson *v.* Thompson, 4 Ohio St. 333; Stevenson *v.* Black, 1 N. J. Eq. 338; Klapworth *v.* Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349; Crowell *v.* Saint Barnabas Hospital, 27 N. J. Eq. 650; Whitehouse *v.* Glass, 7 Grant's Ch. (U. C.) 45.

Irregular Vendor of Corporate Stock. — A vendor of shares of corporate stock, the transfer of which is lacking in some requirement, and who therefore is held liable for a subsequent assessment, has a right to indemnity from the vendee, who has the equitable title as between them. Shepherd *v.* Gillespie, L. R. 3 Ch. 764; Paine *v.* Hutchinson, L. R. 3 Ch. 388; Evans *v.* Wood, L. R. 5 Eq. 9; Grissell *v.* Bristowe, L. R. 3 C. P. 112; Allen *v.* Graves, L. R. 5 Q. B. 478; Coles *v.* Bristowe, L. R. 6 Eq. 149; Hawkins *v.* Maltby, L. R. 6 Eq. 505, L. R. 4 Ch. 200; Wynne *v.* Price, 3 De G. & Sm. 310; Walker *v.* Bartlett, 36 Eng. L. & Eq. 368; Kellogg *v.* Stockwell, 75 Ill. 68; Johnson *v.* Underhill, 52 N. Y. 203.

Vendee Held Liable After Sale. — A stockholder who, by statute, is liable for corporate debts for a certain time after the transfer of his stock, if compelled to pay such debts may recover indemnity from the transferee. Brown *v.* Hitchcock, 36 Ohio St. 667; Thebus *v.* Smiley, 110 Ill. 316.

"When one person is liable for a debt which legally and equitably, as between him and some other person, this other person ought to pay, * * * if he has to pay the debt he can recover it back again from this other person." Greer *v.* McCarter, 5 Kan. 22.

III. Application to Particular Relations — 1. Contribution and Exoneration Between Sureties and Principal — *a.* Contribution Between Co-sureties — (1) *General Principles.* — Whenever one or more of several sureties for the same debt or obligation is obliged to pay the whole debt, or more than a due part thereof, an action either at law or in equity will lie to obtain contribution of his proportional part from the co-sureties.[1]

Foundation of Right. — The right is regarded as resting, not on the original contract, but on the relation created thereby of parties bound by a common obligation, and the contract implied therefrom of discharging such common obligation equally.[2]

" The rule is broad enough * * * to include every instance where one pays a debt for which another is primarily answerable, and that should in equity and good conscience have been discharged by him." Harnsberger *v.* Yancey, 33 Gratt. (Va.) 539.

1. The Right of Contribution Between Co-sureties has been long established. Probably the earliest case reported is Offley *v.* Johnson, 2 Leon. 166. See also Fleetwood *v.* Charnock, Nelson 10, the report whereof is as follows: " The plaintiff and defendant were jointly bound for a third person, who died leaving no estate; the plaintiff was sued, and paid the debt, and brought his bill against the defendant for contribution, who was decreed to pay his proportionable part." In the same year, in Peter *v.* Rich, 1 Ch. Ca. 34, the general principle seems to be well known, and the question was as to the proportion in which the defendant should contribute, a third co-surety being insolvent. See also Swain *v.* Wall, 1 Ch. Rep. 149, and Morgan *v.* Seymour, 1 Ch. Rep. 120.

But in Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270, the doctrine received the form which it has ever since retained. In that case the parties were sureties on separate official bonds for the same public officer, and Lord Chief Baron Eyre in his judgment spoke as follows: " If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract. * * * In Harbert's Case, 3 Coke 11, many cases of contribution are put, and the reason given in the books is that *in equali jure* the law requires equality; one shall not bear the burden in ease of the rest, and the law is grounded in great equity. Contract is never mentioned. * * * Now to come to the particular case of sureties; it is clear that one surety may compel contribution from another towards payment of a debt for which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound, and by different instruments, but for the same principal and the same engagement? In all these cases the sureties have a common interest and a common burden; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportions in which they are to contribute, whereas if they had joined in one bond it must have depended on other circumstances." See also Aspinwall *v.* Sacchi, 57 N. Y. 337.

The same rule of equality between co-sureties applies to compel one who has afterwards received re-indorsement from the principal debtor to share it with his co-sureties who paid equally. See *infra*, this section, *The Measure of Contribution — Only the Net Amount Paid Is Recoverable.*

2. Basis of Right. — Story on Equity Jurisprudence, § 493; Pomeroy on Equity Jurisprudence, § 1418; Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270; Ward *v.* National Bank, L. R. 8 App. 765; Murray *v.* Gibson, 28 Grant's Ch. (U. C.) 12; Moore *v.* Baker, 34 Fed. Rep. 1; Stone *v.* Hammell, 83 Cal. 547, 17 Am. St. Rep. 272; Chipman *v.* Morrill, 20 Cal. 136; Tyus *v.* De Jarnette, 26 Ala. 280; West *v.* Chasten, 12 Fla. 315; Byers *v.* Alcorn, 6 Ill. App. 39; Klepper *v.* Borchsenius, 13 Ill. App. 318; Carroll *v.* Bowie, 7 Gill (Md.) 34; Githene *v.* Kimmer, 68 Ind. 362; Dennis *v.* Gillespie, 24 Miss. 581; Singleton *v.* Townsend, 45 Mo. 380; Matthews *v.* Aikin, 1 N. Y. 601; Wells *v.* Miller, 66 N. Y. 255; Schram *v.* Werner, 85 Hun (N. Y.) 293; Knotts *v.* Butler, 10 Rich. Eq. (S. Car.) 148; Allen *v.* Wood, 3 Ired. Eq. (38 N. Car.) 386; Hartwell *v.* Smith, 15 Ohio St. 204; Faires *v.* Cockerell, 88 Tex. 428; Aldrich *v.* Aldrich, 56 Vt. 327, 48 Am. Rep. 791; Hawker *v.* Moore, 40 W. Va. 49. See also *supra*, this title, *General Principles — Of Exoneration.*

If one of the sureties on a bond suffers loss by the default of his principal, he can, in a suit on the bond, recover only the proportional amount due from the others, since he is himself liable to contribute to the loss equally with them. Alderson *v.* Mendes, 16 Nev. 298; Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196; Chollar *v.* Temple, 39 Ark. 238.

In White *v.* Brown, 29 N. J. L. 307, and McGinnis *v.* Loring, 126 Mo. 404, the right of a surety who has paid a judgment to take an assignment and sue his co-sureties on the judgment, though for a proportional part only, is denied; but in Packer *v.* Vandevender, 13 Pa. Co. Ct. Rep. 31, and Jones *v.* McKinnon, 87 N. Car. 294, he is held entitled to pursue the original security as a means of enforcing the proportional contribution.

The claim for contribution is a simple debt, and not entitled to the preference attaching to the original debt to the United States. State Bank *v.* Adger, 2 Hill Eq. (S. Car.) 262.

One of several makers, really a surety, on paying the note may by agreement with the payee reserve the right to sue principal or co-

Surety of a Surety Not Included. — But the surety of a surety cannot recover contribution from his principal's co-surety.[1]

Obligation to Contribute Is Several. — The obligation to contribute is a several, and not a joint, liability.[2]

(2) *When the Right Accrues* — **Liability of Surety's Estate.** — This implied contract is regarded as an existing obligation from the date of the original contract, so that if a surety dies after entering into the contract of suretyship, but before any sum is paid thereon, his estate is liable to the co-surety who afterwards pays the debt.[3]

Remedy Against Co-surety Before Payment. — One surety may also, without having actually paid the debt, bring a bill in equity to compel his co-surety to contribute with him to its payment,[4] or to prevent him from concealing or fraudulently conveying away his property.[5] But for the purpose of an action to recover the defendant's proportion of the debt, whether at law or in equity, the

sureties on the note. Smith *v.* Latimer, 15 B. Mon. (Ky.) 78.

1. Surety of Surety not Co-surety. — Knox *v.* Vallandingham. 13 Smed. & M. (Miss.) 526; Tom *v.* Goodrich, 2 Johns. (N. Y.) 214; Gibson *v.* Shehan, 5 App. Cas. (D. C.) 391, 23 Wash. L. Rep. (D. C.) 184. But see Stout *v.* Vause, 1 Rob. (Va.) 179.

2. Obligation Several. — Johnson *v.* Harvey, 84 N. Y. 363, 38 Am. Rep. 515; Voss *v.* Lewis, 126 Ind. 155; Graves *v.* Smith, 4 Tex. Civ. App. 537; Adams *v.* Hayes, 120 N. Car. 383.

3. Estate of a Deceased Co-surety Liable — *England.* — Ashby *v.* Ashby, 7 B. & C. 444, 14 E. C. L. 77.

United States. — Liddcrdale *v.* Robinson, 12 Wheat. (U. S.) 594.

Alabama. — Handley *v.* Heflin, 84 Ala. 600.

Arkansas. — Hecht *v.* Skaggs, 53 Ark. 291, 22 Am. St. Rep. 192.

Illinois. — Conover *v.* Hill, 76 Ill. 342.

Indiana. — Sanders *v.* Weelburg, 107 Ind. 266.

Massachusetts. — Wood *v.* Leland, 1 Met. (Mass.) 387; Packard *v.* Nye, 2 Met. (Mass.) 47; Bachelder *v.* Fiske, 17 Mass. 464.

New Jersey. — Vliet *v.* Wyckoff, 42 N. J. Eq. 644; Stothoff *v.* Dunham, 19 N. J. L. 182.

New York. — Bradley *v.* Burwell, 3 Den. (N. Y.) 61; Cornes *v.* Wilkin, 14 Hun (N. Y.) 428; Barry *v.* Ransom, 12 N. Y. 466; Johnson *v.* Harvey, 84 N. Y. 363, 38 Am. Rep. 515.

Pennsylvania. — Malin *v.* Bull, 13 S. & R. (Pa.) 441.

South Carolina. — Burrows *v.* M'Whann, 1 Desaus. (S. Car.) 409; Aikin *v.* Peay, 5 Strobh. L. (S. Car.) 15, 53 Am. Dec. 684; McKenna *v.* George, 2 Rich. Eq. (S. Car.) 15.

Vermont. — Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

And if the liability was not ascertained until after the settlement of the estate, it can be recovered from the heirs who have received the estate. Gibson *v.* Mitchell, 16 Fla. 519; Williams *v.* Ewing, 31 Ark. 229; Stevens *v.* Tucker, 87 Ind. 109; Zollickoffer *v.* Seth, 44 Md. 359.

Distributees contribute proportionally to what they have received. Zollickoffer *v.* Seth, 44 Md. 359.

Contra. — At law, action lies only against the survivors. Primrose *v.* Bromley, 1 Atk. 90. Where the bond was joint, the death of one signer renders the survivor only liable, and he cannot hold the estate of his co-surety liable. Waters *v.* Riley, 2 Har. & G. (Md.) 305, 18 Am. Dec. 302.

But these cases are contrary to the great current of authority as appears above. The argument that a joint bond imposes sole liability on the survivor is answered by the court in Johnson *v.* Harvey, 84 N. Y. 363, 38 Am. Rep. 515, by the remark that though the obligation of the sureties to the creditor was joint, their obligation to contribute to each other is several.

But in *New Jersey* the courts rely upon a statute as giving a right of action against the representative of a deceased signer of a joint bond. Stothoff *v.* Dunham, 19 N. J. L. 182.

"It seems to be settled that the estate of a deceased co-surety is liable to contribute whether he die before the liability arises or afterwards." *Per* Bird, V. C., in Vliet *v.* Wyckoff, 42 N. J. Eq. 642.

4. Compelling Contribution in Equity Before Payment. — Hodgson *v.* Baldwin, 65 Ill. 532; Hyde *v.* Tracy, 2 Day (Conn.) 492; Morrison *v.* Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Ferrer *v.* Barrett, 4 Jones Eq. (57 N. Car.) 455; McKenna *v.* McWitherspoon, *cited* in McKenna *v.* George, 2 Rich. Eq. (S. Car.) 20. This doctrine is for the first time affirmed in *England*, in an elaborate opinion reviewing all the English cases, in Wolmershausen *v.* Gullick (1893) 2 Ch. 514. It is not necessary that he should have demanded that the principal sue and have been refused. Mathews *v.* Saurin, L. R. 31 Ir. 181.

So an owner of the fee may bring a bill to compel a life-tenant to pay an annuity or the proper proportion of an incumbrance, though he has not yet paid anything. Hayes *v.* Hayes, 1 Ch. Ca. 223.

The defendant in a foreclosure action cannot have the money impounded to await the result of another suit against the two, in order to secure his right of contribution, although the plaintiff is about to leave the state. Bell *v.* Walsh, 7 Cal. 84.

For the corresponding right to compel exoneration by the principal before payment, see *infra*, this section, *Exoneration of Sureties by Principal.*

5. Bowen *v.* Hoskins, 45 Miss. 183, 7 Am. Rep. 728; Smith *v.* Rumsey, 33 Mich. 183; Pashby *v.* Mandigo, 42 Mich. 172.

right is regarded as maturing when the plaintiff has paid more than his share of the debt; and until that time, there is neither equitable obligation nor implied contract to make such contribution.[1]

(3) *Incidents of the Right* — (a) **Different Instruments, but the Same Obligation — Suretyship May Be Under Different Instruments.** — It is a general principle that sureties for the same obligation are liable to contribute to each other, though their liability be under different instruments,[2] and though they are ignorant of each

1. Action to Recover Defendant's Proportion of Debt — *England.* — Davies *v.* Humphreys, 6 M. & W. 168; Wallis *v.* Swinburne, 1 Exch. 203; *Ex p.* Snowdon, 17 Ch. Div. 44; *Ex p.* Gifford, 6 Ves. Jr. 805.

Canada. — Harper *v.* Knowlson, 2 Er. & App. (U. C.) 253.

Alabama. — Taylor *v.* Means, 73 Ala. 468; Pegram *v.* Riley, 88 Ala. 399.

Illinois. — Pixley *v.* Gould, 13 Ill. App. 565.

Kentucky. — Lytle *v.* Pope, 11 B. Mon. (Ky.) 307.

Maryland. — Smith *v.* State, 46 Md. 617.

Massachusetts. — Mason *v.* Lord, 20 Pick. (Mass.) 447.

Michigan. — McKee *v.* Campbell, 27 Mich. 497; Backus *v.* Coyne, 45 Mich. 584.

Missouri. — Magruder *v.* Admire, 4 Mo. App. 133; Weidemeyer *v.* Landon, 66 Mo. App. 520.

New Hampshire. — Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497.

New York. — People *v.* Duncan, 1 Johns. (N. Y.) 311; Morgan *v.* Smith, 70 N. Y. 542.

Ohio. — Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

Oregon. — Durbin *v.* Kuney, 19 Oregon 75.

Tennessee. — Gross *v.* Davis, 87 Tenn. 226, 10 Am. St. Rep. 635; Byram *v.* McDowell, 15 Lea (Tenn.) 581.

Texas. — Glasscock *v.* Hamilton, 62 Tex. 166.

Virginia. — Gordon *v.* Rixey, 86 Va. 853.

Washington. — Shoemake *v.* Stimson, 16 Wash. 1.

Wisconsin. — Bushnell *v.* Bushnell, 77 Wis. 435.

So where the administrator of a deceased surety has paid a dividend on the principal debt less than the due proportion of the intestate, he cannot recover contribution from a co-surety. Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497; Apperson *v.* Wilbourn, 58 Miss. 439.

Nor can a surety who owed the principal more than he has paid recover contribution, as he has suffered no loss. Bezzell *v.* White, 13 Ala. 422; Neely *v.* Bee, 32 W. Va. 519; Goepel *v.* Swinden, 1 D. & L. 888. *Contra*, Davis *v.* Toulmin, 77 N. Y. 280.

The plaintiff cannot recover unless he has paid more than the defendant. Powers *v.* Gowen, 32 Me. 381.

If the land of the plaintiff has been taken on execution for the principal debt, his right of action matures when, and not until, every step of the legal process of execution has been completed, so as to divest him of the legal title. Coe *v.* Stow, 8 Conn. 536. But if the property taken stands in the name of another, to whom the plaintiff had conveyed it, the taking does not give him a right to contribution. Mussey *v.* McLellan, 19 Me. 161. Where, by agreement between themselves, each surety agreed to pay a certain portion of the debt, neither can claim contribution till he has paid more than that amount. Gourdin *v.* Trenholm, 25 S. Car. 377. It is said in this case that a surety cannot enforce contribution until the common debt has been fully paid in some way; but the statement is not supported by any argument, and only by a general reference to Dering *v.* Winchelsea, 1 White & T. L. Cas. 114, "and the notes to that case."

The plaintiff must have actually paid, and not merely procured the assignment of the debt to a third person. Becker *v.* Farwell, 25 Ill. App. 432.

Where a debt due the plaintiff has been garnisheed and judgment obtained against the debtor, the plaintiff can sue for contribution, though he has obtained an extension of time for paying the judgment. Gillilan *v.* Nixon, 26 Ill. 50.

Where Debt Has Been Satisfied by a Partial Payment. — Unless the plaintiff has paid more than the defendant remains liable to pay he cannot sustain the action; but if by payment of a smaller sum he has satisfied the debt, he can recover a proportion l part of the sum paid. Stallworth *v.* Preslar, 34 Ala. 510; Pegram *v.* Riley, 88 Ala. 403; Werborn *v.* Kahn, 93 Ala. 201; Cummings *v.* May, 91 Ala. 233. But if he paid a part, agreeing that the rest should remain due, he cannot afterwards claim contribution on the ground that the remaining debt has become barred by the statute of limitations. Pegram *v.* Riley, 88 Ala. 403.

The right of contribution is inchoate from the making of the original contract, but complete from the time of payment. Nally *v.* Long, 56 Md. 567. The obligation exists before payment, and is consummated by payment; where one surety is insolvent, and his assignee sues the other surety on a debt between them, the defendant, paying the debt guaranteed by them during the pendency of the suit, may have a set-off against the claim in suit. Chenault *v.* Bush, 84 Ky. 528.

2. Liable Under Different Instruments — *England.* — Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270; Craythorne *v.* Swinburne, 14 Ves. Jr. 164; Ware *v.* Horwood, 14 Ves. Jr. 31; Mayhew *v.* Crickett, 2 Swanst. 189; Whiting *v.* Burke, L. R. 6 Ch. 342; *In re* Ennis, (1893) 3 Ch. 238.

California. — Powell *v.* Powell, 48 Cal. 235.

Illinois. — Golsen *v.* Brand, 75 Ill. 148.

Kentucky. — Breckenridge *v.* Taylor, 5 Dana (Ky.) 110; Bosley *v.* Taylor, 5 Dana (Ky.) 158, 30 Am. Dec. 677; Cobb *v.* Haynes, 8 B. Mon. (Ky.) 139.

Louisiana. — Stockmeyer *v.* Oertling, 35 La. Ann. 468.

Maryland. — Craig *v.* Ankeney, 4 Gill (Md.) 225.

other's suretyship.[1]

But the Obligation Must Be the Same. — But they must be liable for the same obligation, and in the same degree; if their liability be for separate obligations relating to the same transaction,[2] or for separate and entirely distinct portions of the same debt,[3] or if the liability of one be secondary to that of the other,[4]

Massachusetts. — Warner *v.* Morrison, 3 Allen (Mass.) 566.

Minnesota. — Young *v.* Shunk, 30 Minn. 503.

Mississippi. — Burnett *v.* Millsaps, 59 Miss. 333.

New York. — Schram *v.* Werner, 85 Hun (N. Y.) 293; Armitage *v.* Pulver, 37 N. Y. 494; Aspinwall *v.* Sacchi, 57 N. Y. 331.

North Carolina. — Bell *v.* Jasper, 2 Ired. Eq. (37 N. Car.) 597; Pickens *v.* Miller, 83 N. Car. 543; Bright *v.* Lennon, 83 N. Car. 183.

Oregon. — Durbin *v.* Kuney, 19 Oregon 74.

South Carolina. — Harris *v.* Ferguson, 2 Bailey L. (S. Car.) 397; Enicks *v.* Powell, 2 Strobh. Eq. (S. Car.) 196.

Sureties on successive bonds to secure the same official duty, Dugger *v.* Wright, 51 Ark. 232, 14 Am. St. Rep. 48; Ketler *v.* Thompson, 13 Bush (Ky.) 287; Jones *v.* Hays, 3 Ired. Eq. (38 N. Car.) 502, 44 Am. Dec. 78; Jones *v.* Blanton, 6 Ired. Eq. (41 N. Car.) 115, 51 Am. Dec. 415; Moore *v.* Boudinot, 64 N. Car. 190; Com. *v.* Cox, 36 Pa. St. 442; or where one is on an additional bond required for better security, Bergen *v.* Stewart, 28 How. Pr. (N. Y. Supreme Ct.) 6; or one is on general official bond, and the other on a special bond required with relation to a special duty, Elbert *v.* Jacoby, 8 Bush (Ky.) 547; Cherry *v.* Wilson, 78 N. Car. 164: are co-sureties, and liable to contribute together.

Sureties on different bonds, for different debts of the same debtor, are not co-sureties, and there is no contribution between them. Hutchison *v.* Roberts, 8 Houst. (Del.) 459.

A guardian gave bond with sureties. Afterwards a third party pledged property to the ward as security. It was held that the pledgor and sureties were co-sureties, and the former could have contribution from the latter. Boyd *v.* Robinson, 13 Ohio Cir. Ct. Rep. 211, 7 Ohio Dec. 82.

1. Contribution Though Co-sureties Ignorant of Each Other's Suretyship. — Craythorne *v.* Swinburne, 14 Ves. Jr. 160; Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Warner *v.* Morrison, 3 Allen (Mass.) 566; Norton *v.* Coons, 3 Den. (N. Y.) 130; Schram *v.* Werner, 85 Hun (N. Y.) 293; Wells *v.* Miller, 66 N. Y. 255; Durbin *v.* Kuney, 19 Oregon 74; Sherwood *v.* Jordan, 2 Tex. Unrep. Cas. 610; Stout *v.* Vause, 1 Rob. (Va.) 179; Stovall *v.* Border Grange Bank, 78 Va. 188.

2. Liability for Separate Obligations Relating to Same Transaction. — If the obligations of the different sureties are for wholly distinct things, or have no relation to, or operation upon each other, though they arise out of the same original indebtedness, there is no right of contribution between them. Langford *v.* Perrin, 5 Leigh (Va.) 552; Kellar *v.* Williams, 10 Bush (Ky.) 216; Brandenburg *v.* Flynn, 12 B. Mon. (Ky.) 397; Salyers *v.* Ross, 15 Ind. 130; Daniel *v.* Joyner, 3 Ired. Eq. (38 N. Car.) 513; Enicks *v.* Powell, 2 Strobh. Eq. (S. Car.) 196.

So if one set of sureties have been substituted for others whose liability has ceased. Hutchins *v.* McCauley, 2 Dev. & B. Eq. (22 N. Car.) 399; Tittle *v.* Bennett, 94 Ga. 405; Bell *v.* Boyd, 76 Tex. 133.

A surety on a renewal note taken to replace a former note whereon the plaintiff was surety is not liable to contribute to the plaintiff after payment. Chapman *v.* Garber, 46 Neb. 16.

Plaintiff and defendant were sureties on an administration bond. After settlement of his account, the administrator gave a bond for payment of the balance, with the plaintiff as surety, which was accepted and he was discharged. It was held that the plaintiff could not recover contribution from the defendant. Beckham *v.* Pride, 6 Rich. Eq. (S. Car.) 78.

If One Be Surety for the Original Debt, and the Other on a Bail Bond, or other security given in course of the litigation growing out of the debt, they are not liable to contribute to each other; and if collection against the principal is stayed or prevented by the giving of the latter security, the surety therein is liable to indemnify the original surety. Parsons *v.* Briddock, 2 Vern. 608; Dunlap *v.* Foster, 7 Ala. 734; Yoder *v.* Briggs, 3 Bibb (Ky.) 228; Bohannon *v.* Combs, 12 B. Mon. (Ky.) 577; Hoskins *v.* Parsons, 1 Metc. (Ky.) 254; Hammock *v.* Baker, 3 Bush (Ky.) 208; Old *v.* Chambliss, 3 La. Ann. 205; Semmes *v.* Naylor, 12 Gill & J. (Md.) 358; Smith *v.* Bing, 3 Ohio 33; Burns *v.* Huntingdon Bank, 1 P. & W. (Pa.) 395; Pott *v.* Nathans, 1 W. & S. (Pa.) 155, 37 Am. Dec. 456; Chaffin *v.* Campbell, 4 Sneed (Tenn.) 184; Givens *v.* Nelson, 10 Leigh (Va.) 397; Langford *v.* Perrin, 5 Leigh (Va.) 552; Rosenbaum *v.* Goodman, 78 Va. 121.

Successive Sureties in Litigation Are Liable to Exonerate Each Other in the inverse order of time, the later being sureties for the earlier. Chrisman *v.* Jones, 34 Ark. 73.

Surety of Surety Held Under Facts a Co-surety. — Where the defendants signed as sureties, and the plaintiff, having been applied to to sign, procured a friend to sign and agreed to indemnify him, and on that friend afterwards being called on paid the debt, he is entitled to contribution, as he virtually became a surety in the name of his friend. Stout *v.* Vause, 1 Rob. (Va.) 179.

3. Sureties for Separate Portions of Same Debt. — Coope *v.* Twynam, T. & R. 426; Pendlebury *v.* Walker, 4 Y. & Coll. 424; Field *v.* Pelot, McMull. Eq. (S. Car.) 376.

If by agreement between the sureties and the creditor each of the sureties has assumed a certain portion of the debt and given his separate obligation therefor, the common relation between the sureties ceases to exist, and there is no right to contribution, or to sharing an indemnity received by one of them from the principal debtor. Moore *v.* Isley, 2 Dev. & B. Eq. (22 N. Car.) 372.

4. Surety Secondarily Liable. — If one of the sureties, instead of uniting with the others in

under such circumstances there is no contribution between them.

guaranteeing due performance by the principal, signed as surety for the others, they have no right of contribution against him, and his right against them is not for contribution, but for full indemnity.

England. — Craythorne *v.* Swinburne, 14 Ves. Jr. 164; Hartley *v.* O'Flaherty, Lloyd & G. *temp.* Plunk. 216.

United States. — M'Donald *v.* Magruder, 3 Pet. (U. S.) 470; McCarty *v.* Roots, 21 How. (U. S.) 432; Gillespie *v.* Campbell, 39 Fed. Rep. 724.

Connecticut. — Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74; Bulkeley *v.* House, 62 Conn. 459.

Illinois. — Hamilton *v.* Johnston, 82 Ill. 39; Robertson *v.* Deatherage, 82 Ill. 511.

Indiana. — Bowser *v.* Rendell, 31 Ind. 128; Core *v.* Wilson, 40 Ind. 204; Baldwin *v.* Fleming, 90 Ind. 177.

Iowa. — Boone County *v.* Jones, 58 Iowa 373.

Kentucky. — Whitman *v.* Gaddie, 7 B. Mon. (Ky.) 591; Chapeze *v.* Young, 87 Ky. 476.

Massachusetts. — Longley *v.* Griggs, 10 Pick. (Mass.) 121.

Michigan. — Hanish *v.* Kennedy, 106 Mich. 455.

Mississippi. — Hunt *v.* Chambliss, 7 Smed. & M. (Miss.) 532.

Missouri. — Price *v.* Edwards, 11 Mo. 524; McMahan *v.* Geiger, 73 Mo. 145.

New Hampshire. — Cutter *v.* Emery, 37 N. H. 567; Whitehouse *v.* Hanson, 42 N. H. 9.

New York. — La Grange *v.* Merrill, 3 Barb. Ch. (N. Y.) 625; Norton *v.* Coons, 3 Den. (N. Y.) 130; Phillips *v.* Plato, 42 Hun (N. Y.) 189; Schram *v.* Werner, 85 Hun (N. Y.) 293; Harris *v.* Warner, 13 Wend. (N. Y.) 400; Wells *v.* Miller, 66 N. Y. 255; Sayles *v.* Sims, 73 N. Y. 552.

North Carolina. — Dawson *v.* Pettway, 4 Dev. & B. L. (20 N. Car.) 396; Thompson *v.* Sanders, 4 Dev. & B. L. (20 N. Car.) 404; Smith *v.* Smith, 1 Dev. Eq. (16 N. Car.) 173.

Tennessee. — Cowan *v.* Duncan, Meigs (Tenn.) 470; McClelland *v.* Davis, 4 Lea (Tenn.) 97; Turner *v.* Overall, (Tenn. 1897) 39 S. W. Rep. 756.

Vermont. — Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345; Adams *v.* Flanagan, 36 Vt. 400; Sherman *v.* Black, 49 Vt. 198.

Virginia. — Stout *v.* Vause, 1 Rob. (Va.) 179; Harrison *v.* Lane, 5 Leigh (Va.) 414, 27 Am. Dec. 607; Boulware *v.* Hartsook, 83 Va. 679.

West Virginia. — Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

It is not sufficient that both parties are sureties; they must occupy the same relation to the principal, and be without equities between themselves giving an advantage to one over the other. Wells *v.* Miller, 66 N. Y. 255.

If the several sureties be separate and successive there is no right of contribution between them, but the prior is bound to indemnify the junior party. M'Donald *v.* Magruder, 3 Pet. (U. S.) 470.

Where A was surety on a bond for the discharge of an attachment, and after judgment A and B both entered into a supersedeas bond which A was compelled to satisfy, it was held that A could not claim contribution. Hartwell *v.* Smith, 15 Ohio St. 200.

Contra. — "Three bound in a bond, one being principal and the other two sureties; afterward a fourth becomes bound to the obligee that if the other three did not pay according to the condition of the bond, he would pay; one of the two sureties pays the money, and prefers his bill against the fourth for contribution; and the question was whether he should be bound to contribute, he being but a supplemental surety; and the Master of the Rolls seemed to think that he could." Cooke *v.* ——, 2 Freem. 97. This case was *cited* but *disregarded* in Craythorne *v.* Swinburne, 14 Ves. Jr. 164.

When Surety Is to Be Considered Supplemental. — Where the principal and original sureties signed as makers, and afterwards, a bank having refused to discount the note, the plaintiff signed as a maker, but added the word "surety" to his name, it was held that after payment he was entitled to contribution, but not to indemnity. "They must all be considered co-sureties, unless a state of facts be shown to the court from which it shall appear positively, or by legal intendment, that these defendants intended, as to the subsequent signer, to stand in the character of principals." Warner *v.* Price, 3 Wend. (N. Y.) 397. This decision is *followed* and *approved* in Harris *v.* Warner, 13 Wend. (N. Y.) 400; Whitehouse *v.* Hanson, 42 N. H. 9; Woodworth *v.* Bowes, 5 Ind. 276.

Where he who signs as surety claims that he is liable only as last indorser, he must show the knowledge or consent of the co-sureties to his sustaining that relation. Simmons *v.* Camp, 64 Ga. 726.

But the following cases seem to be contrary to Warner *v.* Price, 3 Wend. (N. Y.) 397, and to make the intention with which the later party signed, rather than the intent, or lack of it, of the earlier parties, the test. Robertson *v.* Deatherage, 82 Ill. 511; Bowser *v.* Rendell, 31 Ind. 128; Bobbitt *v.* Shryer, 70 Ind. 513; Baldwin *v.* Fleming, 90 Ind. 177; Chapeze *v.* Young, 87 Ky. 476; McMahan *v.* Geiger, 73 Mo. 145; Robison *v.* Lyle, 10 Barb. (N. Y.) 512; Smith *v.* Smith, 1 Dev. Eq. (16 N. Car.) 173; Lapham *v.* Barnes, 2 Vt. 213; Adams *v.* Flanagan, 36 Vt. 400; Sherman *v.* Black, 49 Vt. 198.

The fact that the later indorser was induced to sign by the maker telling him that the prior indorser had received the value, and would pay for the goods, does not affect his liability, under the Canadian rule, as co-surety. McKelvey *v.* Davis, 17 Grant's Ch. (U. C.) 355.

But if the later indorser expressly stipulated that he should be liable only on default of the others, he is not liable to contribute, unless it appear that others signed relying on his indorsement, of which he had notice. Mitchell *v.* English, 17 Grant's Ch. (U. C.) 303.

Where there is anything in the form of the contract or the nature of the transaction to show that the subsequent sureties did not expect to be holden as co-sureties with the others, but to stand merely as sureties for all the former signers, they are entitled to full indemnity from each of the others or all jointly; as when the surety signs expressly as surety for all the above signers, or when he signs

(b) **Liability of Deceased Co-surety's Estate.** — The estate of a deceased co-surety is liable to contribute with the living sureties, both at law and in equity.[1]

(c) **Payment Must Be Compulsory.** — A voluntary payment of the debt is not sufficient to give a right to contribution.[2]

saying he is willing to be responsible for all of them. Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345.

The defendant can resist contribution on the ground that he really signed as surety for the plaintiff as well as the principal, unless the plaintiff was induced to sign by the defendant's apparent co-suretyship. Schram *v.* Werner, 85 Hun (N. Y.) 293.

In Adams *v.* Flanagan, 36 Vt. 400, Bobbitt *v.* Shryer, 70 Ind. 513, and Melms *v.* Werdehoff, 14 Wis. 18, both parties were misled by the principal debtor, who assured the first surety that he would procure the other as co-surety, and asked the latter to sign merely as surety for the other, but, on the intent of the later signer, he was held a supplemental surety, and entitled to exoneration.

The defendants were sureties on a note, and refused to renew it except as sureties for the plaintiff. The maker procured the plaintiff to sign by telling him that it was a renewal, and the defendants would sign as co-sureties. On seeing the plaintiff's signature, the defendants signed without further inquiry. It was held that they were co-sureties. Crouse *v.* Wagner, 41 Ohio St. 470.

The mere fact that the defendant signed eight months after the principal and the plaintiff is not sufficient to show that he is not a co-surety liable to contribute. McNeil *v.* Sanford, 3 B. Mon. (Ky.) 11.

The mere fact that the plaintiff signed last, and that he added the word "surety" to his signature, is not enough to entitle him to recover indemnity against another surety who had signed before. It is still necessary for him to prove that he was surety for the other surety, as well as for the principal. Sisson *v.* Barrett, 2 N. Y. 406.

The fact that a note was given to secure a prior liability in which the defendant was a principal and the plaintiff a surety for him is not sufficient to overcome the presumption of co-suretyship created by the terms of the note, in which both parties are described as sureties. Prescott *v.* Perkins, 16 N. H. 305.

A and B gave a note to C, A being surety to B. C indorsed it to D; D then released it for a new note, signed by A and C. It was held that A was not a co-surety with C, and could not have contribution from him. Goetchius *v.* Calkins, 46 Mich. 328.

The plaintiff, really a surety, signed as maker. The defendant signed a renewal as surety, supposing the plaintiff to be a principal. It was held that the plaintiff was principal as to the defendant, and could not have contribution from him. Price *v.* Edwards, 11 Mo. 524.

H. and F. were sureties for a guardian. H. was afterwards appointed his successor, and F. signed H.'s bond as surety. H. charged himself with the sum due from his predecessor, but never received it. The ward recovered the amount from him. It was held that F. was liable to contribute to the loss as co-surety. Flickinger *v.* Hull, 5 Gill (Md.) 60.

Where the plaintiff had received from the principal a note for the amount at the time of signing the guaranteed note, the question is whether that was given him as mere collateral security, or whether he agreed to become the principal debtor. Unless the latter is found, his right to contribution as a co-surety is not destroyed. Done *v.* Walley, 2 Exch. 198.

1. See *supra*, this section, *General Principles; When the Right Accrues.*

2. **Voluntary Payment Not Sufficient.** — Where the several sureties had agreed that each should pay a certain proportion of the debt, and the creditor had accepted the agreement, and one afterwards paid the whole, it was held that the payment of the whole was a voluntary act, and he could not recover contribution. Curtis *v.* Parks, 55 Cal. 106.

Where one of many co-sureties, after another had paid the debt, reimbursed him one-half, he could not join with him in a suit for contribution against the others. Gay *v.* Ward, 67 Conn. 147.

If a note is void for usury, of which fact a surety has knowledge, he cannot, by voluntarily paying it, acquire a right to contribution against his co-sureties. Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

A surety on a bail bond who might have avoided liability by surrendering up the principal, but paid the judgment instead, cannot recover contribution. Skillin *v.* Merrill, 16 Mass. 40.

One of a sheriff's bondsmen, who pays a judgment against the sheriff which was not legally enforceable, cannot recover contribution. Smith *v.* Staples, 49 Conn. 90.

A surety who voluntarily pays a bond not authorized by law, and which could not have been enforced, cannot recover contribution. Halsey *v.* Murray, 112 Ala. 185.

Exceptions to the Rule. — A defense to the note of which the plaintiff had no knowledge is no bar to his recovering contribution. Warner *v.* Morrison, 3 Allen (Mass.) 566; Hichborn *v.* Fletcher, 66 Me. 209, 22 Am. Rep. 562.

One maker of a joint note may pay after the statute of limitations has run, and recover contribution from the others, since that defense is one which any of the makers may waive, and his acknowledgment binds the others. Mills *v.* Hyde, 19 Vt. 59, 46 Am. Dec. 177. A surety is not bound to plead the statute, but may or may not at his discretion, and his waiver does not affect his right to contribution. Bright *v.* Lennon, 83 N. Car. 183.

But if both sureties were discharged by the statute, one cannot pay and collect from the other. Cocke *v.* Hoffman, 5 Lea (Tenn.) 105, 40 Am. Rep. 23. Where the plaintiff was trustee in insolvency of one signer, and the defendant administrator of the other, and the original note was barred before the death and insolvency, the plaintiff cannot pay the debt

But Suit Is Not Necessary. — But if the plaintiff is legally liable, it is not necessary for him to await execution, judgment, or even the bringing of a suit.[1]

and claim contribution. Turner *v.* Thom, 89 Va. 745.

If the plaintiff has been discharged in bankruptcy and the defendant is still liable, the plaintiff may waive his discharge and pay, and still recover contribution; but not if the obligee had given a covenant not to sue him, of which he was aware. Craven *v.* Freeman, 82 N. Car. 361.

The fact that the plaintiff might have resisted enforcement of the note because of an alteration after his signature does not disable him to obtain contribution. He has a right to ratify the note after such alteration. Houck *v.* Graham, 106 Ind. 195, 55 Am. Rep. 727. *Contra*, Davis *v.* Bauer, 41 Ohio St. 257.

It is no defense that the original note was void for want of consideration. Cave *v.* Burns, 6 Ala. 780.

Judgment Against Plaintiff Not Conclusive. — A judgment against the plaintiff does not conclude the defendant from showing that there was no liability. Malin *v.* Bull, 13 S. & R. (Pa.) 441; Kramph *v.* Hatz, 52 Pa. St. 525; Cathcart *v.* Foulke, 13 Mo. 561; Thomas *v.* Hubbell, 15 N. Y. 405, 69 Am. Dec. 619; Briggs *v.* Boyd, 37 Vt. 534; Lowndes *v.* Pinckney, 1 Rich. Eq. (S. Car.) 155.

But the defendant is concluded if he was a party to the original litigation. Love *v.* Gibson, 2 Fla. 598; Rice *v.* Rice, 14 B. Mon. (Ky.) 335; Konitzky *v.* Meyer, 49 N. Y. 571; Hare *v.* Grant, 77 N. Car. 203.

If the defendant had no opportunity of defending in the suit, and can show that a judgment might have been prevented by a proper defense, he can defend against contributing to pay it. Skrainka *v.* Rohan, 18 Mo. App. 340.

It is well settled that "the party entitled to be indemnified may throw upon the indemnitors the burden and risk of the primary litigation, by giving to them the opportunity of defending the original suit. * * * It then becomes the defense of the indemnitors, and they are concluded by its results." Thomas *v.* Hubbell, 15 N. Y. 405, 69 Am. Dec. 619. Where in the original litigation the plaintiff had been held liable, and the defendant not, the plaintiff is concluded and cannot recover judgment. Ledoux *v.* Durrive, 10 La. Ann. 7. *Contra*, Peters *v.* Barnhill, 1 Hill L. (S. Car.) 234.

Defendant's Continued Liability Not Essential. — If at the time of payment the surety who pays was legally bound to pay, he can recover contribution though the co-sureties or principal were discharged by the statute of limitations. Broughton *v.* Robinson, 11 Ala. 931; Preslar *v.* Stallworth, 37 Ala. 402; Sibley *v.* McAllaster, 8 N. H. 389; Crosby *v.* Wyatt, 10 N. H. 321; Peaslee *v.* Breed, 10 N. H. 491, 34 Am. Dec. 178; Boardman *v.* Paige, 11 N. H. 431; Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Martin *v.* Frantz, 127 Pa. St. 389, 14 Am. St. Rep. 859; Reeves *v.* Pulliam, 7 Baxt. (Tenn.) 124; Faires *v.* Cockerell, 88 Tex. 428; Aldrich *v.* Aldrich, 56 Vt. 324, 48 Am. Rep. 791.

Though the defendant had established a defense in a suit on the note he may still be liable to contribute to his co-surety who did not have the defense. Hill *v.* Morse, 61 Me. 541. So where the defendant (an administrator) is discharged by failure to present the original claim. Evans *v.* Evans, 16 Ala. 465.

As to the defendant's discharge in bankruptcy before the plaintiff paid, see *infra*, this section, *Defenses — Bankruptcy*.

Contra. — The doctrine of the above cases is denied in Shelton *v.* Farmer, 9 Bush (Ky.) 314; Cochran *v.* Walker, 82 Ky. 220, 56 Am. Rep. 891; Glasscock *v.* Hamilton, 62 Tex. 153.

And where the plaintiff was sued seven years after maturity of the original note, and judgment obtained which he paid thirty-one years afterwards, his right to contribution was denied. The court said in this case: "Where there is no direct, there can be no indirect liability." But the extraordinary laches of both the creditor and the original plaintiff make the case quite exceptional, and perhaps hardly to be regarded as an authority against the leading proposition. Williamson *v.* Rees, 15 Ohio 572; Williamson *v.* Collins, 17 Ohio 354.

The defendant must have been liable when the plaintiff paid. Stockmeyer *v.* Oertling, 35 La. Ann. 468.

Where the plaintiff, after the statute had run, paid a judgment obtained in a suit begun before the right of action had been barred against him or the co-surety, he can recover contribution, though the co-surety was not made a defendant in the original suit. Glasscock *v.* Hamilton, 62 Tex. 153.

It is no defense that the defendant had been released by the original creditor. Clapp *v.* Rice, 15 Gray (Mass.) 557, 77 Am. Dec. 387.

1. Surety Need Not Await Suit. — Sureties legally bound, who have paid on demand and after being threatened with suit, are entitled to contribution. Hardell *v.* Carroll, 90 Wis. 350. So if they pay after suit is brought, without awaiting trial. Machado *v.* Fernandez, 74 Cal. 362. Or on rendition of judgment, without awaiting execution. Buckner *v.* Stewart, 34 Ala. 529; Briggs *v.* Hinton, 14 Lea (Tenn.) 233; Mason *v.* Pierron, 69 Wis. 590. Or merely on the debt being due and legally collectible. Pitt *v.* Purssord, 8 M. & W. 538; Fishback *v.* Weaver, 34 Ark. 580; Love *v.* Gibson, 2 Fla. 598; Goodall *v.* Wentworth, 20 Me. 322; Warner *v.* Morrison, 3 Allen (Mass.) 566; Skrainka *v.* Rohan, 18 Mo. App. 340; Green *v.* Milbank, 56 How. Pr. (N. Y. Supreme Ct.) 382; Linn *v.* McClelland, 4 Dev. & B. L. (20 N. Car.) 458; Bright *v.* Lennon, 83 N. Car. 188; Acers *v.* Curtis, 68 Tex. 423; Glasscock *v.* Hamilton, 62 Tex. 143; Mason *v.* Pierron, 69 Wis. 585.

And they may even pay in advance of maturity and collect contribution at maturity. Craig *v.* Craig, 5 Rawle (Pa.) 98; Golsen *v.* Brand, 75 Ill. 148; Felton *v.* Bissel, 25 Minn. 20.

Payment after submission to arbitrators and an adverse award has been held sufficient to justify contribution from a joint contractor, though the submission was without his knowledge. Burnell *v.* Minot, 4 Moo. 340, 16 E. C.

(d) **Payment by Note.** — The plaintiff must have actually paid the debt; but if he has given his negotiable note to the original creditor, which has been accepted as payment, he may recover contribution though the note has not been actually paid.[1]

(e) **Notice and Demand Not Necessary.** — Notice by the surety who has paid the debt, to his co-surety, of the payment, and demand for contribution, is not a necessary prerequisite to suit.[2]

(f) **Insolvency of Principal.** — In an action at law it is not necessary to show the insolvency of the principal debtor;[3] in equity the insolvency of the principal

L. 375; McLean *v.* Jones, 2 U. C. L. J. N. S. 206.

It is no defense that the plaintiff suffered a default and had the damages assessed by a referee instead of trying the case before a jury, unless it also appears that there was a defense. Deakyne *v.* Buchanan, 3 Houst. (Del.) 124.

That there was a legal defense is insufficient to bar contribution if the plaintiff could have been compelled in equity to pay. Hutton *v.* Eyre, 1 Marsh. 603, 6 Taunt. 289.

But in *Louisiana* the plaintiff must have been compelled to pay by suit. Stockmeyer *v.* Oertling, 35 La. Ann. 467.

1. Payment by Note — *England.* — Barclay *v.* Gooch, 2 Esp. N. P. 571.

Alabama. — Pinkston *v.* Taliaferro, 9 Ala. 547.

Arkansas. — Anthony *v.* Percifull, 8 Ark. 494.

Illinois. — Ralston *v.* Wood, 15 Ill. 171, 58 Am. Dec. 604.

Indiana. — Keller *v.* Boatman, 49 Ind. 104; White *v.* Carlton, 52 Ind. 372; Nixon *v.* Beard, 111 Ind. 137; Reiter *v.* Cumback, 1 Ind. App. 41.

Kentucky. — Lee *v.* Forman, 3 Metc. (Ky.) 114; Robertson *v.* Maxcey, 6 Dana (Ky.) 104; Atkinson *v.* Stewart, 2 B. Mon. (Ky.) 348.

Massachusetts. — Cornwall *v.* Gould, 4 Pick. (Mass.) 444; Chandler *v.* Brainard, 14 Pick. (Mass.) 285.

Nebraska. — Smith *v.* Mason, 44 Neb. 610.

New Hampshire. — Pearson *v.* Parker, 3 N. H. 366.

New York. — Witherby *v.* Mann, 11 Johns. (N. Y.) 518.

South Carolina. — Peters *v.* Barnhill, 1 Hill L. (S. Car.) 236.

Texas. — Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117.

Contra.— Brisendine *v.* Martin, 1 Ired. L. (23 N. Car.) 286; Nowland *v.* Martin, 1 Ired. L. (23 N. Car.) 307.

Satisfaction of the creditor by note is sufficient, even though the creditor afterwards released the surety from his note. Stubbins *v.* Mitchell, 82 Ky. 535. Or though the maker of the note is insolvent. Owen *v.* McGehee, 61 Ala. 440.

Payment by Nonnegotiable Note or Bond. But if the security given to the original creditor were a nonnegotiable note, Bennett *v.* Buchanan, 3 Ind. 47; White *v.* Miller, 47 Ind. 385; Pitzer *v.* Harmon, 8 Blackf. (Ind.) 112, 44 Am. Dec. 738; Morrison *v.* Berkey, 7 S. & R. (Pa.) 238; Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117; or a bond, Taylor *v.* Higgins, 3 East 169; Maxwell *v.* Jameson, 2 B. & Ald. 51; Cumming *v.* Hackley, 8 Johns. (N. Y.) 202; the surety who has given it can recover neither contribution from the co-sureties nor exoneration from the principal.

Under the statutes of *Indiana* it is required that the note should be not only negotiable, but payable in bank. Romine *v.* Romine, 59 Ind. 351.

The distinction between the effect of giving a negotiable note and a bond is denied in Robertson *v.* Maxcey, 6 Dana (Ky.) 104; Ralston *v.* Wood, 15 Ill. 171, 58 Am. Dec. 604.

It was held sufficient in equity that the plaintiff had assumed the debt, and given mortgage security for it, and made payments from sales of the mortgaged property nearly sufficient to cover it, although there had been no accounting between him and the creditor. Lytle *v.* Pope, 11 B. Mon. (Ky.) 302; Trites *v.* Kelly, Trin. Term, New Bruns. (1833), *cited* in Stevens's Dig. 1103.

Whatever is accepted by the principal creditor in payment, and procures a discharge of the obligation, is sufficient. Knighton *v.* Curry, 62 Ala. 104.

A and B owed A and C. A and C charged off the debt to profit and loss. It was held that this is not such a payment as entitles A to sue B for contribution. Phillips *v.* Blatchford, 137 Mass. 510.

2. Notice and Demand. — Taylor *v.* Reynolds, 53 Cal. 686; Wood *v.* Perry, 9 Iowa 479; Morrison *v.* Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Chaffee *v.* Jones, 19 Pick. (Mass.) 264; Vliet *v.* Wyckoff, 42 N. J. Eq. 644; Parham *v.* Green, 64 N. Car. 436; Bright *v.* Lennon, 83 N. Car. 183; Cage *v.* Foster, 5 Yerg. (Tenn.) 261, 26 Am. Dec. 265; Foster *v.* Johnson, 5 Vt. 60; Mason *v.* Pierron, 69 Wis. 585.

Contra. — Carpenter *v.* Kelly, 9 Ohio 106; Williams *v.* Williams, 5 Ohio 444, holds that where payments are made in small instalments a separate cause of action does not arise on every payment to be barred by the statute period of time, but that there must be a notice of the amount paid, and demand for contribution. Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110, holds that an action may be maintained, but that no costs will be granted if there had been no notice and demand. See also Sherrod *v.* Woodard, 4 Dev. L. (15 N. Car.) 363, 25 Am. Dec. 714.

3. Showing Insolvency of Principle — Rule at Law. — Cowell *v.* Edwards, 2 B. & P. 268; Roberts *v.* Adams, 6 Port. (Ala.) 363, 31 Am. Dec. 694; Buckner *v.* Stewart, 34 Ala. 529; Sloo *v.* Pool, 15 Ill. 47; Judah *v.* Mieure, 5 Blackf. (Ind.) 171; Rankin *v.* Collins, 50 Ind. 158; Goodall *v.* Wentworth, 20 Me. 322; Mosely *v.* Fullerton, 59 Mo. App. 143; Smith

debtor has often been held to be a necessary element.[1]

(g) **Special Contracts and Parol Proof.** — Sureties may by special contract vary their liability from that which the law would otherwise imply from their relation to the original debt;[2] and such special contract, or any facts affecting or negativing the equities between the parties, may be proved by parol.[3]

(4) *Defenses* — (a) **Release to Co-surety.** — A release by a surety of one co-surety

v. Mason, 44 Neb. 610; Odlin *v.* Greenleaf, 3 N. H. 270; Lucas *v.* Guy, 2 Bailey L. (S. Car.) 403.

But in *Kentucky* it is held necessary to allege and prove insolvency of the principal debtor, at law as well as in equity. Morrison *v.* Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Pearson *v.* Duckham, 3 Litt. (Ky.) 385; Bolling *v.* Doneghy, 1 Duv. (Ky.) 220; Atkinson *v.* Stewart, 2 B. Mon. (Ky.) 348; Poignard *v.* Vernon, 1 T. B. Mon. (Ky.) 47; Lee *v.* Forman, 3 Metc. (Ky.) 114.

1. Rule in Equity. — "In point of form * * * the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and such a charge is absolutely necessary. * * * But in substance the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defense on other grounds." Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270.

It is not necessary to prove insolvency of the principal debtor where he is a party defendant, so that the court can do justice to all parties by its decree; but when the principal is not a party, his insolvency must be shown. Lawson *v.* Wright, 1 Cox 275.

In support of the statement of the text are Allen *v.* Wood, 3 Ired. Eq. (38 N. Car.) 388; Rainey *v.* Yarborough, 2 Ired. Eq. (37 N. Car.) 249, 38 Am. Dec. 681; Daniel *v.* Ballard, 2 Dana (Ky.) 296; Couch *v.* Terry, 12 Ala. 225; Glasscock *v.* Hamilton, 62 Tex. 152; Tabor *v.* Cockrell, (Tex. App. 1890) 16 S. W. Rep. 786 *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) p. 4; Stone *v.* Buckner, 12 Smed. & M. (Miss.) 92.

So under the statutory process by notice and motion, it is necessary to show the principal's insolvency. Batson *v.* Lasselle, 1 Blackf. (Ind.) 119.

The plaintiff must show that he has used diligence to collect from the principal, without success. M'Cormack *v.* O'bannon, 3 Munf. (Va.) 484; Morrison *v.* Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92.

2. Express Contract Modifying Prima Facie Relationship. — Swain *v.* Wall, 1 Ch. Rep. 149; Craythorne *v.* Swinburne, 14 Ves. Jr. 164; Thomas *v.* Cook, 8 B. & C. 728, 15 E. C. L. 333; Crayton *v.* Johnson, 27 Ala. 503; North *v.* Brace, 30 Conn. 72; Paul *v.* Berry, 78 Ill. 158; Lusby *v.* Carr, 60 Md. 192; Minick *v.* Brock, 41 Neb. 515; Barry *v.* Ransom, 12 N. Y. 464; Bouchand *v.* Dias, 3 Den. (N. Y.) 238; Moore *v.* Isley, 2 Dev. & B. Eq. (22 N. Car.) 372; Faires *v.* Cockerell, 88 Tex. 428.

3. Relations of Parties Proved by Parol. — It is competent to prove by parol the relation of the parties, and that one surety agreed to indemnify another, or any extrinsic facts affecting the equities between them.

England. — Craythorne *v.* Swinburne, 14 Ves. Jr. 164; Rae *v.* R., 6 Ir. Ch. R. 490.

Connecticut. — Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74; Bulkeley *v.* House, 62 Conn. 459.

Georgia. — Camp *v.* Simmons, 62 Ga. 73.

Illinois. — Paul *v.* Berry, 78 Ill. 158; Robertson *v.* Deatherage, 82 Ill. 511; Klepper *v.* Borchsenius, 13 Ill. App. 318.

Indiana. — Dunn *v.* Sparks, 7 Ind. 490; Bowser *v.* Rendell, 31 Ind. 128; Harshman *v.* Armstrong, 43 Ind. 126; Baldwin *v.* Fleming, 90 Ind. 177; Bobbitt *v.* Shryer, 70 Ind. 513; Knopf *v.* Morel, 111 Ind. 570; Houck *v.* Graham, 123 Ind. 277.

Kansas. — Water-Power Co. *v.* Brown, 23 Kan. 676.

Kentucky. — McNeil *v.* Sanford, 3 B. Mon. (Ky.) 11; Jones *v.* Letcher, 13 B. Mon. (Ky.) 369; Chapeze *v.* Young, 87 Ky. 476.

Maine. — Crosby *v.* Wyatt, 23 Me. 156; Smith *v.* Morrill, 54 Me. 48.

Massachusetts. — Blake *v.* Cole, 22 Pick. (Mass.) 97; Weston *v.* Chamberlin, 7 Cush. (Mass.) 404; Clapp *v.* Rice, 13 Gray (Mass.) 403, 74 Am. Dec. 639; Newcomb *v.* Gibson, 127 Mass. 398; Mansfield *v.* Edwards, 136 Mass. 15, 49 Am. Rep. 1.

Mississippi. — Hunt *v.* Chambliss, 7 Smed. & M. (Miss.) 532.

New Hampshire. — Whitehouse *v.* Hanson, 42 N. H. 19.

New Jersey. — Paulin *v.* Kaighn, 27 N. J. L. 503.

New York. — Robinson *v.* Lyle, 10 Barb. (N. Y.) 512; Barry *v.* Ransom, 12 N. Y. 466; Wells *v.* Miller, 66 N. Y. 255;

North Carolina. — Love *v.* Wall, 1 Hawks (8 N. Car.) 313; Smith *v.* Smith, 1 Dev. Eq. (16 N. Car.) 173; Wharton *v.* Woodburn, 4 Dev. & B. L. (20 N. Car.) 510; Williams *v.* Glenn, 92 N. Car. 253, 53 Am. Rep. 416.

Ohio. — Oldham *v.* Broom, 28 Ohio St. 41.

Vermont. — Adams *v.* Flanagan, 36 Vt. 400.

A prior indorser, sued by a later indorser for indemnity, may show by parol that all the indorsers were for accommodation, and by agreement *inter se* were co-sureties. Easterly *v.* Barber, 66 N. Y. 433; Phillips *v.* Preston, 5 How. (U. S.) 278; Preston *v.* Gould, 64 Iowa 44.

The admissibility of parol evidence to affect the rights between the parties to commercial paper is discussed *infra*, this section, *Contribution and Exoneration between the Parties to Commercial Paper*.

Contra. — The liability of the sureties to contribute equally in case of default is clearly implied by law from their signatures, and cannot be affected by parol evidence that the last signer agreed only to be surety for the others, not co-surety with. Norton *v.* Coons, 6 N. Y. 33. But this case is overruled as to this point by the later New York cases above cited.

will not bar his action against others, but they will be liable to contribute only the same amount as if the released party had continued liable.[1]

(b) **Release to Principal.** — But if the surety who has paid the debt has discharged the principal debtor from liability to indemnify him, he cannot recover contribution from his co-sureties.[2]

(c) **Bankruptcy.** — A discharge of the defendant in bankruptcy proceedings instituted between the making of the original contract and the payment by the plaintiff is no defense, inasmuch as the cause of action became complete only upon the payment.[3]

(d) **The Statute of Limitations.** — The period of limitation applied to an action for contribution is that fixed for an implied contract, or a contract not evidenced by a written instrument, though the original contract was in writing.[4] The statute begins to run from the time when the plaintiff had paid more than his share of the debt.[5]

1. **Release of Co-surety.** — Crowdus *v.* Shelby, 6 J. J. Marsh. (Ky.) 61; Currier *v.* Baker, 51 N. H. 613; Murphy *v.* Gage, (Tex. Civ. App. 1893) 21 S. W. Rep. 396.

And where an execution had issued against one surety, and his property had been seized thereon, and a second surety gave a forthcoming bond and procured the release of the property, and afterward the first became insolvent, the second, after payment of the debt, cannot rely on the insolvency of the first to increase the proportional contribution of other co-sureties. Preston *v.* Preston, 4 Gratt. (Va.) 88, 47 Am. Dec. 717.

If it became necessary to release a co-surety to make him a competent witness, in order to prove the case, the plaintiff will not be required to assume the entire loss of his share. Lefroy *v.* Gore, 7 Ir. Eq. R. 228, 1 Jones & L. 571.

2. **When Surety Releases Principal.** — Cummings *v.* May, 91 Ala. 233. The reason of this rule is that the right of the co-sureties to be subrogated to the plaintiff's rights against the principal is defeated by the release. Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98; Vorley *v.* Barrett, 1 C. B. N. S. 225, 87 E. C. L. 225; Pickering *v.* Marsh, 7 N. H. 195; Draughan *v.* Bunting, 9 Ired. L. (31 N. Car.) 10.

In Hobart *v.* Stone, 10 Pick. (Mass.) 215, a surety had upon his death bequeathed all the residue of his estate to his son, who was the principal on the debt. It was held that this, by releasing the principal, released also the co-sureties.

So where a surety has assented to an agreement by which the creditor stayed proceedings against the debtor, without the assent of the co-surety, he loses his right to contribution from him, and is liable to indemnify him. Boughton *v.* Orleans Bank, 2 Barb. Ch. (N. Y.) 458. But where judgment was rendered in the same action against the principal debtor for the full amount, and against a co-surety for a proportional part, and the plaintiff then entered a remittitur in favor of the principal, it was held that the judgment against the surety was not affected. Jackson *v.* Murray, 77 Tex. 644.

Where the creditor gave time to the principal debtor, three sureties assenting and the other not, the fourth cannot be required to contribute to one of the three. Worthington *v.* Peck, 24 Ont. Rep. 535.

3. **Where a Surety Becomes Bankrupt and Is Discharged,** after signature, but before the payment of the debt by a co-surety, the claim for contribution is not barred by the discharge, as it accrues on the payment, and not on the contracting of the original debt. Browne *v.* Lee, 6 B. & C. 689, 13 E. C. L. 294; Clements *v.* Langley, 2 N. & M. 269; Byers *v.* Alcorn, 6 Ill. App. 39; Dole *v.* Warren, 32 Me. 94, 52 Am. Dec. 640; Vliet *v.* Wyckoff, 42 N. J. Eq. 642; Ellsworth *v.* Caldwell, 27 How. Pr. (N. Y. Supreme Ct.) 188; Goss *v.* Gibson, 8 Humph. (Tenn.) 197; Keer *v.* Clark, 11 Humph. (Tenn.) 77; Swain *v.* Barber, 29 Vt. 292; Liddell *v.* Wiswell, 59 Vt. 365.

A surety who has paid less than his proportion before the bankruptcy of a co-surety, and more after, can recover contribution. Wallis *v.* Swinburne, 1 Exch. 203.

Contra. — Tobias *v.* Rogers, 13 N. Y. 59, in which the court holds that the discharge released the bankrupt from liability on the original debt, and so destroyed the common liability on which the equitable right to contribution rests.

Bankruptcy proceedings after the payment by the co-surety of course discharge the liability. Hays *v.* Ford, 55 Ind. 52.

The right to contribution vests in its essence at the time of the original note, and cannot be defeated by a discharge under a state insolvency act passed after that time, though the payment was after the passage of the act and before the assignment. Danforth *v.* Robinson, 80 Me. 466, 6 Am. St. Rep. 224.

4. **Period of Limitation.** — Chipman *v.* Morrill, 20 Cal. 136; Stone *v.* Hammell, 83 Cal. 547, 17 Am. St. Rep. 272; Sexton *v.* Sexton, 35 Ind. 88; Robinson *v.* Jennings, 7 Bush (Ky.) 630; Singleton *v.* Townsend, 45 Mo. 380; Williams *v.* Williams, 5 Ohio 444; Neilson *v.* Fry, 16 Ohio St. 557, 91 Am. Dec. 110; Faires *v.* Cockerell, 88 Tex. 428.

5. **The Statute of Limitation Runs from the Payment,** and not from the original contract.

England. — Wolmershausen *v.* Gullick, (1893) 2 Ch. 514.

Alabama. — Stallworth *v.* Preslar, 34 Ala. 509; Crawford *v.* Kirksey, 50 Ala. 590.

California. — Sherwood *v.* Dunbar, 6 Cal. 53.

Colorado. — Buell *v.* Burlingame, 11 Colo. 164.

Florida. — May *v.* Vann, 15 Fla. 553.

Indiana. — Sexton *v.* Sexton, 35 Ind. 88.

Iowa. — Wilson *v.* Crawford, 47 Iowa 469; Preston *v.* Gould, 64 Iowa 44.

(5) *The Measure of Contribution* — (a) **Insolvency of One Surety.** — The common-law rule as to the measure of contribution is that each surety is liable for a proportional part of the loss, according to the original number of sureties, whether all are solvent or not; but in equity, if any of those who should contribute are insolvent, they are to be excluded in determining the proportions.[1] But in

Maine. — Ingalls *v.* Dennett, 6 Me. 79.

Maryland. — Hooper *v.* Hooper, 81 Md. 174, 48 Am. St. Rep. 496.

Massachusetts. — Wood *v.* Leland, 1 Met. (Mass.) 387.

Mississippi. — Magee *v.* Leggett, 48 Miss. 139; Pass *v.* Grenada County, 71 Miss. 426.

Missouri. — Singleton *v.* Townsend, 45 Mo. 380.

North Carolina. — Sherrod *v.* Woodard, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714; Ponder *v.* Carter, 12 Ired. L. (34 N. Car.) 242; Leak *v.* Covington, 99 N. Car. 559.

Ohio. — Williams *v.* Williams, 5 Ohio 444; Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

Oregon. — Durbin *v.* Kuney, 19 Oregon 75.

Pennsylvania. — Miller *v.* Howry, 3 P. & W. (Pa.) 380, 24 Am. Dec. 320.

Tennessee. — Reeves *v.* Pulliam, 7 Baxt. (Tenn.) 119, 9 Baxt. (Tenn.) 153; Marshall *v.* Hudson, 9 Yerg. (Tenn.) 57; Maxey *v.* Carter, 10 Yerg. (Tenn.) 521.

Texas. — Beck *v.* Tarrant, 61 Tex. 402; Glasscock *v.* Hamilton, 62 Tex. 154; Faires *v.* Cockerill (Tex. Civ. App. 1897), 29 S. W. Rep. 669, *citing* AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 3.

Wisconsin. — Bushnell *v.* Bushnell, 77 Wis. 435.

It runs from the payment, and not from notice to the defendant of the payment. Sherrod *v.* Woodard, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714. But see Williams *v.* Williams, 5 Ohio 444, in which notice is held necessary to give a right of action, where the payments are portions of the amount due, and made from time to time. See *supra*, this section, *Incidents of the Right—Notice and Demand Not Necessary.*

The statute begins to run when the plaintiff has paid more than his share of the debt, and runs on each payment thereafter. Davies *v.* Humphreys, 6 M. & W. 153; Robinson *v.* Jennings, 7 Bush (Ky.) 630; Magruder *v.* Admire, 4 Mo. App. 138; Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Martin *v.* Frantz, 127 Pa. St. 389, 14 Am. St. Rep. 859; Knotts *v.* Butler, 10 Rich. Eq. (S. Car.) 143; Bushnell *v.* Bushnell, 77 Wis. 435.

Two engaged in litigation, one by agreement paying the bills. It was held that he could wait till the end of the litigation and the adjustment of final costs before seeking contribution, though the statute period had run since the first items were paid. Carter *v.* Carter, 28 Ill. App. 340.

Contribution will not be granted eighteen years after payment, though the defendant was insane, if he had estate, and a guardian was appointed for him. Pickering *v.* Leiberman, 41 Fed. Rep. 376.

1. Measure of Contribution — *England.* — Cowell *v.* Edwards, 2 B. & P. 268; Batard *v.* Hawes, 2 El. & Bl. 287, 75 E. C. L. 287; Browne *v.* Lee, 6 B. & C. 689, 13 E. C. L. 294; Dallas *v.* Walls, 29 L. T. N. S. 599; *In re* McDonoughs, Ir. R. 10 Eq. 269.

Canada. — McKelvey *v.* Davis, 17 Grant's Ch. (U. C.) 355.

Alabama. — Young *v.* Clark, 2 Ala. 264; Sherrod *v.* Rhodes, 5 Ala. 692.

California. — Burroughs *v.* Lott, 19 Cal. 125.

Illinois. — Klein *v.* Mather, 7 Ill. 317; Sloo *v.* Pool, 15 Ill. 48; Moore *v.* Bruner, 31 Ill. App. 400.

Indiana. — Newton *v.* Pence, 10 Ind. App. 672.

Kentucky. — Breckinridge *v.* Taylor, 5 Dana (Ky.) 110; Bosley *v.* Taylor, 5 Dana (Ky.) 158, 30 Am. Dec. 677; Hilton *v.* Crist, 5 Dana (Ky.) 384; Robertson *v.* Maxcey, 6 Dana (Ky.) 101; Morrison *v.* Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Cobb *v.* Haynes, 8 B. Mon. (Ky.) 137.

New Jersey. — Stothoff *v.* Dunham, 19 N. J. L. 182; Vliet *v.* Wyckoff, 42 N. J. Eq. 642.

New York. — Parker *v.* Ellis, 2 Sandf. (N. Y.) 223; Easterly *v.* Barber, 66 N. Y. 439.

North Carolina. — Powell *v.* Matthis, 4 Ired. L. (26 N. Car.) 83, 40 Am. Dec. 427; Samuel *v.* Zachery, 4 Ired. L. (26 N. Car.) 377.

Pennsylvania. — Croft *v.* Moore, 9 Watts (Pa.) 451.

South Carolina. — Burrows *v.* M'Whann, 1 Desaus. (S. Car.) 424; McKenna *v.* George, 2 Rich. Eq. (S. Car.) 18.

Tennessee. — Riley *v.* Rhea, 5 Lea (Tenn.) 116; Gross *v.* Davis, 87 Tenn. 226, 10 Am St. Rep. 635.

Texas. — Acers *v.* Curtis, 68 Tex. 423.

Vermont. — Marsh *v.* Harrington, 18 Vt. 150.

Virginia. — Preston *v.* Preston, 4 Gratt. (Va) 91, 47 Am. Dec. 717.

In Peter *v.* Rich, 1 Ch. Ca. 34, the court gave judgment for a moiety of the debt, a third co-surety being insolvent. In Swain *v.* Wall, 1 Ch. Rep. 149, though Peter *v.* Rich was cited, the court declined to follow it, holding that by the express terms of the contract each party was liable for one third only. Hole *v.* Harrison, 1 Ch. Ca. 246, *followed* Peter *v.* Rich; and the doctrine became firmly settled by the authority of Cowell *v.* Edwards, 2 B. & P. 268, and Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox 318.

Where the signers of a bond were equitably bound to contribute in differing proportions, and one is insolvent, the deficit caused thereby shall be borne equally, not in the varying proportions. Hyde *v.* Tracy, 2 Day (Conn.) 492.

A partnership who sign a note as sureties by the partnership name are to be counted as one in determining the proportions. Chaffee *v.* Jones, 19 Pick. (Mass.) 260.

In a summary proceeding for contribution by motion, the contribution must be ordered *pro rata*, and the fact of insolvency cannot be considered. Riley *v.* Rhea, 5 Lea (Tenn.) 115.

But when the plaintiff has received from certain insolvent co-sureties a partial contribution, and released them, he must exclude them in

some cases this distinction is denied, and contribution is given at law, as well as in equity, according to the number of solvent sureties;[1] while in states where the distinction between law and equity has been abolished, the number of solvent debtors liable to contribute is the basis of apportionment.[2]

(b) **Absence from the Jurisdiction.** — Absence from the jurisdiction of the court is given the same effect as insolvency in determining the proportional liability of the other parties.[3]

(c) **Limitation by the Penalty of a Bond.** — A surety whose original liability is limited by the penalty of a bond is not liable in any case for contribution to a co-surety in an amount exceeding his original liability.[4]

Several Bonds with Different Penalties. — Where there are several bonds with different penalties, to secure the same debt, contribution between the sureties is in proportion to the respective penalties.[5]

(d) **Only the Net Amount Overpaid Is Recoverable.** — The plaintiff can only recover what he has paid over his due proportion.[6] If he has received any advantage in his dealing with the original creditor,[7] or any security or indemnity from

estimating the proportion for a solvent co-surety to pay. Cummings *v.* May, 91 Ala. 233.

Under the English Mercantile Law Amendment Act of 1856, a surety who has paid the creditor may prove the entire amount against a co-surety's estate, though he can actually recover only his proportional part. *In re* Parker, (1894) 3 Ch. 400.

1. Insolvency of Surety Considered at Law. — Mills *v.* Hyde, 19 Vt. 59, 46 Am. Dec. 177; Henderson *v.* McDuffee, 5 N. H. 38, 20 Am. Dec. 557; Michael *v.* Allbright, 126 Ind. 172; Tupper *v.* Hussey, 1 Dane's Abr. (Mass.) 197; Boardman *v.* Paige, 11 N. H. 432; Liddell *v.* Wiswell, 59 Vt. 365; Currier *v.* Baker, 51 N. H. 613; Harris *v.* Ferguson, 2 Bailey L. (S. Car.) 397.

In Young *v.* Lyons, 8 Gill (Md.) 166, the cases of Harris *v.* Ferguson, 2 Bailey L. (S. Car.) 397, and Boardman *v.* Paige, 11 N. H. 432, were referred to, and the question which rule would be applied was left undecided.

The same rule was applied under statutory provisions in Couch *v.* Terry, 12 Ala. 227; Van Petten *v.* Richardson, 68 Mo. 382; Dodd *v.* Winn, 27 Mo. 504; Magruder *v.* Admire, 4 Mo. App. 136; Faurot *v.* Gates, 86 Wis. 569.

2. Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233; Magruder *v.* Admire, 4 Mo. App. 133; Stewart *v.* Goulden, 52 Mich. 143; Smith *v.* Mason, 44 Neb. 610; Scott *v.* Bryan, 96 N. Car. 289; Robertson *v.* Trigg, 32 Gratt. (Va.) 76.

3. Absence from Jurisdiction. — Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233; Bosley *v.* Taylor, 5 Dana (Ky.) 159, 30 Am. Dec. 677; Stewart *v.* Goulden, 52 Mich 143; Boardman *v.* Paige, 11 N. H. 432; Currier *v.* Baker, 51 N. H. 613; Jones *v.* Blanton, 6 Ired. Eq. (41 N. Car.) 115, 51 Am. Dec. 415; McKenna *v.* George, 2 Rich. Eq. (S. Car.) 15; Acers *v.* Curtis, 68 Tex. 423; Liddell *v.* Wiswell, 59 Vt. 365; Faurot *v.* Gates, 86 Wis. 569, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 4.

So under the *Massachusetts* statute. Wood *v.* Leland, 1 Met. (Mass.) 387.

It was held in Lefroy *v.* Gore, 7 Ir. Eq. R. 228, 1 Jones & L. 571, that if it had become necessary for the plaintiff to release one of the sureties to qualify him as a witness in order to prove his case, the same effect should be given to the resulting loss as in case of insolvency.

4. Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270

5. Several Bonds with Different Penalties. — Dering *v.* Winchelsea, 1 Cox 318, 2 B. & P. 270; Armitage *v.* Pulver, 37 N. Y. 494; Bell *v.* Jasper, 2 Ired. Eq. (37 N. Car.) 597; Jones *v.* Hays, 3 Ired. Eq. (38 N. Car.) 502, 44 Am. Dec. 78; Jones *v.* Blanton, 6 Ired. Eq. (41 N. Car.) 115, 51 Am. Dec. 415; Moore *v.* Boudinot, 64 N. Car. 190; Bright *v.* Lennon, 83 N. Car. 187; *In re* McDonoughs, Ir. R. 10 Eq. 269; Ellesmere Brewery Co. *v.* Cooper, (1896) 1 Q. B. 75.

In Burnett *v.* Millsaps, 59 Miss. 333, where there were two bonds with different penalties, it was held that the sureties must all contribute to the amount of the smaller penalty, and the signers of the larger bond to the residue of the liability.

In Redfield's editions of Story on Equity Jurisprudence occurs the following expression of doubt as to the above rule (§ 497*a*): "It may be questioned whether the more recent decisions in courts of equity justify any such discrimination between sureties for the same debt, by different bonds, with different sums as penalties, unless where the purpose of the different sums in which the sureties are bound is to show that the obligor incurs the hazard of only a portion of the debt, or a portion of what the other sureties assume." This passage is referred to with some degree of criticism, but without being absolutely denied, in Armitage *v.* Pulver, 37 N. Y. 499.

An examination of the cases above hardly justifies Mr. Redfield's qualification of the rule.

6. The proper mode of contribution among co-sureties is to divide the entire joint liability, whether paid by one or by more, by the number of solvent sureties, and charge each with his share thus ascertained, and credit him by the entire amount of his payments. Gross *v.* Davis, 87 Tenn. 226, 10 Am. St. Rep. 635. See also *supra*, this section, *When the Right Accrues*.

7. Must Account for Advantages Received from Creditor. — Owen *v.* McGehee, 61 Ala. 440; Kelly *v.* Page, 7 Gray (Mass.) 213; Sinclair *v.* Redington, 56 N. H. 146; Morgan *v.* Smith, 70 N. Y. 537; Acers *v.* Curtis, 68 Tex. 423.

If he has settled with the creditor by transferring property, he can recover a proportional part of the value of the property, but not more

the principal,[1] he must share the benefit with his co-sureties.

than the debt with interest. Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555; Jones *v.* Bradford, 25 Ind. 305.

Where the surety of an administrator bought in the legacies at a discount, he could only charge his co-surety with his proportion of the sum actually paid, and of his expenses in purchasing them. Tarr *v.* Ravenscroft, 12 Gratt. (Va.) 642.

The rule of damages is the actual cost to the party paying. Hanna *v.* Drennan, 2 Tex. Unrep. Cas. 536. Where co-sureties after default employed a broker to buy in bills of the creditor bank with which to make payment, and he got them at twenty-five cents on the dollar, and one paid him, he can recover contribution in that amount only. Derosset *v.* Bradley, 63 N. Car. 17.

Where the principal creditor had a life insurance policy on the debtor's life, and on payment of the debt by a surety assigned the policy to him, from which part of the sum paid was received, the surety must credit it on the amount paid in seeking contribution. *In re* Arcedeckne, 24 Ch. Div. 709.

If he paid in Confederate notes, he can recover a due proportion of the value of the currency at the time of payment. Eakin *v.* Knox, 6 S. Car. 14; Edmonds *v.* Sheahan, 47 Tex. 443. So with depreciated warrants. Dinkgrave's Succession, 31 La. Ann. 703. See also *infra*, this title, *Exoneration of Sureties by Principal — Incidents of the Right.*

1. Surety Who Has Received Security from Principal — *England.* — Swain *v.* Wall, 1 Ch. Rep. 149; Knight *v.* Hughes, M. & M. 247, 3 C. & P. 467, 14 E. C. L. 393; Steel *v.* Dixon, 17 Ch. Div. 825; Berridge *v.* Berridge, 44 Ch. Div. 168.

Ireland. — Latouche *v* Pallas, Hayes 450.

Alabama. — Bell *v.* Lamkin, 1 Stew. & P. (Ala.) 460; John *v.* Jones, 16 Ala. 454; Morrison *v.* Taylor, 21 Ala. 779; Steele *v.* Brown, 18 Ala. 700; Steele *v.* Mealing, 24 Ala. 285.

Delaware. — Cannon *v.* Connaway, 5 Del. Ch. 559.

Illinois. — Silvey *v.* Dowell, 53 Ill. 260; Johnson *v.* Vaughn, 65 Ill. 425.

Indiana. — Comegys *v.* State Bank, 6 Ind. 357.

Iowa. — Reinhart *v.* Johnson, 62 Iowa 155; Woodard *v.* Hamilton, 5 Iowa 745.

Kansas. — Seibert *v.* Thompson, 8 Kan. 65.

Kentucky. — Goodloe *v.* Clay, 6 B. Mon. (Ky.) 236.

Louisiana. — Smith *v.* Conrad, 15 La. Ann. 579.

Maine. — Scribner *v.* Adams, 73 Me. 541.

Massachusetts. — Bachelder *v.* Fiske, 17 Mass. 464; Lane *v.* Stacy, 8 Allen (Mass.) 41.

Minnesota. — Schmidt *v.* Coulter, 6 Minn. 492; Mueller *v.* Barge, 54 Minn. 314.

Missouri. — McCune *v.* Belt, 45 Mo. 174.

New Hampshire. — Currier *v.* Fellows, 27 N. H. 366; Messer *v.* Swan, 4 N. H. 481; Low *v.* Smart, 5 N. H. 353.

New Jersey. — Paulin *v.* Kaighn, 27 N. J. L. 503, 29 N. J. L. 480; Wolcott *v.* Hagerman, 50 N. J. L. 289.

New York. — Davis *v.* Toulmin, 77 N. Y. 280.

North Carolina. — Leary *v.* Cheshire, 3 Jones Eq. (56 N. Car.) 170; Fagan *v.* Jacocks, 4 Dev. L. (15 N. Car.) 263; Gregory *v.* Murrell, 2 Ired. Eq. (37 N. Car.) 237; Hall *v.* Robinson, 8 Ired. L. (30 N. Car.) 56.

Ohio. — Carpenter *v.* Kelly, 9 Ohio 106.

Pennsylvania. — Agnew *v.* Bell, 4 Watts (Pa.) 31; Shaeffer *v.* Clendenin, 100 Pa. St. 565.

South Carolina. — Field *v.* Pelot, McMull. Eq. (S. Car.) 370.

Tennessee. — Bobbitt *v.* Flowers, 1 Swan (Tenn.) 511.

Texas. — Glasscock *v.* Hamilton, 62 Tex. 158.

Vermont. — Hinsdill *v.* Murray, 6 Vt. 136; Whipple *v.* Briggs, 28 Vt. 65; Miller *v.* Sawyer 30 Vt. 412; Fuller *v.* Hapgood, 39 Vt. 617.

Virginia. — M'Mahon *v.* Fawcett, 2 Rand. (Va.) 514, 14 Am. Dec. 796.

West Virginia. — Boughner *v.* Hall, 24 W. Va. 249; Neely *v.* Bee, 32 W. Va. 519.

It seems that a surety is not bound to realize on a security against the principal. He may proceed against his co-surety, and if he does realize anything afterwards, he must share it with those who have contributed. Vliet *v.* Wyckoff, 42 N. J. Eq. 644; Paulin *v.* Kaighn, 27 N. J. L. 503, 29 N. J. L. 480; Mosely *v.* Fullerton, 59 Mo. App. 143; Johnson *v.* Vaughn, 65 Ill. 425; Pinkston *v.* Taliaferro, 9 Ala. 547.

"Although the principal intends that it shall operate only for the benefit of one, yet the law interposes and applies it equally for the benefit of both." Fuller *v.* Hapgood, 39 Vt. 620.

Where the principal has given to one surety a policy of indemnity from a surety company, and that company has paid a judgment against the principal and sureties, it cannot recover contribution from the other sureties, as they are entitled to share in the benefit of such security. Gibson *v.* Shehan, 5 App. Cas. (D. C.) 391.

The rule applies though the plaintiff was induced to become a surety by the receipt of indemnity, and the defendant was ignorant of his receiving it. Mueller *v.* Barge, 54 Minn. 314.

If a surety has received property from the principal, on which he has paid liens, he can be required to credit the value of the property less the amount paid. Keiser *v* Beam, 117 Ind. 31.

Where a surety has obtained execution against the principal, and bought property on execution sale for less than the judgment, a co-surety may show that the property was really worth the entire judgment. Sanders *v.* Weelburg, 107 Ind. 266

And if the surety has released or wasted the security given him by the principal, he loses his right to contribution. Steele *v.* Mealing, 24 Ala. 285; Taylor *v.* Morrison, 26 Ala. 728, 62 Am. Dec. 747; Frink *v.* Peabody, 26 Ill. App. 390; Sanders *v.* Weelburg, 107 Ind. 272; Teeter *v.* Pierce, 11 B. Mon. (Ky.) 399; Rollins *v.* Taber, 25 Me. 144; Schmidt *v.* Coulter, 6 Minn. 492; Chilton *v.* Chapman, 13 Mo. 470; Paulin *v.* Kaighn, 29 N. J. L. 480; Ramsey *v.* Lewis, 30 Barb. (N. Y.) 403; Crisfield *v.* Mur-

(e) **Interest and Costs** — The amount to which the plaintiff is entitled to receive contribution includes interest on the amount paid by him from the date of payment,[1] and also the costs of his defense against the original claim,[2]

dock, 127 N. Y. 315; Kerns *v.* Chambers, 3 Ired. Eq. (38 N. Car.) 576; Neely *v.* Bee, 32 W. Va. 519.

And, proportionally, if he has wasted a part. Roberts *v.* Sayre, 6 T. B. Mon. (Ky.) 189; Goodloe *v.* Clay, 6 B. Mon. (Ky.) 236; Ramsey *v.* Lewis, 30 Barb. (N. Y.) 403

If a surety has discharged a judgment against the principal he must credit its value, and the burden of proof as to value is on him. Fielding *v.* Waterhouse, 40 N. Y. Super. Ct. 424.

If one surety has security, and the others have paid, they can compel him to account to them for the fund realized. Robinson *v.* Brooks, 32 Ala. 222; Hartwell *v.* Whitman, 36 Ala. 712; Munden *v.* Bailey, 70 Ala. 63; Whiteman *v.* Harriman, 85 Ind. 49; Hoover *v.* Mowrer, 84 Iowa 43, 35 Am. St. Rep. 293; Parham *v.* Green, 64 N. Car. 436; Gregory *v.* Murrell, 2 Ired. Eq. (37 N. Car.) 237; Hinsdill *v.* Murray, 6 Vt. 136; Miller *v.* Sawyer, 30 Vt. 412.

Qualifications and Exceptions. — A surety is not entitled to the benefit of a payment made to his co-surety by a person other than the principal. Pfluger *v.* Wilshusen, (C. Pl.) 44 N. Y. St. Rep. 301, 17 N. Y. Supp. 516. Where the principal's wife mortgaged land to one surety for his exclusive benefit, the others cannot claim equal rights in it. Leggett *v.* McClelland, 39 Ohio St. 624.

A surety, taking indemnity from the principal, fairly as regards his co-sureties, may apply the same to his sole benefit until indemnified, but the co-sureties are entitled to any surplus. Moore *v.* Moore, 4 Hawks (11 N. Car.) 358, 15 Am. Dec. 523; Long *v.* Barnett, 3 Ired. Eq. (38 N. Car.) 631.

One surety has an unquestionable right to stipulate indemnity for himself, and to apply that indemnity in extinguishment of his portion of the loss; and such indemnity can be reached by the co-sureties only when it was taken in fraud of their rights, or for their joint benefit. Thompson *v.* Adams, Freem. (Miss.) 225.

And a surety who has paid the whole may receive an express repayment of his share, without losing his right to recover the shares of the others from them. Gould *v.* Fuller, 18 Me. 364.

That the plaintiff has recovered a judgment against the principal is no defense, if he has not been able to realize anything on it. Zimmerman *v.* Neuer, 1 Pearson (Pa.) 110.

A surety who took mortgaged premises and made a fair effort to get reimbursement is liable only for what he actually received, though less than the true value of the property. Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63.

The rule has no application to a case where the plaintiff had security from the principal, but insufficient to satisfy his liability on a prior note guaranteed by him alone. Titcomb *v.* McAllister, 81 Me. 399; Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.) 270. Or a debt due to him as creditor. Brown *v.* Ray, 18 N. H. 102, 45 Am. Dec. 361. *Contra*, Moore *v.* Moberly, 7 B. Mon. (Ky.) 299. Where the principal offered a compromise which the defendant accepted, but the plaintiff refused to accept, and the defendant received therefrom more than half the debt, which he applied to reduce it, the plaintiff, having laid the balance, cannot recover contribution, as the indemnity, under the circumstances, enured to the plaintiff alone. White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283.

Where the sureties have adjusted the loss among themselves, each paying his share, and afterwards the principal indemnifies one, the others cannot claim division. Messer *v.* Swan, 4 N. H. 482. *Aliter*, where they expressly agreed to share equally in any loss. Smith *v.* Hicks, 5 Wend. (N. Y.) 48.

Apportionment of Indemnity. — If there are several demands with different co-sureties, indemnity given to one who is liable on all should be apportioned among them. Brown *v.* Ray, 18 N. H. 102, 45 Am. Dec. 361; Mueller *v.* Barge, 54 Minn. 314.

1. Interest. — Swain *v.* Wall, 1 Ch. Rep. 149; Hitchman *v.* Stewart, 3 Drew. 271; Lawson *v.* Wright, 1 Cox 275; *In re* Swan, 4 Ir. R. Eq. 209; Buckmaster *v.* Grundy, 8 Ill. 626; Moore *v.* Bruner, 31 Ill. App. 400; Breckinridge *v.* Taylor, 5 Dana (Ky.) 110; Bosley *v.* Taylor, 5 Dana (Ky.) 160, 30 Am. Dec. 677; Titcomb *v.* McAllister, 81 Me. 399; Smith *v.* Mason, 44 Neb. 610; Aikin *v.* Peay, 5 Strobh. L. (S. Car.) 15, 53 Am. Dec. 684; Burrows *v.* M'Whann, 1 Desaus. (S. Car.) 424; Sherwood *v.* Jordan, 2 Tex. Unrep. Cas. 610. *Contra*, Bell *v.* Free, 1 Swanst. 90; Salkeld *v.* Abbott, Hayes & Jones (Ir.) 110; Onge *v.* Truelock, 2 Moll. 45.

Where the contribution is to the expense of repairing a party wall, interest should be given only from the notice and demand of contribution. Campbell *v.* Mesier, 6 Johns. Ch. (N. Y.) 21.

2. Cost of Defense. — Kemp *v.* Finden, 12 M. & W. 421; Harper *v.* Knowlson, 2 Er. & App. (U. C.) 253; Bosley *v.* Taylor, 5 Dana (Ky.) 159, 30 Am. Dec. 677; Davis *v.* Emerson, 17 Me. 64; McKee *v.* Campbell, 27 Mich. 407; McKenna *v.* George, 2 Rich. Eq. (S. Car.) 18; Foster *v.* Johnson, 5 Vt. 60; Marsh *v.* Harrington, 18 Vt. 150.

The right to costs is unquestioned where the suit was against the principal and both sureties, and judgment for debt and costs was rendered against all. Davis *v.* Emerson, 17 Me. 64; Newcomb *v.* Gibson, 127 Mass. 396

Contribution on a note includes the cost of protest. Higgins *v.* Morrison, 4 Dana (Ky.) 107.

Contra. — Boardman *v.* Paige, 11 N. H. 432, on the ground that the costs of the suit against the plaintiff were never a common obligation of the parties.

if reasonably incurred,[1] including necessary counsel fees.[2]

b. EXONERATION OF SURETIES BY PRINCIPAL — (1) *General Principles.* — A surety who is compelled to pay the debt may recover from the principal the amount paid, either at law or in equity,[3] or he may bring a bill in equity

1. Must Be Reasonably Incurred.—If the justice of the original claim was denied by the defendant, and only established by suit, the amount to be apportioned should include the costs of suit which the plaintiff was compelled to pay. Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233; Wagenseller *v.* Prettyman, 7 Ill. App. 192; Bright *v.* Lennon, 83 N. Car. 188; Gross *v.* Davis, 87 Tenn. 226, 10 Am. St. Rep. 635; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

Aliter, if he was not authorized by the defendant to defend. Knight *v.* Hughes, M. & M. 247, 3 C. & P. 467, 14 E. C. L. 393; Warner *v.* Morrison, 3 Allen (Mass.) 568.

In Van Winkle *v.* Johnson, 11 Oregon 469, 58 Am. Rep. 495, the defendant was held liable to contribute to costs, though after suit brought he settled with the creditor by paying half the debt, and the plaintiff insisted on defending, and had to pay the remainder of the debt with costs.

2. Counsel Fees. — McKenna *v.* George, 2 Rich. Eq. (S. Car.) 18; Marsh *v.* Harrington, 18 Vt. 150; Gross *v.* Davis, 87 Tenn. 226, 10 Am. St. Rep. 635; Van Winkle *v.* Johnson, 11 Oregon 469, 50 Am. Rep. 495.

3. Exoneration of Surety — *England.* — Davies *v.* Humphreys, 6 M. & W. 153; Watkins *v.* Flannagan, 3 Russ. 421; Rigby *v.* Macnamara, 2 Cox 415; Boyd *v.* Brooks, 34 Beav. 7, *affirmed* 34 L. J. Ch. 605; Badeley *v.* Consolidated Bank, 34 Ch. Div. 556.

United States. — Pigou *v.* French, 1 Wash. (U. S.) 278; Hall *v.* Smith, 5 How. (U. S.) 96.

Alabama. — Riley *v.* Stallworth, 56 Ala. 481; Jenkins *v.* Lockard, 66 Ala. 377.

Arkansas. — Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

California. — Matter of Hill, 67 Cal. 238.

Connecticut. — Bunce *v.* Bunce, Kirby (Conn.) 137; Babcock *v.* Hubbard, 2 Conn. 536; Ward *v.* Henry, 5 Conn. 599, 13 Am. Dec. 119; Monson *v.* Drakeley, 40 Conn. 561, 16 Am. Rep. 74; Bulkeley *v.* House, 62 Conn. 469.

Delaware. — Miller *v.* Stout, 5 Del. Ch. 259.

Illinois. — Shepard *v.* Ogden, 3 Ill. 257; Bonham *v.* Galloway, 13 Ill. 68; Stevens *v.* Hurlburt, 25 Ill. App. 124; Darst *v.* Bates, 51 Ill. 439.

Indiana. — Ritenour *v.* Mathews, 42 Ind. 7; Stearns *v.* Irwin, 62 Ind. 558; Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123.

Iowa. — Wilson *v.* Crawford, 47 Iowa 469.

Kansas. — Water Power Co. *v.* Brown, 23 Kan. 676; Teberg *v.* Swenson, 32 Kan. 224; Cotton *v.* Alexander, 32 Kan. 339.

Kentucky. — Partlow *v.* Lane, 3 B. Mon. (Ky.) 424, 39 Am. Dec. 473; Lansdale *v.* Cox, 7 T. B. Mon. (Ky.) 405; Hite *v.* Campbell, 10 B. Mon. (Ky.) 80; Kimble *v.* Cummins, 3 Metc. (Ky.) 327.

Maine. — Howe *v.* Ward, 4 Me. 195; Smith *v.* Sayward, 5 Me. 504; Thompson *v.* Thompson, 19 Me. 244; Powers *v.* Nash, 37 Me. 322.

Massachusetts. — Mowry *v.* Adams, 14 Mass. 327; Gibbs *v.* Bryant, 1 Pick. (Mass.) 118; Ford *v.* Keith, 1 Mass. 139, 2 Am. Dec. 4; Appleton *v.* Bascom, 3 Met. (Mass.) 169; Hazleton *v.* Valentine, 113 Mass. 472.

Michigan. — Lange *v.* Perley, 47 Mich. 352.

Minnesota. — Kimmel *v.* Lowe, 28 Minn. 265.

Mississippi. — Loughridge *v.* Bowland, 52 Miss. 556.

Nebraska. — Eaton *v.* Lambert, 1 Neb. 339; Minick *v.* Huff, 41 Neb. 516.

Nevada. — Frevert *v.* Henry, 14 Nev. 191.

New Hampshire. — Odlin *v.* Greenleaf, 3 N. H. 270; Pearson *v.* Parker, 3 N. H. 366.

New Jersey. — Apgar *v.* Hiler, 24 N. J. L. 812.

New York. — Powell *v.* Smith, 8 Johns. (N. Y.) 249; Holmes *v.* Weed, 19 Barb. (N. Y.) 135; Garr *v.* Martin, 20 N. Y. 306; Konitzky *v.* Meyer, 49 N. Y. 571; Thompson *v.* Taylor, 72 N. Y. 32.

North Carolina.— Perry *v.* Yarbrough, 3 Jones Eq. (56 N. Car.) 66; Williams *v.* Helme, 1 Dev. Eq. (16 N. Car.) 159, 18 Am. Dec. 580; Gray *v.* Bowls, 1 Dev. & B. L. (18 N. Car.) 437

Ohio. — Williams *v.* Williams, 5 Ohio 444.

Pennsylvania. — Hassinger *v.* Solms, 5 S. & R. (Pa.) 8.

South Carolina. — Fraser *v.* Goode, 3 Rich. L. (S. Car.) 199.

Texas. — Holliman *v.* Rogers, 6 Tex. 91.

Vermont. — Viele *v.* Hoag, 24 Vt. 46; Hulett *v.* Soullard, 26 Vt. 295; Clay *v.* Severance, 55 Vt. 300.

Virginia. — Baxter *v.* Moore, 5 Leigh (Va.) 219; Kenkrick *v.* Forney, 22 Gratt. (Va.) 749; Harper *v.* McVeigh, 82 Va. 751.

West Virginia. — Mattingly *v.* Sutton, 19 W. Va. 19.

A principal who defaults, and exposes his surety to suit, and then agrees for a consideration to pay the debt, cannot enforce the agreement for compensation either directly or by set-off. Ritenour *v.* Mathews, 42 Ind. 7.

It makes no difference that the plaintiff gave the guaranty of the defendant's debt, and paid the same, without the defendant's knowledge. Teberg *v.* Swenson, 32 Kan. 224. *Contra* White *v.* White, 4 Dev. & B. L. (20 N. Car.) 401; Carter *v.* Black, 4 Dev. & B. L. (20 N. Car.) 425.

Surety of a Surety. — The surety of a surety, who pays the debt, can recover indemnity from the principal. Hall *v.* Smith, 5 How. (U. S.) 96. But not if the principal has already paid the debt to the first surety. State Bank *v.* Fletcher, 5 Wend. (N. Y.) 85.

A guarantor, or supplemental surety, for all the rest, is not a co-surety, and if he pays he can recover indemnity. Craythorne *v.* Swinburne, 14 Ves. Jr. 164. See also *supra*, this section, *Contribution Between Co-Sureties — Incidents of the Right.*

Recovery for Partial Payments. — The surety's right is not necessarily indivisible. He can recover for partial payments. Davies *v.* Humphreys, 6 M. & W. 153; Pownal *v.* Ferrand, 6 B. & C. 439, 13 E. C. L. 230; Robinson *v.* Jennings, 7 Bush (Ky.) 630; Newman *v.* Goza, 2 La. Ann. 642; Pickett *v.* Bates, 3 La. Ann. 627; Bullock *v.* Campbell, 9 Gill (Md.) 182;

to compel the principal to pay the debt, and so protect him from liability, before payment.[1]

The Right to Indemnity Rests on a Contract Implied from the equitable obligation, and not on the express contract, under which the common liability arose.[2]

Williams *v.* Williams, 5 Ohio 444; Hall *v.* Hall, 10 Humph. (Tenn.) 352.

1. Bill to Compel Principal to Pay — *England.* — Nisbet *v.* Smith, 2 Bro. C. C. 582; Ranelaugh *v.* Hayes, 1 Vern. 189; Antrobus *v.* Davidson, 3 Meriv. 579; Lee *v.* Rook, Mos. 318; Wooldridge *v.* Norris, L. R. 6 Eq. 410; Bradin *v.* Reade, 1 Law Rec. O. S. (Ir. K. B.) 482.

Alabama. — Kimball *v.* Greig, 47 Ala. 230.

Connecticut. — Bunce *v.* Bunce, Kirby (Conn.) 137.

Florida. — West *v.* Chasten, 12 Fla. 315.

Illinois. — Moore *v.* Topliff, 107 Ill. 241.

Indiana. — Ritenour *v.* Mathews, 42 Ind. 7.

Louisiana. — Montgomery's Succession, 2 La. Ann. 469.

Maryland. — Hoffman *v.* Johnson, 1 Bland (Md.) 103; Whitridge *v.* Durkee, 2 Md. Ch. 442.

New Jersey. — Irick *v.* Black, 17 N. J. Eq. 189; Delaware, etc., R. Co. *v.* Oxford Iron Co. 38 N. J. Eq. 151; Philadelphia, etc., R. Co. *v.* Little, 41 N. J. Eq. 519.

New York. — King *v.* Baldwin, 2 Johns. Ch. (N. Y.) 554; Hannay *v.* Pell, 3 E. D. Smith (N. Y.) 432; Gibbs *v.* Mennard, 6 Paige (N. Y.) 258; Marsh *v.* Pike, 10 Paige (N. Y.) 595.

North Carolina. — Thigpen *v.* Price, Phil. Eq. (62 N. Car.) 146; Taylor *v.* Miller, Phil. Eq. (62 N. Car.) 365; Polk *v.* Gallant, 2 Dev. & B. Eq. (22 N. Car.) 395, 34 Am. Dec. 410; Daniel *v.* Joiner, 3 Ired. Eq. (38 N. Car.) 513; Egerton *v.* Alley, 6 Ired. Eq. (41 N. Car.) 188.

Ohio. — Stump *v.* Rogers, 1 Ohio 533; McConnell *v.* Scott, 15 Ohio 401, 45 Am. Dec. 583.

Pennsylvania. — Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375.

South Carolina. — Pride *v.* Boyce, Rice Eq. (S. Car.) 276, 33 Am. Dec. 78; Norton *v.* Reid, 11 S. Car. 593.

Tennessee. — Howell *v.* Cobb, 2 Coldw. (Tenn.) 104, 88 Am. Dec. 591; Gilliam *v.* Esselman, 5 Sneed (Tenn.) 86; Croone *v.* Bivens, 2 Head (Tenn.) 339; Washington *v.* Tait, 3 Humph. (Tenn.) 543; Greene *v.* Starnes, 1 Heisk. (Tenn.) 582; Saylors *v.* Saylors, 3 Heisk. (Tenn.) 525.

Vermont. — Bishop *v.* Day, 13 Vt. 81, 37 Am. Dec. 582.

Virginia. — Hatcher *v.* Hatcher, 1 Rand. (Va.) 53; Stephenson *v.* Taverners, 9 Gratt. (Va.) 398.

Hawaii. — Macfie *v.* Kilauea Sugar Co., 6 Hawaiian 440.

The same rule is established by statute in *Minnesota.* Huey *v.* Pinney, 5 Minn. 322.

As to the requisites of such an action under the *Louisiana* Code, see Edwards *v.* Prather, 22 La. Ann. 334.

A surety who has placed funds in the principal's hands to meet the debt may sue him in equity to compel him to apply the fund to the debt. Woodruff *v.* Erie R. Co., 93 N. Y. 609.

If the surety and the principal have each mortgaged property for the debt, the surety can maintain a bill to compel the principal's land to be first used. Hoppes *v.* Hoppes, 123 Ind. 397.

Limitations of the Right. — Jurisdiction in equity before payment only exists in *Kentucky* by statute; and the court can act only to prevent removal of the defendant or his property, not to render a money judgment. Buford *v.* Francisco, 3 Dana (Ky.) 68.

The cases in which such a jurisdiction is exercised by a court of equity are those where the creditor has a right to sue the principal debtor, and refuses; if the debt is not yet matured, the surety has no right to a decree against the principal. Padwick *v.* Stanley, 9 Hare 627.

The surety cannot compel the principal, before maturity, to give him counter-security, unless it was contracted for. Delaney *v.* Tipton, 3 Hayw. (Tenn.) 14. In Covey *v.* Neff, 63 Ind. 395, the right of the surety, before payment, to require a portion of the principal's assets to be set aside to pay the debt was denied. And in Nash *v.* Burchard, 87 Mich. 85, a bill by a surety to prevent the principal, who had made a bequest to secure the indebtedness, from disposing of the estate bequeathed, and to put it in a receiver's hands, was dismissed.

In Gibbs *v.* Mennard, 6 Paige (N. Y.) 258, the court refused a writ of *ne exeat* against the principal, where his liability and that of the surety was doubtful, and the surety had not been sued.

2. Right Rests on Implied Contract — *England.* — Badeley *v.* Consolidated Bank, 34 Ch. Div. 556.

Connecticut. — Bunce *v.* Bunce, Kirby (Conn.) 137; Babcock *v.* Hubbard, 2 Conn. 536; Ward *v.* Henry, 5 Conn. 595, 13 Am. Dec. 119.

Delaware. — Miller *v.* Stout, 5 Del. Ch. 259.

Illinois. — Darst *v.* Bates, 51 Ill. 439; Mugge *v.* Ewing, 54 Ill. 236; Katz *v.* Moessinger, 110 Ill. 372.

Iowa. — Lamb *v.* Withrow, 31 Iowa 164; Wilson *v.* Crawford, 47 Iowa 471.

Kansas. — Cotton *v.* Alexander, 32 Kan. 339.

Maine. — Smith *v.* Sayward, 5 Me. 504; Powers *v.* Nash, 37 Me. 322.

Massachusetts. — Gibbs *v.* Bryant, 1 Pick. (Mass.) 118; Appleton *v.* Bascom, 3 Met. (Mass.) 169.

Michigan. — Lee *v.* Wisner, 38 Mich. 82.

Missouri. — Blake *v.* Downey, 51 Mo. 437; Thomas *v.* Liebke, 9 Mo. App. 424, *affirmed* 81 Mo. 675.

Nevada. — Frevert *v.* Henry, 14 Nev. 191.

New York. — Powell *v.* Smith, 8 Johns. (N. Y.) 249; Davis *v.* Perrine, 4 Edw. Ch. (N. Y.) 62; Powers *v.* Ingraham, 3 Barb. (N. Y.) 576; Holmes *v.* Weed, 19 Barb. (N. Y.) 135; Konitzky *v.* Myer, 49 N. Y. 571; Thompson *v.* Taylor, 72 N. Y. 32.

Ohio. — Williams *v.* Williams, 5 Ohio 444.

Pennsylvania. — Hassinger *v.* Solms, 5 S. & R. (Pa.) 8.

South Carolina. — Norton *v.* Reid, 11 S. Car.

(2) *When the Right Accrues.* — The surety from the moment of entering into the obligation has an inchoate right,[1] which he may protect by retaining funds of the principal in his hands,[2] by action in equity to set aside a fraudulent conveyance of property made by the principal,[3] or by other proper *quia timet* proceedings;[4] but the right does not mature, so as to lay the foundation

593; Hellams *v.* Abercrombie, 15 S. Car. 115, 40 Am. Rep. 684.

Texas. — Holliman *v.* Rogers, 6 Tex. 91.

Contra. — Tutt *v.* Thornton, 57 Tex. 35, in which it is held that where a surety pays a note, his remedy is on the note; and many cases in which the right of action is held to be on the written contract, for the purpose of giving the surety rights by way of subrogation. See the title SUBROGATION.

The right exists, though the principal's name does not appear on the obligation. Harnsberger *v.* Yancey, 33 Gratt. (Va.) 527; School Trustees *v.* Sheik, 119 Ill. 585, 59 Am. Rep. 830.

The surety may sue on the implied promise, though he holds property to secure an express promise, unless there was an express agreement that his remedy should be confined to that property. Cornwall *v.* Gould, 4 Pick. (Mass.) 444; Wesley Church *v.* Moore, 10 Pa. St. 273.

A surety who pays a bond and takes an assignment of it has at law only an action in assumpsit for money paid; but in equity the bond will be regarded as still existing for the purpose of indemnifying him. Crisfield *v.* State, 55 Md. 192.

1. When Right to Exoneration Becomes Fixed. — "The implied promise of indemnity * * * must be considered as made at the time when the plaintiffs became responsible to the creditor on the bond." Appleton *v.* Bascom, 3 Met. (Mass.) 171; Rice *v.* Southgate, 16 Gray (Mass.) 142.

The promise is implied at the date of the obligation, and the payment only fixes the amount of recovery. Martin *v.* Ellerbe, 70 Ala. 326; Miller *v.* Stout, 5 Del. Ch. 263; Howe *v.* Ward, 4 Me. 195; Thompson *v.* Thompson, 19 Me. 244; Morrow *v.* Morrow, 2 Tenn. Ch. 555.

"Whether the surety is esteemed the creditor of his principal from the date of his suretyship, or the date of payment of the debt, depends very much on the character of the remedy or redress which he may seek. Undoubtedly for all purposes he is a creditor from the time of payment. At that moment a cause of action for reimbursement becomes complete by action at law or in equity, for substitution to the securities held by the original creditors. * * * But for some purposes the surety is the creditor of his principal from the day he incurred the obligation for him. * * * An accommodation indorser and surety are treated as creditors from the time they indorsed or signed the note, and may set aside a fraudulent conveyance executed by the principal after becoming so liable, and before payment of the debt." Loughridge *v.* Bowland, 52 Miss. 556.

2. Retaining Funds of Principal Before Payment. — The surety, before payment, has a right to hold debts due from himself to the principal, for security, even as against an assignee or administrator. *In re* Perkins, 10 Nat. Bank Reg. 529; *In re* Reynolds, 16 Nat. Bank Reg. 158; Bates *v.* Vary, 40 Ala. 421; Sims *v.* Wallace, 6 B. Mon. (Ky.) 410; Abbey *v.* Van Campen, Freem. (Miss.) 273; Williams *v.* Helme, 1 Dev. Eq. (16 N. Car.) 151, 18 Am. Dec. 580; Battle *v.* Hart, 2 Dev. Eq. (17 N. Car.) 31; Walker *v.* Dicks, 80 N. Car. 263; Scott *v.* Timberlake, 83 N. Car. 382; Creager *v.* Minard, Wright (Ohio) 519; Beaver *v.* Beaver, 23 Pa. St. 167; Barney *v.* Grover, 28 Vt. 391; Strong *v.* Mitchell, 19 Vt. 644; Mattingly *v.* Sutton, 19 W. Va. 19. But see Walker *v.* McKay, 2 Metc. (Ky.) 294; Sharp *v.* Caldwell, 7 Humph. (Tenn.) 415. *Contra*, Tyree *v.* Parham, 66 Ala. 424.

A principal who has placed securities in surety's hands cannot revoke the act and reclaim them. Mandigo *v.* Mandigo, 26 Mich. 349.

When the surety of an insolvent principal obtains title to a fund belonging to the principal, equity will not compel him to surrender it, but will enforce its application to the debt. McKnight *v.* Bradley, 10 Rich. Eq. (S. Car.) 557.

In Ingalls *v.* Dennett, 6 Me. 79, it was held that a surety who had effects of the principal in his hands, and was garnisheed therefor, and afterwards paid the debt, could still be held for the goods in his hands, since at the time of service on him he had no claim on the principal, "though the case seems to be a hard one for the defendant."

3. Setting Aside Fraudulent Conveyance — *United States.* — Findlay *v.* U. S. Bank, 2 McLean (U. S.) 44.

Alabama. — Kimball *v.* Greig, 47 Ala. 230.

Georgia. — Outlaw *v.* Reddick, 11 Ga. 669; Anderson *v.* Walton, 35 Ga. 202.

Illinois. — Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Hatfield *v.* Merod, 82 Ill. 113.

Indiana. — Rodenbarger *v.* Bramblett, 78 Ind. 213.

Maine. — Howe *v.* Ward, 4 Me. 195; Thompson *v.* Thompson, 19 Me. 244.

Maryland. — Williams *v.* Banks, 11 Md. 242.

Mississippi. — Pennington *v.* Seal, 49 Miss. 525; Loughridge *v.* Bowland, 52 Miss. 556.

Pennsylvania. — Hamet *v.* Dundass, 4 Pa. St. 178.

South Carolina. — Taylor *v.* Heriot, 4 Desaus. (S. Car.) 227.

Tennessee. — Greene *v.* Starnes, 1 Heisk. (Tenn.) 582.

Contra. — Meux *v.* Anthony, 11 Ark. 411, 52 Am. Dec. 274; Williams *v.* Bizzell, 11 Ark. 716; Rice *v.* Downing, 12 B. Mon. (Ky.) 44; Williams *v.* Tipton, 5 Humph. (Tenn.) 66, 42 Am. Dec. 420; Oneal *v.* Smith, 10 Lea (Tenn.) 340.

4. See *supra*, this section, *General Principles*, p. 346, note 1.

of an action to recover the amount of the obligation, until the surety has paid the debt.[1]

Statute of Limitations — Discharges in Bankruptcy. — The statute of limitation,[2] and

1. Right of Action for Money Paid Accrues Only on Payment — *England.* — Davies *v.* Humphreys, 6 M. & W. 153.

United States. — Pigou *v.* French, 1 Wash. (U. S.) 278; Whetmore *v.* Murdock, 3 Woodb. & M. (U. S.) 390.

California. — Matter of Hill, 67 Cal. 238.

Connecticut. — Ward *v.* Henry, 5 Conn. 599, 13 Am. Dec. 119.

Illinois. — Shepard *v.* Ogden, 3 Ill. 257; Bonham *v.* Galloway, 13 Ill. 68; Darst *v.* Bates, 51 Ill. 439; Stevens *v.* Hurlburt, 25 Ill. App. 124.

Indiana. — Stearns *v.* Irwin, 62 Ind. 558.

Iowa. — Dennison *v.* Soper, 33 Iowa 183.

Kentucky. — Walker *v.* McKay, 2 Metc. (Ky.) 294.

Louisiana. — Forest *v.* Shores, 11 La. 416; Banon *v.* Barnett, 7 La. Ann. 105.

Maine. — Ingalls *v.* Dennett, 6 Me. 79.

Maryland. — Gillespie *v.* Creswell, 12 Gill & J. (Md.) 36; Nally *v.* Long, 56 Md. 567.

Massachusetts. — Swift *v.* Crocker, 21 Pick. (Mass.) 242.

Mississippi. — Rucks *v.* Taylor, 49 Miss. 552.

Nebraska. — Minick *v.* Huff, 41 Neb. 516.

New York. — Powell *v.* Smith, 8 Johns. (N. Y.) 249.

North Carolina. — Hodges *v.* Armstrong, 3 Dev. L. (14 N. Car.) 253; Green *v.* Williams, 11 Ired. L. (33 N. Car.) 139; Ponder *v.* Carter, 12 Ired. L. (34 N. Car.) 242.

South Carolina. — Peters *v.* Barnhill, 1 Hill L. (S. Car.) 234.

A surety who has paid a judgment may recover from his principal, though the judgment was afterward reversed. Garr *v.* Martin, 20 N. Y. 306.

If the surety of an administrator, after his default, is himself appointed administrator, and at once charges himself with the full amount due from his predecessor, this is a payment. Hazelton *v.* Valentine, 113 Mass. 472.

Special Agreements for Indemnity. — Where the principal has given a mortgage conditioned to indemnify the surety and save him harmless, the surety can foreclose the mortgage after the principal makes default as to the original debt, though the surety has not yet paid it. Hellams *v.* Abercrombie, 15 S. Car. 110, 40 Am. Rep. 684; Bellune *v.* Wallace, 2 Rich. L. (S. Car.) 80; Tankersley *v.* Anderson, 4 Desaus. (S. Car.) 44.

Where a bond was given for indemnity, not only against damage actually suffered, but against any liability incurred, it is not necessary for the surety to have paid the loss, but, if he has become liable, the condition of the bond is broken. Chace *v.* Hinman, 8 Wend. (N. Y.) 452, 24 Am. Dec. 39; Belloni *v.* Freeborn, 63 N. Y. 383; Jones *v.* Childs, 8 Nev. 121.

In Rockfeller *v.* Donnely, 8 Cow. (N. Y.) 639, it was held that under a general bond of indemnity the obligee, if legally liable for the debt, which is liquidated, may recover the amount, in order to obviate the necessity of advancing it; but this is questioned by Sutherland, J., in Chace *v.* Hinman, 8 Wend. (N. Y.) 457, 24 Am. Dec. 39.

Where the principal gives the surety a written covenant to pay the debt on a certain day, and fails to do it, the surety can recover the full amount in a suit at law, without having paid the debt. Loosemore *v.* Radford, 9 M. & W. 657.

And if a note is given as security, the surety can sue on the note at maturity, without having paid the debt. Russell *v.* La Roque, 11 Ala. 352.

If the surety take judgment on a judgment note given him as security, before the payment of the debt, the judgment will not be regarded as fraudulent or inequitable on that account, if the adverse party were not misled or defrauded. Farmers', etc., Bank *v.* Spear, 49 Ill. App. 509.

If a mortgage is given, and the principal afterward pays the debt, the mortgage is satisfied. Newell *v.* Hurlburt, 2 Vt. 351.

Demand and Notice Not Required. — It is not necessary for the surety to give the notice of the payment to the principal, and demand repayment, before suit. Collins *v.* Boyd, 14 Ala. 510; Ward *v.* Henry, 5 Conn. 599, 13 Am. Dec. 119; Sikes *v.* Quick, 7 Jones L. (52 N. Car.) 19; Newnan *v.* Campbell, Mart. & Y. (Tenn.) 63.

Contra. — Where the surety has paid in small instalments, action does not lie on each payment until notice. Williams *v.* Williams, 5 Ohio 444.

2. Statute of Limitations. — Walker *v.* Lathrop, 6 Iowa 516; Wilson *v.* Crawford, 47 Iowa 469; Gillespie *v.* Cresswell, 12 Gill & J. (Md.) 36; Thayer *v.* Daniels, 110 Mass. 345; Scott *v.* Nichols, 27 Miss. 94, 61 Am. Dec. 503; Odlin *v.* Greenleaf, 3 N. H. 270; Ponder *v.* Carter, 12 Ired. L. (34 N. Car.) 242; Wesley Church *v.* Moore, 10 Pa. St. 273; Marshall *v.* Hudson, 9 Yerg. (Tenn.) 62; Harper *v.* McVeigh, 82 Va. 751.

If Several Payments Have Been Made, the statute runs as to each from its date. Davies *v.* Humphreys, 6 M. & W. 153; Pownal *v.* Ferrand, 6 B. & C. 439, 13 E. C. L. 230; Robinson *v.* Jennings, 7 Bush (Ky.) 630; Bullock *v.* Campbell, 9 Gill (Md.) 182; Hall *v.* Hall, 10 Humph. (Tenn.) 352.

One surety paid three years after maturity, the other paid him one-half four years later; three years later still the latter surety sued the principal. It was held that the action is not barred by a six-years statute of limitation. Odlin *v.* Greenleaf, 3 N. H. 270.

But where an agreement had been made by all the managers of a corporation to reimburse two of their number who made a certain loan in their own names, and the obligees paid the loan gradually, renewing the unpaid balances from time to time, it was held that a right of action for the entire sum arose on the completion of the payments, which was not barred till the statute had run after that time. Jones *v.* Trimble, 3 Rawle (Pa.) 388. This case relies on Overton *v.* Tracey, 14 S. & R.

the operation of a discharge in bankruptcy,[1] run from the latter period.

If the Surety Pays the Debt Before Maturity, he can recover indemnity at maturity, but not before.[2]

(3) *Incidents of the Right* — **Payment by Note.** — The giving of a negotiable note, which is accepted by the creditor in payment of the original obligation, is sufficient to enable the surety to sue for indemnity.[3] The surety need not wait to be sued,[4] but he must have been under legal obligation to pay.[5]

(Pa.) 311, but is not supported by it, since in that case the action was on a guaranty of a mortgage which by its terms was not enforceable until a year after maturity of the last payment. Of course the guaranty was limited by the terms of the instrument guaranteed.

Williams *v.* Williams, 5 Ohio 444, denies that a right of action begins to run on partial payments, until notice to, and demand on, the principal.

1. Discharge in Bankruptcy. — Alsop *v.* Price, 1 Dougl. 160; Chilton *v.* Whiffin, 3 Wils. 13; Taylor *v.* Milis, 2 Cowp. 525; Ainslie *v.* Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532.

But where the plaintiff has taken a bond to secure him, which has been broken before bankruptcy, the right of action is barred by the discharge, and he cannot waive his bond and sue on the implied assumpsit. Toussaint *v.* Martinnant, 2 T. R. 104; Martin *v.* Court, 2 T. R. 640; Hodgson *v.* Bell, 7 T. R. 93; Roosevelt *v.* Mark, 6 Johns. Ch. (N. Y.) 266.

Under the United States Bankrupt Act of 1841, the surety could present a claim for exoneration before payment; the discharge, therefore, barred the claim, and it did not revive on payment of the debt after the discharge. Mace *v.* Wells, 7 How. (U. S.) 272; Crafts *v.* Mott. 4 N. Y. 604.

A compromise of the note in bankruptcy proceedings does not discharge the liability to reimburse a surety who paid after the bankruptcy was begun. Thomas *v.* Liebke, 9 Mo. App. 424, *affirmed* 81 Mo. 675.

2. Payment by Surety Before Maturity. — Jackson *v.* Adamson, 7 Blackf. (Ind.) 597; White *v.* Miller, 47 Ind. 385; Ross *v.* Menefee, 125 Ind. 432; Tillotson *v.* Rose, 11 Met. (Mass.) 299; Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 429; Craig *v.* Craig, 5 Rawle (Pa.) 98.

3. Payment by Negotiable Note — *England.* — Barclay *v.* Gooch, 2 Esp. N. P. 571.

Arkansas. — Neale *v.* Newland, 4 Ark. 506; Jordan *v.* Adams, 7 Ark. 348.

Georgia. — Mims *v.* McDowell, 4 Ga. 182.

Iowa. — Sapp *v.* Aiken, 68 Iowa 699.

Kansas. — Rizer *v.* Callen, 27 Kan. 340.

Massachusetts. — Doolittle *v.* Dwight, 2 Met. (Mass.) 561.

New Hampshire. — Pearson *v.* Parker, 3 N. H. 366.

New York. — Cumming *v.* Hackley, 8 Johns. (N. Y.) 202; Witherby *v.* Man, 11 Johns. (N. Y.) 518; State Bank *v.* Fletcher, 5 Wend. (N. Y.) 85; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Howe *v.* Buffalo, etc., R. Co., 37 N. Y. 297.

South Carolina. — Peters *v.* Barnhill, 1 Hill L. (S. Car.) 236.

Texas. — Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117.

Vermont. — Lapham *v.* Barnes, 2 Vt. 213.

"The mere fact of giving a note or due-bill for the whole amount of the bond is not sufficient, without proof that he has paid or has the means to pay it." Lynch *v.* Hancock, 14 S. Car. 93.

A surety who has given, but not paid, a note, as contribution to a co-surety who paid the debt, cannot recover from the principal, especially where the statute of limitations has run in favor of the principal since the payment by the surety, though the plaintiff had been out of the state, and so not protected by the statute. Stone *v.* Hammell, 83 Cal. 547, 17 Am. St. Rep. 272.

Payment partly in cash, and partly in a secured note, which is accepted by the principal, is sufficient. Bone *v.* Torry, 16 Ark. 83.

But until the agreement for giving the note has been completely carried out, so as to discharge the original debt, the surety has no right of action. Hearne *v.* Keath, 63 Mo. 84.

As to satisfaction of the debt by giving a nonnegotiable note or bond, see the cases cited *supra*, this title, *Contribution Between Co-sureties — Incidents of the Right — Payment by Note*, in notes.

Payment by "replevying the judgment," which involves giving a substitute bond, which is accepted by the creditor, is sufficient. Burns *v.* Parish, 3 B. Mon. (Ky.) 8.

4. Surety Need Not Await Suit. — Martin *v.* Ellerbe, 70 Ala. 326; Mims *v.* McDowell, 4 Ga. 182; Constant *v.* Matteson, 22 Ill. 546; Hazelton *v.* Valentine, 113 Mass. 472; Odlin *v.* Greenleaf, 3 N. H. 270; Mauri *v.* Heffernan, 13 Johns. (N. Y.) 58; Williams *v.* Williams, 5 Ohio 444; Stinson *v.* Brennan, Cheves L. (S. Car.) 15.

But if he pays without suit or notice to the principal, he is subject to all defenses which the latter could have made as against the principal. Gates *v.* Renfroe, 7 La. Ann. 569.

The judgment is *prima facie* proof of liability. Hagerthy *v.* Bradford, 9 Ala. 571; Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54; Bone *v.* Torry, 16 Ark. 83; Cobb *v.* Haynes, 8 B. Mon. (Ky.) 137; Train *v.* Gold, 5 Pick. (Mass.) 380; State *v.* Colerick, 3 Ohio 488; Scates *v.* Wilson, 9 Leigh (Va.) 473.

And if the defendant was a party, or was notified by the plaintiff, the judgment is conclusive. Hagerthy *v.* Bradford, 9 Ala. 571; Hare *v.* Grant, 77 N. Car. 203; State *v.* Colerick, 3 Ohio 488.

5. Must Be Under Legal Obligation to Pay. — Noble *v.* Blount, 77 Mo. 235.

If an indorser pays the note without having received regular notice of nonpayment and demand, he cannot recover indemnity. Bachellor *v.* Priest, 12 Pick. (Mass.) 399. Nor if he pays it when barred by the statute of limitations. Hatchett *v.* Pegram, 21 La. Ann. 722;

Doctrines Applicable to both Contribution and Exoneration. — Many of the doctrines applied to cases of contribution are equally applicable to suits for indemnity between surety and principal; and the preceding section may be referred to generally for statements of principles and illustrative cases.[1]

(4) *Measure of Damages.* — The obligation of the principal to recompense his surety is measured by the loss the surety has actually suffered, that is, ordinarily, the amount he has paid, with interest; and the surety cannot "speculate upon" the principal by obtaining a reduction from the amount of the debt and then recovering the entire amount from the principal.[2]

Ellicott *v.* Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Elder *v.* Elder, 43 Kan. 514. Nor if plaintiff is surety in a replevin bond, and is discharged by delay in taking out execution. Kimble *v.* Cummins, 3 Metc. (Ky.) 327.

If the creditor has made an agreement which legally releases the surety, he cannot pay the debt and then recover it from the principal. Geary *v.* Gore Bank, 5 Grant's Ch. (U. C.) 536.

Where a person has become surety only for the production of property taken on attachment, but has paid the debt, he cannot recover. Gray *v.* Bowls, 1 Dev. & B. L. (18 N. Car.) 437.

When the surety pays, he must be legally bound to pay, and the principal must also be under legal obligation to pay the debt. Hollinsbee *v.* Ritchey, 49 Ind. 261.

If a surety pays a note given for an election bet, he cannot recover from the maker. Harley *v.* Stapleton, 24 Mo. 248.

Where a judgment was absolutely barred, a surety who pays it has no right of action; *aliter*, if the judgment was in any way enforceable. Randolph *v.* Randolph, 3 Rand. (Va.) 490.

Exceptions and Qualifications. — Though the surety has been legally released by an extension of time given the principal, yet if his goods are seized on execution he can protect them by paying the debt, and recover the amount from the principal. Boling *v.* Young, 38 Ohio St. 135.

A surety in a criminal recognizance, when the principal defaults, is not required to make technical defenses to a suit. Reynolds *v.* Harral, 2 Strobh. L. (S. Car.) 87.

Though there is a legal defense of usury, if the surety is not notified thereof, but suffers default and pain, he can recover. Stinson *v.* Brennan, Cheves L. (S. Car.) 15; Turman *v.* Looper, 42 Ark. 500.

The surety is under no obligation to defend, on the ground of usury, against a note which he executed at the principal's request. Polhill *v.* Brown, 84 Ga. 343; Ford *v.* Keith, 1 Mass. 139, 2 Am. Dec. 4; Thurston *v.* Prentiss, Walk. (Mich.) 529; Wade *v.* Green, 3 Humph. (Tenn.) 547; Jackson *v.* Jackson, 51 Vt. 253, 31 Am. Rep. 688. *Contra*, Potkins's Case, 3 Leon. 63; Whitehead *v.* Peck, 1 Ga. 151; Hargraves *v.* Lewis, 3 Ga. 162; Joes *v.* Joyner, 8 Ga. 562.

If a judgment has been obtained against the principal and surety, and the surety pays it, the principal cannot defend on the ground that there was usury on the original debt. Maples *v.* Cox, 74 Ga. 701.

In Robinson *v.* May, Cro. Eliz. 588, it was held that to a suit by surety on a counter bond, usury on the original debt could not be pleaded, the court saying that it was no plea, "for he ought to take heed to save his surety harmless." To the same effect are Basset *v.* Prowe, 2 Leon. 166; Button *v.* Downham, Cro. Eliz. 643.

It is no defense that the defendant (an administrator) was protected from liability by non-presentment of the claim. Marshall *v.* Hudson, 9 Yerg. (Tenn.) 62; Sibley *v.* McAllister, 8 N. H. 389. Nor that the defendant was protected by the statute of limitations, if the surety was liable. Bowman *v.* Wright, 7 Bush (Ky.) 375; McClatchie *v.* Durham, 44 Mich. 435; Rucks *v.* Taylor, 49 Miss. 552.

Where the plaintiff (an administrator) was discharged by non-presentment of the claim, but submitted it to arbitration, which went against him, he could collect from the principal, if the latter had never been discharged from liability to the creditor. Shaw *v.* Loud, 12 Mass. 447.

1. Relations Between Rights of Exoneration and Contribution. — The doctrines already discussed under contribution as to the equitable origin and nature of the right, the time of its accruing, the compulsion under which the payment was made, payment by note or other security, the admissibility of parol proof to create or modify the equities between the parties, the bar by the statute of limitation or by bankruptcy, and the measure of contribution, apply in a very similar way to cases of suit for indemnity, and many of the cases cited under contribution are also authority for cases of indemnity. In other cases, as in the case of the rule as to supplemental sureties, the right of contribution as between co-sureties, and that of indemnity of the party secondarily liable by the one primarily liable, are alternative rights, and the cases which affirm one right thereby negative the other.

Release of a Co-surety. — It is no defense to a suit for indemnity of a surety by the principal that the plaintiff has released his co-surety. Crowdus *v.* Shelby, 6 J. J. Marsh. (Ky.) 61; Hook *v.* Richeson, 115 Ill. 431.

2. Amount of Exoneration — *England.* — Rigby *v.* Macnamara, 2 Cox 415; Reed *v.* Norris, 2 Myl. & C. 375; Petre *v.* Duncombe, 2 L. M. & P. 107.

Alabama. — Martin *v.* Ellerbe, 70 Ala. 326.

California. — Matter of Hill, 67 Cal. 238; Waldrip *v.* Black, 74 Cal. 409.

Georgia. — Riggins *v.* Brown, 12 Ga. 271; Stanford *v.* Connery, 84 Ga. 744.

Indiana. — Gieseke *v.* Johnson, 115 Ind. 308.

Kentucky. — Thomas *v.* Beckman, 1 B. Mon. (Ky.) 29; Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555.

Louisiana. — Pickett *v.* Bates, 3 La. Ann. 627.

The Costs Which the Surety Had to Pay he can recover with the principal debt.[1]

Maryland. — Martindale *v.* Brock, 41 Md. 571.

Nebraska. — Eaton *v.* Lambert, 1 Neb. 339.

New Hampshire. — Child *v.* Eureka Powder Works, 44 N. H. 354.

New Jersey. — Delaware, etc., R. Co. *v.* Oxford Iron Co., 38 N. J. Eq. 151.

New York. — Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 424; Ainslie *v.* Wilson, 7 Cow. (N. Y.) 668, 17 Am. Dec. 532; Bonney *v.* Seely, 2 Wend. (N. Y.) 481.

Pennsylvania. — Wynn *v.* Brooke, 5 Rawle (Pa.) 106.

South Carolina. — Lynch *v.* Hancock, 14 S. Car. 92.

Vermont. — Thomas *v.* Carter, 63 Vt. 609.

Virginia. — Blow *v.* Maynard, 2 Leigh (Va.) 29; Kendrick *v.* Forney, 22 Gratt. (Va.) 748; Southall *v.* Farish, 85 Va. 403.

West Virginia. — Matthews *v.* Hall, 21 W. Va. 510; Cranmer *v.* McSwords, 26 W. Va. 412.

If the surety paid usurious interest after maturity, he cannot recover the excess over legal interest from his principal. Lucking *v.* Gegg, 12 Bush (Ky.) 298.

If the sureties have received contribution from a co-surety, it must be deducted from the amount paid. Thomas *v.* Carter, 63 Vt. 609.

If the principal gives the surety a note as security, the surety cannot recover the face, but only the amount he has paid, or, if he has paid nothing, only nominal damages. Osgood *v.* Osgood, 39 N. H. 209; Haseltine *v.* Guild, 11 N. H. 390; Child *v.* Eureka Powder Works, 44 N. H. 354; Cushing *v.* Gore, 15 Mass. 74; Little *v.* Little, 13 Pick. (Mass.) 426; Pope *v.* Davidson, 5 J. J. Marsh. (Ky.) 400.

But on a covenant to pay the debt on a given day, the surety may recover the full amount as damages, though he has not paid. Loosemore *v.* Radford, 9 M. & W. 657.

Settlement in Property. — If the surety conveyed property in settlement, he could recover from principal the fair value of the property, not exceeding the debt with interest. Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555; Ainslie *v.* Wilson, 7 Cow. (N. Y.) 668, 17 Am. Dec. 532; Bonney *v.* Seely, 2 Wend. (N. Y.) 481; Lord *v.* Staples, 23 N. H. 448.

In Depreciated Money. — Where the surety paid the obligation in depreciated money, he can only recover the value of the money paid, at the time of payment. Jordan *v.* Adams, 7 Ark. 348; Owings *v.* Owings, 3 J. J. Marsh. (Ky.) 590; Miles *v.* Bacon, 4 J. J. Marsh. (Ky.) 457; Crozier *v.* Grayson, 4 J. J. Marsh. (Ky.) 517; Gillespie *v.* Creswell, 12 Gill & J. (Md.) 36; Kendrick *v.* Forney, 22 Gratt. (Va.) 748; Butler *v.* Butler, 8 W. Va. 674; Feamster *v.* Withrow, 9 W. Va. 296, 12 W. Va. 611.

Additional Losses. — If a surety suffered damages, by the principal's default, beyond the principal and interest of the debt, he can recover the full amount. Badeley *v.* Consolidated Bank, 34 Ch. Div. 556.

The amount recoverable is the amount the plaintiff has paid, with such reasonable expenses as he was obliged to incur; but extraordinary and remote losses (such as by the breaking up of his business by his flight to avoid suit) are not recoverable. Hayden *v.* Cabot, 17 Mass. 169.

A surety cannot claim reimbursement for expenses incurred by him, on account of his own fears, to compel the principal to account and to procure his own release from the bond. Boyle *v.* Boyle, 106 N. Y. 654.

Nor for loss by sale of his property on execution, where he had collateral in his hands sufficient to pay the judgment. Vance *v.* Lancaster, 3 Hayw. (Tenn.) 130.

"He is entitled to full indemnity against the consequences of the default of the principal, and is therefore entitled to call upon him for reimbursement not only of what he may have been obliged to pay in discharge of the obligation for which he was surety, but also of all reasonable expenses legitimately incurred in consequence of such default, or for his own protection. These do not include expenses incurred in defending himself against the just claim of the creditor, nor remote and consequential damages sustained by the surety, such as sacrifices of property for the purpose of meeting his liability, loss of time, injury to business, expenses incurred in seeking to avoid payment, etc. But we apprehend that they do include expenses reasonably incurred for the purpose of securing the application of the property of the principal to the payment of the debt in exoneration of the surety." Thompson *v.* Taylor, 72 N. Y. 34.

If an indorsee of a note try to collect from the maker by suit, he cannot recover the costs from a prior indorser. Copp *v.* M'Dougall, 9 Mass. 1.

If the plaintiff have a bond with warrant to confess judgment, he may enter judgment for the entire penalty; but will be restrained from levying for more than he has paid. Monell *v.* Smith, 5 Cow. (N. Y.) 441.

It was held in Rigby *v.* Macnamara, 2 Cox 415, that where a surety paid the debt with interest, he could not recover from the principal interest on the interest paid; but this distinction would probably not be now followed. See also Caulfield *v.* M'Guire, 2 Jones & L. 141.

1. Costs Recoverable — *England.* — *Ex p.* Marshall, 1 Atk. 262; Jones *v.* Brooke, 4 Taunt. 464; Stratton *v.* Mathews, 3 Exch. 48.

Mississippi. — Whitworth *v.* Tilman, 40 Miss. 76.

New Jersey. — Apgar *v.* Hiler, 24 N. J. L. 812.

New York. — Baker *v.* Martin, 3 Barb. (N. Y.) 634; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Bonney *v.* Seely, 2 Wend. (N. Y.) 481.

South Carolina. — Cleveland *v.* Covington, 3 Strobh. L. (S. Car.) 184.

Vermont. — Hulett *v.* Soullard, 26 Vt. 295; Bancroft *v.* Pearce, 27 Vt. 668; Downer *v.* Baxter, 30 Vt. 467.

Qualifications and Exceptions. — Costs will not be allowed if the surety tried to make an unconscionable defense, without the sanction of the principal. Beckley *v.* Munson, 22 Conn. 300; Holmes *v.* Weed, 24 Barb. (N. Y.) 546. Or made defense for the mere sake of delay. Wynn *v.* Brooke, 5 Rawle (Pa.) 106.

Costs will not be allowed unless the principal authorized the defense. Gillett *v.* Rippon,

(5) *Joinder of Suit.* — If several sureties have satisfied the debt jointly, as by their joint note,[1] or from a joint fund which they have provided for the purpose,[2] or by paying a joint judgment in equal shares,[3] they may sue jointly; but if each one has individually paid his proportion of the amount, the right of recovery is several, and must be enforced by several suits.[4]

2. Contribution Between Co-insurers. — Where two or more insurers are each liable for the same loss the owner may recover a single satisfaction from any one of them, and the one who pays will be entitled to a contribution from the other or others, proportioned to their respective liabilities.[5]

M. & M. 406, 22 E. C. L. 342; Roach *v.* Thompson, M. & M. 487; Beech *v.* Jones, 5 C. B. 696, 57 E. C. L. 696; Emery *v.* Vinall, 26 Me. 295.

Costs of litigation incurred by the surety are not recoverable, unless they were incurred with the principal's consent, or with reasonable prospects of success, or with results beneficial to the principal. Whitworth *v.* Tilman, 40 Miss. 76.

The surety must show that costs were incurred in good faith and on reasonable grounds, and were incurred in asserting a measure of defense necessary to the interests of both parties, and calculated so to result. Cranmer *v.* McSwords, 26 W. Va. 417.

The indorser who has been compelled by suit to pay cannot recover costs against the drawer. He ought to pay without suit. Simpson *v.* Griffin, 9 Johns. (N. Y.) 131. So also Lord Tenterden, in Roach *v.* Thompson, M. & M. 487: "Plaintiff had no defense against Knight, a *bona fide* holder; he ought therefore to have paid the bill when Knight demanded it, and then these costs would not have been made." But see Whitehouse *v.* Glass, 7 Grant's Ch. (U. C.) 47.

It is optional with an accommodation indorser who has paid, to sue on the note or for money paid; if he sue on the note he can recover only the amount with interest; if he sue for money paid he can recover also the costs paid. Burton *v.* Stewart, 62 Barb. (N. Y.) 194.

The principal is liable for the costs of a suit brought against the surety, provided he did not unnecessarily incur expense in defending. Trites *v.* Kelly, Trin. Term 1833, *cited* in Stevens's New Bruns. Dig. 1103.

Sureties on a bond for appearance may recover necessary expenses in finding and re-arresting him after he absconded. Milk *v.* Waite, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 236.

1. Sureties Paying by Joint Note — *England.* — Osborne *v.* Harper, 5 East 225.

California. — Dussol *v.* Bruguiere, 50 Cal. 456.

Illinois. — Ross *v.* Allen, 67 Ill. 317.

Kansas. — Rizer *v.* Callen, 27 Kan. 339.

Massachusetts. — Chandler *v.* Brainerd, 14 Pick. (Mass.) 285; Doolittle *v.* Dwight, 2 Met. (Mass.) 561.

New Hampshire. — Pearson *v.* Parker, 3 N. H. 365.

South Carolina. — Stewart *v.* Vaughan, Rice L. (S. Car.) 33.

Vermont. — Whipple *v.* Briggs, 28 Vt. 65; Prescott *v.* Newell, 39 Vt. 82.

2. Paying from Joint Funds. — Jewett *v.* Cornforth, 3 Me. 107; Thomas *v.* Carter, 63 Vt. 609.

3. Paying Joint Judgment. — Snider *v* Greathouse, 16 Ark. 72, 63 Am. Dec. 54; Rizer *v.* Callen, 27 Kan. 339; Day *v.* Swann, 13 Me. 165; Appleton *v.* Bascom, 3 Met. (Mass.) 169; Clapp *v.* Rice, 15 Gray (Mass.) 557, 77 Am. Dec. 387; Westcott *v.* King, 14 Barb. (N. Y.) 32; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

4. Each Paying His Proportion Individually — *England.* — Brand *v.* Boulcott, 3 B. & P. 235; Kelby *v.* Steel, 5 Esp. N. P. 194.

Alabama. — Parker *v.* Leek, 1 Stew. (Ala.) 523.

Maine. — Lombard *v.* Cobb, 14 Me. 222; Bunker *v.* Tufts, 55 Me. 180.

Missouri. — Sevier *v.* Roddie, 51 Mo. 580.

New Hampshire. — Peabody *v.* Chapman, 20 N. H. 418.

New York. — Doremus *v.* Selden, 19 Johns. (N. Y.) 213; Gould *v.* Gould, 6 Wend. (N. Y.) 263, 8 Cow. (N. Y.) 168.

Pennsylvania. — Boggs *v.* Curtin, 10 S. & R. (Pa.) 211; Lowry *v.* Lumbermen's Bank, 2 W. & S. (Pa.) 210.

Tennessee. — Graham *v.* Green, 4 Hayw. (Tenn.) 188.

Vermont. — Prescott *v.* Newell, 39 Vt. 82.

5. Double Insurance — Contribution. — "Where a man makes a double insurance of the same thing, in such a maner that he can clearly recover, against several insurers in distinct policies, a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. * * * And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole." Godin *v.* London Assur. Co., 1 Burr. 492, *per* Lord Mansfield; Newby *v.* Reed, 1 W. Bl. 416.

"These cases have never been contradicted, and must be decisive on the subject." Thurston *v.* Koch, 4 Dall. (U. S.) 352. See also Rogers, J., in Stacey *v.* Franklin F. Ins. Co., 2 W. & S. (Pa.) 542; Lucas *v.* Jefferson Ins. Co., 6 Cow. (N. Y.) 635; Bank of British North America *v.* Western Assur. Co., 7 Ont. Rep. 166.

The above cases have firmly established the rule in England, the United States, and Canada, though the continental rule, and that early applied in England, was different. By the commercial codes in force on the continent of Europe, the first insurer was liable for the entire loss to the amount of his policy, and later insurers were liable only for the loss remaining after satisfaction of the prior policies, and for return of the unearned premiums or portions of premiums.

This rule is stated to exist in France and

Provisions of Modern Policies. — The provisions of modern policies of insurance usually prevent the application of this rule by determining the exact liability of each insurer to the owner, and preventing the occurrence of double insurance;[1] but whenever double insurance still occurs, the right of contribution exists between the co-insurers.[2]

3. Contribution Between Co-owners of Property — *a.* TO THE REMOVAL OF INCUMBRANCES — **Removal by Joint Tenants or Tenants in Common.** — Where one of

Spain, Thurston *v.* Koch, 4 Dall. (U. S.) 352, and in Antwerp, Genoa, Spain, France, Bilboa, Florence, Amsterdam, Hamburg, and Stockholm, in the brief in Brown *v.* Hartford Ins. Co., 3 Day (Conn.) 66.

The same rule is shown by African Co. *v.* Bull, 1 Show. 132, to have been established by custom in England. In that case a second insurer pleaded the custom of merchants that later insurers were liable only for the surplus of loss over the amount previously insured. Issue was joined upon the custom, and "they proved it very plainly and fully by all the exchange."

The early cases are fully quoted and discussed in American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 462; Marshall on Insurance, *146.

1. Marine Policies — "American Clause." — The usual provision in marine policies, known as the "American clause," restores the rule established prior to Godin *v.* London Assur. Co., 1 Burr. 492, and Newby *v.* Reed, 1 W. Bl. 416, by providing that a later insurer shall pay only the loss remaining after receipt of the prior insurance. Potter *v.* Marine Ins. Co., 2 Mason (U. S.) 475; Brown *v.* Hartford Ins. Co., 3 Day (Conn.) 66; Whiting *v.* Independent Mut. Ins. Co., 15 Md. 309; Wiggin *v.* Suffolk Ins. Co., 18 Pick. (Mass.) 152, 29 Am. Dec. 576; Peters *v.* Delaware Ins. Co., 5 S. & R. (Pa.) 481. See also the title MARINE INSURANCE.

To determine the question of priority under the "American clause" in marine policies of the same date, the hours of issuance will be inquired into. Brown *v.* Hartford Ins. Co., 3 Day (Conn.) 66; Potter *v.* Marine Ins. Co., 2 Mason (U. S.) 475. The date of the policy fixes the priority, not the time when the risk actually attached. Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306.

The "American clause" in marine policies only provides for the event of double or over insurance, and as it is the settled law of marine insurance that an insurer whose policy is for less than the full value is liable to pay only the proportion of a partial loss which the policy bears to the full value, there is no over insurance unless the total amount of insurance exceeds the value of the property, and consequently the clause does not apply. Each insurer is separately liable, and there is no contribution; but where one insurer paid the full loss, and took an assignment of other policies, he can prosecute a suit in the name of the insured for the proportional amount due on them. Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.

But where the total value of the property exceeded the insurance when it was made, but was subsequently diminished by landing a part of the cargo, so that at the time of loss there was over insurance, the "American clause" applies to cast prior liability for the entire loss on the first insurer. American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399.

In Fire Insurance Policies it is now invariably provided that if the insured shall procure any other insurance on the same property without the consent of the insurer, the policy shall be void, and that if there be other insurance with consent the insurer shall only be liable for its ratable proportion of the loss. See the title FIRE INSURANCE, where the subject of double and additional insurance against fire is fully discussed.

2. Contribution Enforced in Case of Double Insurance. — If the property which was the subject of insurance is the same, interest the same, and risk identical, the contribution is that which would be proper as between cosureties. Deming *v.* Merchants' Cotton-press, etc., Co., 90 Tenn. 306.

This most often occurs when different persons, each having an interest in the property and the right to insure it, have insured the same property against the same risk. Bank of British North America *v.* Western Assur. Co., 7 Ont. Rep. 166; Potter *v.* Marine Ins. Co., 2 Mason (U. S.) 475; Robbins *v.* Firemen's Fund Ins. Co., 16 Blatchf. (U. S.) 122; Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 562; Cromie *v.* Kentucky, etc., Mut. Ins. Co., 15 B. Mon. (Ky.) 436; Hough *v.* People's F. Ins. Co., 36 Md. 398; Baltimore F. Ins. Co. *v.* Loney, 20 Md. 38; Wiggin *v.* Suffolk Ins. Co., 18 Pick. (Mass.) 153, 29 Am. Dec. 576; Lucas *v.* Jefferson Ins. Co., 6 Cow. (N. Y.) 635; Harris *v.* Ohio Ins. Co., 5 Ohio 466.

In North British, etc., Ins. Co. *v.* London, etc., Ins. Co., 5 Ch. Div. 569, it was held, by Jessel, M. R., and affirmed on appeal, that where a wharfinger, being liable like a common carrier for the safety of the goods, insured them, and the owner also insured them, the insurers of the wharfinger had the primary liability, and could not require the other insurers to contribute, holding that the provision for contribution only applied when the same property, and the same interest, was insured.

In Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, on the other hand, it was held, on the language of the policy, that the warehouseman's policy insured the goods, and not merely his interest.

In Home Ins. Co. *v.* Gwathmey, 82 Va. 923, and Royster *v.* Roanoke, etc., Steam-Boat Co., 26 Fed. Rep. 492, the courts follow North British, etc., Ins. Co. *v.* London, etc., Ins. Co., 5 Ch. Div. 569, distinguishing between the terms used in the respective policies and that in Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527.

several tenants in common, or joint tenants of land removes a burden resting upon the joint estate, he is entitled to a just contribution from the others, so that the burden may be equal.[1]

Applications of Principle. — This rule applies alike to the payment of a mortgage,[2]

1. Contribution Between Joint Tenants, etc. — *England.* — Harbert's Case, 3 Coke 11; Barnes *v.* Racster, 1 Y. & Coll. 401.

Alabama. — Newbold *v.* Smart, 67 Ala. 326.

Connecticut. — Osborn *v.* Carr, 12 Conn. 204; Young *v.* Williams, 17 Conn. 393.

Illinois. — Titsworth *v.* Stout, 49 Ill. 80, 95 Am. Dec. 577; Wilton *v.* Tazewell, 86 Ill. 32; Carter *v.* Penn, 99 Ill. 395; Vogle *v.* Brown, 120 Ill. 338; Jones *v.* Gilbert, 135 Ill. 27; Griffith *v.* Robinson, 14 Ill. App. 377; Brown *v.* Shurtleff, 24 Ill. App. 569.

Indiana. — Eads *v.* Retherford, 114 Ind. 273, 5 Am. St. Rep. 611; Falley *v.* Gribling, 128 Ind. 110.

Iowa. — Oliver *v.* Montgomery, 39 Iowa 601, 42 Iowa 36; Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616.

Kentucky. — Lee *v.* Fox, 6 Dana (Ky.) 172; Sneed *v.* Atherton, 6 Dana (Ky.) 281, 32 Am. Dec. 70; Dickey *v.* Thompson, 8 B. Mon. (Ky.) 312.

Massachusetts. — Allen *v.* Clark, 17 Pick. (Mass.) 56; Kites *v.* Church, 142 Mass. 586; Hurley *v.* Hurley, 148 Mass. 444.

Mississippi. — Davidson *v.* Wallace, 53 Miss. 475; Allen *v.* Poole, 54 Miss. 334; Harrison *v.* Harrison, 56 Miss. 174.

New York. — Cheesebrough *v.* Millard, 1 Johns. Ch. (N. Y.) 415, 7 Am. Dec. 494; Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 430, 7 Am. Dec. 499; Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388.

Ohio. — Clark *v.* Lindsey, 47 Ohio St. 437.

Pennsylvania. — Leitch *v.* Little, 14 Pa. St. 250; Wall *v.* Fife, 37 Pa. St. 394.

Tennessee. — Furman *v.* McMillian, 2 Lea (Tenn.) 121; Rankin *v.* Black, 1 Head (Tenn.) 658; Gee *v.* Gee, 2 Sneed (Tenn.) 395.

Where costs were incurred by one owner in behalf of himself and others to restrain waste by a stranger, he may recover contribution in proportion to the benefits received by the others. Gage *v.* Mulholland, 16 Grant's Ch. (U. C.) 145.

Measure of Contribution. — The measure of contribution to the removal of an incumbrance is the proportionate value of the lots owned by the several owners. Cheesebrough *v.* Millard, 1 Johns. Ch. (N. Y.) 415, 7 Am. Dec. 494; Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; Morrison *v.* Beckwith, 4 T. B. Mon. (Ky.) 76, 16 Am. Dec. 136; Burk *v.* Chrisman, 3 B. Mon. (Ky.) 50; Dickey *v.* Thompson, 8 B. Mon. (Ky.) 316.

If the plaintiff has been in possession of the property without paying rent, this may be considered in fixing the amount. Sullivan *v.* Brennan, 94 Iowa 743.

The general rule in equity is that all the estates concerned, whether defined by quantity of interest and duration, or by extent of territory, shall contribute to the incumbrance according to their relative value, when the debt falls due. Danforth *v.* Smith, 23 Vt. 247.

So a life tenant may have contribution against the remainderman, Daviess *v.* Myers, 13 B. Mon. (Ky.) 514; Miller's Estate, Tuck. (N. Y.) 346; and the owners of the fee against a dowress, Selb *v.* Montague, 102 Ill. 446; Cox *v.* Garst, 105 Ill. 342; Selb *v.* Mabee, 14 Ill. App. 574; Noffts *v.* Koss, 29 Ill. App. 301; Linden *v.* Graham, 34 Barb. (N. Y.) 316; Hodges *v.* Phinney, 106 Mich. 537; according to the actual value of the several interests.

But a widow who has taken a deed of part of an estate in exchange for her dower is not liable to contribute to the removal of a mortgage on the entire estate, dower being prior in right to the mortgage. Brooks *v.* Harwood, 8 Pick. (Mass.) 497.

No Liability After Interest Ceases. — Where one joint owner sold his interest, and the vendee has occupied long enough to have title by possession, and the other was afterwards compelled to pay a vendor's lien, the first cannot be compelled to contribute, as he receives no benefit from the payment. Screven *v.* Joyner, 1 Hill Eq. (S. Car.) 260, 26 Am. Dec. 199.

2. Payment of Mortgage. — Young *v.* Williams, 17 Conn. 393; Titsworth *v.* Stout, 49 Ill. 80, 95 Am. Dec. 577; Fischer *v.* Eslaman, 63 Ill. 78; Briscoe *v.* Power, 85 Ill. 420; Carter *v.* Penn, 99 Ill. 395; Vogle *v.* Brown, 120 Ill. 338; Jones *v.* Gilbert, 135 Ill. 27; Allen *v.* Clark, 17 Pick. (Mass.) 56; Taylor *v.* Porter, 7 Mass. 355; Cheesebrough *v.* Millard, 1 Johns. Ch. (N. Y.) 415, 7 Am. Dec. 494; Sawyer *v.* Lyon, 10 Johns. (N. Y.) 32; Tarbell *v.* Durant, 61 Vt. 516.

There is no contribution between owners of separate parts to payment of a mortgage, unless it was necessary for the plaintiff to pay the whole. Thompson *v.* Perry, 2 Hill Eq. (S. Car.) 204.

If one tenant in common is compelled to pay the whole mortgage, and takes a transfer of the mortgage, carrying the legal title, the share of the mortgage resting on his part is extinguished; and he can enforce the residue by foreclosure against the other owners. Young *v.* Williams, 17 Conn. 393.

A building and loan association which loaned a part owner money to pay a mortgage, supposing him to be the sole owner, is entitled to contribution from the other owners. Haverford Loan, etc., Assoc. *v.* Philadelphia Fire Assoc., 180 Pa. St. 522.

Co-tenants have contribution for payment of an existing mortgage debt; but after it is merged by foreclosure, if one pay he can enforce the lien, but not bring a personal action. McLaughlin *v.* Curts, 27 Wis. 644.

When a mortgagor is compelled, in order to protect his title, to pay a prior mortgage covering his portion and also other land, he can recover exoneration. Lyman *v.* Little, 15 Vt. 576.

A part owner of mortgaged land may compel his co-owner to contribute to payment of the mortgage when he has paid more than his share; but not when he has paid an amount less than his share, though defendant has paid nothing. Sawyer *v.* Lyon, 10 Johns. (N. Y.) 32.

a purchase-money lien,[1] taxes assessed upon the land,[2] ground rent,[3] or the removal of a superior title.[4]

Partial Conveyances of Encumbered Tracts. — But if the owner of land which is encumbered sells a part of the land by warranty deed, the primary duty of removing the incumbrance remains upon the portion which he retains; and if a subsequent purchaser of the remaining portion removes the incumbrance, he has no right to contribution from the prior purchaser;[5] and in the case of

1. Purchase-money Lien. — Where two buy a tract of land together, and one is compelled to pay more than his share of the purchase money, he can recover contribution from the other, so as to make their payments equal, or in an agreed proportion. Newbold *v.* Smart, 67 Ala. 326; Brown *v.* Budd, 2 Ind. 442; Soule *v.* Frost, 76 Me. 119; Leitch *v.* Little, 14 Pa. St. 250; Wall *v.* Fife, 37 Pa. St. 394; Furman *v.* McMillan, 2 Lea (Tenn.) 121; Rankin *v.* Black, 1 Head (Tenn.) 658; Gee *v.* Gee, 2 Sneed (Tenn.) 395.

2. Taxes. — Moore *v.* Woodall, 40 Ark. 42; Cocks *v.* Simmons, 55 Ark. 104, 29 Am. St. Rep. 28; Eads *v.* Retherford, 114 Ind. 273, 5 Am. St. Rep. 611; Oliver *v.* Montgomery, 39 Iowa 601, 42 Iowa 36; Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616; Kites *v.* Church, 142 Mass. 586; Hurley *v.* Hurley, 148 Mass. 444; Davidson *v.* Wallace, 53 Miss. 475; Allen *v.* Poole, 54 Miss. 334; Harrison *v.* Harrison, 56 Miss. 174; Clark *v.* Lindsey, 47 Ohio St. 437.

Contra. — "There was not * * * any provision of law authorizing a tenant in common to recover of his co-tenant for taxes paid by the former upon the latter's share of the common estate, unless such payment was made at the latter's express or implied request; payment without such request would * * * be the act of a mere volunteer, and would impose no obligation of reimbursement." Kean *v.* Connelly, 25 Minn. 228, 33 Am. Rep. 458. This statement can hardly be regarded as satisfactory, unless the tax were assessed upon the interest of each tenant in common separately, and so as to create no lien upon the common title. The report does not clearly show the facts in this respect.

A lessee who has paid all the taxes and rent, the estate being unproductive, cannot recover contribution from his co-lessee. Van Brunt *v.* Gordon, 53 Minn. 227.

3. Donagan *v.* McKee, 13 Phila. (Pa.) 48.

4. Removal of Superior Title. — If one tenant in common or joint tenant buys in a superior title, the others have a right to share in the title so acquired upon contributing proportionately to the amount paid; and conversely, they are bound to contribute if they share in the benefits of the purchase. Rothwell *v.* Dewees, 2 Black (U. S.) 613; Titsworth *v.* Stout, 49 Ill. 81, 95 Am. Dec. 577; Sneed *v.* Atherton, 6 Dana (Ky.) 281, 32 Am. Dec. 70; Lee *v.* Fox, 6 Dana (Ky.) 172; Farmer *v.* Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388.

Though the title bought in be worthless, if the purchaser by its use obtains a compromise of which his co-tenant claims the benefit, the latter must contribute to the amount paid. Lee *v.* Fox, 6 Dana (Ky.) 172.

Whether an outstanding title for life or years, or a dower or homestead right, is such an incumbrance as to entitle the buyer to contribution from his co-tenants, *quære*. If the co-tenants receive the benefit of the extinction of such a right, they are bound to contribute. Wilton *v.* Tazwell, 86 Ill. 32.

Unassigned dower is an incumbrance for the removal of which a co-tenant can have contribution. Chesnut *v.* Chesnut, 15 Ill. App. 442.

In Carter *v.* Penn, 99 Ill. 395, the homestead right of a widow was held to be within the rule, though the defendant was willing to have the widow retain her right.

So with the expense of defending the title against one who sues, claiming superior title. Gosselin *v.* Smith, 154 Ill. 74. But a co-tenant need not contribute to litigation not to protect the title, but to obtain redress for a trespass. Paine *v.* Slocum, 56 Vt. 504.

5. Sale of Part with Warranty — Retained Tract Must Bear Whole Burden — *Connecticut.* — Hunt *v.* Mansfield, 31 Conn. 488; Sanford *v.* Hill, 46 Conn. 42.

Illinois. — Lock *v.* Fulford, 52 Ill. 166.

Indiana. — Henderson *v.* Truitt, 95 Ind. 309.

Massachusetts. — Chase *v.* Woodbury, 6 Cush. (Mass.) 143; Bradley *v.* George, 2 Allen (Mass.) 392; George *v.* Kent, 7 Allen (Mass.) 17; Kilborn *v.* Robbins, 8 Allen (Mass.) 466; George *v.* Wood, 9 Allen (Mass.) 80, 85 Am. Dec. 741; Beard *v.* Fitzgerald, 105 Mass. 134; Clark *v.* Fontain, 135 Mass. 466; Converse *v.* Ware Sav. Bank, 152 Mass. 407.

Michigan. — Caruthers *v.* Hall, 10 Mich. 40.

New York. — Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 241; La Farge F. Ins. Co. *v.* Bell, 22 Barb. (N. Y.) 54.

Ohio. — Cary *v.* Folsom, 14 Ohio 365.

Pennsylvania. — Nailer *v.* Stanley, 10 S. & R. (Pa.) 450, 13 Am. Dec. 691.

Virginia. — Henkle *v.* Allstadt, 4 Gratt. (Va.) 284.

Exceptions and Limitations. — But this doctrine is sometimes held not to apply to cases where each of the present owners acquired his title in equal good faith. Osborn *v.* Carr, 12 Conn. 195; Hartley *v.* O'Flaherty, Lloyd & G. *temp.* Plunk. 208.

If the two portions were in different towns, mortgaged by different deeds for the same debt, and neither the deed of the second purchaser nor the deed recorded in his town gave any notice of the other mortgage, so that the second purchaser had no notice either in fact or from the record office in his town, he is *in equali jure* with the other mortgagee, and they shall contribute. Osborn *v.* Carr, 12 Conn. 195.

The only general exception to the right of the first purchaser to exemption from the burden of the incumbrance is where he agreed to assume the mortgage. Cooper *v.* Bigly, 13 Mich. 463; Mason *v.* Payne, Walk. (Mich.) 459; Caruthers *v.* Hall, 10 Mich. 40.

successive conveyances of different portions of an encumbered tract, the burden will rest upon them in the inverse order of conveyance.[1]

b. To the Making of Repairs. — **At the Common Law,** the writ *de reparatione facienda* lay to compel one joint tenant or tenant in common to unite with the other in necessary repairs of a house or mill, but not to compel inclosure or reparation of a wood or arable land.[2]

By the Modern Rule, the right to assistance in making repairs is extended to include contribution to the expense of repairs made, but only in cases where they were clearly necessary.[3]

If the first grantee gave back a mortgage which was still unpaid at the time of trial, the later grantee takes the superior legal title, and with it a right to contribution if he pay the original mortgage. Allen *v.* Clark, 17 Pick. (Mass.) 56.

1. Successive Conveyances — Incumbrances Chargeable in Inverse Order — *England.* — Averall *v.* Wade, Lloyd & G. *temp.* Sugd. 252; Lanoy *v.* Athol, 2 Atk. 446.

Illinois. — Vogle *v.* Brown, 120 Ill. 338.

Michigan. — Mason *v.* Payne, Walk. (Mich.) 459; Cooper *v.* Bigly, 13 Mich. 463.

Missouri. — Ingram *v.* Tompkins, 16 Mo. 399.

New Hampshire. — Brown *v.* Simons, 44 N. H. 475.

New Jersey. — Shannon *v.* Marselis, 1 N. J. Eq. 421; Britton *v.* Updike, 3 N. J. Eq. 125; Wikoff *v.* Davis, 4 N. J. Eq. 224.

New York. — Gill *v.* Lyon, 1 Johns. Ch. (N. Y.) 447; Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 241; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151; James *v.* Hubbard, 1 Paige (N. Y.) 228; Gouverneur *v.* Lynch, 2 Paige (N. Y.) 300; Jenkins *v.* Freyer, 4 Paige (N. Y.) 47; Guion *v.* Knapp, 6 Paige (N. Y.) 35, 29 Am. Dec. 741; Skeel *v.* Spraker, 8 Paige (N. Y.) 195; Patty *v.* Pease, 8 Paige (N. Y.) 277, 35 Am. Dec. 683; Schryver *v.* Teller, 9 Paige (N. Y.) 173; Howard Ins. Co. *v.* Halsey, 4 Sandf. (N. Y.) 565.

Pennsylvania. — Cowden's Estate, 1 Pa. St. 267, *overruling* Donley *v.* Hays, 17 S. & R. (Pa.) 400; Corporation, etc. *v.* Wallace, 3 Rawle (Pa.) 109.

Vermont. — Lyman *v.* Lyman, 32 Vt. 79, 76 Am. Dec. 151; Root *v.* Collins, 34 Vt. 173.

Virginia. — Jones *v.* Myrick, 8 Gratt. (Va.) 179.

Justice Story, in his Equity Jurisprudence, § 1233*a*, criticises this rule as follows: "But there seems great reason to doubt whether this last position is maintainable upon principle; for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive that either has in consequence thereof any superiority of right or equity over the other. On the contrary, there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them according to the relative values of the estates. And so the doctrine has been asserted in the ancient as well as the modern English cases on the subject."

But it will be found that none of the authorities cited, except Barnes *v.* Racster, 1 Y. & Coll. 401; Dickey *v.* Thompson, 8 B. Mon. (Ky.) 312, and Morrison *v.* Beckwith, 4 T. B. Mon. (Ky.) 76, 16 Am. Dec. 136, sustain his objection to the doctrine; some of them being directly contrary to it, and those above named resting upon peculiar equitable considerations affecting the parties which made it inequitable to give one party the preference over the others. Hall *v.* Morgan, 79 Mo. 47, gives some support to Judge Story's position, but the decision seems to be controlled by the terms of a special contract.

One who had only a contract for purchase of a lot sold it in two parcels. The first vendee bought it as a title in fee, and paid full price. The second purchaser knew of the rights of the first, and had only a quitclaim. It was held that the second, on paying the purchase price, could recover contribution from the first. Hilton *v.* Young, 73 Cal. 196.

The overwhelming preponderance of authority supports the proposition of the text, and Mr. Perry, the editor of the twelfth edition of Story, adds a note to the above section, in which he says: "We apprehend that there is no doubt in regard to the entire soundness of the rule requiring such a discrimination."

So if one has sold his real estate in several parcels, and a tax-bill is levied on the last piece sold, the owner of it cannot have contribution. Bull *v.* Griswold, 14 R. I. 22.

An owner of mortgaged premises mortgaged part to A, subject to the prior mortgage; then he sold the rest to B by quitclaim, and then quitclaimed to A. A paid the mortgage. It was held that he had no right of contribution against B. Pike *v.* Goodnow, 12 Allen (Mass.) 472.

2. "If there be two joint tenants of a wood or arable land, the one hath no remedy against the other to inclose or for reparations for safeguard of the wood or corn, but if there be two joint tenants of a house, the one shall have a writ *de reparatione facienda* against the other." Bowles's Case, 11 Coke 82. The same doctrine is stated more fully in Co. Litt. 200 *b*.

3. Compelling Contribution as to Expenses of Repairs. — At the common law, by writ *de reparatione facienda*, one joint tenant or tenant in common might compel the co-tenants to unite in necessary repairs of a house or mill; and the same right extends to recovery of contribution for expenses incurred for repairs, but only after request to assist in the repairs and refusal. Louvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161; Gardner *v.* Diederichs, 41 Ill. 171; Stevens *v.* Thompson, 17 N. H. 103; Pickering *v.* Pickering, 63 N. H. 470; Mumford *v.* Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 590; Anderson *v.* Greble, 1 Ashm. (Pa.) 139; Beaty *v.* Bordwell, 91 Pa. St. 441; Kidder *v.* Rixford, 16 Vt. 172, 42 Am. Dec. 504.

c. To the Making of Improvements — **Co-tenant's Right to Reimbursement for Improvements.** — If one co-tenant improves the common property by contract with or with the assent of the other, he has a right to reimbursement of the other's proportionate share;[1] but he cannot recover for improvements made without the consent of his co-tenant.[2]

And the common-law rule does not extend to woodland or arable land, as for removing stumps. Beaty *v.* Bordwell, 91 Pa. St. 438.

But some of the cases state the present rule more broadly, and give a right of contribution for reasonable and necessary repairs, without other qualification. Fowler *v.* Fowler, 50 Conn. 256; Haven *v.* Mehlgarten, 19 Ill. 91; Alexander *v.* Ellison, 79 Ky. 148; Gwinneth *v.* Thompson, 9 Pick. (Mass.) 31, 19 Am. Dec. 350; Denman *v.* Prince, 40 Barb. (N. Y.) 217; Farrand *v.* Gleason, 56 Vt. 633; Webb *v.* Laird, 62 Vt. 448, 22 Am. St. Rep. 121; Clark *v.* Plummer, 31 Wis. 442.

Contribution for necessary repairs can be had in chancery, though not at law. McDearman *v.* McClure, 31 Ark. 559; Williams *v.* Coombs, 88 Me. 183.

Several parties were by tenure liable for the repairs of a bridge. One of them repaired. A co-tenant was therefore liable to contribute to the repairs of the bridge, in the proportion which her portion of the demesne lands bore to the whole. Dimes *v.* Arden, 6 N. & M. 494, 36 E. C. L. 443.

A tenant in common who has leased his interest to the co-tenant, who makes extensive and necessary repairs, by consent of the other, is liable to contribute thereto, not as landlord but as co-tenant. Grannis *v.* Cook, 3 Thomp. & C. (N. Y.) 299.

The lessee of one co-tenant making necessary repairs required by his lease, to which the other tenant does not agree, can have contribution from him by way of deduction from rents and profits. Huston *v.* Springer 2 Rawle (Pa.) 97.

Contra in Massachusetts. — If the ancient rule ever extended to contribution for repairs made, it has not been adopted in Massachusetts. Carver *v.* Miller, 4 Mass. 561; Converse *v.* Ferre, 11 Mass. 325; Calvert *v.* Aldrich, 99 Mass. 74, 96 Am. Dec. 693.

Repairs Must Be Strictly Necessary. — Contribution cannot be given for expenses which were incurred, not for the preservation of the property, but to gratify the taste and contribute to the convenience of the tenant incurring them. Israel *v.* Israel, 30 Md. 128, 96 Am. Dec. 571.

Repairs must be such as "are absolutely necessary to the enjoyment of the property." Dech's Appeal, 57 Pa. St. 472. "Such as are needful for the proper preservation of the property." Farrand *v.* Gleason, 56 Vt. 633.

In case the money is expended for ordinary repairs, and not such as are absolutely necessary for the prevention of ruin, the party making them cannot recover contribution from his co-tenants. Leigh *v.* Dickeson, 12 Q. B. Div. 194, *affirmed* 15 Q. B. Div. 60.

Express Agreement for Contribution. — If the respective rights and duties of mill owners in respect to repairs of a dam are fixed by their deeds, no action can be brought on an implied contract. Tullar *v.* Baxter, 59 Vt. 467.

1. Co-tenant's Right to Reimbursement for Improvements. — Young *v.* Polack, 3 Cal. 208; Baird *v.* Jackson, 98 Ill. 87; Sears *v.* Munson, 23 Iowa 380; Jordan *v.* Soule, 79 Me. 590; Davidson *v.* Wallace, 53 Miss. 479; Prentice *v.* Janssen, 79 N. Y. 489; Houston *v.* McCluney, 8 W. Va. 135; Reed *v.* Jones, 8 Wis. 421.

2. Improvements Without Consent of Co-tenant — *Colorado.* — Neuman *v.* Dreifurst, 9 Colo. 228; Rico Reduction, etc., Co. *v.* Musgrave, 14 Colo. 79.

Georgia. — Bazemore *v.* Davis, 55 Ga. 519.

Illinois. — Gardner *v.* Diedrichs, 41 Ill. 171; Chambers *v.* Jones, 72 Ill. 275.

Indiana. — Lane *v.* Taylor, 40 Ind. 501; Elrod *v.* Keller, 89 Ind. 385; Harry *v.* Harry, 127 Ind. 91.

Kentucky. — Graham *v.* Graham, 6 T. B. Mon. (Ky.) 562, 17 Am. Dec. 166; Bent *v.* Barnett, 90 Ky. 600.

Louisiana. — Becnel *v.* Becnel, 23 La. Ann. 150; Morgan *v.* Morgan, 23 La. Ann. 502; Bayley *v.* Denny, 26 La. Ann. 255.

Minnesota. — Walter *v.* Greenwood, 29 Minn. 87.

Nevada. — Welland *v.* Williams, 21 Nev. 230.

New Hampshire. — Stevens *v.* Thompson, 17 N. H. 103.

New York. — Putnam *v.* Ritchie, 6 Paige (N. Y.) 405; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582; Scott *v.* Guernsey, 48 N. Y. 106.

Pennsylvania. — Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353; Gregg *v.* Patterson, 9 W. & S. (Pa.) 198; McKinley *v.* Peters, 111 Pa. St. 283.

South Carolina. — Dellet *v.* Whitner, Cheves Eq. (S. Car.) 229; Hancock *v.* Day, McMull. Eq. (S. Car.) 74, 36 Am. Dec. 293; Thurston *v.* Dickinson, 2 Rich. Eq. (S. Car.) 317, 46 Am. Dec. 56; Corbett *v.* Laurens, 5 Rich. Eq. (S. Car.) 301.

Vermont. — Kidder *v.* Rixford, 16 Vt. 169, 42 Am. Dec. 504; Farrand *v.* Gleason, 56 Vt. 638. See Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550; Field *v.* Leiter, 117 Ill. 341.

No contribution can be had for expenditures of no benefit to the common estate, and not desired by the defendant. Chapin *v.* Smith, 52 Conn. 260.

Street improvements ordered by a city are a necessary common charge, and one of several owners who pays for them may recover from the others. Whitehead's Succession, 3 La. Ann. 396.

Life tenant and remainderman contribute to an assessment for permanent public improvement. Miller's Estate, Tuck. (N. Y.) 346.

A part owner may compel a lessee of the other part to contribute to assessments which the defendant was bound by the terms of his lease to pay. Williams *v.* Craig, 2 Edw. Ch. (N. Y.) 297.

Where two have a right to the use of the same property, and outlay is necessary to the

Partition — Adjusting as to Improvements. — But in case of a partition of the improved property, his equitable rights will be preserved by aparting to him the portion which he has improved,[1] and in case of judicial sale, or apportionment by value, he will be entitled to receive the increased amount arising from the improvements.[2] If he is chargeable to the other tenants for rents and profits received, he should be credited on the account with any increase in value resulting from his repairs or improvements.[3]

4. Contribution Between Heirs, Devisees, and Legatees. — An heir, devisee, or legatee, whose interest has been taken for liabilities, or who has paid such liabilities, has a right to contribution from others who have a like interest in the estate, which was subject to the same liability.[4] The abatement of legacies

enjoyment by one, and beneficial to the other, the expense should be proportionally borne by each, the ratio to be equitably determined. Kennedy *v.* Covington, 17 B. Mon. (Ky.) 584.

By the law of *Louisiana* joint owners must contribute ratably to useful improvements made by the managing owner, if the others made no opposition. Percy *v.* Millaudon, 6 Martin N. S. (La.) 616, 17 Am. Dec. 196.

1. Partition — Improvements. — Wilkinson *v.* Stuart, 74 Ala. 198; Seale *v.* Soto, 35 Cal. 102; Louvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161; Carver *v.* Coffman, 109 Ind. 547; Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 140, 23 Am. Dec. 387; Curtis *v.* Poland, 66 Tex. 511; Dodson *v.* Hays, 29 W. Va. 597.

For a full discussion of this topic, see the title PARTITION.

In some of the cases the right to an equitable partition in favor of an improving tenant is limited to cases in which the other tenant seeks the partition, and rests on the motto, "He who seeks equity must do equity." Swan *v.* Swan, 8 Price 518; Ford *v.* Knapp, 102 N. Y. 141, 55 Am. Rep. 782; Bazemore *v.* Davis, 55 Ga. 519. This difference of rights between a plaintiff and a defendant is recognized, but severely criticised, in Davis *v.* Smith, 5 Ga. 289, 48 Am. Dec. 279.

But in Brookfield *v.* Williams, 2 N. J. Eq. 341, and Doughaday *v.* Crowell, 11 N. J. Eq. 203, the improving tenant was plaintiff in the partition suit, and was allowed the improved portion.

The plaintiff has a right to pay her proportion for the improvements, and thereupon have an equal division of the improved property. Stafford *v.* Nutt, 35 Ind. 93.

In Rowan *v.* Reed, 19 Ill. 21, the court refused to apart to the occupying tenant improvements not made for the benefit of the estate, but for his personal convenience, and of which he had had the enjoyment for several years.

Compensation Allowed for Improvements. — If justice cannot be done by way of "equitable partition," the defendant will be given compensation for his improvements as a condition of granting the partition. Swan *v.* Swan, 8 Price 518; Drennen *v.* Walker, 21 Ark. 540; Louvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161; Kurtz *v.* Hibner, 55 Ill. 521, 8 Am. Rep. 665; Mahoney *v.* Mahoney, 65 Ill. 406; Martindale *v.* Alexander, 26 Ind. 104, 89 Am. Dec. 458; Sneed *v.* Atherton, 6 Dana (Ky.) 281, 32 Am. Dec. 70; Borah *v.* Archers, 7 Dana (Ky.) 177; Respass *v.* Breckenridge, 2 A. K. Marsh. (Ky.) 581; Nelson *v.* Leake, 25 Miss. 199; Hitchcock *v.* Skinner, Hoffm. Ch, (N. Y.) 27; Green *v.* Putnam, 1 Barb. (N. Y.) 500; Curtis *v.* Poland, 66 Tex. 511; Chinn *v.* Murray, 4 Gratt. (Va.) 348.

If a tenant made improvements while wrongly dispossessing his co-tenant, he gains no right to either compensation or equitable partition. Austin *v.* Barrett, 44 Iowa 489.

2. Judicial Sale — Apportionment by Value. — Gardner *v.* Diederichs, 41 Ill. 171; Louvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161; Dean *v.* O'Meara, 47 Ill. 120; Ford *v.* Knapp, 102 N. Y. 135, 55 Am. Rep. 782; Conklin *v.* Conklin, 3 Sandf. Ch. (N. Y.) 64; Moore *v.* Thorp, 16 R. I. 657; Scaife *v.* Thomson, 15 S. Car. 337; Broyles *v.* Waddel, 11 Heisk. (Tenn.) 32; Dodson *v.* Hays, 29 W. Va. 597. *Contra*, Elrod *v.* Keller, 89 Ind. 386.

3. Offsetting Improvements Against Rents, and Profits Received. — Bazemore *v.* Davis, 55 Ga. 519; Hyatt *v.* Cochran, 85 Ind. 231; Pickering *v.* Pickering, 63 N. H. 468; Hancock *v.* Day, McMull. Eq. (S. Car.) 72, 36 Am. Dec. 293; Thompson *v.* Bostick, McMull. Eq. (S. Car.) 78; Sutton *v.* Sutton, 26 S. Car. 33; Annely *v.* De Saussure, 26 S. Car. 497, 4 Am. St. Rep. 725; McGee *v.* Hall, 28S. Car. 562; Tyner *v.* Fenner, 4 Lea (Tenn.) 469; Curtis *v.* Poland, 66 Tex. 511; Ruffners *v.* Lewis, 7 Leigh (Va.) 743, 30 Am. Dec. 513; Graham *v.* Pierce, 19 Gratt. (Va.) 28, 100 Am. Dec. 658. *Contra*, Coakley *v.* Mahar, 36 Hun (N. Y.) 157.

So, on the other hand, if claim is made by the occupying tenant for the expense of improvements, the other party will be entitled to set off rents and occupation. Davis *v.* Chapman, 36 Fed. Rep. 42; Hyatt *v.* Cochran, 85 Ind. 231; Hannan *v.* Osborn, 4 Paige (N. Y.) 336.

In Graham *v.* Graham, 6 T. B. Mon. (Ky.) 562, 17 Am. Dec. 166, the court refused to allow improvements made by a copartner to be charged against any rents except those arising from the improvement.

4. Contribution Among Heirs, Devisees, and Legatees. — See generally the titles LEGACIES AND DEVISES; MARSHALING.

An heir who has paid legacies or debts which were a charge upon the real estate which he and others jointly inherit can recover contribution from the others. Harland *v.* Person, 93 Ala. 273; Griffith *v.* Robinson, 14 Ill. App. 377; Cook *v.* Cook, 92 Ind. 398; Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400; Sinking Fund Com'rs *v.* Woodward, 40 N. J. Eq. 23; Schermerhorn *v.* Barhydt, 9 Paige (N. Y.) 43; Livingston *v.* Livingston, 3

on account of a deficiency of assets, or the failure of title to a part, and the respective priorities of different classes of beneficiaries of an estate, in case the claims of all cannot be met, are not within the scope of this article.[1]

5. Contribution Between the Parties to Commercial Paper — Order of Liability Generally. — As between the several parties to a promissory note or bill of exchange, the order of liability is fixed by the well-established law of commercial paper, and is, in the case of a promissory note, first, the maker, and then the indorsers in the order of their indorsements; and in the case of an accepted bill of exchange, first, the acceptor, second, the drawer, and then the successive indorsers.[2]

Without Contract No Contribution Between Successive Parties. — In the absence, therefore, of a special agreement, an earlier indorser cannot have contribution against a later indorser, but the later indorser is entitled to indemnity from the earlier, and this is so though they both signed for accommodation.[3] The same rule of liability exists between acceptor and indorser,[4] maker and indorser,[5] and original surety and indorser,[6] the first named in each case being the party primarily liable on the instrument, and therefore debarred from contribution, and liable for indemnity.

Parol Proof of Co-suretyship. — But a prior indorser, sued by a later indorser for indemnity, may show by parol that by agreement between themselves the indorsers were co-sureties;[7] and parol evidence is admissible between any of

Johns. Ch. (N. Y.) 158; U. S. Bank *v.* Delorac, Wright (Ohio) 285; Shillito *v.* Shillito, 160 Pa. St. 167; Gallagher *v.* Redmond, 64 Tex. 622; Perrin *v.* Lomax, 2 Rob. (Va.) 133.

A devisee whose land is assigned as dower has a right to contribution. Eliason *v.* Eliason, 3 Del. Ch. 260.

An heir whose land is sold to pay debts of the ancestor may have contribution from the other heirs, all being *equali jure*. Griswold *v.* Bigelow, 6 Conn. 267; Davis *v.* Vansands, 45 Conn. 603; Coffin *v.* Leech, 12 Misc. Rep. (N. Y. Supreme Ct.) 593; Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 235.

An estate was completely settled in ignorance of the deceased's liability as surety on a bond. Afterwards suit was brought against the principal and all the legatees. It was held that they were liable to contribute *inter sese*. Lanier *v.* Griffin, 11 S. Ca1. 565.

Heirs have no right of contribution against specific devisees, the undevised land being regarded as primarily liable. Graham *v.* Dickinson, 3 Barb. Ch. (N. Y.) 169; Livingston *v.* Livingston, 3 Johns. Ch. (N. Y.) 158.

Dower, or a legacy in lieu of dower, cannot be compelled to contribute to payment of legacies. Lord *v.* Lord, 23 Conn. 327; Hickey *v.* Hickey, 26 Conn. 261; Williamson *v.* Williamson, 6 Paige (N. Y.) 305.

A specific legatee whose legacy is taken for debts may have contribution from other specific legatees. Matter of Moulton, 48 Cal. 191; Glass *v.* Dunn, 17 Ohio St. 423; Tomlinson *v.* Bury, 145 Mass. 346, 1 Am. St. Rep. 464. *Contra*, Peeples *v.* Horton, 39 Miss. 406.

Or from the devisees of the real estate. Chase *v.* Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; Thomas *v.* Thomas, 17 N. J. Eq. 356.

"All the legatees had separate and independent rights, and the legacy of each was alike liable to the execution, without priority or equitable exemption; and it was simply a misfortune that a judgment which was paramount to all their rights was levied of the slaves left to one of them, to the exemption of those left to others. * * * There is no precedent for the doctrine that after payment in such a case they would be accountable as between each other for contribution." Peeples *v.* Horton, 39 Miss. 406.

One of two residuary legatees, who employed counsel to defend the will, the result being the saving of the legacies of both, can recover one-half the expense. New Orleans *v.* Baltimore, 15 La. Ann. 625.

1. See the titles ABATEMENT OF LEGACIES, vol. 1, p. 42; LEGACIES AND DEVISES; MARSHALING.

2. See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, subdiv. *Liabilities of Parties*, vol. 4, p. 469 *et seq.* See also the title ACCOMMODATION PAPER, vol. 1, p. 356.

3. Contribution Between Indorsers. — Pomeroy *v.* Clark, 1 MacArthur (D. C.) 606; Harshman *v.* Armstrong, 43 Ind. 131; Harrah *v.* Doherty, (Mich. 1896) 69 N. W. Rep. 242; Willis *v.* Willis, 42 W. Va. 522.

A Full Discussion and collection of authorities upon this point will be found under the title ACCOMMODATION PAPER, vol. 1, p. 356 *et seq.*

The exceptional doctrine prevailing in *North Carolina* (see vol. 1, p. 359) has recently been again declared in Atwater *v.* Farthing, 118 N. Car. 388.

4. Acceptor and Indorser. — Gillespie *v.* Campbell, 39 Fed. Rep. 724; McCarty *v.* Roots, 21 How. (U. S.) 432; Gomez *v.* Lazarus, 1 Dev. Eq. (16 N. Car.) 205.

5. Maker and Indorser. — Dawson *v.* Pettway, 4 Dev. & B. L. (20 N. Car.) 396; Hillegas *v.* Stephenson, 75 Mo. 118, 42 Am. Rep. 393.

6. Surety and Indorser. — Nurre *v.* Chittenden, 56 Ind 462; Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665; Mulcare *v.* Welch, 160 Mass. 58; Smith *v.* Smith, 1 Dev. Eq. (16 N. Car.) 173.

7. Parol Proof of Co-suretyship Among Indorsers. — Preston *v.* Gould, 64 Iowa 44; Smith

the parties to commercial paper to show their real relations and change the order of liability from that indicated by the terms of the instrument.[1]

6. Contribution Between Partners — Generally No Contribution. — The essence of a partnership is an agreement for the sharing of profits and losses. The very multiplicity of the transactions requiring to be adjusted between partners, however, renders it impossible to grant contribution upon any single transaction;[2] and the well-established rule is that the rights of partners can only be adjusted by an action in equity, where the entire partnership account can be settled.[3]

v. Morrill, 54 Me. 48; Cathcart *v.* Gibson, 1 Rich. L. (S. Car.) 10; Kiel *v.* Choate, 92 Wis. 517. See also the titles ACCOMMODATION PAPER, vol. 1, pp. 343, 358; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 154, 487.

Where a note was indorsed by three for accommodation of the maker, each stipulating that the others should sign, with no agreement as to the order, and the actual order of signatures was merely casual, the three were co-sureties. Hagerthy *v.* Phillips, 83 Me. 336.

If the maker and indorsers agree that they shall pay the note, and the maker conveys to one of them security, they become co-sureties *inter sese*. Westfall *v.* Parsons, 16 Barb. (N. Y.) 645.

An agreement without consideration, entered into after the original liability was complete, that all the indorsers shall contribute as co-sureties, is *nudum pactum*. Druhe *v.* Christy, 10 Mo. App. 566.

1. Parol Evidence to Show Real Relations of Parties. — Reynolds *v.* Wheeler, 10 C. B. N. S. 561, 100 E. C. L. 561; Core *v.* Wilson, 40 Ind. 204; Nurre *v.* Chittenden, 56 Ind. 463; Knopf *v.* Morel, 111 Ind. 570; Craig *v.* West, 61 Iowa 758; Water-Power Co. *v.* Brown, 23 Kan. 676; Coolidge *v.* Wiggin, 62 Me. 568; Clapp *v.* Rice, 13 Gray (Mass.) 403, 74 Am. Dec. 639; Mansfield *v.* Edwards, 136 Mass. 15, 49 Am. Rep. 1; Dunn *v.* Wade, 23 Mo. 207; Apgar *v.* Hiler, 24 N. J. L. 812; Smith *v.* Smith, 1 Dev. Eq. (16 N. Car.) 173; Montgomery *v.* Page, 29 Oregon 320; Slaymaker *v.* Gundacker, 10 S. & R. (Pa.) 75; Martin *v.* Marshall, 60 Vt. 321. See also the references to the titles ACCOMMODATION PAPER and BILLS OF EXCHANGE AND PROMISSORY NOTES given in the last note.

But evidence of the mere intention of a party to be liable otherwise than as appears by the instrument is inadmissible. Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665.

Nothing less than an actual agreement to vary the liability appearing on the note will be sufficient. Mulcare *v.* Welch, 160 Mass. 58; Harrah *v.* Doherty, (Mich. 1896) 69 N. W. Rep. 242.

It was held in Phelps *v.* Garrow, 8 Paige (N. Y.) 322, 35 Am. Dec. 688, and Baker *v.* Martin, 3 Barb. (N. Y.) 634, that a second indorser, though he sign with the intention of being a surety for the maker to the payee, and the payee take the note with that understanding, is not liable to the payee, since under the statute of frauds an agreement to become surety for another must be in writing. See also Norton *v.* Coons, 6 N. Y. 33. But these cases are contrary to the great weight of authority.

Where one of several joint makers paid a note, and then transferred it to the plaintiff, the plaintiff acquired a right to proportional contribution against the other makers, though he supposed that he had bought the note itself, paid its face value, received interest in full several years against his assignor, and proved the claim in full against his estate, and received a dividend thereon. Dillenbeck *v.* Dygert, 97 N. Y. 303, 49 Am. Rep. 525.

The Burden of Proof is on the one who attacks the relations appearing on the face of the paper. Turner *v.* Overall, (Tenn. 1897) 39 S. W. Rep. 756.

2. Partners — No Contribution on Single Transaction. — Sadler *v.* Nixon, 5 B. & Ad. 936, 27 E. C. L. 247; Bishop *v.* Bishop, 54 Conn. 233; Mickle *v.* Peet, 43 Conn. 65; Thompson *v.* Lowe, 111 Ind. 272; Harris *v.* Harris, 39 N. H. 45; Murray *v.* Bogert, 14 Johns. (N. Y.) 322, 7 Am. Dec. 466; Ozeas *v.* Johnson, 1 Bin. (Pa.) 191; Dowling *v.* Clarke, 13 R. I. 134. But *compare* Honsinger *v.* Love, 16 Ont. Rep. 170.

3. Entire Account Must Be Settled in Equity — *England.* — Sadler *v.* Nixon, 5 B. & Ad. 936, 27 E. C. L. 247; Pearson *v.* Skelton, 1 M. & W. 504; Bovill *v.* Hammond, 6 B. & C. 149, 13 E. C. L. 126.

Canada. — Small *v.* Riddel, 31 U. C. C. P. 373; Scripture *v.* Gordon, 7 Ont. Pr. Rep. 164.

United States. — Lamalere *v.* Caze, 1 Wash. (U. S.) 435.

Arkansas. — Bailey *v.* Starke, 6 Ark. 192; Johnson *v.* Peck, 58 Ark. 580.

California. — Bradbury *v.* Barnes, 19 Cal. 120.

Connecticut. — Dewitt *v.* Staniford, 1 Root (Conn.) 270; Day *v.* Lockwood, 24 Conn. 198; Mickle *v.* Peet, 43 Conn. 65.

District of Columbia. — Riggs *v.* Stewart, 2 Cranch (C. C.) 171.

Illinois. — Bowzer *v.* Stoughton, 119 Ill. 47.

Indiana. — Crossley *v.* Taylor, 83 Ind. 337.

Kentucky. — Lawrence *v.* Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133.

Louisiana. — Reddick *v.* White, 46 La. Ann. 1198.

Massachusetts. — Williams *v.* Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366, 12 Pick. (Mass.) 378, 23 Am. Dec. 614; White *v.* Harlow, 5 Gray (Mass.) 463; Starbuck *v.* Shaw, 10 Gray (Mass.) 492; Phillips *v.* Blatchford, 137 Mass. 510.

Michigan. — McGunn *v.* Hanlin, 29 Mich. 476.

Missouri. — Smith *v.* Smith, 33 Mo. 557; Cockrell *v.* Thompson, 85 Mo. 510.

New Hampshire. — Wright *v.* Cobleigh, 21 N. H. 339; Gibson *v.* Moore, 6 N. H. 547.

New York. — Westerlo *v.* Evertson, 1 Wend. (N. Y.) 532; Mendez *v.* Schleuter, (Brooklyn City Ct.) 9 N. Y. Supp. 278.

When Contribution Enforceable. — But if the partnership was limited to a single transaction, or the expenditure in question was antecedent to or outside the partnership affairs,[1] or if by agreement a single item is to be separately adjusted,[2] contribution may be had without a general account.

If the Partnership Has Been Closed, and the accounts settled, and one partner is afterwards obliged to pay an overlooked item, he can recover contribution.[3] And after ascertainment of the final balance due, assumpsit will lie for its recovery.[4]

North Carolina. — Graham *v.* Holt, 3 Ired. L. (25 N. Car.) 300, 40 Am. Dec. 408.

Oregon. — McDonald *v.* Holmes, 22 Oregon 212.

Pennsylvania. — McFadden *v.* Sallada, 6 Pa. St. 283; Fulton's Appeal, 95 Pa. St. 323.

Wisconsin. — Tolford *v.* Tolford, 44 Wis. 547.

See generally the title PARTNERSHIP.

Partners Cannot Sue Each Other at Law for anything relating to their partnership concerns, unless there has been a settlement, a balance struck, and an agreement to pay. Fromont *v.* Coupland, 2 Bing. 170, 9 E. C. L. 366; Beach *v.* Hotchkiss, 2 Conn. 428; Halsted *v.* Schmelzel, 17 Johns. (N. Y.) 84; Murray *v.* Bogert, 14 Johns. (N. Y.) 322, 7 Am. Dec. 466; Casey *v.* Brush, 2 Cai. (N. Y.) 293; Westerlo *v.* Evertson, 1 Wend. (N. Y.) 532.

One partner who takes possession of the assets and proceeds to settle up the business cannot have contribution for debts paid until settlement of the entire account. Compton *v.* Thorn, 90 Va. 653; Smith *v.* Zumbro, 41 W. Va. 623.

A partner cannot maintain a suit to compel another to put money in the hands of a receiver in order that they may settle the liabilities together. Wright *v.* Cudahy, 64 Ill. App. 453.

1. Partnership for Single Transaction — Expenditure Outside Scope of Partnership — *England.* — Smith *v.* Barrow, 2 T. R. 476; Wright *v.* Hunter, 1 East 20; Sedgwick *v.* Daniell, 2 H. & N. 319; Venning *v.* Leckie, 13 East 7; Gale *v.* Leckie, 2 Stark. 107, 3 E. C. L. 337; Helme *v.* Smith, 7 Bing. 709, 20 E. C. L. 300.

Kentucky. — Lawrence *v.* Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133.

Maine. — Soule *v.* Frost, 76 Me. 119.

Massachusetts. — Chamberlain *v.* Walker, 10 Allen (Mass.) 429.

New Hampshire. — Gibson *v.* Moore, 6 N. H. 547.

New York. — Musier *v.* Trumpbour, 5 Wend. (N. Y.) 274.

North Carolina. — Scott *v.* Bryan, 96 N. Car. 289.

Pennsylvania. — Galbreath *v.* Moore, 2 Watts (Pa.) 86; Brubaker *v.* Robinson, 3 P. & W. (Pa.) 295; Wright *v.* Cumpsty, 41 Pa. St. 102.

If the cause of action is distinct from the partnership accounts, and does not involve their consideration, an action at law may be maintained. Howard *v.* France, 43 N. Y. 593; Crater *v.* Bininger, 45 N. Y. 545; Gridley *v.* Dole, 4 N. Y. 486.

A Part Owner of a Vessel may have contribution for sums paid if it appears that there are no other accounts outstanding by which the mutual rights of the parties would be affected. Wood *v.* Merritt, 2 Bosw. (N. Y.) 368.

2. Foster *v.* Allanson, 2 T. R. 479; Blakely *v.* Graham, 111 Mass. 8; Gibson *v.* Moore, 6 N. H. 549.

Where, on dissolution, a single debt was agreed to be still partnership property, the surviving partner can recover from the other's estate contribution to reasonable disbursements, fairly made, in steps appropriate for its collection. Preston *v.* Fitch, 137 N. Y. 41.

3. After Partnership Closed. — Johnson *v.* Peck, 58 Ark. 580; Mussetter *v.* Timmerman, 11 Colo. 201; Wendlandt *v.* Sohre, 37 Minn. 162; Brown *v.* Agnew, 6 W. & S. (Pa.) 238; Kelly *v.* Kaufman, 18 Pa. St. 351.

4. When Only Account Involving Few Items Left Unsettled. — Where the assets have been disposed of, the debts paid, and nothing left unsettled except an account between the two partners, and that is limited to a few items, an action will lie at law. Clarke *v.* Mills, 36 Kan. 393; Wheeler *v.* Arnold, 30 Mich. 304; Musier *v.* Trumpbour, 5 Wend. (N. Y.) 274.

Assumpsit Will Lie to Recover the Final Balance, even if it involve an accounting. Rackstraw *v.* Imber, Holt 368, 3 E. C. L. 149; Sears *v.* Starbird, 78 Cal. 225; Jepsen *v.* Beck, 78 Cal. 540; Price *v.* Cavins, 50 Ind. 122; Fanning *v.* Chadwick, 3 Pick. (Mass.) 423, 15 Am. Dec. 233; Brinley *v.* Kupfer, 6 Pick. (Mass.) 179; Williams *v.* Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; Bond *v.* Hays, 12 Mass. 34; Wilby *v.* Phinney, 15 Mass. 121; Farnum *v.* Patch, 60 N. H. 294, 49 Am. Rep. 313; Gardner *v.* Conn, 34 Ohio St. 187; Eakin *v.* Knox, 6 S. Car. 14.

But it is held in some cases that to maintain assumpsit for the balance there must have been an express promise. Fromont *v.* Coupland, 2 Bing. 170, 9 E. C. L. 366; Beach *v.* Hotchkiss, 2 Conn. 428; Halsted *v.* Schmelzel, 17 Johns. (N. Y.) 84; Murray *v.* Bogert, 14 Johns. (N. Y.) 322, 7 Am. Dec. 466; Casey *v.* Brush, 2 Cai. (N. Y.) 293; Westerlo *v.* Evertson, 1 Wend. (N. Y.) 532; Crater *v.* Bininger, 45 N. Y. 548.

A partnership implies an agreement that in case any partner pays more than his share, the others shall indemnify him. Rogers *v.* Mackenzie, 4 Ves. Jr. 752; Wright *v.* Hunter, 5 Ves. Jr. 792.

Where one partner wound up the concern, and paid the debts from his own funds, after exhausting the firm assets, he can recover the due proportion of the deficit from the other partners, in equity. Sells *v.* Hubbell, 2 Johns. Ch. (N. Y.) 397; Olleman *v.* Reagan, 28 Ind. 109; Harter *v.* Songer, 138 Ind. 161.

Where, in an equitable action, judgment has been rendered adjusting the account and determining the amount due one partner, an action at law will lie to recover it from the others. Logan *v.* Trayser, 77 Wis. 579.

If final settlement was had, and the defend-

7. Contribution in Regard to Party Walls. — The decisions of the courts in regard to contribution to the building and repair of party walls are so fragmentary and conflicting that no general rules can be formulated. The cases will be found in the note.[1]

ant agreed to pay one or more remaining debts, which he failed to do, the plaintiff, upon paying them, can sue for exoneration. Warring *v.* Hill, 89 Ind. 497; Gilmore *v.* Ham, 61 Hun (N. Y.) 1, *affirmed* 133 N. Y. 664.

The claim for contribution to a surviving partner does not accrue till complete settlement, and is not barred by a period of limitation for claims which expires before this. Logan *v.* Dixon, 73 Wis. 533.

1. Party Walls. — One who builds a party wall by agreement with the adjoining owner, for the use of both, can recover contribution to the expense. Huck *v.* Flentye, 80 Ill. 258; Molony *v.* Dixon, 65 Iowa 136, 54 Am. Rep. 1.

An agreement may be inferred from the conduct of the parties. Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347.

Where the defendant has agreed to unite in building a wall, and refuses to proceed with it after the plaintiff has built a part and bought material for the remainder, the plaintiff may complete the wall and recover contribution. Rindge *v.* Baker, 57 N. Y. 210, 15 Am. Rep. 475.

One who makes additions to an existing party wall can require the other to contribute, if the latter afterwards use the wall. Sanders *v.* Martin, 2 Lea (Tenn.) 213, 31 Am. Rep. 598. And if the second builder actually use the wall for support, it does not matter that he does not extend his joists into it. Greenwald *v.* Kappes, 31 Ind. 216.

But if the defendant build an independent wall, it is not a use of the party wall, though his wall is not so thick as would otherwise have been necessary. Kingsland *v.* Tucker, 115 N. Y. 574.

After a party wall was in use, one owner thickened and strengthened it on his own land, and increased the height. The other afterwards used the additional height, extending his timbers only to the line. It was held that he was liable to contribute to the cost of the increased height, but not to that of strengthening the wall. Walker *v.* Stetson 162 Mass. 86, 44 Am. St. Rep. 350.

One who builds a party wall without agreement, express or implied, cannot recover from a subsequent purchaser of the adjoining lot who builds into the wall. Antomarchi *v.* Russell, 63 Ala. 356, 35 Am. Rep. 40; Orman *v.* Day, 5 Fla. 385; McCord *v.* Herrick, 18 Ill. App. 423; Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347; Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480; Oat *v.* Middleton, 2 Miles (Pa.) 247; Norris *v.* Adams, 2 Miles (Pa.) 337; List *v.* Hornbrook, 2 W. Va. 340.

One who builds into a wall built by a neighbor wholly on his own land is not liable in an action for contribution. The remedy is trespass. Bisquay *v.* Jeunelot, 10 Ala. 245, 44 Am. Dec. 483.

Running of a Party-wall Agreement with the Land. — Liability under an agreement of record to pay one-half the cost of a party wall whenever one uses the same runs with the land against a purchaser. Savage *v.* Mason, 3 Cush. (Mass.) 500; Cutter *v.* Williams, 3 Allen (Mass.) 196; Maine *v.* Cumston, 98 Mass. 317; Standish *v.* Lawrence, 111 Mass. 111; Richardson *v.* Tobey, 121 Mass. 457; Walker *v.* Stetson, 162 Mass. 86, 44 Am. St. Rep. 350; Keating *v.* Korfhage, 88 Mo. 524; Burlock *v.* Peck, 2 Duer (N. Y.) 90 (*disapproved* in Cole *v.* Hughes, 54 N. Y. 444, 13 Am. Rep. 611); Campbell *v.* Mesier, 6 Johns. Ch. (N. Y.) 21.

But if the agreement was a mere unsealed contract, though recorded, the right established by it to recover contribution is a personal one, and does not pass with the land. Joy *v.* Boston Penny Sav. Bank, 115 Mass. 60; Gibson *v.* Holden, 115 Ill. 199, 56 Am. Rep. 146.

So as to the burden where the agreement was not contained in any conveyance, nor recorded, though the defendant had notice of it. Cole *v.* Hughes, 54 N. Y. 444, 13 Am. Rep. 611. But if the defendant takes by a quitclaim deed, notice of the unrecorded covenant will be imputed to him. Sharp *v.* Cheatham, 88 Mo. 498, 57 Am. Rep. 433.

In *Pennsylvania*, by statute, one who uses a party wall is bound to contribute to the cost of building it; but this right is personal to the first builder, and the burden to the second builder, so that neither the right nor the burden runs with the land. Oat *v.* Middleton, 2 Miles (Pa.) 247; Hart *v.* Kucher, 5 S. & R. (Pa.) 1; Ingles *v.* Bringhurst, 1 Dall. (U. S.) 341; Davids *v.* Harris, 9 Pa. St. 501; Todd *v.* Stokes, 10 Pa. St. 155; Gilbert *v.* Drew, 10 Pa. St. 219.

The doctrine of contribution to party walls is to be strictly limited to the terms of the statute. One who rebuilds a party wall, increasing its size and strength for his own purposes, cannot have contribution to the expense, though he adopted suggestions of the adjoining proprietor increasing the cost thereby. Hoffstot *v.* Voight, 146 Pa. St. 632.

The same rule was applied to the right to receive contribution under an unrecorded contract in List *v.* Hornbrook, 2 W. Va. 340; Bloch *v.* Isham, 28 Ind. 37, 92 Am. Dec. 287; Huling *v.* Chester, 19 Mo. App. 607.

But in *Iowa* the right given by statute runs to a purchaser. Thomson *v.* Curtis, 28 Iowa 232. And a similar right by contract is held to pass to the purchaser in Platt *v.* Eggleston, 20 Ohio St. 414; Keteltas *v.* Penfold, 4 E. D. Smith (N. Y.) 122; Weyman *v.* Ringold, 1 Bradf. (N. Y.) 41.

Rebuilding an Existing Wall. — If a party wall becomes ruinous, and one party rebuilds it, he can recover half the cost from the other, excluding additional expense caused by his building a higher and better wall. Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570.

But Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480, is directly contrary, holding that where a party wall becomes unusable neither party is liable

8. Contribution Between Directors and Stockholders in Corporations. — **The Stockholders of a Corporation** are pre-eminently persons having a common interest and charged with a common burden, and if one, without his own fault, is compelled to pay a debt of the corporation, he can recover contribution from the others.[1]

Directors. — So, if the directors, by their common acts or omissions, become personally liable for debts contracted in the name of the corporation, one who satisfies such debts can recover from the others.[2]

to contribute to its rebuilding, except by agreement.

In Partridge *v.* Gilbert, 15 N. Y. 601, 69 Am. Dec. 632, Denio, C. J., approves the doctrine of Sherred *v.* Cisco, 4 Sandf. (N. Y.) 480, and Shankland, J., that of Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570. Both statements were *dicta*, so the contradiction is still unresolved.

1. Contribution Between Stockholders. — Where the statute casts a personal liability for the debts of the corporation upon its stockholders, and one has been compelled to pay such a debt, he can sue the other stockholders for contribution; and equity is the proper forum, so that the liability of all may be determined.

California. — Wolters *v.* Henningsan, 114 Cal. 433.

Illinois. — Wincock *v.* Turpin, 96 Ill. 135; Buchanan *v.* Meisser, 105 Ill. 638.

Iowa. — Callanan *v.* Windsor, 78 Iowa 193.

Maryland. — Matthews *v.* Albert, 24 Md. 527.

Mississippi. — Perkins *v.* Sanders, 56 Miss. 733.

New Hampshire. — Hadley *v.* Russell, 40 N. H. 112; Erickson *v.* Nesmith, 46 N. H. 371.

New York. — Aspinwall *v.* Torrance, 1 Lans. (N. Y.) 383.

Ohio. — Umsted *v.* Buskirk, 17 Ohio St. 113; Wehrman *v.* Reakirt, 1 Cinc. Super. Ct. Rep. 230.

Pennsylvania. — Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43.

Rhode Island. — Sayles *v.* Bates, 15 R. I. 342.

So, also, where their liability arises from the failure of the directors to make a certificate that the capital stock is fully paid in. Aspinwall *v.* Sacchi, 57 N. Y. 331. Or from lack of legal organization. Richardson *v.* Pitts, 71 Mo. 128.

A member of a corporation, whose members were liable as general partners, sued the corporation, and after exhausting its assets, proceeded against the members. It was held that he must credit his own liability as one contributor. Farrow *v.* Bivings, 13 Rich. Eq. (S. Car.) 25; Perkins *v.* Sanders, 56 Miss. 733.

One who pays corporate debts to protect the property of himself and other stockholders can have contribution from others. Redington *v.* Cornwell, 90 Cal. 49.

Though the statutory liability to creditors exists only in the forum of the corporation, the right of one who has paid debts to contribution rests in general equity, and can be enforced in a different forum. Allen *v.* Fairbanks, 45 Fed. Rep. 445.

A stockholder cannot have contribution from another so long as he holds a mortgage on the corporate property as security. Gray *v.* Coffin, 9 Cush. (Mass.) 192.

Nor can a stockholder who incurs and pays debts in excess of the total liability of stockholders under the charter collect contribution in excess of the legal liability, without showing that it was done by unanimous consent of the stockholders. Haldeman *v.* Ainslie, 82 Ky. 395.

Stockholders liable only secondarily, and to a limited amount, cannot voluntarily discharge the corporate debts, and then sue their associates for contribution. Andrews *v.* Callender, 13 Pick. (Mass.) 484; Burr *v.* Bates, 3 Ohio Cir. Ct. Rep. 1.

Stockholders who voluntarily pay claims for which they were only secondarily liable, when the company had assets to pay them, cannot, after insolvency of the corporation, recover contribution from other stockholders. Ewing *v.* Stultz, 9 Ind. App. 1.

It is not sufficient that the plaintiff executed notes of the corporation as surety, for its benefit, and at the request of the other stockholders. Larson *v.* Dayton, 52 Iowa 597.

Contribution between stockholders in a limited corporation can only be had in equity, all the stockholders being made parties. Koons *v.* Martin, 66 Hun (N. Y.) 554, *affirmed* in 143 N. Y. 672.

2. Directors or committeemen who together pledge their personal liability are liable to contribute to one of the members who pays the liability, though it was done on behalf of the corporation. Edger *v.* Knapp, 5 M. & G. 753, 44 E. C. L. 393; Boulter *v.* Peploe, 9 C. B. 493, 67 E. C. L. 493; Batard *v.* Hawes, 2 El. & Bl. 287, 75 E. C. L. 287; *Re* Dover, etc., R. Co., 1 Eq. Rep. 271; Lefroy *v.* Gore, 1 Jones & L. 571; Slaymaker *v.* Gundacker, 10 S. & R. (Pa). 75.

A board of directors, by a vote *ultra vires*, bought certain stock, and placed it in the name of one of the board. As the nominal holder, he became liable to certain assessments. The other directors who participated in the vote were held liable to contribute to him. Ashhurst *v.* Mason, L. R. 20 Eq. 225; Ramskill *v.* Edwards, 31 Ch. Div. 100.

But in Baird *v.* Midvale Steel Works, 12 Phila. (Pa.) 255, one who participated in an illegal vote was denied indemnity from the loss falling on him.

Where the directors neglected to file a certificate, and the president was compelled to pay a debt in consequence of such neglect, he can recover contribution from the other directors. Nickerson *v.* Wheeler, 118 Mass. 295. The statutory liability in such a case is not within the rule prohibiting contribution between tort-feasors. Nickerson *v.* Wheeler, 118 Mass. 295. *Contra*, Andrews *v.* Murray, 33 Barb. (N. Y.) 354.

Contribution by Stockholders to Directors. — Directors who have incurred debts *ultra vires* of the corporation, and have been compelled to

Measure of Liability.— The liability of stockholders, depending on their common interest, is proportional to their holdings of stock; but that of the directors, resulting from their acts, is to be equally shared.[1]

9. Contribution and Indemnity Between Tortfeasors — General Rule — No Contribution or Indemnity. — It is a general and long-established rule that neither contribution nor indemnity will be given to one of several tortfeasors against the others.[2]

pay them personally, cannot recover from the stockholders. Heald *v.* Owen, 79 Iowa 23.

But if the liability is without misconduct on their part, they can recover from the stockholders. Tyrrell *v.* Washburn, 6 Allen (Mass.) 466.

If the statute imposes a primary liability on the officers and a secondary one on the stockholders, the former cannot claim contribution from the latter. Stone *v.* Fenno, 6 Allen (Mass.) 579.

1. Measure of Contribution. — See the cases cited in the last two notes, *supra*.

Contribution by stockholders is proportional to the number of shares held by solvent parties within the jurisdiction. Cary *v.* Holmes, 16 Gray (Mass.) 127.

Stockholders who as trustees incur losses by their common negligence should contribute equally, and not proportionally to their stock. Coit *v.* Tracy, 9 Conn. 15.

Where stockholders agree to contribute to losses in proportion to their holdings of stock, the contract fixes the liability, and it cannot be increased by the insolvency of one of the number. North *v.* Brace, 30 Conn. 60.

Where the stockholders, to procure money for the corporation, all signed a note in their individual names, they are regarded as individual debtors, and contribute equally. Coburn *v.* Wheelock, 34 N. Y. 440.

Where the directors incur expenses in planning a corporate enterprise, but the company is never organized, the basis of contribution is not the number of directors, nor the number of shares which each was to take, but the participation of each in contracting the bills in question. Lefroy *v.* Gore, 1 Jones & L. 571.

2. No Contribution Between Tortfeasors. — Merryweather *v.* Nixan, 8 T. R. 186, is the leading case. The plaintiff and the defendant had been sued, and recovery had, for an injury, the nature whereof is not stated, to a mill. The present plaintiff was compelled to pay the judgment, and sued for contribution. At *nisi prius* the plaintiff was nonsuited, Thomson, B., "being of opinion that no contribution could by law be claimed as between wrongdoers." "Lord Kenyon, C. J., said there could be no doubt but that the nonsuit was proper; that he had never before heard of such an action having been brought where the former recovery was for a tort; that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit; and that this decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right."

Other cases in which contribution has been refused are: Atty-Gen. *v.* Wilson, Craig & P. 28; Arnold *v.* Clifford, 2 Sumn. (U. S.) 238; Boyd *v.* Gill, 19 Fed. Rep. 146; Heath *v.* Erie R. Co., 8 Blatchf. (U. S.) 411; Herr *v.* Barber, 2 Mackey (D. C.) 545; Hunt *v.* Lane, 9 Ind. 248; Hess *v.* Lowrey, 122 Ind. 225, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 12, 13; Dupuy *v.* Johnson, 1 Bibb (Ky.) 562; Percy *v.* Clary, 32 Md. 245; Churchill *v.* Holt, 131 Mass. 67, 41 Am. Rep. 191; Peck *v.* Ellis, 2 Johns. Ch. (N. Y.) 131; Pierson *v.* Thompson, 1 Edw. Ch. (N. Y.) 218; Miller *v.* Fenton, 11 Paige (N. Y.) 18; Andrews *v.* Murray, 33 Barb. (N. Y.) 354; Wehle *v.* Haviland, 42 How. Pr. (N. Y. C. Pl.) 410; Acheson *v.* Miller, 18 Ohio 1; Boyer *v.* Bolender, 129 Pa. St. 324, 15 Am. St. Rep. 723; Rhea *v.* White, 3 Head (Tenn.) 121; Anderson *v.* Saylors, 3 Head (Tenn.) 551; Spalding *v.* Oakes, 42 Vt. 343; Atkins *v.* Johnson, 43 Vt. 78, 5 Am. Rep. 260. See also Johnson *v.* Magnuson, 68 Ill. App. 448, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 12.

Trustees, by improper investments, lost less than one-fifth of the funds. Afterwards one of them became a beneficiary to the extent of one-fifth. It was held that he must bear the loss on his own portion, and could not compel the other trustees to share the loss. Chillingworth *v.* Chambers, (1895) W. N. 132, L. R. Dig. (1891–1895) 928.

One of two railroad companies whose cars collided cannot recover contribution from the other, unless it shows that it was not an actual participant in the commission of the injury. Cincinnati, etc., R. Co. *v.* Louisville, etc., R. Co., 97 Ky. 128.

One partner was county treasurer. With the knowledge of his copartner he used the funds in his business. After dissolution there were assets sufficient to pay the other debts, but the second partner was compelled to reimburse the county. It was held that he could have neither contribution nor exoneration. Davis *v.* Gelhaus, 44 Ohio St. 69.

The Same Rule Denies Indemnity to a conscious wrongdoer. An officer who has let a prisoner go on his promise to pay the creditor, having been compelled to satisfy the creditor, cannot recover from the prisoner, since his demand arises out of his breach of duty. Pitcher *v.* Bailey, 8 East 171; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232.

An auctioneer was denied indemnity from the sheriff, under whose deputy he acted in selling on execution goods not belonging to the execution debtor. Farebrother *v.* Ansley, 1 Campb. 343. And a deputy sheriff in like case was refused indemnity from the plaintiff. Wilson *v.* Milner, 2 Campb. 452.

"Among joint tortfeasors there is neither contribution nor implied promise of indemnity." Lord Ellenborough, in Wilson *v.* Milner, 2 Campb. 452.

A promise of one tortfeasor to indemnify

Limitations on Rule. — But it is to be observed that this rule is only applied to cases of intentional and conscious wrongdoing; if the tortious act was committed without guilty intent,[1] or if the plaintiff, without personal fault, has been exposed to liability because of his responsibility for the acts of the actual wrongdoer,[2] he can recover contribution from those who participated in the act or shared the responsibility,[3] or indemnity from the one with whom rests

another, acknowledging his own guilt and the other's innocence, is insufficient to support an action, unless there is some other consideration than the relation. Nichols *v.* Nowling, 82 Ind. 488.

If an agent knew the act to be unlawful, neither an express nor an implied promise of indemnity will entitle him to recover. Pierson *v.* Thompson, 1 Edw. Ch. (N. Y.) 218.

A publisher who publishes a libelous article on assurance of its truth, and promise of indemnity, cannot enforce the promise. Atkins *v.* Johnson, 43 Vt. 78, 5 Am. Rep. 260; Arnold *v.* Clifford, 2 Sumn. (U. S.) 238; Shackell *v.* Rosier, 2 Bing. N. Cas. 634, 29 E. C. L. 438. Even though the libel was inserted without his knowledge or consent. Colburn *v.* Patmore, 1 C. M. & R. 73, 4 Tyrw. 677.

Indemnity was refused to one who assisted a constable in making an arrest on the request and promise of a magistrate. Cumpston *v.* Lambert, 18 Ohio 81, 51 Am. Dec. 442.

A landlord who knowingly permits a tenant to sell liquors illegally cannot claim indemnity or contribution if compelled to pay for damage done by the liquor sold. Zigler *v.* Rommel, 30 Ohio L. J. 115. Nor can one liquor dealer recover contribution from another to a judgment for damage done by one to whom they had both sold liquor. Torpy *v.* Johnson, 43 Neb. 882.

One of several stockholders who participated in an illegal issue of stock cannot require the others to exonerate him from resulting loss. Baird *v.* Midvale Steel Works, 12 Phila. (Pa.) 255.

Contribution Not Inequitable. — Equal contribution is not inequitable, even among wrongdoers, and the court will not give equitable relief against such contribution; though an action to enforce it would not lie. Selz *v.* Unna, 6 Wall. (U. S.) 327

The General Rule Denied in Scotland. — In Palmer *v.* Wick, etc., Steam Shipping Co., (1894) App. 318, the House of Lords, by Lord Herschell, in a Scotch case, say: "The reasons to be found in Lord Kenyon's judgment [in Merryweather *v.* Nixan, 8 T. R. 186], so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England."

1. **Where There is No Guilty Intent** — *England.* — Battersey's Case, Winch 48; Betts *v.* Gibbins, 2 Ad. & El. 57, 29 E. C. L. 29.

Alabama. — Moore *v.* Appleton, 26 Ala. 633.

District of Columbia. — Herr *v.* Barber, 2 Mackey (D. C.) 556.

Connecticut. — Coit *v.* Tracy, 9 Conn. 15; Bailey *v.* Bussing, 28 Conn. 455.

Maine. — Gower *v.* Emery, 18 Me. 79.

Massachusetts. — Jacobs *v.* Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105.

Michigan. — Smith *v.* Ayrault, 71 Mich. 475.

Minnesota. — Ankeny *v.* Moffett, 37 Minn. 109.

Nebraska. — Johnson *v.* Torpy, 35 Neb. 604, 37 Am. St. Rep. 447.

Ohio. — Acheson *v.* Miller, 2 Ohio St. 205.

Pennsylvania. — Horbach *v.* Elder, 18 Pa. St. 33; Armstrong County *v.* Clarion County, 66 Pa. St. 220, 5 Am. Rep. 368.

Texas. — Gulf, etc., R. Co. *v.* Galveston, etc., R. Co., 83 Tex. 515.

Virginia. — Thweatt *v.* Jones, 1 Rand. (Va.) 328, 10 Am. Dec. 538.

Goldsborough *v.* Darst, 9 Ill. App. 205, holds that the rule applies only to damage recovered for an active injury, and not to a fraudulent attempt to conceal property from creditors; but this seems to put the distinction on the wrong basis, as the wrong done there was wilful and intentional. The court *cites* Bailey *v.* Bussing, 28 Conn. 455, but misapplies it. Goldsborough *v.* Darst, 9 Ill. App. 205, is *followed* in Janvrin *v.* Curtis, 63 N. H. 312.

Spalding *v.* Oakes, 42 Vt. 343, refuses contribution where each of the parties was guilty of negligence; but this is contrary to Coit *v.* Tracy, 9 Conn. 15, and Armstrong County *v.* Clarion County, 66 Pa. St. 220, 5 Am. Rep. 368, and to the principle of the above-cited cases.

The principle that no rights of indemnity and contribution exist as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the court will not entertain a suit for the relief of the tortfeasor. The principle is further limited to cases where the fraudulent or illegal transaction is itself the basis of the action, and does not apply where the transaction, though leading to that which is the basis of the action, is separable from it. Power *v.* Hoey, 19 W. R. 916.

2. Pearson *v.* Skelton, 1 M. & W. 504; Wooley *v.* Batte, 2 C. & P. 417, 12 E. C. L. 198; Bailey *v.* Bussing, 28 Conn. 455; Horbach *v.* Elder, 18 Pa. St. 33; Robbins *v.* Chicago, 4 Wall. (U. S.) 657; Smith *v.* Foran, 43 Conn. 244, 21 Am. Rep. 647.

3. **When Contribution Recoverable.** — In Pearson *v.* Skelton, 1 M. & W. 504, the parties were jointly interested in a stagecoach, the driver of which had caused a death by negligence. The defendant made two defenses, the first of which was that contribution could not be had because the liability was for a tort, but the court dismissed the action on the second ground only, saying (by Parke, B.): "The first objection made at the trial does not apply."

Wooley *v.* Batte, 2 C. & P. 417, 12 E. C. L.

the actual guilt or the primary responsibility.[1]

198, and Horbach *v.* Elder, 18 Pa. St. 33, are almost identical in facts with Pearson *v.* Skelton, 1 M. & W. 504, and the *dictum* above quoted is followed.

Bailey *v.* Bussing, 28 Conn. 455, is the leading American case. The owner of a coach, having been made liable for the driver's negligence, sued him for contribution, and recovered. It is obvious that the plaintiff was entitled to full indemnity, instead of contribution, and the court intimates as much. Ellsworth, J., reviews the English cases, and says: "The reason assigned in the books for denying contribution among trespassers is that no right of action can be based on a violation of law, that is, where the act is known to be such or is apparently of that character. A guilty trespasser, it is said, cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or, as the case may be, a contribution, as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right, an assistant rendering aid to a sheriff in the execution of process, or common carriers, to whom is committed, and who innocently carry away, property which has been stolen from the owner. * * * The form of action, then, is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied. Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers, and the like."

It is held in Cornish *v.* Clark, L. R. 14 Eq. 184; Janvrin *v.* Curtis, 63 N. H. 312; Chamberlayne *v.* Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786; Brice *v.* Myers, 5 Ohio 121, that contribution may be had between fraudulent grantees of land to one whose land has been taken to pay the grantor's debts. See also Goldsborough *v.* Darst, 9 Ill. App. 205.

Where the plaintiff and the defendant, in good faith, believing property to have been fraudulently conveyed by a debtor, agreed to attach it together, and the plaintiff was compelled to pay the owner damages, it was held that he might recover contribution. Farwell *v.* Becker, 129 Ill. 261, 16 Am. St. Rep. 267, 25 Ill. App. 432; Selz *v.* Guthman, 62 Ill. App. 624; Vandiver *v.* Pollak, 97 Ala. 467, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 12, *affirmed* 107 Ala. 553, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 12.

1. When Indemnity Recoverable. — A carrier, by command of the shipper, who promised to indemnify him, refused to deliver goods to the owner. He was compelled to pay damages. It was held that he could recover indemnity. Lord Denman, C. J., saying: "The case of Merryweather *v.* Nixan, 8 T. R. 186, seems to me to have been strained beyond what the decision will bear. * * * The general rule is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal in itself." Betts *v.* Gibbins, 2 Ad. & El. 57, 29 E. C. L. 29.

Where one gave an auctioneer goods to sell as his, the auctioneer, having been compelled to pay damages to the real owner, may recover indemnity. Adamson *v.* Jarvis, 4 Bing. 66, 13 E. C. L. 343.

A judgment creditor who pointed out goods to the sheriff as those of the debtor is liable to indemnify him for damages recovered by the owner for the seizure. Humphreys *v.* Pratt, 2 Dow & Cl. 288.

A servant, acting under orders, relying on his master's supposed title, without knowledge of its illegality, has a right to indemnity from the master. Moore *v.* Appleton, 26 Ala. 633; Gower *v.* Emery, 18 Me. 79; Howe *v.* Buffalo, etc., R. Co., 37 N. Y. 297.

So where a tort was committed in acting, under a promise of indemnity, in assertion of the promisor's claim of title, or by an officer in serving process according to his instructions. Arundel *v.* Gardiner, Cro. Jac. 652; Nelson *v.* Cook, 17 Ill. 449; Tarr *v.* Northey, 17 Me. 113, 35 Am. Dec. 232; Crossman *v.* Owen, 62 Me. 528; Avery *v.* Halsey, 14 Pick. (Mass.) 174; Allaire *v.* Ouland, 2 Johns. Cas. (N. Y.) 54; Coventry *v.* Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; Stone *v.* Hooker, 9 Cow. (N. Y.) 154; Chamberlain *v.* Beller, 18 N. Y. 115; Ives *v.* Jones, 3 Ired. L. (25 N. Car.) 538, 40 Am. Dec. 421.

An officer may demand indemnity before levying on property the liability of which to seizure is in dispute, and may recover his damages and costs if compelled to pay. Long *v.* Neville, 36 Cal. 455, 95 Am. Dec. 199; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28; Smith *v.* Cicotte, 11 Mich. 383; Chamberlain *v.* Beller, 18 N. Y. 115; Com. *v.* Vandyke, 57 Pa. St. 34; Spangler *v.* Com., 16 S. & R. (Pa.) 68, 16 Am. Dec. 548; Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

So where an employer has been subjected to liability by the act of an employee, he can recover indemnity from the guilty servant. Smith *v.* Foran, 43 Conn. 244, 21 Am. Rep. 647; Grand Trunk R. Co. *v.* Latham, 63 Me. 177.

"In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them although both parties are wrongdoers." Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 32, 34 Am. Dec. 33.

A landowner who has contracted for work

requiring an excavation, without making any stipulation for care in making the excavation, is *in pari delicto* with the contractor in respect to an injury done by the excavation, and cannot recover from him. Silvers *v.* Nerdlinger, 30 Ind. 53.

Where the defendant, by contract with the plaintiff, has become responsible to it for the due protection of the public, the plaintiff is not *in pari delicto* with the defendant so as to lose his right to indemnity, though he may be equally liable to third persons. Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 487, 7 Am. Rep. 469; Chesapeake, etc., Canal Co. *v.* Allegany County, 57 Md. 201.

Other cases of liability for negligence shifted to the party on whom was the primary duty of care are: Chicago *v.* Robbins, 2 Black (U. S.) 418, 4 Wall. (U. S.) 657; Gridley *v.* Bloomington, 68 Ill. 47; Portland *v.* Richardson, 54 Me. 46, 89 Am. Dec. 720; Milford *v.* Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735; Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; Gray *v.* Boston Gas Light Co., 114 Mass. 149, 19 Am. Rep. 324; Campbell *v.* Somerville, 114 Mass. 334; Churchill *v.* Holt, 127 Mass. 165, 34 Am. Rep. 355; Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121; Newbury *v.* Connecticut, etc., Rivers R. Co., 25 Vt. 377.

A plaintiff who, by reason of his and the defendant's concurrent negligence, has been compelled to pay damages may recover indemnity, although but for his own negligence the injury would not have happened, if at the time it occurred he could not, and defendant could, have prevented it. Nashua Iron, etc., Co. *v.* Worcester, etc., R. Co., 62 N. H. 159.

But where a landowner left a hatchway dangerous, and another interfered with it and made it more dangerous, the owner cannot recover contribution from the other, as the primary liability was on himself. Churchill *v.* Holt, 131 Mass. 67, 41 Am. Rep. 191.

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CROSS-REFERENCES.

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For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ACT OF GOD, vol. 1, p. 584; *AGENCY*, vol. 1, p. 930; *ANIMALS*, vol. 2, p. 341; *BAILMENTS*, vol. 3, p. 732; *BURDEN OF PROOF*, vol. 5, p. 21; *CARRIERS OF PASSENGERS*, vol. 5, p. 474, *and the references there given; CIVIL DAMAGE ACTS*, vol. 6, p. 36; *COMPARATIVE NEGLIGENCE*, vol. 6, p. 361; *CORPORATIONS (PRIVATE)*, *post*; *COUPLING CARS (INJURIES BY)*, *post*; *CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACT; ELECTRIC LIGHT COMPANIES; ELECTRIC RAILWAYS; ELEVATED RAILWAYS; ELEVATORS; EXPLOSIONS; FELLOW-SERVANTS; FENCES; FIRES; GUARDIAN AND WARD; HIGHWAYS; INFANTS; INNS AND INNKEEPERS; INSANITY; LAW OF THE ROAD; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; NAVIGATION; NEGLIGENCE; PARENT AND CHILD; PHYSICIANS AND SURGEONS; PUBLIC OFFICERS; QUESTIONS OF LAW AND FACT; RAILROADS; STREETS AND SIDEWALKS; TELEGRAPHS AND TELEPHONES; TURNPIKES; TURNTABLES.*

I. INTRODUCTORY — SCOPE OF TITLE. — In the articles in this work upon the various topics and relations wherein the principles of law relating to contributory negligence have application, the special modifications and concrete applications of those principles will be treated. Whence it follows, that the general doctrines of the law of contributory negligence will form the principal subject of this article, and contributory negligence in its special phases and particular applications will only be treated of incidentally and by way of illustration. Illustrations herein are necessarily chosen from almost every branch of the law in which the doctrines of contributory negligence are enforced. But while the principles which govern in all relations are stated, with their application, more complete collections of authorities must be looked for under other appropriate titles. For such titles reference is made to the table of cross-references immediately preceding.

II. DEFINITIONS — 1. Negligence. — The present writer has elsewhere defined negligence in law as follows: "Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a noncontractual duty implied by law, which failure is the proximate cause of injury to a person to whom the

duty is due." [1] Assuming the correctness of this definition of negligence, it is evident that contributory negligence is itself negligence upon the part of the person injured, which if it had resulted in injury to the other negligent person would have been actionable, in the absence of negligence on the part of the latter proximately contributing to his own injury.[2]

2. Contributory Negligence. — It follows that contributory negligence, generally speaking, possesses all the elements of actionable negligence, except that instead of inflicting an injury upon another it combines with the negligence of another in proximately causing an injury to the contributorily negligent person himself. Hence, contributory negligence may be thus defined: Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.[3]

III. THE GENERAL RULE — 1. Statement of Rule. — It has long been a settled rule of the common law, that, for injuries negligently inflicted upon one person by another, there can be no recovery of damages if the injured person by his own negligence, or by the negligence of another legally imputable to him, proximately contributed to the injury.[4] This rule of the common law, first

1. Negligence Defined.—This definition, which is taken from 16 AM. AND ENG. ENCYC. OF LAW (1st ed.) 389, is believed to be accurate, inclusive as well as exclusive, and technically correct, and is spoken of in a recent work as "the admirable definition" in the AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW. 1 Jaggard on Torts, p. 811, note.

2. 1 Beven on Negligence (2d ed.) 168, 169; Tuff *v.* Warman, 5 C. B. N. S. 585, 94 E. C. L. 585; Walton *v.* London, etc., R. Co., 1 H. & R. 424; Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728; Pickett *v.* Wilmington, etc., R. Co., 117 N. Car. 616.

3. Various Definitions of Contributory Negligence. — This definition, from the first edition of the AM. AND ENG. ENCYC. OF LAW, has been adopted and approved by the Supreme Court of Alabama, Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372; the Supreme Court of Oregon, Moakler *v.* Willamette, etc., R. Co., 18 Ore. 189; and the Supreme Court of West Virginia, Woodell *v.* W. Va. Improvement Co., 38 W. Va,. 40.

"If the plaintiff or party injured, by the exercise of ordinary care under the circumstances might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof." Cooley on Torts, 674.

"The obligation to use ordinary care, so as to avoid receiving injury as well as to avoid inflicting it, governs the relation of all who are exercising independent rights. One who, by the breach of this duty, has shared in bringing an injury upon himself, cannot complain of another who, by a breach of the corresponding duty, has also shared in producing it. In an action for negligence, two conditions must concur, — a performance of duty by the plaintiff, and a breach of duty by the defendant. The more approved statement of the doctrine of contributory negligence is, that a person cannot recover for an injury to which he contributed by his own want of ordinary care." Pierce on Railroads, 323.

"Contributory negligence in law is that sort of negligence on the part of a plaintiff which is the proximate, and not the remote, cause of the injury." Whittaker's Smith on Neg. 373.

And see the philosophical description of contributory negligence in Pollock on Torts, 374–379.

The definition of Smith, quoted above, is misleading, because he would make the plaintiff's negligence, which is the sole proximate cause of an injury, contributory negligence. This error, which is common, has been well corrected in a West Virginia case, where the true meaning of contributory negligence is accurately stated. "Properly speaking, contributory negligence, as the very words import, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury." Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 10 Am. & Eng. R. Cas. 755.

See also: *United States.* — Southern Bell Telephone, etc., Co. *v.* Watts, 66 Fed. Rep. 466; Watkins *v.* Southern Pac. R. Co., 38 Fed. Rep. 711, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) pp. 17, 19.

Illinois. — Ohio, etc., R. Co. *v.* Maisch, 29 Ill. App. 640.

Louisiana. — Contributory negligence on the part of an employee injured through the employer's negligence is the want of ordinary care and prudence, without which the injury would not have occurred. Bomar *v.* Louisiana North, etc., R. Co., 42 La. Ann. 983, 1206.

Michigan. — Hutchins *v.* Priestly Express Wagon, etc., Co., 61 Mich. 252.

Texas. — International, etc., R. Co. *v.* Dyer, 76 Tex. 156.

4. The Rule Stated. — There is no doubt that the principles which govern in the law of contributory negligence were known in the Roman law. Wharton on Neg. (2d ed.), § 300; Pollock on Torts 484. And probably from this source the rule was derived by the common law. Beach on Con. Neg., § 1.

clearly enunciated in the leading case of Butterfield *v.* Forrester,[1] is, after all, like so many other doctrines of the common law, but an application of a maxim of the Roman law, namely: *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*[2]

2. Reason for Rule. — The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other is not that the wrong of one is set off against the wrong of the other; it is that the law cannot measure how much of the damage suffered is attributable to the plaintiff's

Rule First Enunciated in Butterfield v. Forrester. — But, as applicable in cases of tortious injury by negligence, the doctrine of contributory negligence, substantially as it now prevails, was first enunciated in Butterfield *v.* Forrester, 11 East 60. The case was as follows: This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down, with his horse, and injured, etc. At the trial before Bayley, J., at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the roadside, at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction; that the plaintiff left a public house not far distant from the place in question, at eight o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at one hundred yards' distance, and the witness, who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it. The plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse, and was much hurt in consequence of the accident, and there was no evidence of his being intoxicated at the time. On this evidence, Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant, which they accordingly did. In the Court of King's Bench it was contended that this direction was wrong, and that, on the above facts, the plaintiff was entitled to recover. But the case was thus disposed of by Lord Ellenborough, C. J.: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, — an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Rule Never Departed from. — The doctrine thus laid down in 1809 by the English Court of King's Bench has never since been doubted or denied, and this case has been cited with approval and followed in every jurisdiction where the common law prevails.

American Statements of the General Doctrine are forcible and frequent. "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained." Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323.

"When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained." Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Timmons *v.* Central Ohio R. Co., 6 Ohio St. 109; Haley *v.* Chicago, etc., R. Co., 21 Iowa 25; Reynolds *v.* Hindman, 32 Iowa 146; Button *v.* Hudson River R. Co., 18 N. Y. 257; Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409; Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 214.

"If the injury was the result of the carelessness of the plaintiff, and could have been avoided by the exercise of ordinary vigilance, he should not recover." Ohio, etc., R. Co. *v.* Gullett, 15 Ind. 487.

"The general rule is, that one who receives an injury from the negligence of another may maintain an action for his damages. Upon this rule a natural and reasonable exception has been ingrafted, that if the injured party, by his own negligence, has contributed to the injury, he cannot maintain an action." Chapman *v.* New Haven R. Co., 19 N. Y. 341, 75 Am. Dec. 344.

"The law is well settled that there can be no recovery if the plaintiff's negligence or want of care contributed in any way to the injury complained of." Indianapolis *v.* Cook, 99 Ind. 11.

"Whenever there is negligence on the part of the plaintiff, contributing directly or as a proximate cause to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery." Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390.

1. "Butterfield *v.* Forrester, 11 East 60, 10 Rev. Rep. 433, is the first of the modern line of cases on contributory negligence, and has been uniformly upheld in this country at any rate." 10 Rev. Rep., preface, v.

2. Dig. 50, 17, 203; 1 Beven on Negligence (2d ed.) 168. Translated freely, the maxim is: "The harm I bring upon myself I must bear myself." See Richmond, etc., R. Co. *v.* Morris, 31 Gratt. (Va.) 200.

own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct.[1]

3. Difficulties in Its Application. — While this general rule is recognized in all jurisdictions where the common law prevails, yet many difficulties have arisen in its practical application, and it is only in recent years that the doctrines of contributory negligence have become reasonably well settled.[2]

IV. Elements of Contributory Negligence — 1. Negligence of Defendant. — There can be no contributory negligence on the part of the plaintiff except in cases where there has been negligence upon the part of the defendant. Contributory negligence exists only when the negligence of both parties has combined and concurred in producing the injury.[3]

2. Negligence of Plaintiff Must Be Proximate. — Assuming as a postulate the negligence of a defendant as a proximate cause of an injury, then the essential elements of contributory negligence on the part of a person injured are: (1) A failure on his part, or on the part of some person with whose negligence he is chargeable, to exercise ordinary care to avoid injury; and (2) a proximate connection between such failure to exercise ordinary care, and the injury, so direct and immediate that but for such want of ordinary care the injury would not have occurred.[4] That is, the negligence of the defendant

1. Heil *v.* Glanding, 42 Pa. St. 498, 82 Am. Dec. 537.

"The law has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief." Little Schuylkill Nav. R., etc., Co. *v.* Norton, 24 Pa. St. 469, 64 Am. Dec. 672.

2. Indefiniteness of Rule. — The annotator of the American Decisions says: "Scarcely any theme in the whole range of legal science has been more fruitful in adjudications than the subject of contributory negligence; but the multiplicity of decisions on this point has not by any means cleared it of difficulties. On the contrary, it has in some respects seemed rather to 'darken counsel,' by the introduction of a great variety of metaphysical refinements and subtile distinctions." Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 666, note.

"These doctrines remain little more than metaphysical abstractions, tending to confuse courts and juries, and to defeat the ends of justice, unless there can be extracted from them a definite practical rule or rules. We are convinced, after a study of the adjudications of both the English and American courts, that the whole subject of contributory negligence remains in a state of great confusion and uncertainty. The doctrinal formulas, already laid down in the preceding sections, are reiterated in many judicial opinions without their import being understood by the judges who make use of them; and even those judges, who, by study, seem to have acquired definite theoretical views of the import of these expressions, are unable to agree upon any definite rules with respect to their applications." With these statements Mr. Thompson closes a review of the general principles of the law of contributory negligence (2 Thompson on Neg. 1155, § 7); and hence the difficulties of laying down "definite" and "practical" rules, for the application of those principles, may be apprehended. Notwithstanding the difficulty of the task, we shall endeavor without discussion or argument to formulate in this article "definite" and "practical" rules, which can be supported both upon principle and authority; and it is believed that if the principles of the subject are developed in logical order, as they have been evolved by the cases, many of the difficulties in their application will disappear.

3. Defendant Must Be Negligent. — "There can be no contributory negligence except where the defendant has been guilty of negligence to which the plaintiff's negligence could contribute. An assault and battery is not negligence. The former is intentional; the latter is unintentional." Ruter *v.* Foy, 46 Iowa 132; Steinmetz *v.* Kelly, 72 Ind. 442, 37 Am. Rep. 170.

Thus no matter how negligent the plaintiff may be, he is not guilty of contributory negligence if purposely injured by the defendant. Carter *v.* Louisville, etc., R. Co., 98 Ind. 552, 49 Am. Rep. 780, 22 Am. & Eng. R. Cas. 360.

The negligence of the defendant must be shown before any question of contributory negligence can arise. Simms *v.* South Carolina R. Co., 26 S. Car. 490.

Thus in Harris *v.* Minneapolis, etc., R. Co., 33 Minn. 459, the case was reversed because there was no evidence of the defendant's negligence, and the question of the decedent's negligence was not considered; but on another trial it was held that, the defendant's negligence having been sufficiently shown, the question of the decedent's contributory negligence arose. Harris *v.* Minneapolis, etc., R. Co., 37 Minn. 47.

See also the following cases:

United States. — Southern Bell Telephone, etc., Co. *v.* Watts, 25 U. S. App. 214, 66 Fed. Rep. 466.

Alabama. — McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 200, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 18.

Kentucky. — Central Pass. R. Co. *v.* Stevens, 14 Ky. L. Rep. 803, (Ky. 1893) 22 S. W. Rep. 312.

Michigan. — Flower *v.* Witkovsky, 69 Mich. 371.

4. Negligence of Plaintiff Must Be Proximate. — "In order to constitute such negligence as will bar a recovery of damages, these two ele-

and the negligence of the plaintiff must have been so inextricably mingled together, jointly and in combination causing the injury, that it cannot be said that the injury would have happened had the plaintiff, or person injured, been free from fault at the time of the injury.[1]

ments must in every case concur: 1. A want of ordinary care on the part of the plaintiff. * * * 2. A proximate connection between this want of ordinary care and the injury complained of." 2 Thompson on Neg. 1148, § 3; Beach on Con. Neg. (2d ed.), § 19. This is an accurate statement of the abstract legal doctrine, but it affords no test by which to determine when the causal connection between the failure of ordinary care and the injury exists. In the rules laid down in the text, and well supported by authorities, we have endeavored to formulate such a test. Thus it has been said: "Mere negligence, or want of ordinary care or caution, would not, however, disentitle [the plaintiff] to recover, unless it were such that, but for that negligence, or want of ordinary care and caution, the misfortune could not have happened." Tuff *v.* Warman, 5 C. B. N. S. 573, 94 E. C. L. 573.

"To defeat the right of action, it must appear that, but for the negligence of the party injured operating as an efficient cause of the injury, in connection with the negligence or misconduct of the defendant, the injury would not have happened." Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 668, note. And it seems that the rule, as stated in the text, is fully warranted by many cases and authorities, as to which see the following:

England. — Radley *v.* London, etc., R. Co., L. R. 1 App. 754.

United States. — Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439.

Alabama. — Anniston Pipe Works *v.* Dickey, 93 Ala. 418; North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 18 Am. St. Rep. 105.

Arkansas. — St. Louis, etc., R. Co. *v.* Philadelphia F. Assoc., 55 Ark. 163.

California. — Tobin *v.* Omnibus Cable Co., (Cal. 1893) 34 Pac. Rep. 124.

Colorado. — Colorado Cent. R. Co. *v.* Holmes, 5 Colo. 197, 8 Am. & Eng. R. Cas. 410.

Iowa. — Banning *v.* Chicago, etc., R. Co., 89 Iowa 74; Portman *v.* Decorah, 89 Iowa 336.

Kentucky. — Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. Cas. 80; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41; Sullivan *v.* Louisville Bridge Co., 9 Bush (Ky.) 81.

Louisiana. — Woods *v.* Jones, 34 La. Ann. 1086; Gruy *v.* Aiken, 43 La. Ann. 798.

Massachusetts. — Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390; Gaffney *v.* Brown, 150 Mass. 479.

Missouri. — Oglesby *v.* Smith, 38 Mo. App. 67; Dowell *v.* Guthrie, 99 Mo. 653, 17 Am. St. Rep. 598.

New Jersey. — Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180.

New York. — Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182; Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721; Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, 44 N. Y. St. Rep. 680; Boylan *v.* Brown, (Supreme Ct.) 43 N. Y. St. Rep. 412, 17 N. Y. Supp. 648; Thomas *v.* Henjes, (Supreme Ct.) 42 N. Y. St. Rep. 28; Miller *v.* Rochester Vulcanite Paving Co., (Supreme Ct.) 49 N. Y. St. Rep. 856, 21 N. Y. Supp. 651; Leach *v.* Brooklyn, etc., R. Co., (Supreme Ct.) 16 N. Y. Supp. 948; Anselment *v.* Daniell, 4 Misc. Rep. (N. Y. C. Pl.) 144; Rattagliata *v.* Hubbell, (N. Y. Com. Pl.) 7 Misc. Rep. 103, *citing* 4 AM. AND ENG. ENCYC. OF LAW, title CONTRIBUTORY NEGLIGENCE.

North Carolina. — Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 17, 18, 29.

Texas. — Clark *v.* Dyer, 81 Tex. 339; Gulf, etc., R. Co. *v.* Danshank, 6 Tex. Civ. App. 385; Boyd *v.* Burkett, (Tex. Civ. App. 1894) 27 S. W. Rep. 223.

Virginia. — Richmond, etc., R. Co. *v.* Morris, 31 Gratt. (Va.) 200; Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 750.

Washington. — Tacoma Lumber, etc., Co. *v.* Tacoma, 1 Wash. 12.

West Virginia. — Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86.

1. "Contributory Negligence Is a Defense Which Confesses and Avoids the Plaintiff's Case, and must be made out by showing affirmatively not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury." Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. Cas. 81.

"When, however, the two circumstances occur at the same time, the defendant is not charged with the duty of taking care of the plaintiff, inasmuch as the sudden occurrence of the plaintiff's act gives him no opportunity to do so. The two acts of negligence being concurrent, each is held to contribute to the result." Spencer *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 138, 54 Am. Rep. 272.

"The injury must have been the result of the concurring negligence of both." Central Pass. R. Co. *v.* Stevens, (Ky. App. 1893) 22 S. W. Rep. 312.

See also the following:

North Carolina. — The rule of contributory negligence is simply a means of determining whether the plaintiff's negligence is a remote or proximate cause of the injury. Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728.

Texas. — Contributory negligence in its legal significance is such an act or omission on the part of the plaintiff, amounting to a want of ordinary and proper care and prudence, as, concurring or co-operating with some negligent act of the defendant, is the proximate cause or occasion of the injury complained of. Martin *v.* Texas, etc., R. Co., 87 Tex. 117. The contributory negligence which will defeat a plaintiff's recovery for personal injuries is such as proximately contributes to his injury so that but for it he would not have been hurt. Campbell *v.* McCoy, 3 Tex. Civ. App. 298.

3. Plaintiff's Remote Negligence. — But the plaintiff's act or omission, when only a remote cause,[1] or a mere antecedent occasion[2] or condition,[3] of the injury, is not contributory negligence.

4. Want of Ordinary Care. — These elements of contributory negligence, namely, the want of ordinary care and the proximate causal connection of that want of care with the injury, being considered in their order, we find the doctrine established by an overwhelming weight of authority, that there must have been a want of ordinary care, under the circumstances of the case, contributing to the injury, as an efficient and proper cause thereof, before contributory negligence can exist.[4] But when such want of ordinary care exists,

1. Plaintiff's Remote Negligence — *England.* — Davies *v.* Mann, 10 M. & W. 546; 2 Thompson on Neg. 1105; Lee *v.* Nixey, 8 Ry. & Corp. L. J. 489.

Alabama. — Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34; Highland Ave., etc., R. Co. *v.* Sampson, 91 Ala. 560; Central R., etc., Co. *v.* Vaughan, 93 Ala. 209, 30 Am. St. Rep. 50.

California. — Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161.

Georgia. — Central R., etc., Co. *v.* Denson, 84 Ga. 774, 8 Ry. & Corp. L. J. 425.

Indiana. — Nave *v.* Flack, 90 Ind. 206, 46 Am. Rep. 205.

Kansas. — Pacific R. Co. *v.* Houts, 12 Kan. 328.

Maine. — Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249; Pollard *v.* Maine Cent. R. Co., 87 Me. 51.

Massachusetts. — Wiswell *v.* Doyle, 160 Mass. 42, 39 Am. St. Rep. 451.

Minnesota. — Undhejem *v.* Hastings, 38 Minn. 485.

Missouri. — Hall *v.* Huber, 61 Mo. App. 384; Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323.

Nebraska. — Union Pac. R. Co. *v.* Mertes, 35 Neb. 204.

New Hampshire. — State *v.* Manchester, etc., R. Co., 52 N. H. 528.

New York. — Rottenberg *v.* Segelke, 6 N. Y. Misc. Rep. (Brooklyn City Ct.) 3; Lynch *v.* New Rochelle, 78 Hun (N. Y.) 207; Heffran *v.* Brooklyn Heights R. Co., 8 N. Y. Misc. Rep. (Brooklyn City Ct.) 41; Smith *v.* American Soc., etc., 7 Misc. Rep. (N. Y. C. Pl.) 158; Johnson *v.* Parker, 7 Misc. Rep. (N. Y. C. Pl.) 685; Dohn *v.* Dawson, 90 Hun (N. Y.) 271; Canton *v.* Simpson, 2 N. Y. App. Div. 561.

North Carolina. — Doggett *v.* Richmond, etc., R. Co., 78 N. Car. 305; Baker *v.* Wilmington, etc., R. Co., 118 N. Car. 1015.

Ohio. — Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Pennsylvania. — Winans *v.* Randolph, 169 Pa. St. 606.

Texas. — Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577; Clark *v.* Dyer, 81 Tex. 339.

Vermont. — Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

2. Mere Antecedent Occasion — *United States.* — Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 249, 8 Am. & Eng. R. Cas. 59.

Iowa. — Sherman *v.* Western Stage Co., 24 Iowa 563.

Maryland. — Hussey *v.* Ryan, 64 Md. 426, 54 Am. Rep. 772; Murray *v.* McShane, 52 Md. 217, 36 Am. Rep. 367.

New Hampshire. — Varney *v.* Manchester, 58 N. H. 430, 42 Am. Rep. 592.

New York. — Lyons *v.* Avis, 5 N. Y. App. Div. 193.

3. *Iowa.* — Weymire *v.* Wolfe, 52 Iowa 533.

Maryland. — Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Massachusetts. — White *v.* Lang, 128 Mass. 598, 35 Am. Rep. 402.

Ohio. — Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507.

Pennsylvania. — Thirteenth, etc., St. Pass. R. Co. *v.* Boudrou, 92 Pa. St. 475, 37 Am. Rep. 707, 2 Am. & Eng. R. Cas. 30.

4. Want of Ordinary Care — *England.* — Butterfield *v.* Forrester, 11 East 60; Thompson on Neg. 1104; Bridge *v.* Grand Junction R. Co., 3 M. & W. 244.

United States. — Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439; Missouri Pac. R. Co. *v.* Moseley, 12 U. S. App. 601, 57 Fed. Rep. 921.

Alabama. — Gothard *v.* Alabama G. S. R. Co., 67 Ala. 114; Lilley *v.* Fletcher, 81 Ala. 234; Anniston Pipe Works *v.* Dickey, 93 Ala. 418.

California. — Strong *v.* Sacramento, etc., R. Co., 61 Cal. 326, 8 Am. & Eng. R. Cas. 273.

Connecticut. — Daley *v.* Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413; Williams *v.* Clinton, 28 Conn. 266; Fox *v.* Glastenbury, 29 Conn. 204.

District of Columbia. — Greenwell *v.* Washington Market Co., 21 Wash. L. Rep. (D. C.) 67.

Georgia. — Hutson *v.* King, 95 Ga. 271.

Illinois. — Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 225; Madigan *v.* Flaherty, 50 Ill. App. 393; Chicago, etc., R. Co. *v.* Bentz, 38 Ill. App. 485; Mandel *v.* Wheeler, 59 Ill. App. 459.

Contributory negligence is not legally attributable to one injured while in the exercise of ordinary care, although he may not have been in the exercise of the highest degree of care. North Chicago St. R. Co. *v.* Eldridge, 151 Ill. 542.

Indiana. — Ohio, etc., R. Co. *v.* Gullett, 15 Ind. 487; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 148; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 291, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77; Pennsylvania Co. *v.* Meyers, 136 Ind. 242; Faris *v.* Hoberg, 134 Ind. 269, 39 Am. St. Rep. 261, 37 Cent. L. J. 48, 21 Wash. L. Rep. (D. C.) 474; Howe *v.* Ohmart, 7 Ind. App. 41, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 19.

Iowa. — Steele *v.* Central R. Co., 43 Iowa 109; Hughes *v.* Muscatine County, 44 Iowa 672.

it will bar a recovery, no matter whether, in point of time, it preceded,[1]

Kansas. — Union Pac. R. Co. *v.* Hutchinson, 39 Kan. 485.

Louisiana. — Hill *v.* New Orleans, etc., Co., 11 La. Ann. 292; Mercier *v.* New Orleans, etc., R. Co., 23 La. Ann. 264; Schexnaydre *v.* Texas, etc., R. Co., 46 La. Ann. 248; DeGruy *v.* Aiken, 43 La. Ann. 798.

Maine. — Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Massachusetts. — Smith *v.* Smith, 2 Pick. (Mass.) 621, 13 Am. Dec. 464; Priest *v.* Nichols, 116 Mass. 401; Marble *v.* Ross, 124 Mass. 44; Magee *v.* West End St. R. Co., 151 Mass. 240; Poor *v.* Sears, 154 Mass. 539, 26 Am. St. Rep. 272.

Missouri. — Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 18, 19.

New Jersey. — Runyon *v.* Central R. Co., 25 N. J. L. 556; Menger *v.* Laur, 55 N. J. L. 205, 47 Alb. L. J. 394.

New York. — Smith *v.* New York Cent., etc., R. Co., 38 Hun (N. Y.) 33; Greany *v.* Long Island R. Co., 101 N. Y. 425, 24 Am. & Eng. R. Cas. 473; Hinz *v.* Starin, 46 Hun (N. Y.) 526; Muhr *v.* New York, 15 Daly (N. Y.) 12; Chisholm *v.* Knickerbocker Ice Co., (Supreme Ct.) 1 N. Y. Supp. 743; Larkin *v.* O'Neill, 48 Hun (N. Y.) 591; Guichard *v.* New, 9 N. Y. App. Div. 485; Bradley *v.* Second Ave. R. Co., 90 Hun (N. Y.) 419; Leroy *v.* North German Lloyd Steamship Co., 16 Misc. Rep. (N. Y. Supreme Ct.) 162; Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495; Hale *v.* Smith, 78 N. Y. 480; Cordell *v.* New York Cent., etc., R. Co., 75 N. Y. 330; Powers *v.* O'Neill, 89 Hun (N. Y.) 129.

Pennsylvania. — Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514; Harris *v.* Commercial Ice Co., 153 Pa. St. 278, 31 W. N. C. (Pa.) 567.

Texas. — Texas, etc., R. Co. *v.* Watkins, (Tex. Civ. App. 1894) 26 S. W. Rep. 760.

Virginia. — Richmond, etc., R. Co. *v.* Morris, 31 Gratt. (Va.) 200.

Wisconsin. — Jalie *v.* Cardinal, 35 Wis. 118; Hammond *v.* Mukwa, 40 Wis. 35; Cremer *v.* Portland, 36 Wis. 99.

Statements of the Rule. — The general rule of ordinary care on the part of the plaintiff has thus been stated: "The defendant's negligence upon this branch of the case, upon this disputed testimony, became a question which was proper to be submitted to the jury. But this alone, resolved in plaintiff's favor, would not entitle him to a verdict. He must also show that he himself was in the exercise of ordinary care, and free from any negligence which contributed to the injury." Thompson *v.* Flint, etc., R. Co., 57 Mich. 300, 23 Am. & Eng. R. Cas. 295.

And in a *Wisconsin* case the rule was thus admirably expressed: "If the plaintiff was guilty of any want of ordinary care and prudence, however slight, which neglect contributed directly to produce the injury, he cannot recover. * * * It is not the law that slight negligence on the part of the plaintiff will defeat the action. Slight negligence is the want of extraordinary care and prudence; and the law does not require of a person injured by the carelessness of others, the exercise of that high degree of caution as a condition precedent to his right to recover damages for the injuries thus sustained." Cremer *v.* Portland, 36 Wis. 92.

So it is said: "An examination of the cases leads to the conclusion, that the correct rule is, that if the party by the want of ordinary care contributed to produce the injury, he will not be entitled to recover." Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 253.

And again: "In the legal sense, he [the plaintiff] was innocent of negligence, unless there was a want of ordinary care and prudence on his part. The rule is not that any degree of negligence, however slight, which directly concurs in producing the injury, will prevent a recovery; but if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover." Strong *v.* Sacramento, etc., R. Co., 61 Cal. 326, 8 Am. & Eng. R. Cas. 275; Robinson *v.* Western Pac. R. Co., 48 Cal. 423.

There are cases that apparently conflict with this doctrine, by holding that the plaintiff must be "entirely free from any negligence whatever contributing to the injury." See Beach on Contributory Negligence (2d ed.), §§ 19, 29; Vanderplank *v.* Miller, M. & M. 169, 22 E. C. L. 280; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434; Wilds *v.* Hudson River R. Co., 24 N. Y. 430; Grippen *v.* New York Cent. R. Co., 40 N. Y. 34; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

But it is doubtful if these cases really conflict with the great mass of authority. In all of them the degrees of negligence are repudiated, and it follows that they use the term "negligence" as meaning a want of ordinary care under the circumstances. Hence, when they say that in order to charge the defendant it must be a case of unmixed negligence, or that the plaintiff's negligence must not have contributed to his injury in any degree, they only declare the general rule, that if the plaintiff's want of ordinary care contributed to his injury he cannot recover. See Cremer *v.* Portland, 36 Wis. 92. Thus it is said in Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 291, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77: "It is the general doctrine, and the settled law of this state, that where negligence is the issue it must be a case of unmixed negligence; that in such case a party cannot recover if it appear that, by the want of ordinary care and prudence on his part, he contributed to the injury, or if by the exercise of ordinary care he might have prevented the injury."

1. Immaterial that Plaintiff's Want of Ordinary Care Preceded Defendant's Negligence — *Connecticut.* — Broschart *v.* Tuttle, 59 Conn. 1.

Illinois. — Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 116; Illinois Cent. R. Co. *v.* Hall, 72 Ill. 222; Illinois Cent. R. Co. *v.* Hetherington, 83 Ill. 510.

Minnesota. — Carroll *v.* Minnesota Valley R. Co., 13 Minn. 30, 97 Am. Dec. 221.

succeeded,[1] or came into existence contemporaneously [2] with the negligence of the defendant, provided it proximately combined with such negligence in causing the injury.[3]

5. Slight Want of Ordinary Care. — And while the degrees of negligence are not recognized in determining whether there has been contributory negligence,[4] yet the slightest want of ordinary care, as herein defined and tested, will constitute contributory negligence, if, in combination with the negligence of the defendant, it causes the injury.[5]

New York. — Gaudin *v.* Carthage, (Supreme Ct.) 36 N. Y. St. Rep. 308, 12 N. Y. Supp. 796.

Pennsylvania. — Pennsylvania R. Co. *v.* Morgan, 82 Pa. St. 134.

Texas. — Landa *v.* McDermott, (Tex. 1891) 16 S. W. Rep. 802.

Virginia. — Stewart *v.* Newport News, etc., R. Co., 86 Va. 988, 14 Va. L. J. 444.

1. Or Succeeded It — *England.* — Butterfield *v.* Forrester, 11 East 60.

Illinois. — Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355.

Iowa. — Martensen *v.* Chicago, etc., R. Co., 60 Iowa 705, 11 Am. & Eng. R. Cas. 233.

Minnesota. — Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165.

North Carolina. — Jackson *v.* Greene County, 76 N. Car. 282.

2. Or Was Contemporaneous with It. — Moak's Underhill on Torts 285; Beach on Cont. Neg. 21.

Illinois. — Chicago, etc., R. Co. *v.* Becker, 76 Ill. 26, 84 Ill. 483.

Maine. — O'Brien *v.* McGlinchy, 68 Me. 552.

North Carolina. — Doggett *v.* Richmond, etc., R. Co., 78 N. Car. 305.

3. The Causal Connection in Such Cases must not be overlooked. Indeed, the doctrines already laid down in the text must be viewed in connection with the discussion farther on of the rule that the law looks at the proximate, and not the remote, cause of an injury in fixing the liability for its existence. See, in this connection:

Connecticut. — Isbell *v.* New York, etc., R. Co., 27 Conn. 406, 71 Am. Dec. 78, and note.

Georgia. — Pierce *v.* Atlanta Cotton Mills, 79 Ga. 782.

Indiana. — Evans *v.* Adams Express Co., 122 Ind. 362.

Louisiana. — Bemiss *v.* New Orleans, etc., R. Co., 47 La Ann. 1671, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), title CONTRIBUTORY NEGLIGENCE.

Massachusetts. — Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390.

Pennsylvania. — Johnson *v.* Wilcox, 135 Pa. St. 217.

4. See *infra*, this section, *Degrees of Negligence.*

5. Slight Want of Ordinary Care Constitutes Negligence. — "If the plaintiff was guilty of any want of ordinary care and prudence, however slight, which neglect contributed directly to produce the injury, he cannot recover." Cremer *v.* Portland, 36 Wis. 92.

England. — Bridge *v.* Grand Junction R. Co., 3 M. & W. 244.

California. — Strong *v.* Sacramento, etc., R. Co., 61 Cal. 326, 8 Am. & Eng. R. Cas. 275.

Delaware. — Jones *v.* Belt, 8 Houst. (Del.) 562; Robinson *v.* Simpson, 8 Houst. (Del.) 398.

Indiana. — Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 291, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77.

Maryland. — Baltimore, etc., R. Co. *v.* Fitzpatrick, 35 Md. 32.

Missouri. — Dowling *v.* Allen, 102 Mo. 213.

North Carolina. — Manly *v.* Wilmington, etc., R. Co., 74 N. Car. 655.

Ohio. — Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Pennsylvania. — Monongahela City *v.* Fischer, 111 Pa. St. 9, 13 Am. & Eng. Corp. Cas. 431, 56 Am. Rep. 241; Long *v.* Milford Tp., 137 Pa. St. 122.

Tennessee. — Dush *v.* Fitzhugh, 2 Lea (Tenn.) 307.

Texas. — Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573.

Wisconsin. — Cremer *v.* Portland, 36 Wis. 92; Hammond *v.* Mukwa, 40 Wis. 35; Otis *v.* Janesville, 47 Wis. 422.

Slight Negligence. — It must be borne in mind that the term "slight negligence," as used in some of these cases, means always slight want of ordinary care, and never a want of extraordinary care, or of the slightest degree of care, a distinction which seems to have escaped Mr. Beach. Beach on Cont. Neg. (1st ed.) 20 and 21, and note 1, p. 21. However, in the second edition of his work, Mr. Beach adopts the doctrine here stated, upon the strength of the cases cited in the first edition of this article as it appeared in 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), 23, 24.

There is a Difference of Opinion as to the Utility of the Doctrine laid down in the text. Mr. Beach pronounces it "ingenious and philosophical, and capable of useful application" (Beach Con. Neg., § 19); while Mr. Freeman says, "This distinction between slight negligence and slight want of ordinary care is exceedingly minute, and in practice it would be very difficult to make an average jury comprehend it." Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 670, note. But it seems that Mr. Freeman overlooks the marked difference between a slight want of ordinary care, which is negligence by reason of the very fact that it is a failure of ordinary care (Pierce on R. R. 324), and that omission of extraordinary care which is usually denominated slight negligence (Story on Bailments, § 17), but which, where the only standard is that of ordinary care, is not negligence at all. "In cases like the one now before us, each party is required to exercise ordinary care, and neither party is required to exercise great or extraordinary care. The want of ordinary care is ordinary negligence, but the want of great or extraordinary care is only slight negligence; and while either party will be held to be guilty of culpable negligence if found to be

6. Test of Ordinary Care. — The only test by which it can be determined whether ordinary care has been used or omitted in any particular case is the test of negligence in general, which may be formulated thus: There has been no want of ordinary care when, under all the circumstances and surroundings of the case, the person injured, or those whose negligence is imputable to him, did or omitted nothing which an ordinarily careful and prudent person, similarly situated, would not have done or omitted; and, conversely, there has been a want of ordinary care when, under all the circumstances and surroundings of the case, something has been done or omitted that an ordinarily careful and prudent person, so situated, would not have done or omitted to do.[1]

guilty of ordinary negligence, yet neither party will be held to be guilty of culpable negligence if found to be guilty of only slight negligence." Valentine, J., in Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630, 11 Am. & Eng. R. Cas. 271.

1. The Meaning of "Ordinary Care" — *England.* — Blyth *v.* Birmingham Waterworks Co., 11 Exch. 784.

United States. — Nitro-Glycerine Case, 15 Wall. (U. S.) 524; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; New Jersey R. Co. *v.* Pollard, 22 Wall. (U. S.) 341; Texas, etc., R. Co. *v.* Gentry, 163 U. S. 368; Grand Trunk R. Co. *v.* Ives, 144 U. S. 417; Crane Elevator Co. *v.* Lippert, 24 U. S. App. 185; Cincinnati St. R. Co. *v.* Whitcomb, 31 U. S. App. 385.

California. — Strong *v.* Sacramento, etc., R. Co., 61 Cal. 326, 8 Am. & Eng. R. Cas. 273; Wilson *v.* Cunningham, 3 Cal. 241, 58 Am. Dec. 407.

Connecticut. — Beers *v.* Housatonic R. Co., 19 Conn. 571.

Georgia. — Rome R. Co. *v.* Tolbert, 85 Ga. 447.

Illinois. — Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585; Wabash, etc., R. Co. *v.* Wallace, 110 Ill. 114, 19 Am. & Eng. R. Cas. 359; Hagerstrom *v.* West Chicago St. R. Co., 67 Ill. App. 63.

Indiana. — Madison *v.* Ross, 3 Ind. 236, 54 Am. Dec. 481.

Iowa. — Schmidt *v.* Burlington, etc., R. Co., 75 Iowa 606.

Kansas. — Wyandotte *v.* White, 13 Kan. 191.

Maryland. — Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545; Baltimore, etc., R. Co. *v.* Keedy, 75 Md. 320.

Michigan. — Glover *v.* Scotten, 82 Mich. 369; Helbig *v.* Michigan Cent. R. Co., 85 Mich. 359.

Minnesota. — Brown *v.* Milwaukee, etc., R. Co. 22 Minn. 165; Flannagan *v.* St. Paul City R. Co., (Minn. 1897) 71 N. W. Rep. 379.

Mississippi. — Alabama, etc., R. Co. *v.* Jones, 73 Miss. 110.

Missouri. — Morgan *v.* Cox, 22 Mo. 373, 66 Am. Dec. 623; Henry *v.* Grand Ave. R. Co., 113 Mo. 525.

Nebraska. — Culbertson *v.* Holliday, 50 Neb. 229.

New Hampshire. — State *v.* Manchester, etc., R. Co., 52 N. H. 552; Tucker *v.* Henniker, 41 N. H. 317.

New Jersey. — Moore *v.* Central R. Co., 24 N. J. L. 268.

New York. — New York *v.* Bailey, 2 Den. (N. Y.) 433; Beisiegel *v.* New York Cent. R. Co., 34 N. Y. 628, 90 Am. Dec. 741; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 99 Am. Dec. 761; Mackay *v.* New York Cent. R. Co., 35 N. Y. 80.

North Carolina. — Manly *v.* Wilmington, etc., R. Co., 74 N. Car. 660.

Ohio. — Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 638, 15 Am. Rep. 633.

Pennsylvania. — Creed *v.* Pennsylvania R. Co., 86 Pa. St. 145, 27 Am. Rep. 693; Hays *v.* Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. Rep. 624; Vallo *v.* U. S. Express Co., 147 Pa. St. 404, 30 Am. St. Rep. 741.

South Carolina. — Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 663, and note.

Texas. — Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496; Gulf, etc., R. Co. *v.* Hodges, 76 Tex. 90; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 599.

Vermont. — Reynolds *v.* Burlington, 52 Vt. 300.

Wisconsin. — Ditberner *v.* Chicago, etc., R. Co., 47 Wis. 138; Wheeler *v.* Westport, 30 Wis. 392; Ward *v.* Milwaukee, etc., R. Co., 29 Wis. 144.

Judicial Statements of Rule. — The test of ordinary care formulated in the text, and supported in a general way by the foregoing authorities, has been stated by the courts as follows:

"There is no absolute rule as to what constitutes negligence. Where a higher degree of care is demanded under some circumstances than under others, when the standard shifts with the circumstances of the case, when both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proven." West Philadelphia Pass. R. Co. *v.* Gallagher, 108 Pa. St. 524, 27 Am. & Eng. R. Cas. 204.

"The rights and duties of parties grow out of the circumstances in which they are placed." Pennsylvania R. Co. *v.* Kilgore, 32 Pa. St. 292, 72 Am. Dec. 787.

"What is reasonable skill, proper care and diligence, etc., can only be determined, as matter of fact, by the jury. It is impossible to establish any general rule upon so indefinite a subject; and it is impossible to make juries, or merely practical men anywhere, determine these matters except upon the circumstances of each particular case." Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 74.

"The degree of care and foresight which it is necessary to use, in cases of this description, must always be in proportion to the nature and magnitude of the injury that will be likely

7. Degrees of Negligence. — In determining whether there has been a want of ordinary care the so-called degrees of negligence, namely, "slight," "ordinary," and "gross" negligence, are not to be considered.[1] The division of negligence into degrees is not recognized in jurisdictions where the doctrine of contributory negligence prevails.[2] Indeed, it is declared by high authority

to result from the occurrence which is to be anticipated and guarded against; and it should be that care and prudence which a discreet and cautious individual would or ought to use if the whole risk and loss were to be his own exclusively." Walworth, Chancellor, in New York *v.* Bailey, 2 Den. (N. Y.) 440.

And in a case involving the question of care in crossing a railway, it is said: "The plaintiff is not bound to see; he is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances. He is not to provide against any certain result. He is to make an effort for a result that will give safety, — such effort as caution, care, and prudence will dictate." Greany *v.* Long Island R. Co., 101 N. Y. 419, 24 Am. & Eng. R. Cas. 476.

So in a similar case it is said: "What constitutes negligence in a given exigency is generally a question for the jury, and not for the court. Negligence is want of ordinary care under the circumstances; the standard is therefore necessarily variable; no fixed rule of duty can be formed which can apply to all cases. A course of conduct justly regarded as resulting from the exercise of ordinary care, under some circumstances, would exhibit the grossest degree of negligence under other circumstances; the opportunity for deliberation and action, the degree of danger, and many other considerations of a like nature, affect the standard of care which may be reasonably required in a particular case." Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 469.

And, more exactly in line with the text, it has been said: "The general doctrine is perfectly familiar to us, that when the negligence of the injured party contributes directly to the injury complained of, the law will afford no redress. * * * But negligence is a relative term, and is defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Moreover, it is not absolute or intrinsic, but always relates to some circumstance of time, place, or persons.'" Jamison *v.* San Jose, etc., R. Co., 55 Cal. 593, 3 Am. & Eng. R. Cas. 352. See also Broom's Leg. Max. 329; Richardson *v.* Kier, 34 Cal. 63, 91 Am. Dec. 681.

Where the plaintiff carried on a varnish factory adjoining the defendant's railway, and in the manufacture exposed benzine out of doors on his premises, which was ignited by sparks from the defendant's engine, and caused the destruction of the factory, it was held that the plaintiff was not guilty of contributory negligence. Kalbfleisch *v.* Long Island R. Co., 102 N. Y. 520, 55 Am. Rep. 832, 29 Am. & Eng. R. Cas. 179. See also Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 215, 78 Am. Dec. 178.

And There Are Numerous Recent Cases Which Recognize This Doctrine, and assert the principle that the plaintiff's act or omission contributing to the injury must be such as a person of ordinary care and prudence would not have been guilty of under the circumstances, or it does not constitute contributory negligence.

Alabama. — Montgomery Gas-Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372.

Indiana. — Louisville, etc., R. Co. *v.* Richardson, 66 Ind. 43, 32 Am. Rep. 94; Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496, 44 Am. Rep. 334, 11 Am. & Eng. R. Cas. 76.

Iowa. — Jeffrey *v.* Keokuk, etc., R. Co., 56 Iowa 546, 5 Am. & Eng. R. Cas. 568.

Kentucky. — South Covington, etc., St. R. Co. *v.* Ware, 84 Ky. 267, 27 Am. & Eng. R. Cas. 206.

Louisiana. — Bomar *v.* Louisiana North, etc., R. Co., 42 La. Ann. 983; Paland *v.* Chicago, etc., R. Co., 44 La. Ann. 1003.

Mississippi. — Vicksburg, etc., R. Co. *v.* McGowan, 62 Miss. 682, 52 Am. Rep. 205.

Missouri. — Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, 14 Am. St. Rep. 617; Catton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 23 Am. & Eng. R. Cas. 364, 56 Am. Rep. 446.

Nebraska. — Culbertson *v.* Holliday, 50 Neb. 229.

Ohio. — Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 3 Am. & Eng. R. Cas. 361, 38 Am. Rep. 597.

Texas. — International, etc., R. Co. *v.* Garcia, 75 Tex. 583.

Virginia. — Richmond, etc., R. Co. *v.* Medley, 75 Va. 499, 7 Am. & Eng. R. Cas. 493, 40 Am. Rep. 734.

Wisconsin. — Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

1. Degrees of Negligence. — Cooley on Torts 630; Deering on Negligence, § 11; Patterson's Ry. Acc. Law. 8.

United States. — The Steamboat New World *v.* King, 16 How. (U. S.) 474; Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 494.

Indiana. — Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 293, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77.

New York. — Smith *v.* New York Cent. R. Co., 24 N. Y. 241.

Pennsylvania. — Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St. 449; Marean *v.* New York, etc., R. Co., 167 Pa. St. 220.

2. The statement of the text is not too broad when limited to cases where the principles of contributory negligence are applicable. See the following authorities:

Wharton on Neg., § 64; Deering on Neg., § 11; Patterson's Ry. Acc. Law 8; Cooley on Torts 630; Beach on Cont. Neg. 19, 80.

Indiana. — Pennsylvania Co. *v.* Roney, 89 Ind. 453, 46 Am. Rep. 173, 12 Am. & Eng. R. Cas. 223.

Iowa. — O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467.

to be misleading in practice, and unscientific in principle.[1]

V. How the Elements Must Combine. — But a want of ordinary care on the part of the plaintiff or the person injured will not prevent a recovery if such want of ordinary care was not a proximate cause of injury.[2] Nor will the fact that the person injured proximately contributed to his own injury by his conduct constitute contributory negligence, if he was not guilty of a want of ordinary care.[3] Hence there must be a want of ordinary care contributing to the injury as a proximate cause before contributory negligence can exist.[4]

Kansas. — Chicago, etc., R. Co. *v.* Brown, 44 Kan. 384.

New York. — Wilds *v.* Hudson River R. Co., 24 N. Y. 432.

In other words, where the doctrine of contributory negligence is applied, if it appears that the plaintiff, by a want of ordinary care, has proximately contributed to his own injury, he cannot recover by saying that the negligence of the defendant was greater in degree than his own. "The parties being mutually in fault, there can be no apportionment of the damages. The law has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief." Little Schuylkill Nav. R., etc., Co. *v.* Norton, 24 Pa. St. 465, 64 Am. Dec. 672. And often as it is denied, this is the rule, even where the doctrine of comparative negligence prevails. Abend *v.* Terre Haute, etc., R. Co., 111 Ill. 203, 53 Am. Rep. 616, 17 Am. & Eng. R. Cas. 614. See the title Comparative Negligence, vol. 6, p. 360.

1. Thus Chief Justice Cockburn, in his dissenting opinion in the Geneva Award Cases, says: "The older authorities, indeed, speak of three degrees of negligence, and of gross negligence as being necessary in some cases to found liability; but the tendency of modern decisions has been to apply in all cases the sound practical rule that, in determining the question of negligence, the true test is whether there has been, with reference to the particular subject-matter, that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise in the same circumstances." *Quoted* in 6 Alb. L. J. 313, where many other similar criticisms are collected. See also New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Deering on Neg., § 11; and the authorities cited in the two preceding notes. But, as holding a contrary view in a limited sense, see Shearman & Redf. on Neg., §§ 16, 17; Wharton on Neg. (2d ed.), §§ 44–65.

2. Causal Connection of Elements. — In the discussion of causal connection which follows, the application of this rule will be shown. It is sufficient here to cite the general authorities for it.

England. — Davies *v.* Mann, 10 M. & W. 546; 2 Thomp. on Neg., 1105; Radley *v.* London, etc., R. Co., L. R. 1 App. 754; 2 Thomp. on Neg. 1108; Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, 5 C. B. N. S. 573, 94 E. C. L. 573.

United States. — Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 249, 8 Am. & Eng. R. Cas. 61.

Massachusetts. — Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390.

Minnesota. — Flannagan *v.* St. Paul City R. Co., (Minn. 1897) 71 N. W. Rep. 379.

Missouri. — Brown *v.* Hannibal, etc., R. Co., 50 Mo. 461, 11 Am. Rep. 420; Burham *v.* St. Louis, etc., R. Co., 56 Mo. 338.

North Carolina. — Doggett *v.* Richmond, etc., R. Co., 78 N. Car. 305.

South Carolina. — Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 663, note.

3. Proximate Contribution Not Enough. — This principle has been illustrated already, and other illustrations are plentiful. Thus a person exercising ordinary care may suddenly, without fault on his own part, be put into a position of danger that requires him to adopt a perilous alternative in attempting to escape the immediate danger. If in doing this he is injured by the negligence of another, he is not guilty of contributory negligence, even though, had he remained passive in the first instance, he would have escaped injury.

England. — Jones *v.* Boyce, 1 Stark. 493.

United States. — Stevenson *v.* Chicago, etc., R. Co., 18 Fed. Rep. 493.

Alabama. — Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15.

Georgia. — Georgia R., etc., Co. *v.* Rhodes, 56 Ga. 645.

Illinois. — Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25; Galena, etc., R. Co. *v.* Yarwood, 17 Ill. 509, 65 Am. Dec. 682.

Indiana. — Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Turner *v.* Buchanan, 82 Ind. 147, 42 Am. Rep. 485; Nave *v.* Flack, 90 Ind. 211, 46 Am. Rep. 205; Louisville, etc., R. Co. *v.* Richardson, 66 Ind. 48, 32 Am. Rep. 94.

Kentucky. — South Covington, etc., St. R. Co. *v.* Ware, 84 Ky. 267, 27 Am. & Eng. R. Cas. 206.

Massachusetts. — Linnehan *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692.

Minnesota. — Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 37 Am. Rep. 410.

Missouri. — Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594.

New York. — Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Lowery *v.* Manhattan R. Co., 99 N. Y. 158, 52 Am. Rep. 12, 23 Am. & Eng. R. Cas. 276, and note; Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721; Gibney *v.* State, 137 N. Y. 1, 33 Am. St. Rep. 690.

Ohio. — Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 38 Am. Rep. 597, 3 Am. & Eng. R. Cas. 361; Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 29 Am. St. Rep. 553.

Pennsylvania. — Pittsburgh, etc., R. Co. *v.* Rohrman, (Pa. 1883) 12 Am. & Eng. R. Cas. 176, and note.

4. There Must Also Be a Want of Ordinary Care. — This results as a logical consequence,

VI. Proximate and Remote Causes — 1. Proximate Cause Defined. — Where one person has been injured by the negligence of another, and the defense of contributory negligence is interposed in bar of an action to recover for the injury, the question that arises upon the threshold of the inquiry is whether there was a want of ordinary care upon the part of the injured person, combining and concurring with the negligence complained of as a proximate cause of the injury.[1] The term "proximate cause," as applicable to cases of contributory negligence, may be defined thus: A want of ordinary care upon the part of a person injured by the negligence of another is itself a proximate cause of the injury, making such want of ordinary care contributory negligence on the part of the person injured, when, acting concurrently and in combination with the negligence complained of, such want of ordinary care, in natural and continuous sequence, unbroken by any intervening, independent, efficient cause, results in the injury which, but for such want of ordinary care on the part of the person injured, would not have occurred.[2]

2. Remote Cause Defined. — But when a person injured by the negligence of another is himself guilty of carelessness or a want of ordinary care which is a mere condition or remote cause of his injury, followed by a subsequent, intervening, independent, and efficient cause, to wit, the negligence of the party complained of, as the true or proximate cause of the injury, such carelessness or want of ordinary care upon the part of the person injured, not being a bar to an action by him to recover for the injuries inflicted upon him, may be spoken of as remote in the chain of causation;[3] that is, a want of ordinary

and is, of course, well settled. Pollock on Torts 378; Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728; and the authorities cited to the two preceding notes.

1. See the preceding parts of this title.

"To constitute contributory negligence there must have been a want of ordinary care, under all the circumstances of the case, contributing to the injury as an efficient and proper cause thereof." Flannagan *v.* St. Paul City R. Co., (Minn. 1897) 71 N. W. Rep. 379. See also Johnson *v.* Stewart, 62 Ark. 170, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 17.

2. "**The Proximate Cause Is the Efficient Cause,** the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." Ætna F. Ins. Co. *v.* Boon, 95 U. S. 130; Union Pac. R. Co. *v.* Evans, (Neb. 1897) 71 N. W. Rep. 1062.

"The so-called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence." Washington, etc., R. Co. *v.* Hickey, 166 U. S. 525, *per* Peckham, J.

"The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred, and the remote cause of an injury is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof." Goodlander Mill Co. *v.* Standard Oil Co., 24 U. S. App. 8.

The rule that the negligence of the plaintiff will not prevent his recovery if, notwithstanding such negligence, the injury could have been avoided by the exercise of ordinary care on the part of the defendant at the time, does not apply where both persons are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them. Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161.

Four interesting *New York* cases on the meaning of the term "proximate cause" are the following: Pollett *v.* Long, 56 N. Y. 200; Lowery *v.* Manhattan R. Co., 99 N. Y. 163, 52 Am. Rep. 12; Weber *v.* Third Ave. R. Co., 12 N. Y. App. Div. 512; Hurley *v.* New York, etc., Brewing Co., 13 N. Y. App. Div. 167.

3. **Remote Cause.** — "The jury were told in explicit language that 'if there was negligence on the part of the deceased contributing to the death, and in the absence of which the death would not have occurred, then it could not be said that his death was the result of the accident, but was the result of his own negligence. But if death would have occurred in any event, whether he was careless or not, then I do not think the defendant is relieved.' The language we have quoted was, in substance, again repeated, and we think was sufficiently adhered to in all comments made by the trial judge to the jury on that branch of the case, and * * * the exceptions taken by the defendant to the charge in regard to that branch of the case do not present any error requiring us to interfere with the verdict." Kuhn *v.* Delaware, etc., R. Co., 92 Hun (N. Y.) 76; Distler *v.* Long Island R. Co., 151 N. Y. 429; The Portia, 26 U. S. App. 479; Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230.

care which, however culpable in itself, did not contribute to the injury as a proximate cause thereof.

3. Principles by Which Question Determined — **Causa Proxima et Non Remota Spectatur.** — In the application of the principle that the law looks at the proximate, and not at the remote, cause of an injury, lies the great difficulty in the law of contributory negligence.[1] No general rule for determining when causes are proximate, and when remote, has yet been formulated.[2] But the principles that govern the determination of the question are well settled.[3] When it is once established that a person injured by the negligence of another has been guilty of a want of ordinary care, it becomes necessary to determine whether such want of ordinary care proximately contributed to the injury, as an efficient cause, or only remotely, as a condition or remote cause thereof.[4] If it proximately contributed, there can be no recovery; but if it was only a remote cause or condition of the injury, a recovery can be had.[5]

1. **Casua Proxima Et Non Remota Spectatur.** — The maxim of the law is: *In jure non remota causa sed proxima spectatur*, of which Lord Bacon says: "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Maxims, Reg. 1, *quoted* in Broom's Max. 216. But this does not help us to tell when a cause is proximate and when remote. See also McKeon *v.* Steinway R. Co., 20 N. Y. App. Div. 601.

2. **"To a Sound Judgment Must Be Left Each Particular Case."** Harrison *v.* Berkley, 1 Strobh. L. (S. Car.) 525, 47 Am. Dec. 578. "Many cases illustrate, but none define, what is an immediate or what is a remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case." Fairbanks *v.* Kerr, 70 Pa. St. 86, 10 Am. Rep. 664. "There can be no fixed and immutable rule upon the subject that can be applied to all cases. Much must, therefore, as is often said, depend upon the circumstances of each particular case." Page *v.* Bucksport, 64 Me. 51, 18 Am. Rep. 239.

3. With the law of causal connection in the field of negligence in general we do not here deal. Perhaps the principles that must be invoked to determine when a cause is proximate and when remote have never been better stated than by Judge Cooley. Cooley on Torts, 68–80. See also the following:

United States. — Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 251, 8 Am. & Eng. R. Cas. 59; Mutual Ins. Co. *v.* Tweed, 7 Wall. (U. S.) 44; Ætna F. Ins. Co. *v.* Boon, 95 U. S. 117.

Indiana. — Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 350, 49 Am. Rep. 168, 18 Am. & Eng. R. Cas. 234.

Michigan. — Lewis *v.* Flint, etc., R. Co., 54 Mich. 55, 52 Am. Rep. 790, 18 Am. & Eng. R. Cas. 263, opinion by Cooley, C. J.

Missouri. — Henry *v.* St. Louis, etc., R. Co., 76 Mo. 288, 43 Am. Rep. 762, 12 Am. & Eng. R. Cas. 136.

Ohio. — Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230.

4. *California.* — Holmes *v.* South Pac. Coast R. Co., Cal. 161.

South Carolina. — Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 668.

Utah. — Hall *v.* Ogden City St. R. Co., 13 Utah 243.

See *supra*, this title, *Elements of Contributory Negligence.*

5. **The Doctrine of Davies v. Mann.** — Here we encounter two distinct lines of authority, of which Butterfield *v.* Forrester, 11 East 60, heads one, and Davies *v.* Mann, 10 M. & W. 546, the other. In the first case the general rule was laid down, which has never since been denied, that a want of ordinary care on his own part, proximately contributing to his injury, will prevent a person injured by the negligence of another from recovering. In the second case, decided in 1842, the correctness of the doctrine in Butterfield *v.* Forrester was conceded, but it was held that it had no application to the case before the court, on the ground that the plaintiff's want of ordinary care did not constitute contributory negligence, because it was a remote cause or mere condition of the injury, resulting from the defendant's negligence, and did not proximately contribute to it. In other words, the defendant's negligence was held the sole proximate cause of the injury sustained by the plaintiff, the principle being that the negligence of the defendant arising subsequently to that of the plaintiff, and the plaintiff's negligence being so obvious that the defendant could, by the exercise of ordinary care, have discovered it in time to avoid inflicting the injury, the defendant's failure to discover such want of care on the plaintiff's part was itself the negligence proximately and directly causing the injury, with no intervening negligence on the plaintiff's part to break the causal connection between the defendant's negligence and the injury. The following text-writers and cases sustain or apply the rule of Davies *v.* Mann, 10 M. & W. 546, as just stated:

Textbooks. — Wharton on Negligence §§ 323–329; Pollock on Torts, 378, 379; Shearman & Redf. on Neg. (4th ed.), §§ 99, 100; Pierce on R. R. 326, 327; Patterson's Ry. Acc. Law, pp. 51–56, and especially § 58, p. 55; Bishop's Non-contract Law, §§ 463, 464.

United States. — In Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, it is said: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary

Slight Want of Ordinary Care Not Slight Negligence. — A want of ordinary care may be said to contribute proximately to an injury when it is an active and efficient cause of the injury in any degree, however slight, and not the mere condition or occasion of it.[1]

care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in Davies *v.* Mann, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, and cases cited; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Deans *v.* Wilmington, etc., R. Co., 107 N. Car. 686, 22 Am. St. Rep. 902; 2 Thompson on Negligence, 1157; Cooley on Torts (1st ed.) 675, 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), title CONTRIBUTORY NEGLIGENCE, 30, and authorities cited in note 1." See also Cincinnati St. R. Co. *v.* Whitcomb, 31 U. S. App. 386.

England. — The Bernina, 12 Prob. Div. 58, 57 Am. Rep. 494, 509, note.

Alabama. — Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34.

Connecticut. — Smithwick *v.* Hall, etc., Co., 59 Conn. 261, 21 Am. St. Rep. 104; Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 83.

District of Columbia. — Holohan *v.* Washington, etc., R. Co., 18 Wash. L. Rep. (D. C.) 751; Spencer *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 138, 54 Am. Rep. 272.

Kansas. — Union Pac. R. Co. *v.* Eddy, 2 Kan. App. 291.

Louisiana. —Factors, etc., Ins. Co. *v.* Werlein, 42 La. Ann. 1046.

Nebraska. — Omaha St. R. Co. *v.* Martin, 48 Neb. 68.

New York. — Scott *v.* Third Ave. R. Co., 59 Hun (N. Y.) 456; Meisch *v.* Rochester Electric R. Co., 72 Hun (N. Y.) 606; Rooks *v.* Houston, etc., R. Co., 10 N. Y. App. Div. 98; Button *v.* Hudson River R. Co., 18 N. Y. 258; Austin *v.* New Jersey Steamboat Co., 43 N. Y. 82; Sweeney *v.* New York Steam Co., 15 Daly (N. Y.) 312.

North Carolina. — See Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 17, 18, 27; Clark, *v.* Wilmington, etc., R. Co., 109 N. Car. 449, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 27.

Ohio. — Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 27 Ohio L. J. 383.

Utah. — Hall *v.* Ogden City St. R. Co., 13 Utah 243.

Vermont. — Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 196.

So, also, a dictum in the case of Davies *v.* Mann may be cited as sustaining the doctrine that contributory negligence is not a defense where an injury is wilfully inflicted. Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 243.

Some Text Writers Have Criticised the Rule in Davies *v.* Mann, and have declared the case "a mischief-making authority." Beach on Con. Neg. (2d ed.), §§ 27–30; 2 Thomp. on Neg. 1155. But Mr. Thompson has shown how the rule can be usefully and practically applied — 2 Thomp. on Neg. 1157 — and there is little prospect of its abandonment by the courts as a safe and proper rule in its practical effects.

1. Slight Want of Ordinary Care Not Slight Negligence — *England.* — Greenland *v.* Chaplin, 5 Exch. 248; Tuff *v.* Warman, 5 C. B. N. S. 573, 94 E. C. L. 573.

Illinois. — Chicago, etc., R. Co. *v.* Becker, 76 Ill. 30. *Compare* Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 225.

Iowa. — McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338; Muldowney *v.* Illinois Cent. R. Co., 39 Iowa 615; Haley *v.* Chicago, etc., R. Co., 21 Iowa 15.

Kansas. — Valentine, J., in Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630, 11 Am. & Eng. R. Cas. 260.

Kentucky. — Sullivan *v.* Louisville Bridge Co., 9 Bush (Ky.) 90.

Massachusetts. — Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390; Marble *v.* Worcester, 4 Gray (Mass.) 395.

New Hampshire. — Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546.

New Jersey. —Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180, 2 Am. & Eng. R. Cas. 220.

Pennsylvania. — Monongahela City *v.* Fischer, 111 Pa. St. 9, 56 Am. Rep. 241, 13 Am. & Eng. Corp. Cas. 431.

But It Must Be Proximate to Bar Recovery. — "The act or omission on the part of a plaintiff claimed to have contributed to the injury must have direct relation to the act or omission charged to be negligence on the part of a defendant." McQuilken *v.* Central Pac. R. Co., 64 Cal. 463, 16 Am. & Eng. R. Cas. 353.

"The negligence of the plaintiff which will defeat his recovery must be a proximate cause of the injury." Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579, 8 Am. & Eng. R. Cas. 482.

"Where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." Greenland *v.* Chaplin, 5 Exch. 248.

"When there has been mutual negligence on the part of the plaintiff and defendant, and the negligence of each was the proximate cause of the injury, no action can be sustained." Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

"Properly speaking, contributory negligence, as the very words import, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury. * * * On the contrary, if the act of the defendant is the immediate cause of the injury no preceding negligence or improper conduct of the plaintiff would prevent him from recovering; for in such a case his

Defendant's Negligence More Immediate Efficient Cause. — But it is not a proximate cause of the injury when the negligence of the person inflicting it is a more immediate efficient cause.[1]

preceding negligence or improper conduct would not be in law regarded as any part of the cause of the injury, and would not therefore be held to be contributory negligence. The plaintiff's preceding negligence or improper conduct is in such case a mere condition, and not a cause of the injury. Though it may be in such a case that the injury could not possibly have happened without this preceding negligence or improper conduct of the plaintiff, that is, without circumstances being in the actual condition in which the plaintiff had improperly placed them, he may in such case nevertheless recover; for in the view of the law, which never looks to the remote cause, which we have called a condition, but only the proximate cause, the injury in such a case would be held to be caused by the defendant only." Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 10 Am. & Eng. R. Cas. 755.

"Although the plaintiff was wrongfully upon the cars, the conductor was bound to exercise reasonable care and prudence in removing him. The rule that the plaintiff cannot recover if his own wrong, as well as that of the defendant, has conduced to the injury which he has sustained, is confined to cases where his wrong or negligence has immediately or proximately contributed to the result." Meeks *v.* Southern Pac. R. Co., 56 Cal. 513, 38 Am. Rep. 67, 8 Am. & Eng. R. Cas. 319, *quoting* Kline *v.* Central Pac. R. Co., 37 Cal. 400.

"Negligence which does not contribute to results need not be regarded." Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 4 Am. & Eng. R. Cas. 551, 49 Mich. 99.

"It is clear that a plaintiff may recover, though he did not use due care, if his negligence in no wise caused the accident resulting in his injury." Thirteenth, etc., St. Pass. R. Co. *v.* Boudrou, 92 Pa. St. 475, 37 Am. Rep. 707, 2 Am. & Eng. R. Cas. 34.

For Further Statements and Illustrations of the principle, see:

Arkansas. — Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510.

Indiana. — White Sewing Mach. Co. *v.* Richter, 2 Ind. App. 331; Chicago, etc., R. Co. *v.* Williams, 131 Ind. 30; Grimes *v.* Louisville, etc., R. Co., 3 Ind. App. 573.

Massachusetts. — Bowes *v.* Boston, 155 Mass. 344.

Minnesota. — Gunderson *v.* Northwestern Elevator Co., 47 Minn. 161; Johnson *v.* Northwestern Telephone Exch. Co., 48 Minn. 433.

New York. — Distler *v.* Long Island R. Co., 151 N. Y. 429.

North Carolina. — Clark *v.* Wilmington, etc., R. Co., 109 N. Car. 430, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 27.

North Dakota. — Boss *v.* Northern Pac. R. Co., 2 N. Dak. 128.

Oregon. — Meeker *v.* Northern Pac. R. Co., 21 Oregon 513, 28 Am. St. Rep. 758.

Pennsylvania. — Vallo *v.* U. S. Express Co., 147 Pa. St. 404, 30 Am. St. Rep. 741.

Texas. — Rose *v.* Gulf, etc., R. Co., (Tex. 1891) 17 S. W. Rep. 789; Corona *v.* Galveston, etc., R. Co., (Tex. 1891) 17 S. W. Rep. 384.

1. Not Proximate When Defendant's Negligence More Immediate Efficient Cause — *England.* — Radley *v.* London, etc., R. Co., L. R. 1 App. 759, 2 Thomp. on Neg. 1108.

California. — Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409.

Indiana. — White Sewing Mach. Co. *v.* Richter, 2 Ind. App. 331.

Iowa. — Weymire *v.* Wolfe, 52 Iowa 533.

Kansas. — Pacific R. Co. *v.* Houts, 12 Kan. 328.

Massachusetts. — Bowes *v.* Boston, 155 Mass. 344, 35 Am. & Eng. Corp. Cas. 480.

Minnesota. — Gunderson *v.* Northwestern Elevator Co., 47 Minn. 161.

Missouri. — Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323; Brown *v.* Hannibal, etc., R. Co., 50 Mo. 461, 11 Am. Rep. 420.

New Hampshire. — State *v.* Manchester, etc., R. Co., 52 N. H. 528.

New York. — Button *v.* Hudson River R. Co., 18 N. Y. 258; Mark *v.* Hudson River Bridge Co., 56 How. Pr. (N. Y. Supreme Ct.) 108; Distler *v.* Long Island R. Co., 151 N. Y. 429.

North Carolina.—Manly *v.* Wilmington, etc., R. Co., 74 N. Car. 655; Gunter *v.* Wicker, 85 N. Car. 310.

Ohio. — Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Oregon. — Meeker *v.* Northern Pac. R. Co., 21 Oregon 513, 28 Am. St. Rep. 758.

Pennsylvania. — Vallo *v.* U. S. Express Co., 147 Pa. St. 404, 30 Am. St. Rep. 741.

Tennessee. — Patton *v.* East Tennessee, etc., R. Co., 89 Tenn. 370.

Virginia. — Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 750.

Statements of Rule by the Courts. — "Another qualification to the general rule that there is no liability upon the defendant when the plaintiff has contributed to the injury exists when, though both parties be in fault, the defendant has been the immediate and proximate cause of the injury." Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 554.

"That his [plaintiff's] conduct exhibited an utter disregard of caution, there can scarcely be a doubt. Still, if this want of caution did not proximately contribute to the accident, and the carelessness of the railroad company alone was the immediate cause of it, Karns [the plaintiff] might recover." Pittsburgh, etc., R. Co. *v.* Karns, 13 Ind. 89.

"When the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault." Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 754.

"When the negligence of the defendant * * * is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury, the action for repara-

Rule in Tuff v. Warman. — And so when the negligence of the person inflicting the injury is subsequent to, and independent of, the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effects and prevent injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation.[1] In such a case the want of ordinary care on the part of the injured

tion is maintainable." Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 266, *quoted* in Zemp *v.* Wilmington, etc., R. Co., 9 Rich. L. (S. Car.) 84, 64 Am. Dec. 768.

"Even if it were assumed that the plaintiff was negligent in stepping upon a moving train, yet it cannot be held, as a matter of law, that such negligence in any proper sense contributed to his injury. The danger which attended the boarding of a moving train had been passed. The plaintiff was upon the train, and in a situation of safety unless there was an accident or some mismanagement. His injury can hardly be said to be the proximate result of stepping upon the moving train, or to have been occasioned by his inability to safely reach a seat because the car was in motion. The direct and proximate cause of his injury was the mismanagement of the train, causing a sudden jerk or lurch which threw the plaintiff therefrom, or at least whether that was the cause was a question of fact for the jury." Distler *v.* Long Island R. Co., 151 N. Y. 429.

In a leading *Missouri* case the following statement of the rule in an instruction was approved: "Although the deceased may have been guilty of misconduct, or failed to exercise ordinary care and prudence while passenger on defendant's boat, which may have contributed remotely to the death of deceased, yet if the employees, or either of them, of defendant were guilty of negligence which was the immediate cause of the death, and with the exercise of prudence by said employees, or either of them, said injury and death might have been prevented, the defendant is liable." Morrissey *v.* Wiggins Ferry Co., 43 Mo. 380.

1. The Rule in Tuff v. Warman. — "The leading case which settled the [above stated] doctrine in its modern form is Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740." Pollock on Torts 375,

The doctrine thus enunciated in Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, when correctly applied, is unobjectionable, but the language used by the court has been the subject of some criticism. "We think it is manifest that the rule thus laid down in Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, is not the correct rule of law which governs ordinary cases of injury by negligence; but whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery." Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390.

In general, however, Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, is recognized as authority; and it has been followed in many cases, both in England and the United States.

The Best Illustration of the True Application of the Principle occurs in the case of Radley *v.* London, etc., R. Co., L. R. 1 App. 754, where the facts were these: A railway company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the railway ran some trucks on the siding. All but one were empty, and that one contained another truck, and their joint height amounted to eleven feet. On the Sunday evening the railway servants brought on the siding many other empty trucks, and pushed forward all those previously left on the siding. Some resistance was felt; the power of the engine pushing the trucks was increased, and the two trucks, the joint height of which amounted to eleven feet, struck the bridge and broke it down. In action to recover damages for the injury, the defense of contributory negligence was set up. The judge at the trial told the jury that the plaintiffs must satisfy them that the accident happened solely through the negligence of the defendant's servants, for that if both sides were negligent, so as to contribute to the accident, the plaintiffs could not recover. The jury found, under this direction, that there was contributory negligence, and the verdict was for the defendant. On a final appeal to the House of Lords it was held that there was a question of fact for the jury as to the plaintiff's negligence, but that the law had not been sufficiently stated to them. "They had not been clearly informed, as they should have been, that not every negligence on the part of the plaintiff which in any degree contributes to the mischief will bar him of his remedy, but only such negligence that the defendant could not, by the exercise of ordinary care, have avoided the result." Pollock on Torts, 377. It was said in the opinion: "It is true that in part of his summing up the learned judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might, at this stage of the matter, by ordinary care, have avoided all accident, any previous negligence of the plaintiffs would not prevent them from recovering. In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned judge's charge is that that question was never put to the jury." Radley *v.* London, etc., R. Co., L. R. 1 App. 760.

person is held not a juridical cause of his injury, but only a condition of its occurrence.[1]

Conversely, when the carelessness of the person inflicting the injury is antecedent to the negligence of the person injured, and the latter might by ordinary care have discovered the failure of the former to use such care, in time to avoid the injury, there can be no recovery, because the intervening negligence of the injured person is the direct and proximate cause of his injury.[2]

Statement by Missouri Court. — Perhaps the principle of these cases has never been better stated than in a late Missouri case, where it is said: "If the negligence of a defendant which contributed directly to cause the injury occurred after the danger in which the injured party had placed himself by his own negligence, was or, by the exercise of reasonable care might have been, discovered by the defendant in time to have averted the injury, then defendant is liable, however gross the negligence of the injured party may have been in placing himself in such position of danger." Werner *v.* Citizens' R. Co., 81 Mo. 368, *quoted* in Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 677.

And the Supreme Court of Maryland thus states the same doctrine: "The governing principle established by the courts may now be clearly and concisely expressed in a very few words. If both parties have been negligent, but want of due care and caution on the part of the plaintiff was the direct cause of the injury, or, in other words, if the injury could not have been sustained if the plaintiff had not been careless and neglectful in providing for his safety, there can be no recovery in the action. But if, on the other hand, it is apparent from the evidence that the plaintiff, although negligent, would have suffered no injury had proper care and caution been observed by the defendant, the right of action is maintainable." Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 28 Am. & Eng. R. Cas. 584.

The Supreme Court of North Carolina quotes and approves the statement of the rule in the text, saying: "The foregoing extract is taken from the able article on 'Contributory Negligence' in the AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW (1st ed., vol. 4, p. 27), and is sustained by Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, and numerous authorities cited in the notes, and also by our own decisions." Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728.

For Further Authorities sustaining the principle, see:

England. — Radley *v.* London, etc., R. Co., L. R. 1 App. 754; 2 Thomp. on Neg. 1108; Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, 5 C. B. N. S. 573, 94 E. C. L. 573, 27 L. J. C. P. 322.

Connecticut. — Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Maryland. — Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 28 Am. & Eng. R. Cas. 584.

Missouri. — Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 677; Keim *v.* Union R., etc., Co., 90 Mo. 314; Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280, 10 Am. & Eng. R. Cas. 780; Werner *v.* Citizens' R. Co., 81 Mo. 374; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22; Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553, 41 Am. Rep. 333, 7 Am. & Eng. R. Cas. 414.

South Carolina. — Note to Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 669.

How Applied to Trespassers. — But it seems that the doctrine of the *Missouri* cases above cited will not be invoked to hold a defendant liable for an injury to a trespasser, unless his danger was actually discovered. Rine *v.* Chicago, etc., R. Co., 88 Mo. 392, 25 Am. & Eng. R. Cas. 545; Keim *v.* Union R., etc., Co., 90 Mo. 314; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 677; Bell *v.* Hannibal, etc., R. Co., 86 Mo. 599. And so it has been held in other jurisdictions. Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257; McAllister *v.* Burlington, etc., R. Co., 64 Iowa 395, 19 Am. & Eng. R. Cas. 108; Burnett *v.* Burlington, etc., R. Co., 16 Neb. 332, 19 Am. & Eng. R. Cas. 25; Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595; International, etc., R. Co. *v.* Smith, 62 Tex. 252, 19 Am. & Eng. R. Cas. 21; Central R. Co. *v.* Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42; Patterson's Ry. Acc. Law, 192. But these cases may rest on the principle that it is no want of ordinary care not to look out for persons where they have no right to be. Newport News, etc., Co. *v.* Howe, 6 U. S. App. 186. And the trainmen in such cases, even when a trespasser is seen, may usually depend on him to leave the track in time to avoid injury, if he appears to be a person of average capacity. See Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595; Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784. But see Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565.

1. Wharton on Neg. (2d ed.), §§ 323-325; Pollock on Torts 378; Pierce on Railroads 327.

2. **Plaintiff's Subsequent Negligence a Bar.** — "The established doctrine now is that although the defendant's misconduct may have been the primary cause of the injury complained of, yet the plaintiff cannot recover in an action of this kind if the proximate and immediate cause of the damage can be traced to a want of ordinary care and caution on his part." Irwin *v.* Sprigg, 6 Gill (Md.) 200, 46 Am. Dec. 669.

England. — Witherley *v.* Regents' Canal Co., 12 C. B. N. S. 2, 104 E. C. L. 2; Alston *v.* Herring, 11 Exch. 822; Flower *v.* Adam, 2 Taunt. 314.

Alabama. — Gothard *v.* Alabama G. S. R. Co., 67 Ala. 114; Lilley *v.* Fletcher, 81 Ala. 234.

Georgia. — Macon, etc., R. Co. *v.* Winn, 19 Ga. 440.

Illinois. — Illinois Cent. R. Co. *v.* McClel-

Where Negligence of Other Party Might Have Been Discovered by Ordinary Care. — And upon the principle that one will be charged with notice of that which by ordinary care he might have known, it is held that if either party to an action involving the questions of negligence and contributory negligence should, by the exercise of ordinary care, have discovered the negligence of the other, after its occurrence, in time to foresee and avoid its consequences, then such party is held to have notice; and his negligence in not discovering the negligence of the other, under such circumstances, is held the sole proximate cause of a following injury.[1] But if, in the exercise of ordinary care, the one party would not have discovered the negligence of the other in time to avoid the injury, the rule just stated has no application;[2] and it is only when the negligence of one party is subsequent to that of the other that the rule can be invoked.[3]

When the Negligence of the Two Parties Is Concurrent at the time of the injury, it makes no difference that one discovered the negligence of the other before the catastrophe, but too late to prevent it.[4] In such case the negligence of each is proximate, and contributory negligence bars a recovery.[5]

VII. AGGRAVATION OF INJURY BY PLAINTIFF'S NEGLIGENCE. — While the negligence of the injured person contributing proximately to his injury will bar his recovery of damages, it is held that when he was guilty of no negligence contributing to the injury, negligence upon his part after the injury, by which it is aggravated, will not prevent him from recovering damages for so much

land, 42 Ill. 355; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447, 5 Am. Rep. 57.

Iowa. — Hoehl *v.* Muscatine, 57 Iowa 444.

Maryland. — Irwin *v.* Sprigg, 6 Gill (Md.) 200, 46 Am. Dec. 669.

Missouri. — Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434.

New Jersey. — Dudley *v.* Camden, etc., Ferry Co., 45 N. J. L. 368, 46 Am. Rep. 781, 29 Alb. L. J. 42.

Virginia. — Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 754.

West Virginia. — Note the language of Green, P. J., in Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 10 Am. & Eng. R. Cas. 755.

1. Rule When Negligence Might Have Been Discovered by Ordinary Care. — The doctrine of the text is approved by the Supreme Court of the United States in a recent case where the first edition of this article is cited. Grand Trunk R. Co. *v.* Ives, 144 U. S. 430. And it is well supported by the following cases:

Iowa. — O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467; Morris *v.* Chicago, etc., R. Co., 45 Iowa 29.

Maine. — Purinton *v.* Maine Cent. R. Co., 78 Me. 569.

Maryland. — Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Minnesota. — Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

Missouri. — Nelson *v.* Atlantic, etc., R. Co., 68 Mo. 593; Donohue *v.* St. Louis, etc., R. Co. 91 Mo. 357.

New York. — Barker *v.* Savage, 45 N. Y. 194, 6 Am. Rep. 66.

Pennsylvania. — Brown *v.* Lynn, 31 Pa. St. 510, 72 Am. Dec. 768.

2. When the Rule Does Not Apply. — But "where the manifestation of the peril and the catastrophe are so close, in point of time, as to leave no room for preventive effort," the rule (as above stated) will not apply. Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565. And see Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595; Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784. See also the following cases:

Colorado. — Colorado Cent. R. Co. *v.* Holmes, 5 Colo. 197, 8 Am. & Eng. R. Cas. 410.

Illinois. — Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 231.

Maryland. — Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391, 19 Am. & Eng R. Cas. 261; Kean *v.* Baltimore, etc., R. Co., 61 Md. 154, 19 Am. & Eng. R. Cas. 321.

Missouri. — Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; Price *v.* St. Louis, etc., R. Co., 72 Mo. 414, 3 Am. & Eng. R. Cas. 377.

Texas. — Texas, etc., R. Co. *v.* Barfield, (Tex. 1887) 3 S. W. Rep. 665.

3. When the Rule Can Be Invoked. — See Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390; Bigelow on Torts, 311.

4. Has No Application When Negligence Concurrent. — Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565; Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 196.

5. Bigelow on Torts, 311, 312; Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406; Waite *v.* North Eastern R. Co., El. Bl. & El. 719, 96 E. C. L. 719; Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67; Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390. In considering the case of Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390, it should be borne in mind that many of its statements are fully applicable only where the rule prevails that the burden of disproving contributory negligence is on the plaintiff. Such is not the English rule.

of the injury as the original wrongdoer caused by his negligence.[1] In such cases it seems that the damages may be apportioned or allowance made by the jury for that portion of the injury due to the plaintiff's fault.[2]

VIII. Injury Enhanced by Disease — 1. Defendant's Negligence Causing or Aggravating Disease. — In cases where the defendant's negligence caused a disease,[3] developed a latent tendency to disease,[4] aggravated a prior disease,[5] or led in immediate sequence to disease,[6] the defendant must respond in damages for such part of the diseased condition as his negligence caused.[7]

And If There Can Be No Apportionment, or if it cannot be said that the disease would have existed apart from the injury inflicted by the defendant, then the defendant is responsible for the diseased condition.[8]

2. Diseased Condition Independent of Injury — Defendant's Knowledge. — But

1. Plaintiff's Negligence After Injury — *England.* — Greenland *v.* Chaplin, 5 Exch. 243; Sills *v.* Brown, 9 C. & P. 601, 38 E. C. L. 245.

United States. — Secord *v.* St. Paul, etc., R. Co., 5 McCrary (U. S.) 515, 18 Fed. Rep. 221.

Indiana. — Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 424, 23 Am. & Eng. R. Cas. 522.

New York. — Thomas *v.* Kenyon, 1 Daly (N. Y.) 132.

Vermont. — Stebbins *v.* Central Vermont R. Co., 54 Vt. 464, 11 Am. & Eng. R. Cas. 79, 41 Am. Rep. 855.

2. May Lead to Apportionment of Damages — *England.* — Nitro-Phosphate, etc., Chemical Manure Co. *v.* London, etc., Docks Co., 9 Ch. Div. 503.

Indiana. — Louisville etc., R. Co. *v.* Falvey, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522.

Iowa. — Wright *v.* Illinois, etc., Tel. Co., 20 Iowa 195.

Massachusetts. — Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343; Sherman *v.* Fall River Iron Works Co., 2 Allen (Mass.) 524, 79 Am. Dec. 799; Hibbard *v.* Thompson, 109 Mass. 286.

New Hampshire. — Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

New York. — Chase *v.* New York Cent. R. Co., 24 Barb. (N. Y.) 273.

Pennsylvania. — Gould *v.* McKenna, 86 Pa. St. 297, 27 Am. Rep. 706.

Virginia. — Matthews *v.* Warner, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

See *infra*, this title, *Apportionment of Damages.*

3. Defendant's Negligence Causing a Disease — *Maryland.* — Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 619, 48 Am. Rep. 134.

New York. — Ginna *v.* Second Ave. R. Co., 8 Hun (N. Y.) 494, 67 N. Y. 596.

Texas. — Houston, etc., R. *v.* Leslie, 57 Tex. 83, 9 Am. & Eng. R. Cas. 407.

4. Developing a Latent Tendency to Disease — *Indiana.* — Jeffersonville, etc., R. Co. *v.* Riley, 39 Ind. 568.

Louisiana.—Lapleine *v.* Morgan's Louisiana, etc., R., etc., Co., 40 La. Ann. 661.

Wisconsin. — Stewart *v.* Ripon, 38 Wis. 584.

5. Aggravating a Prior Disease — *Indiana.* — Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522; Louisville, etc., R. Co. *v.* Snyder, 117 Ind. 435, 10 Am. St. Rep. 60; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544.

Iowa. — Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

Maryland. — Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545.

Tennessee. — Louisville, etc., R. Co. *v.* Northington, 91 Tenn. 56.

6. Leading Directly to Disease — *Indiana.* — Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234, 49 Am. Rep. 168.

Michigan. — Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 45 Am. Rep. 30.

Minnesota. — Bishop *v.* St. Paul City R. Co., 48 Minn. 26.

Mississippi. — Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

New York. — Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

Wisconsin. — Jucker *v.* Chicago, etc., R. Co., 52 Wis. 150, 2 Am. & Eng. R. Cas. 41; Delie *v.* Chicago, etc., R. Co., 51 Wis. 400, 5 Am. & Eng. R. Cas. 464.

7. Measure of Damages — How Apportioned — *United States.* — U. S. *v.* Warner, 4 McLean (U. S.) 464.

Alabama. — State *v.* Morea, 2 Ala. 275; McAllister *v.* State, 17 Ala. 434, 52 Am. Dec. 180.

Indiana. — Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 28 Am. & Eng. R. Cas. 170; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522.

Massachusetts. — Com. *v.* Fox, 7 Gray (Mass.) 585.

Mississippi. — Mobile, etc., R. Co. *v.* McArthur, 43 Miss. 180.

Pennsylvania. — Com. *v.* Green, 1 Ashm. (Pa.) 289.

"Here, as I understand the findings of the jury, the plaintiff's injuries would not have been suffered but for the strain and shock of the accident. While both causes were proximate, that was the nearest and most direct. Still further. It was certainly impossible for the plaintiff to prove, or for the jury to find, how much of the injury was due to either cause alone. It was wholly impossible to apportion the damages between the two causes. Shall this difficulty deprive the plaintiff of all remedy? We answer, No. The wrong of the defendant placed the plaintiff in this dilemma, and it cannot complain if it is held for the entire damage." Earl, J., in Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622.

8. When No Apportionment — *New York.* — Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574.

Wisconsin. — McNamara *v.* Clintonville, 62 Wis. 207, 51 Am. Rep. 722.

when the diseased condition exists independently of the injury, and does not flow from it as a natural consequence following in direct sequence, the defendant's liability is only for such consequences as, independently of the diseased condition, were directly and immediately caused by his negligence.[1]

Yet If He Knew of the Diseased Condition, and could have foreseen that it would aggravate an injury inflicted by his negligence, he is liable for the entire consequences that flow from the combination of his negligence with the existing diseased condition.[2]

3. Direct and Natural Consequences — Carriers. — And so the defendant is liable for negligently causing a natural function or condition to become disordered, and must respond in damages for all the direct and natural consequences, however unusual or unexpected.[3] And this doctrine is particularly applicable when the person guilty of the negligence owes a special duty to the person injured, — for example, to carry safely.[4]

Action Arising Out of Contract — Sounding in Tort. — In such cases it is generally held that the action, although it may arise out of contract, sounds in tort, and the negligent person must answer for all the natural consequences of his wrongful act.[5]

Particular Consequences Need Not Have Been Foreseen. — The principle, as applied to carriers of passengers, is, that they should be liable for any consequences of their negligence which are proximately and in natural sequence caused by such negligence, even though such consequences would not ordinarily have been expected to follow.[6]

1. Defendant Not Liable for Consequences of Disease Alone — *United States.* — Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 249, 8 Am. & Eng. R. Cas. 59; Barry *v.* U. S. Mutual Acc. Assoc., 23 Fed. Rep. 716.

Colorado. — Pullman Palace Car Co. *v.* Barker, 4 Colo. 344, 34 Am. Rep. 89.

Illinois. — Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391.

Indiana. — Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 28 Am. & Eng. R. Cas. 170; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522.

Iowa. — Kitteringham *v.* Sioux City, etc., R. Co., 62 Iowa 285, 18 Am. & Eng. R. Cas. 14.

New York. — McCarthy *v.* Travelers' Ins. Co., 8 Ins. L. J. 208.

Pennsylvania. — Gould *v.* McKenna, 86 Pa. St. 297, 27 Am. Rep. 705.

2. When Liable for Aggravation — *Colorado.* — Pullman Palace Car Co. *v.* Barker, 4 Colo. 344, 34 Am. Rep. 89.

Mississippi. — New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478.

Wisconsin. — Stewart *v.* Ripon, 38 Wis. 584.

3. And All Natural Consequences of Injury — *England.* — Fitzpatrick *v.* Great Western R. Co., 12 U. C. Q. B. 645.

Mississippi. — Heirn *v.* M'Caughan, 32 Miss. 17, 66 Am. Dec. 588; Barbee *v.* Reese, 60 Miss. 906.

Wisconsin. — Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 3 Am. & Eng. R. Cas. 444, 41 Am. Rep. 41, and note; Oliver *v.* LaValle, 36 Wis. 592.

4. Especially When Owing Special Duty — *Maryland.* — Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 619, 48 Am. Rep. 134, 18 Am. & Eng. R. Cas. 232.

5. The Action May Arise in Contract, but Sounds in Tort — *Illinois.* — Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688, 11 Am. & Eng. R. Cas. 92, and note.

Indiana. — Lake Erie, etc., R. Co. *v.* Acres, 108 Ind. 548, 28 Am. & Eng. R. Cas. 112; Cincinnati, etc., R. Co. *v.* Eaton, 94 Ind. 474, 48 Am. Rep. 179, 18 Am. & Eng. R. Cas. 254.

Maryland. — Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 619, 48 Am. Rep. 134, 18 Am. & Eng. R. Cas. 233.

Massachusetts. — School Dist. *v.* Boston, etc., R. Co., 102 Mass. 552, 3 Am. Rep. 502.

New York. — Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622; Cregin *v.* Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459.

Wisconsin. — Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 41 Am. Rep. 41, and note.

But where the action is in form purely *ex contractu*, only such damages can be recovered as could reasonably have been foreseen, when the contract was made, as likely to follow its breach, or which flow naturally from such breach.

England. — Hobbs *v.* London, etc., R. Co., L. R. 10 Q. B. 111; Hadley *v.* Baxendale, 9 Exch. 341.

Colorado. — Pullman Palace Car Co. *v.* Barker, 4 Colo. 344, 34 Am. Rep. 89.

Illinois. — Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391.

Massachusetts. — Murdock *v.* Boston, etc., R. Co., 133 Mass. 15, 6 Am. & Eng. R. Cas. 406.

Missouri. — Francis *v.* St. Louis Transfer Co., 5 Mo. App. 7.

Wisconsin. — Walsh *v.* Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376.

6. Not Necessary that Particular Consequences Should Have Been Foreseen — *England.* — Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14.

United States. — Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 475.

Indiana. — Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168, 18 Am. & Eng. R. Cas. 234.

4. Diseased Condition Must Be Traced to Injury. — But it would seem that a carrier should not be held liable for a diseased condition when it cannot be told whether the condition is in any manner attributable to the negligence of the carrier, or wholly arises from other causes.[1] In other words, the plaintiff must show, by a preponderance of the evidence, that his diseased condition is due, in whole or in part, to the negligence of the defendant; and this he does not do if the evidence shows another probable efficient cause of the condition, without showing that such other probable cause was not really the efficient, immediate cause thereof.[2] But where no other proximate cause of a diseased condition or injury except the defendant's negligence can be found, then such negligence will be held the sole proximate cause thereof.[3]

And Subsequently Developed Diseases, apparently flowing from the defendant's negligence, must be shown to be due to some other cause, or the defendant's negligence will be held the proximate cause of such condition.[4]

Question for Jury. — And in all such cases it should be left to the jury, under proper instructions, to determine whether the diseased condition is in whole or in part attributable to the defendant's negligence,[5] and whether the plaintiff's conduct — he having notice of a prior disease, or predisposition to disease — was such as to constitute contributory negligence, and become a proximate cause of an aggravation or development of disease.[6]

Maryland. — Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 74, 18 Am. & Eng. R. Cas. 220.

Michigan. — Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 45 Am. Rep. 30.

Wisconsin. — McNamara *v.* Clintonville, 62 Wis. 207, 51 Am. Rep. 722.

1. No Liability if Negligence Not Shown to Be Cause of Disease — *United States.* — Barry *v.* U. S. Mutual Acc. Assoc., 23 Fed. Rep. 716.

Iowa. — Kitteringham *v.* Sioux City, etc., R. Co., 62 Iowa 285, 18 Am. & Eng. R. Cas. 14.

Missouri. — Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460, 25 Am. & Eng. R. Cas. 327.

New York. — Grotsch *v.* Steinway R. Co., 19 N. Y. App. Div. 130.

2. Any Diseased Condition Must Be Traced to Injury — *Iowa.* — Dubuque Wood, etc., Assoc. *v.* Dubuque, 30 Iowa 176.

Massachusetts. — Marble *v.* Worcester, 4 Gray (Mass.) 402.

New York. — Searles *v.* Manhattan R. Co., 101 N. Y. 662, 25 Am. & Eng. R. Cas. 358.

Ohio. — Reading City Pass. R. Co. *v.* Eckert, (Pa. 1886) 2 Cent. Rep. 793.

3. But This Is Done if No Other Efficient Cause Appears — *United States.* — Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 249, 8 Am. & Eng. R. Cas. 61.

Indiana. — Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168, 18 Am. & Eng. R. Cas. 234.

4. And if Another Cause Exists, Defendant Must Show It — *Indiana.* — Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 28 Am. & Eng. R. Cas. 170.

Maryland. — Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 74, 619, 48 Am. Rep. 134, 18 Am. & Eng. R. Cas. 220.

Michigan. — Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 45 Am. Rep. 30.

Wisconsin. — Jucker *v.* Chicago, etc., R. Co., 52 Wis. 150, 2 Am. & Eng. R. Cas. 41; Delie *v.* Chicago, etc., R. Co., 51 Wis. 400, 5 Am. & Eng. R. Cas. 464.

5. But It Is for the Jury to Determine the Question — *Indiana.* — Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 28 Am. & Eng. R. Cas. 170; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168, 18 Am. & Eng. R. Cas. 234.

Maryland. — Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 74, 619, 18 Am. & Eng. R. Cas. 220, 48 Am. Rep. 134.

Wisconsin. — Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 3 Am. & Eng. R. Cas. 444, 41 Am. Rep. 41.

6. Diseased Condition as Evidence of Contributory Negligence. — The principle stated in the text legitimately results from the preceding doctrines, although, perhaps, it cannot be supported by any direct authority. If a man in the last stages of heart disease should become a passenger on a railway train, knowing his own condition, but giving no notice of it to the carrier, and while being carried by the railway his death should be occasioned and hastened by a slight shock, insufficient to injure even a delicate woman, it might very properly be left to the jury to say whether the passenger had not assumed the risk, or been guilty of contributory negligence, in so taking passage; and perhaps in such case it might be said, as matter of law, the facts being undisputed, that the heart disease was the proximate cause, and the railway shock only the immediate occasion, of the death of the passenger. The case of Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460, 25 Am. & Eng. R. Cas. 327, supports the doctrine of this illustration as to proximate cause; and Reading City Pass. R. Co. *v.* Eckert, (Pa. 1886) 2 Cent. Rep. 793, may be regarded as in line with the text, as well as with the doctrine of this note. See also Renneker *v.* South Carolina R. Co., 20 S. Car. 219, 18 Am. & Eng. R. Cas. 152; Willetts *v.* Buffalo, etc., R. Co., 14 Barb. (N. Y.) 585.

5. Injury or Disease Enhanced by Surgical Operation. — But where an injury or disease is caused by the negligence of a defendant, it will be no defense for him that such injury or disease was enhanced by surgical treatment, provided the person injured used reasonable care in the selection of a surgeon.[1]

IX. KNOWLEDGE OF THE DANGER — 1. On Part of Plaintiff — Ignorant of the Danger. — If the injured person had no actual knowledge of the danger that threatened him, and if in the exercise of ordinary care under the circumstances he would not have apprehended such danger in time to avoid the consequences of the defendant's negligence, he cannot be charged with contributory negligence.[2]

1. Surgical Treatment Enhancing Effects of Injury — *Illinois.* — Pullman Palace Car Co. *v.* Bluhm, 109 Ill. 20, 50 Am. Rep. 601, 18 Am. & Eng. R. Cas. 87.

Iowa. — Collins *v.* Council Bluffs, 32 Iowa 324, 7 Am. Rep. 200.

New York. — Sauter *v.* New York Cent., etc., R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Lyons *v.* Erie R. Co., 57 N. Y. 489; Ginna *v.* Second Ave. R. Co., 8 Hun (N. Y.) 494, 67 N. Y. 596.

Wisconsin. — Page *v.* Sumpter, 53 Wis. 652.

2. Plaintiff Ignorant of Danger — *United States.* — Bennett *v.* Louisville, etc., R. Co., 102 U. S. 577, 1 Am. & Eng. R. Cas. 71; Crane Elevator Co. *v.* Lippert, 63 Fed. Rep. 942.

California. — O'Callaghan *v.* Bode, 84 Cal. 489; Davis *v.* Pacific Power Co., 107 Cal. 563, 48 Am. St. Rep. 156.

Illinois. — Hayward *v.* Merrill, 94 Ill. 349, 34 Am. Rep. 229, and note.

Iowa. — Jeffrey *v.* Keokuk, etc., R. Co., 56 Iowa 546, 5 Am. & Eng. R. Cas. 568.

Maryland. — Murray *v.* McShane, 52 Md. 217, 36 Am. Rep. 367.

Massachusetts. — Whitten *v.* Hartin, 163 Mass. 39.

Missouri. — Langan *v.* St. Louis, etc., R. Co., 72 Mo. 392, 3 Am. & Eng. R. Cas. 355; O'Brien *v.* Western Steel Co., 100 Mo. 182; O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 150.

New Hampshire. — Varney *v.* Manchester, 58 N. H. 430, 42 Am. Rep. 592.

New York. — McGuire *v.* Spence, 91 N. Y. 303, 43 Am. Rep. 668; McGarry *v.* Loomis, 63 N. Y 104, 20 Am. Rep. 510; Jennings *v.* Van Schaick, 108 N. Y. 530, 2 Am. St. Rep. 459; Sickles *v.* New Jersey Ice Co., 80 Hun (N. Y.) 213.

Pennsylvania. — Gray *v.* Scott, 66 Pa. St. 345, 5 Am. Rep. 371; Thirteenth, etc., St. Pass. R. Co. *v.* Boudrou, 92 Pa. St. 475, 37 Am. Rep. 707, 2 Am. & Eng. R. Cas. 30; Baltimore, etc., R. Co. *v.* Colvin, 118 Pa. St. 230.

Rhode Island. — Maguire *v.* Little, (R. I. 1887) 13 Atl. Rep. 108.

South Carolina. — Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 663, and note 672.

Tennessee. — Dush *v.* Fitzhugh, 2 Lea (Tenn.) 307.

West Virginia. — Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579, 8 Am. & Eng. R. Cas. 480; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 10 Am. & Eng. R. Cas. 749.

" [Contributory] negligence is not imputable to a person for failing to look out for a danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended." Langan *v.* St. Louis, etc., R. Co., 72 Mo. 392, 3 Am. & Eng. R. Cas. 355.

It is also somewhat loosely said that a person is not chargeable with contributory negligence in failing to anticipate the fault or negligence of another, 2 Thomp. on Neg. 1172, § 18; Shearman & Redf. on Neg., § 31; Deering on Neg., § 16; and that one person has a right to rely upon the presumption that another will act with due care, Shearman & Redf. on Neg., § 31; Deering on Neg., § 16; and many cases are cited in support of these statements of the rule.

England. — The Mangerton, 1 Swab. 120; Vennall *v.* Garner, 1 Cromp. & M. 21; Gee *v.* Metropolitan R. Co., L. R. 8 Q. B. 171; Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L. 439; Foy *v.* London, etc., R. Co., 18 C. B. N. S. 225, 114 E. C. L. 225.

California. — Shea *v.* Potrero, etc., R. Co., 44 Cal. 414; Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Fraler *v.* Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562.

Colorado. — Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30.

Iowa. — Damour *v.* Lyons City, 44 Iowa 276.

Kansas. — Moulton *v.* Aldrich, 28 Kan. 300.

Massachusetts. — Fox *v.* Sackett, 10 Allen (Mass.) 535, 87 Am. Dec. 682; Fisk *v.* Wait, 104 Mass. 71.

Missouri. — Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Thomp. Car. of Pass. 243.

New York. — Harpell *v.* Curtis, 1 E. D. Smith (N. Y.) 78; Newson *v.* New York Cent. R. Co., 29 N. Y. 383; Ernst *v.* Hudson River R. Co., 35 N. Y. 35, 90 Am. Dec. 761; Barton *v.* Syracuse, 37 Barb. (N. Y.) 299; Carroll *v.* New York, etc., R. Co., 1 Duer (N. Y.) 571; Beisiegel *v.* New York Cent. R. Co., 34 N. Y. 622, 90 Am. Dec. 741.

Ohio. — Baker *v.* Pendergrast, 8 Cent. L. J. 334; Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

Pennsylvania. — Brown *v.* Lynn, 31 Pa. St. 510, 72 Am. Dec. 768; Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713; Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244.

West Virginia. — Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14.

Wisconsin. — Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

But these cases do not have the meaning that is imputed to them by the rule as stated. They hold either, first, the doctrine of the text, that it is not contributory negligence not to look out for danger when there is no reason to apprehend any; or, secondly, that a mere failure to anticipate the negligence or wrong-doing of another is not contributory negligence when

Reason to Apprehend Danger Must Exist. — It follows that there must be knowledge of the danger, or sufficient reason to apprehend it to put a reasonable and careful man on his guard, or there can be no contributory negligence.[1]

Knowledge of Danger Not Negligence Per Se. — But even though the person injured knew of the danger or had reason to apprehend it, yet it does not necessarily follow that he has been guilty of contributory negligence. Notwithstanding his knowledge of or reason to apprehend danger, he may have been in the exercise of ordinary care to avoid injury; and in such event his injury may be solely due to the negligence of another.[2] Thus one may voluntarily and unnecessarily expose himself or his property to a known danger, without being guilty of contributory negligence as a matter of law;[3] and while in so doing

it does not amount to a want of ordinary care, or is only a remote cause of the mere condition of the injury; and so the rule is understood and stated by Mr. Beach. Beach on Cont. Neg. (2d ed.), §§ 38, 39. See also Miller *v.* Terre Haute, etc., R. Co., 144 Ind. 328, *citing* 4 AM. AND ENG. ENCYC. OF LAW, (1st ed.) p. 34.

1. Reason to Apprehend Danger Must Exist. — Deering on Neg., § 16; Beach on Cont. Neg., p. 39. See also cases cited in note preceding.

United States. — The Jersey City, 46 Fed. Rep. 134.

Alabama. — Anniston Pipe Works *v.* Dickey, 93 Ala. 418; Birmingham Water-Works Co. *v.* Hubbard, 85 Ala. 179, 7 Am. St. Rep. 35.

California. — O'Callaghan *v.* Bode, 84 Cal. 489.

District of Columbia. — Cullen *v.* Baltimore, etc., R. Co., 8 App. Cas. (D. C.) 69.

Georgia. — Nelling *v.* Industrial Mfg. Co., 78 Ga. 260; Montgomery *v.* East Tennessee, etc., R. Co., 94 Ga. 332.

Illinois. — Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232.

Indiana. — Valparaiso *v.* Ramsey, (Ind. App. 1894) 38 N. E. Rep. 875.

Kansas. — Union Pac. R. Co. *v.* Hutchinson, 39 Kan. 485.

Michigan. — French *v.* Detroit, etc., R. Co., 89 Mich. 537.

Missouri. — O'Donnell *v.* Patton, 117 Mo. 13; Hudson *v.* Wabash Western R. Co., 123 Mo. 445; Moore *v.* Kansas City, etc., R. Co., 126 Mo. 265; Thorpe *v.* Missouri Pac. R. Co., 89 Mo. 650, 58 Am. Rep. 120; Neier *v.* Missouri Pac. R. Co., (Mo. 1886) 1 S. W. Rep. 387.

New York. — Hilsenbeck *v.* Guhring, 131 N. Y. 674, 30 N. E. Rep. 580; Odell *v.* New York Cent., etc., R. Co., 120 N. Y. 323, 17 Am. St. Rep. 650; Splittorf *v.* State, 108 N. Y. 205; Carr *v.* Sheehan, 81 Hun (N. Y.) 291.

Pennsylvania. — Barnes *v.* Sowden, 119 Pa. St. 53; Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. Rep. 624; Allen *v.* Pennsylvania R. Co., (Pa. 1888) 12 Atl. Rep. 493; Ferguson *v.* Traction Co., 47 Phila. Leg. Int. 494; Ingram *v.* Lehigh Coal, etc., Co., 148 Pa. St. 177.

Texas. — Wilson *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. Rep. 753; Missouri Pac. R. Co. *v.* Lehmberg, 75 Tex. 61; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582.

Vermont. — Magoon *v.* Boston, etc., R. Co., 67 Vt. 177.

Wisconsin. — McCabe *v.* Chicago, etc., R. Co., 88 Wis. 531.

2. But Knowledge of Danger Not Negligence Per Se — *England.* — Dublin, etc., R. Co. *v.* Slattery, L. R. 3 App. 1155, 19 Alb. L. J. 70.

Alabama. — Alabama G. S. R. Co. *v.* Arnold, 84 Ala. 159, 5 Am. St. Rep. 354.

Arkansas. — St. Louis, etc., R. Co. *v.* Box, 52 Ark. 368.

Georgia. — Samples *v.* Atlanta, 94 Ga. 116, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 35.

Indiana. — Turner *v.* Buchanan, 82 Ind. 147, 42 Am. Rep. 485; Henry County Turnpike Co. *v.* Jackson, 86 Ind. 111, 44 Am. Rep. 274; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230.

Iowa. — Jeffrey *v.* Keokuk, etc., R. Co., 56 Iowa 546, 5 Am. & Eng. R. Cas. 568.

Kansas. — Osage City *v.* Brown, 27 Kan. 74.

Kentucky. — White *v.* Cincinnati, etc. R. Co., 89 Ky. 478.

Massachusetts. — Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Frost *v.* Waltham, 12 Allen (Mass.) 85; Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 450, 85 Am. Dec. 720; Coombs *v.* New Bedford Cordage Co., 102 Mass. 585, 3 Am. Rep. 506; Marble *v.* Ross, 124 Mass. 44; Mahoney *v.* Metropolitan R. Co., 104 Mass. 73; Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219.

Minnesota. — Estelle *v.* Lake Crystal, 27 Minn. 243.

Nebraska. — Beatrice *v.* Reid, 41 Neb. 214.

New York. — Weed *v.* Ballston Spa, 76 N. Y. 329; Thomas *v.* New York, 28 Hun (N. Y.) 110; Evans *v.* Utica, 69 N. Y. 166, 25 Am. Rep. 165; Bassett *v.* Fish, 75 N. Y. 303; Ochsenbein *v.* Shapley, 85 N. Y. 214; Dollard *v.* Roberts, 130 N. Y. 269.

Ohio. — Schaefler *v.* Sandusky, 33 Ohio St. 246, 31 Am. Rep. 533; Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 38 Am. Rep. 597, 3 Am. & Eng. R. Cas. 361.

Pennsylvania. — Pittsburgh Southern R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580.

Wisconsin. — Wheeler *v.* Westport, 30 Wis. 392.

3. And Exposure to a Known Danger Not Always Negligence — *England.* — Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L. 439; Holmes *v.* Clarke, 6 H. & N. 349, 7 H. & N. 937; 2 Thomp. on Neg. 956, 966; Dublin, etc., R. Co. *v.* Slattery, L. R. 3 App. 1155, 19 Alb. L. J. 70.

District of Columbia. — District of Columbia *v.* Bolling, 22 Wash. L. Rep. (D. C.) 753.

Indiana. — Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 453, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 36.

he is held to assume all risks of injury which a careful and prudent person would apprehend as likely to flow from his conduct,[1] yet if injured by the negligence of another, without any negligence upon his own part proximately contributing to the injury, he may recover.[2]

Question for Jury. — And it is usually held a question for the jury whether he was in exercise of due care to avoid the known danger.[3]

But There Seems to Be a Presumption of Fact, which may be rebutted, that there has been contributory negligence.[4]

Iowa. — Baldwin *v.* St. Louis, etc., R. Co., 63 Iowa 210, 15 Am. & Eng. R. Cas. 166; Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 59.

Mississippi. — Smith *v.* Team, (Miss. 1894) 16 So. Rep. 492.

New York. — Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Kalbfleisch *v.* Long Island R. Co., 102 N. Y. 520, 29 Am. & Eng. R. Cas. 179, 55 Am. Rep. 833; Rexter *v.* Starin, 73 N. Y. 601; Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212, 1 Am. & Eng. R. Cas. 122, 36 Am. Rep. 608; Willis *v.* Long Island R. Co., 34 N. Y. 670; Merwin *v.* Manhattan R. Co., 48 Hun (N. Y.) 608; Wood *v.* Brooklyn City R. Co., 5 N. Y. App. Div. 492; McGrath *v.* Brooklyn, etc., R. Co., 87 Hun (N. Y.) 310; Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495; Ginna *v.* Second Ave. R. Co., 67 N. Y. 596; Nolan *v.* Brooklyn City, etc., R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Taft *v.* Brooklyn Heights R. Co., 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 390; Hastings *v.* Central Crosstown R. Co., 7 N. Y. App. Div. 312; Spooner *v.* Brooklyn City R. Co., 54 N. Y. 230, 13 Am. Rep. 570; Sheridan *v.* Brooklyn, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490; Graham *v.* Manhattan R. Co., 149 N. Y. 336; Seelig *v.* Metropolitan St. R. Co., 18 Misc. Rep. (N. Y. City Ct.) 383; Vail *v.* Broadway R. Co., 147 N. Y. 377; Peil *v.* Reinhart, 127 N. Y. 381.

Wisconsin. — Fisher *v.* Franklin, 89 Wis. 42.

" It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by defendant's negligence, voluntarily incurs that danger." Harris *v.* Clinton Tp., 64 Mich. 447, 8 Am. St. Rep. 842.

So where a tenant, while using a stairway left in an unsafe condition by the landlord, was injured, it was said: " The fact, if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care." Looney *v.* McLean, 129 Mass. 33, 37 Am. Rep. 295; Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219.

" The fact that a person voluntarily takes some risk is not conclusive evidence, under all circumstances, that he is not using due care." Lawless *v.* Connecticut River R. Co., 136 Mass. 1, 18 Am. & Eng. R. Cas. 96.

1. But Person So Exposing Himself Assumes Ordinary Risks — *Alabama.* — Anniston Pipe Works *v.* Dickey, 93 Ala. 418.

California. — Noyes *v.* Southern Pac. R. Co., (Cal. 1890) 24 Pac. Rep. 927.

Pennsylvania. — Pittsburgh, etc., R., etc., Co. *v.* Collins, 87 Pa. St. 405, 30 Am. Rep. 371.

Wisconsin. — Goldstein *v.* Chicago, etc., R. Co., 46 Wis. 404.

Ohio. — The plaintiff " voluntarily and needlessly put himself in a highly dangerous place — a place, however, where he might go without incurring any liability as a wrong-doer, but where his own safety required his attention to his surroundings without one moment's interruption. If he risked himself in such a place, he must take whatever injury came from his own want of attention to his danger." Baltimore, etc., R. Co. *v.* Depew, 40 Ohio St. 127, 12 Am. & Eng. R. Cas. 64.

Kansas. — Corlett *v.* Leavenworth, 27 Kan. 673.

New York. — Mehan *v.* Syracuse, etc., R. Corp., 73 N. Y. 585.

Pennsylvania. — Erie *v.* Magill, 101 Pa. St. 616, 47 Am. Rep. 739; Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662.

2. When He May Recover for Negligent Injury. — " Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury if he has adopted the course which most prudent men would take under similar circumstances." Shearman & Redf. on Neg., § 31.

" This doctrine has often been applied, and is peculiarly applicable to cases like this. The obstruction is seen in the street. There is room to pass it. It is not known that it will cause fright; and the traveler, with due care, knowing the temper of his horses and having control of them, believing there is no danger, attempts to pass. In doing this, he is not guilty of negligence. He takes the risk which a prudent man would take, and nothing more. Such an assumption of risk affords no excuse for the wrong-doer — the party who wrongfully placed the obstruction in the street." Turner *v.* Buchanan, 82 Ind. 147, 42 Am. Rep. 485; Mahoney *v.* Metropolitan R. Co., 104 Mass. 73; Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219; Graham *v.* Manhattan R. Co., 149 N. Y. 336.

3. In Such Cases Jury to Decide — *Iowa.* — Hanlon *v.* Keokuk, 7 Iowa 488, 74 Am. Dec. 276.

Massachusetts. — Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219.

Michigan. — Harris *v.* Clinton Tp., 64 Mich. 447, 8 Am. St. Rep. 842.

New York. — Graham *v.* Manhattan R. Co., 149 N. Y. 336.

And this is the rule, even though it may be clear that the plaintiff's conduct is an endeavor to avoid danger actually contributed to his injury. Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 38 Am. Rep. 597, 3 Am. & Eng. R. Cas. 361.

4. But There Is a Rebuttable Presumption of Contributory Negligence — *Kansas.* — Osage City *v.* Brown, 27 Kan. 74.

2. On Part of Defendant. — The converse of some of the foregoing rules may be found in the doctrine, that if the defendant knew of, or had reason to apprehend, special dangers from his acts or omissions, or had greater capacity for understanding the harmful results likely to flow from his conduct than the injured person had, he will be liable, notwithstanding acts or omissions on the part of the injured person that, with equal knowledge of the danger or capacity to apprehend it, would have been contributory negligence.[1] This, however, is but a special application of the general rule, that in determining whether the plaintiff was guilty of a want of ordinary care contributing to his injury, his conduct and that of the defendant must be considered in the light of the attending circumstances; and, when so considered, a want of extraordinary care on the part of the plaintiff is not sufficient to bar his action, if the defendant, knowing of dangers which the plaintiff had no reason to apprehend, was guilty of a want of ordinary care to avoid injuring the plaintiff.[2]

X. Danger Incurred to Save Life — 1. General Rule Stated. — It is said that one who is injured by the negligence of another, while attempting to save the life of a person imperiled by that negligence, is not himself guilty of contributory negligence.[3] But the true rule in such cases is, that contributory

Massachusetts. — Marble *v.* Ross, 124 Mass. 44; Frost *v.* Waltham, 12 Allen (Mass.) 85; Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662.

Minnesota. — Estelle *v.* Lake Crystal, 27 Minn. 243.

Missouri. — Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Smith *v.* St. Joseph, 45 Mo. 449.

New York. — Evans *v.* Utica, 69 N. Y. 166, 25 Am. Rep. 165.

Pennsylvania. — Forks Tp. *v.* King, 84 Pa. St. 230.

Wisconsin. — Wheeler *v.* Westport, 30 Wis. 392.

1. Defendant Liable if He Knew of Danger When Plaintiff Ignorant of It. — Thus where a common laborer in an iron foundry was directed by the foreman to assist another employee in carrying a ladleful of molten iron over an icy passageway, and in so doing was killed by an explosion resulting from the spilling of the molten metal on the ice, it was held that although he had assumed the ordinary risks of the employment, and perhaps been careless in carrying the metal, yet he was not guilty of contributory negligence, and could not be held to have assumed the risk of the danger which caused his injury, because he was ignorant of the effects that would follow the contact of the molten metal with the ice, of which danger the foreman had full knowledge and failed to warn him. He took the risk of slipping, and may even have been careless in allowing the iron to spill, but he was not in a position to know the real danger or apprehend the injury that would result; hence the negligence of the foreman in sending him over the ice with the ladle of iron was the only negligent cause of the injury. In other words, the injured man, in view of his knowledge, exercised ordinary care, while the foreman, in view of his knowledge, did not. Smith *v.* Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542, 12 Am. & Eng. Corp. Cas. 269.

For Other Authorities on This Point, see:

England. — Lynch *v.* Nurdin, 1 Q. B. 29, 41 E. C. L. 422; Clark *v.* Chambers, 3 Q. B. Div. 327.

United States. — Stout *v.* Sioux City, etc., R. Co., 2 Dill. (U. S.) 294; Sioux City, etc., R. Co. *v.* Stout, 17 Wall. (U. S.) 657.

Indiana. — Baltimore, etc., R. Co. *v.* Rowan, 104 Ind. 88, 23 Am. & Eng. R. Cas. 390; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 22, 28 Am. & Eng. R. Cas. 308; St. Louis, etc., R. Co. *v.* Valirius, 56 Ind. 511.

Kentucky. — Bransom *v.* Labrot, 81 Ky. 638, 50 Am. Rep. 196.

Massachusetts. — Holden *v.* Fitchburg R. Co., 129 Mass. 268, 37 Am. Rep. 343; 2 Am. & Eng. R. Cas. 94.

Michigan. — Smith *v.* Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542, 12 Am. & Eng. Corp. Cas. 269.

Minnesota. — Keffe *v.* Milwaukee, etc., R. Co., 21 Minn. 207, 18 Am. Rep. 393.

New York. — Vosburgh *v.* Lake Shore, etc., R. Co., 94 N. Y. 374, 15 Am. & Eng. R. Cas. 249, 46 Am. Rep. 148; Van Houten *v.* Fleischman, 1 Misc. Rep. (N. Y. C. Pl.) 130.

Ohio. — Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322.

Vermont. — Davis *v.* Central Vermont R. Co., 55 Vt. 84, 11 Am. & Eng. R. Cas. 173, 45 Am. Rep. 590.

Wisconsin. — Jones *v.* Florence Min. Co., 66 Wis. 268, 57 Am. Rep. 269.

2. *California.* — Strong *v.* Sacramento, etc., R. Co., 61 Cal. 326, 8 Am. & Eng. R. Cas. 273.

Ohio. — Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Tennessee. — Whirley *v.* Whiteman, 1 Head (Tenn.) 611.

3. Not Contributory Negligence to Try to Save Life. — Beach on Cont. Neg. (2d ed.), p. 58. In the opening part of section 42 of his work Mr. Beach thus broadly states the rule, but this statement may be considered as qualified by the doctrines that immediately follow; whether it is negligent under the circumstances cannot usually be determined by the court as a matter of law.

negligence is a question of fact for the jury.[1] And if it appears that the attempt was not so rash as to entail certain injury, a recovery will be sustained.[2]

2. Danger Created by Wrongful Act. — "The fact that the injured person did some act by which he incurred or increased danger does not necessarily involve negligence which will prevent recovery, where the danger was created by some wrongful act" of the person inflicting the injury.[3]

3. Whether Negligence of Person Saved Imputed to Rescuer. — But it would seem that the contributory negligence of the person sought to be saved will be imputed to the savior;[4] yet if the act of the latter could have been discovered by the exercise of ordinary care by the defendant in time to avoid the infliction of the injury, although the danger of the person saved could not have been itself so discovered, the defendant is liable.[5]

4. Person Saved Non Sui Juris, or Not Negligent. — And so the defendant is liable when the person saved was incapable of contributory negligence,[6] or was free from such negligence,[7] provided there was negligence on the part of the defendant toward such person or toward the plaintiff.[8]

1. But the Question Is for the Jury. — Linnehan *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692.

2. When a Recovery May Be Had — *Kansas.* — Condiff *v.* Kansas City, etc., R. Co., 45 Kan. 256.

Ohio. — Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 29 Am. St. Rep. 553.

New York. — Eckert *v.* Long Island R. Co., 57 Barb. (N. Y.) 555, 43 N. Y. 503, 3 Am. Rep. 721; Gibney *v.* State, 137 N. Y. 1, 33 Am. St. Rep. 690.

3. Danger Created by Wrongful Act. — Pierce on Railroads 328.

New York. — Twombley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162, and note; Gibney *v.* State, 137 N. Y. 1, 33 Am. St. Rep. 690.

4. Whether Negligence of Saved Imputable to Savior. — "Why was Hiatt injured? Because his father was carelessly remaining upon the railroad track, in front of an approaching train, which it was his duty to avoid, * * * but which he carelessly failed to do. * * * If it be said that the father was old and feeble, and unable to get out of the way of the train, then we say the carelessness, the rashness, of going upon the track in front of an approaching train was still greater, and involves those who were with the old man, to some extent, in the carelessness, in not preventing him from going upon the track; or, at all events, keeping close to him with watchfulness while he was on it." Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 104.

The doctrine of the text is certainly reasonable. The person inflicting the injury should not be held liable unless he would have been liable to the person originally in danger, except in cases where he could, by the exercise of ordinary care, have discovered the danger of the rescuer in time to have avoided injuring him. See Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594.

5. When Not Imputable; Related Questions. — "It is to be observed that it is only when the railroad company, by its own negligence, created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person, and recover for an injury he may sustain in that attempt. For instance, if a man is lying on the track of a railroad, intoxicated or asleep, but in such a position that he could not be seen by the men managing an approaching train, and they had no warning of his situation, and another seeing his danger should go upon the track to save his life, and be injured by the train, he could not recover unless the trainmen were guilty of negligence with respect to the rescuer, occurring after the beginning of his attempt." Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594; Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 104.

6. Persons Saved Non Sui Juris. — "No negligence is imputable to a child as young as the one killed by this train." Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 597; Eckert *v.* Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721.

7. If Person Saved Not Negligent, Defendant Liable. — Perhaps no direct authority can be found for this position, but it follows of necessity from the doctrines of the cases heretofore cited. If the person saved was in danger without any fault on his own part, then the person who rescued him could stand in no worse position; but the doctrine might be qualified if the attempt at rescue should be made under such circumstances that it would be manifest that there was little hope of success, and if injury, in fact, followed to the person first in danger and the intended rescuer. And see Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 29 Am. St. Rep. 553.

8. Provided Defendant Was Negligent. — In the case of Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 594, already quoted from extensively, the facts were, that the plaintiff, Mrs. Donahoe, was struck and injured by a train while trying to save the life of her infant child, which had wandered upon a railroad track in front of an approaching train. In the course of a very admirable opinion, Henry, J., said: "If the railroad company is not chargeable with negligence with respect to the person in danger, the case of the person who attempted to rescue him and was injured must be determined with reference to the negligence of the company in its conduct towards him, and his in making the attempt. In other words, the negligence of the company

XI. Danger Incurred in Discharge of Duty — 1. General Rule. — A person whose duty it is to care for the safety of others intrusted to his care is not guilty of contributory negligence in remaining at his post of duty and sacrificing his life in endeavoring to avert a danger to those in his care, but from which he might have escaped himself.[1]

2. Where Danger Apparent. — He whose duty it is to care for the safety of others may do so, even though his duty leads him into great and visible dangers, and not be chargeable with contributory negligence.[2]

3. Person Injured Must Be Free from Fault. — But the injured person must not have created the danger or been guilty of the negligence from the consequences of which he tried to save others, or his recovery will be barred.[3] And it must appear that he was in the discharge of duty,[4] and could not, by the exercise of ordinary care, have performed his whole duty and yet escaped the danger.[5]

4. Public or Official Duty. — So a person who goes into a place of danger in the discharge of a public or official duty which rendered such exposure to danger necessary, and is there injured by the negligence of another, is not guilty of contributory negligence in incurring the danger, if he used due care under the circumstances to avoid injury therefrom.[6]

5. Private Duty of Imperative Obligation. — And the same principle applies where danger is knowingly incurred in the discharge of a private duty of imperative obligation, as where one goes into danger in the performance of necessary work.[7]

as to the person in danger is imputed to the company with respect to him who attempts the rescue; and if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the rescuer, after his efforts to rescue the person in danger commenced."

And this was all that was decided in the much misunderstood case of Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102. It is there said: "As the injured party, then, was in fault in continuing so long upon the track, if not, indeed, in going upon it at all under the circumstances, and the railroad operatives, after they discovered the condition of the persons, were guilty of no neglect in trying to avoid the collision, the plaintiff cannot recover." In another part of the opinion it is said that the railroad employees "were guilty of no manner of negligence whatever;" and this was the basis of the decision.

1. Not Contributory Negligence to Discharge Duty. — "A locomotive engineer, killed by remaining upon his engine when a collision was imminent, and taking measures to stop his train, is not chargeable with contributory negligence as matter of law, although he might have escaped injury by leaving his post." Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634, 32 Am. Rep. 796. See also Condiff *v.* Kansas City, etc., R. Co., 45 Kan. 256.

2. Even though Dangers Are Apparent. — "An engineer who remains at his post and faces danger is not to be deemed negligent. An engineer in charge of a train laden with men, women, and children is not bound to leap from his engine to escape impending danger. If he believes his duty requires him to do what he can to save those under his charge, and he braves death in the discharge of that duty, the law has for him no censure, but has, on the contrary, high commendation and respect." Pennsylvania Co. *v.* Roney, 89 Ind. 453, 12 Am. & Eng. R. Cas. 223, 46 Am. Rep. 173.

See also: *Georgia.* — Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463.

New York. — Gibney *v.* State, 137 N. Y. 1, 33 Am. St. Rep. 690.

3. But Persons So Injured Must Have Been Free from Fault — *Georgia.* — Central R. Co. *v.* Sears, 61 Ga. 279.

Ohio. — Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 29 Am. St. Rep. 553.

4. And in the Discharge of Duty — *Georgia.* — Atlanta, etc., Air Line R. Co. *v.* Ray, 70 Ga. 674, 22 Am. & Eng. R. Cas. 281; Central R. Co. *v.* Sears, 61 Ga. 279.

5. Where Ordinary Care Would Not Have Avoided Injury — *Georgia.* — Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463.

Wisconsin. — Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634, 32 Am. Rep. 796.

6. Injury When in Danger Because of Public Duty. — Thus a customs officer searching for smugglers along a wharf, and injured by falling into an opening left unguarded and unlighted, can recover, although, had he carried a light, he might have avoided the injury.

"It is noticeable that in arguing this point [contributory negligence] on the motion, the learned counsel for defendants fall back in part upon their original contention that the customs officer 'was obliged to move about at his own peril.' Not so. His duty carried him there in consequence of, and in connection with, the business which defendants had established there. The jury probably thought that if he went as a section of a torchlight procession, he might as well have stayed at home; that he was not in search of an honest man, and had no need of a lantern." Low *v.* Grand Trunk R. Co., 72 Me. 313, 39 Am. Rep. 331.

7. Private Duty of Imperative Obligation. — Thus when a common seaman, over his pro-

6. Assumption of Risks of Known Danger. — But in many such cases as this the person going into the place of danger is held to have assumed the risk of injury from the known danger,[1] although he may recover for an injury resulting from the negligence of another, and which he could not reasonably have foreseen as one of the hazards of the place.[2] In such an instance the injury results, not from a known danger, the risks of which were assumed, but from some extraneous cause.[3]

XII. Inevitable Accident — Concurring Causes — 1. Inevitable Accident Causing Injury. — There is no liability for an injury inflicted by one person on another, even though the injured person be free from fault, if the cause of the injury was so unusual that reasonable and careful human foresight could not have foreseen it as such, and therefore, under the circumstances, such care and foresight would not have guarded against it. Such an injury, without any want of ordinary care on the part of the person inflicting it, is held an inevitable accident.[4]

tests, was forced to go into a dangerous place by the commands of his superior, and was there injured, it was held that he was entitled to recover; and the case was distinguished from those cases which hold that an employee cannot recover for an injury resulting from his work in a dangerous place, the hazards of which he knew and assumed in taking employment. The court said: "'The master has an absolute authority on board his ship, and his orders, if not unlawful, are and must be imperative; submission is amongst the first duties of the seaman.' * * * The seaman on the voyage has no alternative but to obey, or suffer punishment." Thompson *v.* Hermann, 47 Wis. 602, 32 Am. Rep. 784.

And when a railway freight brakeman was killed by a collision between two freight cars, caused by the negligence of the company, it was held that he was not guilty of contributory negligence in climbing upon one of the cars and setting the brakes, in the endeavor to save the company's property; and that, on the facts, he was not injured by a danger of the employment, the risk of which he had assumed. Kelley *v.* Chicago, etc., R. Co., 50 Wis. 381, 2 Am. & Eng. R. Cas. 65.

So it was held that a railroad engineer was not guilty of contributory negligence in reversing his engine after it had left the track by the negligence of the company, although his arm was broken by so doing, and his only purpose was to save the property of the company from further injury, as he might himself have escaped by leaping to the ground. Knapp *v.* Sioux City, etc., R. Co., 65 Iowa 91, 54 Am. Rep. 1, 18 Am. & Eng. R. Cas. 60, 50 Am. Rep. 569, note. And see Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720.

And where a father plunged into a canal, endeavoring to save the life of his child, it was held that he was not guilty of contributory negligence; that the negligence which caused the fall of the child into the canal was the proximate cause not only of the death of the child but of that of the father, which followed, and that the father was in the performance of a natural and instinctive duty of imperative obligation. Gibney *v.* State, 137 N. Y. 1, 33 Am. St. Rep. 690.

1. But the Risks of Injury Are Often Assumed. — Contributory negligence and assumption of the risk of injury from a known danger, or the ordinary hazards of an employment, are often confounded, but are in reality essentially different. 2 Thompson on Neg. 1147, § 2. Later on we shall note the distinction more fully. It has its principal application in cases where an employee is held, by the contract of employment, to assume the usual dangers and risks of the business he undertakes. Wood's Master and Servant (2d ed.), § 326 *et seq.*; Simmons *v.* Chicago, etc., R. Co., 110 Ill. 340, 18 Am. & Eng. R. Cas. 50; Farwell *v.* Boston, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339; Murray *v.* South Carolina R. Co., 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268, and note.

As applications of the doctrine when no contractual relation exists, see Goldstein *v.* Chicago, etc., R. Co., 46 Wis. 404; Wohlfahrt *v.* Beckert, 92 N. Y. 490, 44 Am. Rep. 406.

2. Wood's Master and Servant (2d ed.), §§ 349, 353, 357, 359, 385, 386, 387.

3. Gray *v.* Scott, 66 Pa. St. 345, 5 Am. Rep. 371.

4. Inevitable Accident Causing Injury. — Cooley on Torts (2d ed.), *80. See the title Act of God, vol. 1, p. 584.

England. — Holmes *v.* Mather, L. R. 10 Exch. 261.

United States. — The Nitro-glycerine Case, 15 Wall. (U. S.) 524, 1 Thomp. on Neg. 42.

Missouri. — Barkley *v.* Missouri Pac. R. Co., 96 Mo. 367.

New Hampshire. — Brown *v.* Collins, 53 N. H. 442, 16 Am. Rep. 372, 1 Thomp. on Neg. 61.

New York. — Harvey *v.* Dunlop, Hill & D. Supp. (N. Y.) 193; Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, 1 Thomp. on Neg. 47; Sheldon *v.* Sherman, 42 N. Y. 484, 1 Am. Rep. 569.

"No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. * * * All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility." Harvey *v.* Dunlop, Hill & D. Supp. (N. Y.) 193.

A telegraph wire extending over the defend-

2. Accident and Negligence in Combination. — But where an accident and a want of ordinary care concur in producing an injury, the negligent person is liable for the consequences if, without his negligence, the injury would not have been caused by the accident alone.[1] This is upon the principle, applicable throughout the law of negligence, that where there are concurring causes of an injury, one of such causes being negligence, the negligent person cannot escape liability if, notwithstanding the other contributing causes, the injury or a part of the injury would not have occurred had the negligent person been in the exercise of ordinary care.

3. Natural Consequences Always Proximate. — But a want of ordinary care substantially contributing to cause an injury is not excused because the particular consequences are unusual and unexpected, and such as would not ordinarily have been foreseen, provided the want of ordinary care was such that it might have been foreseen that some injury was likely to result from it. Natural consequences are always proximate, in the absence of any intervening efficient cause, even though such consequences had never followed before, and could not have been anticipated.[2] And a want of ordinary care on the part

ant's tracks broke by reason of coming into contact with a brakeman standing on a flat car of a moving train. In some unexplained manner the wire coiled around the deceased, who was working beside the track, and was at the same time caught by a brake handle of the train, thus dragging the deceased along, and inflicting injuries causing his death. The flat car was above average height, and the brake man very tall, but the latter, as well as other brakemen, had passed under the wire many times, standing on cars. The breakage occurred by reason of the lowering of the wire, of which the defendant had no notice. It was held that it was an unforeseen accident, for which the defendant was not liable. Wabash, etc., R. Co. *v.* Locke, 112 Ind. 404, 2 Am. St. Rep. 193.

1. Accident and Negligence in Combination. — "An accident may be defined as an event happening unexpectedly and without fault; if there is any fault, there is liability." Cooley on Torts (2d ed.) 80, note; Leame *v.* Bray, 3 East 593.

The distinction between an accident and an act of God seems to be that in one case there is not, and in the other case there is, the presence and operation of *vis major*. Patterson's Ry. Acc. Law 35. See the title ACT OF GOD, vol. 1, p. 584.

But, as stated in the text, if negligence combines and concurs with either an inevitable accident or the act of God as a proximate cause of an injury, without which it would not have occurred, the negligent person is liable.

England. — Romney Marsh *v.* Trinity House Corp., L. R. 5 Exch. 204, L. R. 7 Exch. 247, 2 Thomp. on Neg. 1063.

Massachusetts. — Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.

New York. — Pollett *v.* Long, 56 N. Y. 200; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 38 N. Y. St. Rep. 675; Durkin *v.* Sharp, 88 N. Y. 225; Searles *v.* Manhattan R. Co., 101 N. Y. 661; Seeley *v.* New York Cent., etc., R. Co., 102 N. Y. 719, 2 N. Y. St. Rep. 452; Grant *v.* Pennsylvania, etc., Canal, etc., Co., 133 N. Y. 657, 45 N. Y. St. Rep. 305.

In Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354, it is said: "The fact that a natural cause contributes to produce an injury which could not have happened without the unlawful act of the defendant does not make the act so remote as to excuse him."

And the same principle has been stated thus: "We apprehend that the concurring negligence which, when combined with the act of God, produces the injury, must be such as is in itself a real producing cause of the injury, and not merely a fanciful or speculative or miscroscopic negligence which may not have been in the least degree the cause of the injury. In other words, if the act of God in this particular case was of such an overwhelming and destructive character as, by its own force, and independently of the particular negligence alleged or shown, produced the injury, there would be no liability, though there were some negligence in the maintenance of the particular structure. To create liability it must have required the combined effect of the act of God and the concurring negligence to produce the injury." Baltimore, etc., R. Co. *v.* Sulphur Springs Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529, 2 Am. & Eng. R. Cas. 166.

For further cases to the same point, see:

England. — Lambkin *v.* South Eastern R. Co., L. R. 5 App. 352; Dixon *v.* Metropolitan Board of Works, 7 Q. B. Div. 418.

Missouri. — Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527.

Pennsylvania. — Baltimore, etc., R. Co. *v.* Sulphur Springs Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529, 2 Am. & Eng. R. Cas. 166; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 356, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407.

Vermont. — Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

2. Unusual Consequences May Be Proximate — *England.* — Scott *v.* Shepherd, 2 W. Bl. 892; Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14.

United States. — Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469; Mutual Ins. Co. *v.* Tweed, 7 Wall. (U. S.) 44; Chicago, etc., R.

of the injured person contributing in natural and unbroken, though unusual and extraordinary, sequence to cause the injury breaks the chain of causation, and becomes an intervening cause of the injury that relieves the person inflicting the injury from liability.[1]

XIII. Erroneous or Illegal Conduct of Plaintiff — 1. Erroneous Conduct Caused by Defendant. — When the plaintiff acts erroneously through fright or excitement induced by the defendant's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened by such negligence; or is lulled into fancied security by the defendant's conduct, and then acts mistakenly in endeavoring to avoid an unexpected danger negligently caused by the defendant; or is induced to incur danger, not obviously certain to result in injury, by the defendant's directions or assurances of safety, upon which he relies, he is not guilty of contributory negligence as a matter of law.[2]

Co. *v.* Elliott, 12 U. S. App. 381; Northern Pac. R. Co. *v.* Lewis, 7 U. S. App. 254.

Arkansas. — Bizzell *v.* Booker, 16 Ark. 308.

Indiana. — Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168, 18 Am. & Eng. R. Cas. 234; Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508; Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230, 6 Am. & Eng. R. Cas. 41.

Maryland. — Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 74, 619, 48 Am. Rep. 134, 18 Am. & Eng. R. Cas. 220.

Michigan. — Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 45 Am. Rep. 30.

Minnesota. — Griggs *v.* Fleckenstein, 14 Min. 81, 100 Am. Dec. 199.

New Hampshire. — Ricker *v.* Freeman, 50 N. H. 420, 9 Am. Rep. 267.

New York. — Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Gibney *v.* State, 137 N. Y. 1, 33 Am. St. Rep. 690.

"It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principal obtains that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of that the more remote cause will not be charged with the effect. If a given result can be directly traced to a particular cause as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all condition of things, produce like results? * * * Hence the general rule is that in actions of tort like the present the wrongdoer is liable for all the direct injury resulting from his wrongful act, and that, too, although the extent or special nature of the resulting injury could not with certainty have been foreseen or contemplated as the probable result of the act done." Alvey, C. J., in Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 74, 18 Am. & Eng. R. Cas. 220.

1. Wharton on Neg., §§ 133, 300.

2. Defendant Putting Plaintiff in Danger. — "But though in fact it may be hazardous [to alight from a moving train], a passenger who does so at the instance or direction of the conductor or other employee in the management of the train, on whose opinion or judgment in the matter he has the right to rely, and where the risk or danger was not apparent, cannot be chargeable with negligence." St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 8 Am. & Eng. R. Cas. 198, 40 Am. Rep. 105. See also Georgia R., etc., Co. *v.* McCurdy, 45 Ga. 288, 12 Am. Rep. 577.

In Patton *v.* Western North Carolina R. Co., 96 N. Car. 455, a railroad section master, with power to hire, direct, and discharge men, suddenly ordered a new and inexperienced section hand, in the course of his employment, to jump from a swiftly moving train, which order was obeyed; and it was held that as the plaintiff acted in the course of duty on a sudden command to do an extra-hazardous thing he was entitled to recover for injuries resulting therefrom, and that the section master, in giving the command, was not a fellow servant, but a vice-principal.

In Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579, 8 Am. & Eng. R. Cas. 480, the plaintiff, in the night-time, went upon a railway track, by directions of the conductor of a freight train on which he was a passenger, to assist in caring for some cattle which he had in one of the cars in the train. He was assured by the conductor that he was safe in doing this and had nothing to fear from any other train, as the freight was entitled to the track upon which he would have to stand, or along which he would pass. While standing on such track, caring for his cattle, the plaintiff was struck and injured by an express train which came upon him without warning. It was held that he had a right to rely upon the assurances of the conductor, and that he was not guilty of contributory negligence in not keeping a lookout for the train that injured him.

"If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." Lord Ellenborough, in Jones *v.* Boyce, 1 Stark. 493, 2 E. C. L. 189, Thomp. Car. of Pass. 246.

"If, therefore, a person should leap from the car under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself." Black, C. J., in Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323.

And see to the same point the following cases:

United States. — Killien *v.* Hyde, 63 Fed. Rep. 172.

When Plaintiff's Erroneous Act Not Proximate Cause. — And even though the injured person might have escaped the injury so brought upon him but for his hasty and mistaken conduct in the face of danger, yet the defendant's negligence is the sole juridical cause of the injury, and the plaintiff's error of judgment only its condition, when the plaintiff was placed in the position of danger without previous negligence on his own part.[1]

Alabama. — Cook *v.* Central, etc., R. Co., 67 Ala. 533; Cook *v.* Parham, 24 Ala. 21; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141.

California. — Karr *v.* Parks, 40 Cal. 188.

Georgia. — Western, etc., R. Co. *v.* Wilson, 71 Ga. 22.

Illinois. — Chicago, etc., R. Co. *v.* Randolph, 53 Ill. 510, 5 Am. Rep. 60; Wesley City Coal Co. *v.* Healer, 84 Ill. 126; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242 *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 42; Dunham Towing, etc., Co. *v.* Dandelin, 143 Ill. 409.

Indiana. — Louisville, etc., R. Co. *v.* Kelly, 92 Ind. 371, 47 Am. Rep. 149, 13 Am. & Eng. R. Cas. 1; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Indianapolis, etc., R. Co. *v.* Carr, 35 Ind. 510; Clarke *v.* Pennsylvania Co., 132 Ind. 199.

Kansas. — Edgerton *v.* O'Neil, 4 Kan. App. 73.

Kentucky. — South Covington, etc., St. R. Co. *v.* Ware, 84 Ky. 267, 27 Am. & Eng. R. Cas. 206.

Maryland. — Baltimore, etc., R. Co. *v.* Leapley, 65 Md. 571, 27 Am. & Eng. R. Cas. 169.

Massachusetts. — Ingalls *v.* Bills, 9 Met. (Mass.) 1, 43 Am. Dec. 346.

Michigan. — Harris *v.* Clinton Tp., 64 Mich. 447, 8 Am. St. Rep. 842; Barnes *v.* Brown, 95 Mich. 576.

Mississippi. — Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444.

Missouri. — Kelly *v.* Hannibal, etc., R. Co., 70 Mo. 604; Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371; Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509; Bischoff *v.* People's R. Co., 121 Mo. 216.

Nebraska. — Lincoln Rapid Transit Co. *v.* Nichols, 37 Neb. 332.

New York. — Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; McIntyre *v.* New York Cent. R. Co., 37 N. Y. 287; Canton *v.* Simpson, 2 N. Y. App. Div. 561; Akers *v.* New York, 14 Misc. Rep. (N. Y. C. Pl.) 524; Dyer *v.* Erie R. Co., 71 N. Y. 228; Heath *v.* Glens Falls, etc., St. R. Co., 90 Hun (N. Y.) 560; Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Roll *v.* Northern Cent. R. Co., 80 N. Y. 647; Voak *v.* Northern Cent. R. Co., 75 N. Y. 320; Coulter *v.* American Merchants' Union Express Co., 56 N. Y. 585; Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Baber *v.* Broadway, etc., R. Co., 10 Misc. Rep. (N. Y. C. Pl.) 109, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 48.

North Carolina. — Lambeth *v.* North Carolina R. Co., 66 N. Car. 494, 8 Am. Rep. 508.

Ohio. — Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451.

Pennsylvania. — Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323, Thomp. Car. of Pass. 252; Delaware, etc., Canal Co. *v.* Webster, (Pa. 1886) 6 Atl. Rep. 841, 27 Am. & Eng. R. Cas. 160; Johnson *v.* West Chester, etc., R. Co., 70 Pa. St. 357; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322; Neilson *v.* Hillside Coal, etc., Co., 168 Pa. St. 256, 47 Am. St. Rep. 886.

Tennessee. — Southern R. Co. *v.* Pugh, 97 Tenn. 624.

Texas. — International, etc., R. Co. *v.* Neff, 87 Tex. 303.

Virginia. — Richmond, etc., R. Co. *v.* Brown, 89 Va. 749, 17 Va. L. J. 203.

West Virginia. — Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570.

Wisconsin. — Pool *v.* Chicago, etc., R. Co., 53 Wis. 659, 3 Am. & Eng. R. Cas. 332; Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304; Baltzer *v.* Chicago, etc., R. Co., 83 Wis. 459; Berg *v.* Milwaukee, 83 Wis. 599.

See the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

1. When Plaintiff's Erroneous Act Not a Proximate Cause. — "When the negligence of the agents puts a passenger in such a situation that the danger of remaining on the car is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the latter; and this rule holds good even where the event has shown that he might have remained inside with more safety." Black, C. J., in Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181.

"If the jury had found, as they might from the evidence, that through defendant's negligence the unexpected, sudden, and rapid approach of the car placed Hemberg, without his fault, in a position of apparent peril requiring instant action to escape, and that the peril and shouting by the brakeman and others frightened and bewildered him, so that for the moment he was incapable of deliberating and choosing the safest course to pursue, the defendant cannot allege it as negligence in law on his part, so as to prevent his recovery, that he adopted an unsafe course if it were a natural result of the fright and bewilderment so caused by defendant's negligence, such as might occur to one acting with ordinary prudence. * * * If the jury had been satisfied from the evidence, as they might have been, that the car was run in negligently; that it was not negligence in Hemberg not to see the car till it was close upon him; and if he then ran upon the track, that his doing so was through terror and loss of self-possession caused by defendant's negligence, his doing so was not his negligence." Mark *v.* St. Paul, etc., R. Co., 30 Minn. 493, 12 Am. & Eng. R. Cas. 86.

Plaintiff's Contributory Negligence. — But the plaintiff cannot recover when his own negligence combined and concurred with that of the defendant in putting him in the position of peril.[1]

2. Illegal Conduct — *a.* IN GENERAL. — It is not contributory negligence *per se* for the injured person, at the time of his injury, to be engaged in a violation of law, either positive or negative in its character. Before an illegal act or omission can be held contributory negligence it must appear that such act or omission was a proximate cause of the injury.[2] It is usually held that the mere collateral wrongdoing of the plaintiff cannot of itself bar him of his action when it did not proximately contribute to the injury.[3]

For further authorities sustaining the principle, see:

United States. — Greenwood *v.* Westport, 60 Fed. Rep. 560, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 48; Haff *v.* Minneapolis, etc., R. Co., 14 Fed. Rep. 558; Stevenson *v.* Chicago, etc., R. Co., 18 Fed. Rep. 493; Collins *v.* Davidson, 19 Fed. Rep. 83.

Illinois. — Frink *v.* Potter, 17 Ill. 406; Durham Towing, etc., Co. *v.* Dandelin, 143 Ill. 416, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 48, 49, 50; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 29; Galena, etc., R. Co. *v.* Yarwood, 17 Ill. 509, 65 Am. Dec. 682.

Indiana. — Turner *v.* Buchanan, 82 Ind. 147, 42 Am. Rep. 485.

Iowa. — Moore *v.* Central R. Co., 47 Iowa 688.

Minnesota. — Mark *v.* St. Paul, etc., R. Co., 30 Minn. 493, 12 Am. & Eng. R. Cas. 86; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 37 Am. Rep. 410; Mark *v.* St. Paul, etc., R. Co., 30 Minn. 493, 12 Am. & Eng. R. Cas. 86.

Missouri. — Siegrist *v.* Arnot, 10 Mo. App. 197.

Nebraska. — Omaha St. R. Co. *v.* Cameron, 43 Neb. 297.

New York. — Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Coulter *v.* American Merchants' Union Express Co., 56 N. Y. 585.

Ohio. — Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 3 Am. & Eng. R. Cas. 361, 38 Am. Rep. 597.

Pennsylvania. — Pennsylvania R. Co. *v.* Werner, 89 Pa. St. 59; Pittsburgh, etc., R. Co. *v.* Rohrman, (Pa. 1883) 12 Am. & Eng. R. Cas. 176, and 180 note.

Virginia. — Richmond, etc., R. Co. *v.* Morris, 31 Gratt. (Va.) 200; Richmond, etc., R. Co. *v.* Brown, 89 Va. 749, 17 Va. L. J. 203.

Wisconsin. — Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638.

1. *Illinois.* — Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373.

Indiana. — Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 57 Am. Rep. 114, 27 Am. & Eng. R. Cas. 210.

Massachusetts. — Frost *v.* Grand Trunk R. Co., 10 Allen (Mass.) 387, 87 Am. Dec. 668.

Pennsylvania. — Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323, Thomp. Car. of Pass. 252.

But Plaintiff's Contributory Negligence Bars Him. — "A railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to his own safety, even though the agents in charge of the train are also remiss in their duty. From these principles it follows very clearly that if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad." Black, C. J., in Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323.

2. Illegal Conduct Not Negligence Per Se — *Colorado.* — Pueblo *v.* Smith, 3 Colo. App. 386.

Georgia. — Western, etc., R. Co. *v.* Jones, 65 Ga. 631, 8 Am. & Eng. R. Cas. 267.

Maine. — Davidson *v.* Portland, 69 Me. 116, 31 Am. Rep. 253; Hamilton *v.* Goding, 55 Me. 419; Baker *v.* Portland, 58 Me. 199, 4 Am. Rep. 274.

Massachusetts. — Steele *v.* Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; Spofford *v.* Harlow, 3 Allen (Mass.) 176; Welch *v.* Wesson, 6 Gray (Mass.) 505; Hall *v.* Ripley, 119 Mass. 135; Newcomb *v.* Boston Protective Department, 146 Mass. 596, 4 Am. St. Rep. 354.

Michigan. — Cook *v.* Johnston, 58 Mich. 437, 55 Am. Rep. 703; Billings *v.* Breinig, 45 Mich. 65; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268.

Minnesota. — Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199.

New York. — Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488; Pakalinsky *v.* New York Cent., etc., R. Co., 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251.

Ohio. — Pittsburgh, etc., R. Co. *v.* Staley, 41 Ohio St. 118, 19 Am. & Eng. R. Cas. 381, 52 Am. Rep. 74.

Wisconsin. — Neanow *v.* Uttech, 46 Wis. 581.

3. Must Proximately Contribute to Be a Bar — *United States.* — Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. (U. S.) 209.

Alabama. — Savannah, etc., R. Co. *v.* Meadors, 95 Ala. 137.

Arkansas. — Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576.

Colorado. — Pueblo *v.* Smith, 3 Colo. App. 386.

Georgia. — Phillips *v.* East Tennessee, etc., R. Co., 87 Ga. 272.

b. TRESPASS AS AN ELEMENT OF NEGLIGENCE. — Upon analogous principles, a mere trespass is not contributory negligence *per se*, and before it can be held contributory negligence it must appear that it was an efficient and direct cause of an injury complained of, producing the injury in combination with the negligence of the defendant; and if the plaintiff was at the place of injury by the invitation, license, or consent of the defendant, express or implied, the question is simply one of ordinary care apart from the trespass. But if the plaintiff was a naked trespasser, to whom the defendant owed no duty, he cannot recover merely because he used ordinary care after becoming a trespasser. By becoming a trespasser a person assumes the risks attendant on the trespass; and he must show that the defendant, by some negligence subsequent to the trespass, inflicted an injury upon him that could have been avoided by the exercise of ordinary care toward a trespasser, before he can recover.[1]

Indiana. — Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 30, 28 Am. & Eng. R. Cas. 308.

Iowa. — Schmid *v.* Humphrey, 48 Iowa 652, 30 Am. Rep. 414.

Michigan. — French *v.* Detroit, etc., R. Co., 89 Mich. 537.

Minnesota. — Opsahl *v.* Judd, 30 Minn. 126.

New Hampshire. — Wentworth *v.* Jefferson, 60 N. H. 158.

New Mexico. — Candelaria *v.* Atchison, etc., R. Co., 6 N. Mex. 266, 48 Am. & Eng. R. Cas. 565.

New York. — Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Platz *v.* Cohoes, 89 N. Y. 219, 42 Am. Rep. 286; Scott *v.* Pennsylvania R. Co., (Ct. App.) 41 N. Y. St. Rep. 712; Minerly *v.* Union Ferry Co., 56 Hun (N. Y.) 113.

North Carolina. — Clark *v.* Wilmington, etc., R. Co., 109 N. Car. 430, 48 Am. & Eng. R. Cas. 546.

Pennsylvania. — Molmey *v.* Cook, 26 Pa. St. 342, 17 Am. Dec. 419.

Rhode Island. — Baldwin *v.* Barney, 12 R. I. 392, 34 Am. Rep. 670.

Wisconsin. — Knowlton *v.* Milwaukee City R. Co., 59 Wis. 278.

When Plaintiff's Action Founded in His Violation of Law. — But it must not be overlooked that when the plaintiff is compelled to found his action in his own violation of law he cannot recover. Cooley on Torts, p. 156, note 1.

Connecticut. — Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253.

Massachusetts. — Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Way *v.* Foster, 1 Allen (Mass.) 408; Smith *v.* Boston, etc., R. Co., 120 Mass. 490, 21 Am. Rep. 538; Crosman *v.* Lynn, 121 Mass. 301; Bosworth *v.* Swansey, 10 Met. (Mass.) 363, 43 Am. Dec. 441; Banks *v.* Highland St. R. Co., 136 Mass. 485; Read *v.* Boston, etc., R. Co., 140 Mass. 199.

Nebraska. — Johnson *v.* Missouri Pac. R. Co., 18 Neb. 690, 23 Am. & Eng. R. Cas. 429.

New Hampshire. — Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Dec. 310; Parker *v.* Nashua, 59 N. H. 402.

New York. — De Groot *v.* Van Duzer, 20 Wend. (N. Y.) 390.

Pennsylvania. — Holt *v.* Green, 73 Pa. St. 200, 13 Am. Rep. 737.

These cases and the rule just stated, however, turn usually upon the proposition that the plaintiff cannot recover except through an illegal contract which is the foundation of his right of action; and when he can make out a case of injury independent of the illegal contract, a recovery may be had.

Alabama. — Tamplin *v.* Still, 77 Ala. 374.

Connecticut. — Frost *v.* Plumb, 13 Am. L. Reg. N. S. 537.

Massachusetts. — Read *v.* Boston, etc., R. Co., 140 Mass. 199; McGrath *v.* Merwin, 112 Mass. 467, 17 Am. Rep. 119.

Missouri. — Bernard *v.* Lüpping, 32 Mo. 341.

New Hampshire. — Williams *v.* Hastings, 59 N. H. 373.

1. A Trespass as an Element of Negligence — *England.* — Smith *v.* London, etc., Docks Co., L. R. 3 C. P. 326; Colchester *v.* Brooke, 7 Q. B. 339, 53 E. C. L. 339; Hardcastle *v.* South Yorkshire R., etc., Co., 4 H. & N. 67, 28 L. J. Exch. 139; Stone *v.* Jackson, 16 C. B. 199, 81 E. C. L. 199, 32 Eng. L. & Eq. 349; Indermaur *v.* Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311.

United States. — Bennett *v.* Louisville, etc., R. Co., 102 U. S. 577, 1 Am. & Eng. R. Cas. 71; Tucker *v.* Baltimore, etc., R. Co., 59 Fed. Rep. 968; McClary *v.* Chicago, etc., R. Co., 46 Fed. Rep. 343; Kansas City, etc., R. Co. *v.* Cook, 66 Fed. Rep. 115.

Alabama. — Nave *v.* Alabama G. S. R. Co., 96 Ala. 264, 54 Am. & Eng. R. Cas. 151; Goodwin *v.* Central R., etc., Co., 96 Ala. 445; Louisville, etc., R. Co. *v.* Hairston, 97 Ala. 351; East Tennessee, etc., R. Co. *v.* Kornegay, 92 Ala. 228; Ensley R. Co. *v.* Chewning, 93 Ala. 24.

Arkansas. — Little Rock, etc., R. Co. *v.* Pankhurst, 36 Ark. 371, 5 Am. & Eng. R. Cas. 635; Jones *v.* Nichols, 46 Ark. 207, 55 Am. Rep. 575; St. Louis, etc., R. Co. *v.* Martin, 61 Ark. 549.

California. — Meeks *v.* Southern Pac. R. Co., 56 Cal. 513, 8 Am. & Eng. R. Cas. 314, 38 Am. Rep. 67; Pastene *v.* Adams, 49 Cal. 87; Noyes *v.* Southern Pac. R. Co., (Cal. 1890) 24 Pac. Rep. 927; Esrey *v.* Southern Pac. Co., 88 Cal. 399, 103 Cal. 541.

Connecticut. — Daley *v.* Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413; Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78; Johnson *v.* Patterson, 14 Conn. 1, 35 Am. Dec. 96; Woolf *v.* Chalker, 31 Conn. 131, 81 Am. Dec. 175; Birge *v.* Gardner, 19 Conn. 507, 50 Am. Dec. 261; Crogan *v.* Schiele, 53 Conn. 186, 55 Am. Rep. 88.

c. CHILDREN AS TRESPASSERS. — A child injured while trespassing has no right of action, unless injured by the negligence of the defendant when the injury might have been avoided by ordinary care on the defendant's part. But when a child of tender years commits a mere technical trespass, and is

Dakota. — Sanders *v.* Reister, 1 Dakota 151.

Georgia. — Southwestern R. Co. *v.* Hankerson, 61 Ga. 114; Central R. Co. *v.* Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42; Dowdy *v.* Georgia R. Co., 88 Ga. 726; Atlanta, etc. Air Line R. Co. *v.* Leach, 91 Ga. 419, 44 Am. St. Rep. 47; Martin *v.* Georgia R., etc., Co., 95 Ga. 361.

Illinois. — Chicago, etc., R. Co. *v.* Kellam, 92 Ill. 245, 34 Am. Rep. 128; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Hayward *v.* Merrill, 94 Ill. 349, 34 Am. Rep. 229; Southeast, etc., R. Co. *v.* Stotlar, 43 Ill. App. 94; Pittsburgh, etc., R. Co. *v.* Callaghan, 157 Ill. 406.

Indiana. — Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77; Lary *v.* Cleveland, etc., R. Co., 78 Ind. 323, 41 Am. Rep. 572, 3 Am. & Eng. R. Cas. 498; Graves *v.* Thomas, 95 Ind. 361, 48 Am. Rep. 727; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, 41 Am. Rep. 567, 4 Am. & Eng. R. Cas. 599; McClelland *v.* Louisville, etc., R. Co., 94 Ind. 276, 18 Am. & Eng. R. Cas. 260; Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783; Cleveland, etc., R. Co. *v.* Stephenson, 139 Ind. 641; Parker *v.* Pennsylvania Co., 134 Ind. 673.

Iowa. — Weymire *v.* Wolfe, 52 Iowa 533; Haughey *v.* Hart, 62 Iowa 96, 49 Am. Rep. 138; Buelow *v.* Chicago, etc., R. Co., 92 Iowa 240.

Kansas. — Mason *v.* Missouri Pac. R. Co., 27 Kan. 83, 41 Am. Rep. 405, 6 Am. & Eng. R. Cas. 1; Atchison, etc., R. Co. *v.* Priest, 50 Kan. 16.

Kentucky. — Craddock *v.* Louisville, etc., R. Co., 13 Ky. L. Rep. 18, (Ky. 1891) 16 S. W. Rep. 125; Oatts *v.* Cincinnati, etc., R. Co., 15 Ky. L. Rep. 87, (Ky. 1893) 22 S. W. Rep. 330.

Louisiana. — Settoon *v.* Texas, etc., R. Co., 48 La. Ann. 807.

Maine. — Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503.

Maryland. — Baltimore, etc., R. Co. *v.* State, 33 Md. 542.

Massachusetts. — Larue *v.* Farren Hotel Co., 116 Mass. 67; Learoyd *v.* Godfrey, 138 Mass. 315; Marble *v.* Ross, 124 Mass. 44; Zoebisch *v.* Tarbell, 10 Allen (Mass.) 385, 87 Am. Dec. 660; Severy *v.* Nickerson, 120 Mass. 306, 21 Am. Rep. 514; Davis *v.* Central Cong. Soc., 129 Mass. 367, 37 Am. Rep. 368; Carleton *v.* Franconia Iron, etc., Co., 99 Mass. 216; Gilbert *v.* Nagle, 118 Mass. 278; Rigg *v.* Boston, etc., R. Co., 158 Mass. 309; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644.

Michigan. — McKone *v.* Michigan Cent. R. Co., 51 Mich. 601, 47 Am. Rep. 596; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 279; Hargreaves *v.* Deacon, 25 Mich. 1; Powers *v.* Harlow, 53 Mich. 507, 51 Am. Rep. 154.

Minnesota. — Johnson *v.* Truesdale, 46 Minn. 345.

Mississippi. — Green *v.* Louisville, etc., R. Co., (Miss. 1893) 12 So. Rep. 826; Louisville, etc., R. Co. *v.* Cooper, 68 Miss. 368; Fulmer *v.* Illinois Cent. R. Co., 68 Miss. 355.

Missouri. — Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; Harris *v.* Missouri Pac. R. Co., 40 Mo. App. 255; Kelly *v.* Union R., etc., Co., 95 Mo. 279; Barkley *v.* Missouri Pac. R. Co., 96 Mo. 367; Hyde *v.* Missouri Pac. R. Co., 110 Mo. 272; Mauerman *v.* St. Louis, etc., R. Co., 41 Mo. App. 348.

New Hampshire. — Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546.

New York. — Totten *v.* Phipps, 52 N. Y. 354; Bush *v.* Brainerd, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384; Larmore *v.* Crown Point Iron Co., 101 N. Y. 391, 54 Am. Rep. 718; Mullaney *v.* Spence, 15 Abb. Pr. N. S. (Brooklyn City Ct.) 319; Loomis *v.* Terry, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306; McAlpin *v.* Powell, 70 N. Y. 126, 26 Am. Rep. 555; Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377, 13 Am. & Eng. R. Cas. 615; Ackert *v.* Lansing, 59 N. Y. 646; Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282; Adams *v.* New York, etc., R. Co., (Supreme Ct.) 49 N. Y. St. Rep. 854, 21 N. Y. Supp. 681; Remer *v.* Long Island R. Co., 48 Hun (N. Y.) 352.

North Carolina. — Herring *v.* Wilmington, etc., R. Co., 10 Ired. L. (32 N. Car.) 402, 51 Am. Dec. 395; Campbell *v.* Boyd, 88 N. Car. 129, 43 Am. Rep. 740; Matthews *v.* Atlantic, etc., R. Co., 117 N. Car. 640; Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728; High *v.* Carolina Cent. R. Co., 112 N. Car. 385; Norwood *v.* Raleigh, etc., R. Co., 111 N. Car. 236.

Ohio. — Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Baltimore, etc., R. Co. *v.* Depew, 40 Ohio St. 121, 12 Am. & Eng. R. Cas. 64.

Pennsylvania. — Brown *v.* Lynn, 31 Pa. St. 510, 72 Am. Dec. 768; Mulherrin *v.* Delaware, etc., R. Co., 81 Pa. St. 366; Gramlich *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Schilling *v.* Abernethy, 112 Pa. St. 437, 56 Am. Rep. 320; Ham *v.* Delaware, etc., Canal Co., 155 Pa. St. 548; Dell *v.* Phillips Glass Co., 169 Pa. St. 549.

South Carolina. — Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 663; Carter *v.* Columbia, etc., R. Co., 19 S. Car. 20, 45 Am. Rep. 754, 15 Am. & Eng. R. Cas. 414.

Tennessee. — Whirley *v.* Whiteman, 1 Head (Tenn.) 611; East Tennessee, etc., R. Co. *v.* Fain, 12 Lea (Tenn.) 35, 19 Am. & Eng. R. Cas. 102; Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26; Patton *v.* East Tennessee, etc., R. Co., 89 Tenn. 370.

Texas. — Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632; Houston, etc., R. Co. *v.* Richards, 59 Tex. 373, 12 Am. & Eng. R. Cas. 70; Hamilton *v.* Texas, etc., R.

injured by agencies that to an adult would be open and obvious warnings of danger, but not so to a child, he is not debarred from recovering, if the things instrumental in his injury were left exposed and unguarded, and were of such a character as to be likely to attract children, excite their curiosity, and lead to their injury, while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication.[1]

Co., 64 Tex. 251, 53 Am. Rep. 756, 21 Am. & Eng. R. Cas. 336; San Antonio, etc., R. Co. *v.* Jazo, (Tex. Civ. App. 1894) 25 S. W. Rep. 712; McIntyre *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. Rep. 632; Missouri Pac. R. Co. *v.* Peay, 7 Tex. Civ. App. 400; Rozwadosfskie *v.* International, etc., R. Co., 1 Tex. Civ. App. 487; Garteiser *v.* Galveston, etc., R. Co., 2 Tex. Civ. App. 230; Galveston, etc., R. Co. *v.* Ryon, 70 Tex. 56; Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126.

Vermont. — Pierce *v.* Whitcomb, 48 Vt. 127, 21 Am. Rep. 120.

Virginia. — Virginia Midland R. Co. *v.* Boswell, 82 Va. 932.

Wisconsin. — Davis *v.* Chicago, etc., R. Co., 58 Wis. 646, 46 Am. Rep. 667, 15 Am. & Eng. R. Cas. 424; Hogan *v.* Chicago, etc., R. Co., 59 Wis. 139, 15 Am. & Eng. R. Cas. 439.

1. **Infant Trespassers** — *England.* — Lynch *v.* Nurdin, 1 Q. B. 29, 41 E. C. L. 422, 2 Thomp. on Neg. 1140; Clark *v.* Chambers, 3 Q. B. Div. 329, 7 Cent. L. J. 11, 17 Alb. L. J. 505; Hughes *v.* Macfie, 2 H. & C. 744; Mangan *v.* Atterton, L. R. 1 Exch. 239.

United States. — Sioux City, etc., R. Co. *v.* Stout, 17 Wall. (U. S.) 657; Washington, etc., R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401; Felton *v.* Aubrey, 43 U. S. App. 278.

California. — Durkee *v.* Central Pac. R. Co., (Cal. 1885) 9 Pac. Rep. 99, 25 Am. & Eng. R. Cas. 350.

Connecticut. — Birge *v.* Gardner, 19 Conn. 507, 50 Am. Dec. 261; Daley *v.* Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413; Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 25 Am. & Eng. R. Cas. 342.

Georgia. — Western, etc., R. Co. *v.* Wilson, 71 Ga. 22; Central R. Co. *v.* Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42.

Illinois. — Pittsburgh, etc., R. Co. *v.* Bumstead, 48 Ill. 221, 95 Am. Dec. 539; St. Louis, etc., R. Co. *v.* Bell, 81 Ill. 76, 25 Am. Rep. 269; Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Chicago, etc., R. Co. *v.* Murray, 71 Ill. 601; Chicago, etc., R. Co. *v.* Dewey, 26 Ill. 259, 79 Am. Dec. 374; Pekin *v.* McMahon, 154 Ill. 141, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 53; Chicago *v.* Starr, 42 Ill. 174, 89 Am. Dec. 422.

Indiana. — Citizens' St. R. Co. *v.* Carey, 56 Ind. 396; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 25 Am. & Eng. R. Cas. 313.

Iowa. — Wood *v.* Independent School Dist. 44 Iowa 27.

Kansas. — Kansas Cent. R. Co. *v.* Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Central Branch Union Pac. R. Co. *v.* Henigh, 23 Kan. 347, 33 Am. Rep. 167; Smith *v.* Atchison, etc., R. Co., 25 Kan. 738, 28 Kan. 541, 4 Am. & Eng. R. Cas. 554; Union Pac. R. Co. *v.* Dunden, 37 Kan. 1.

Kentucky. — Bransom *v.* Labrot, 81 Ky. 638, 50 Am. Rep. 193.

Louisiana. — Westerfield *v.* Levis, 43 La. Ann. 63, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 53.

Massachusetts. — Lane *v.* Atlantic Works, 107 Mass. 104, 111 Mass. 136; Lyons *v.* Brookline, 119 Mass. 491 (see criticisms Mass. Rule 4, Am. Law Rev. 405, 1870); Fitzpatrick *v.* Fitchburg R. Co., 128 Mass. 13; Plumley *v.* Birge, 124 Mass. 57, 26 Am. Rep. 645; Munn *v.* Reed, 4 Allen (Mass.) 431; Dowd *v.* Chicopee, 116 Mass. 93; Morrissey *v.* Eastern R. Co., 126 Mass. 377; Sweeny *v.* Old Colony, etc., R. C., 10 Allen (Mass.) 368 87 Am. Dec. 644.

Michigan. — Ecliff *v.* Wabash, etc., R. Co., 64 Mich. 196; Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, 56 Am. Rep. 405; Powers *v.* Harlow, 53 Mich. 507, 51 Am. Rep. 154.

Missouri. — Duffy *v.* Missouri Pac. R. Co., 19 Mo. App. 380; Hicks *v.* Pacific R. Co., 64 Mo. 430; Ostertag *v.* Pacific R. Co., 64 Mo. 421; Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Scoville *v.* Hannibal, etc., R. Co., 81 Mo. 434; Nagel *v.* Missouri Pac R. Co., 75 Mo. 653, 42 Am. Rep. 418, 10 Am. & Eng. R. Cas. 702; Koons *v.* St. Louis, etc., R. Co., 65 Mo. 592; Boland *v.* Missouri R. Co., 36 Mo. 484; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Schmidt *v.* Kansas City Distilling Co., 90 Mo. 284, 59 Am. Rep. 16; Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275.

Nebraska. — Meyer *v.* Midland Pac. R. Co., 2 Neb. 319.

New Jersey. — Vanderbeck *v.* Hendry, 34 N. J. L. 467.

New York. — Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377, 13 Am. & Eng. R. Cas. 615; Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Byrne *v.* New York Cent., etc., R. Co., 83 N. Y. 620; Bulger *v.* Albany R. Co., 42 N. Y. 459; Roberton *v.* New York, 7 Misc. Rep. (N. Y. C. Pl.) 645.

North Carolina — Manly *v.* Wilmington, etc., R. Co., 74 N. Car. 655.

Pennsylvania. — Couley *v.* Pittsburgh, etc., R. Co., 95 Pa. St. 398, 40 Am. Rep. 664; Moore *v.* Pennsylvania R. Co., 99 Pa. St. 301, 44 Am. Rep. 106; Pennsylvania R. Co. *v.* Morgan, 82 Pa. St. 134; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747; Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332; Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Pennsylvania R. Co. *v.* Lewis, 79 Pa. St. 33; Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544; Taylor *v.* Delaware, etc., Canal Co., 113 Pa. St. 162, 57 Am. Rep. 446; Schilling *v.* Abernethy, 112 Pa. St. 437, 56 Am. Rep. 320; Biddle *v.* Hestonville, etc., Pass. R. Co., 112 Pa. St. 551, 26 Am. & Eng. R. Cas. 208; Baltimore, etc., R. Co. *v.* Schwindling, 101 Pa. St. 258, 47 Am. Rep. 706, 8 Am. & Eng. R. Cas. 544; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St.

XIV. Contributory Negligence of Children — 1. Standard of Care Varies with Age and Capacity. — While the test of ordinary care is applied throughout the entire law of negligence, yet, as we have seen, it is ordinary care under the circumstances and conditions.[1] Thus what would be ordinary care for one person might be culpable negligence in another; and conduct which on the part of a person of full age and average capacity would be held contributory negligence, as a matter of law, might be ordinary care in a child of tender years.[2]

2. Children of Tender Years. — Hence it follows that children so young as to be *non sui juris* cannot be guilty of contributory negligence.[3] And children

372; Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375.

Ohio. — Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507.

Tennessee. — Whirley *v.* Whiteman, 1 Head (Tenn.) 611.

Texas. — Galveston, etc., R. Co. *v.* Moore, 59 Tex. 64, 46 Am. Rep. 265, 10 Am. & Eng. R. Cas. 746; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 44 Am. Rep. 586, 6 Am. & Eng. R. Cas. 182.

Virginia. — Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455.

Wisconsin. — Meibus *v.* Dodge, 38 Wis. 300, 20 Am. Rep. 6; Johnson *v.* Chicago, etc., R. Co., 56 Wis. 274, 8 Am. & Eng. R. Cas. 471.

1. Ordinary Care under the Circumstances. — See *supra*, this title, *Elements of Contributory Negligence.*

"'Ordinary care' is a term that has relation to the situation of parties, and the business in which they are engaged. It is used here as synonymous with the term 'reasonable care' as used by the courts in England. 'Care and diligence should vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted.'" Fletcher *v.* Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695.

England. — Lynch *v.* Nurdin, 2 Thomp. on Neg. 1140, 1 Q. B. 29, 41 E. C. L. 422.

Massachusetts. — Fletcher *v.* Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695; Holly *v.* Boston Gas Light Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233.

New Jersey. — Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682.

New York. — Huerzeler *v.* Central Crosstown R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 136.

Vermont. — Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 73.

2. The Standard of Care Varies with Age and Capacity. — The age and inexperience of the party may be taken into consideration in passing upon the question of negligence alleged against him. For instance, no negligence is imputable to a child, although its own carelessness may produce its injury; and less care and foresight are exacted of an experienced youth than of a man of mature years. Dowling *v.* Allen, 88 Mo. 293. But *compare* Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 283.

Louisiana. — Westerfield *v.* Levis, 43 La. Ann. 63, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 53.

Missouri. — Murphy *v.* St. Louis, etc., R. Co., 43 Mo. App. 342; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 283.

New Jersey. — Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682.

New York. — Elze *v.* Baumann, 2 Misc. Rep. (N. Y. Superior Ct.) 72, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 43.

3. Infants of Tender Years Incapable of Negligence. — "The child was only three years and two months old, and clearly within the adjudged cases in which infants have been held not *sui juris*, or responsible for their own conduct." Ihl *v.* Forty-second St., etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450.

"No negligence is imputable to a child as young as the one killed by this train." Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 560, 53 Am. Rep. 597.

"This rule, however [of contributory negligence], does not apply when the party plaintiff is an idiot, insane person, or an infant of such tender years as to be incapable of taking care of himself or herself, or incapable of apprehending danger, or of the exercise of prudence or foresight in avoiding danger. In this case the child, Lulu Frick [aged two years], was incapable of contributory negligence." Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280. See also Smith *v.* Atchison, etc., R. Co., 25 Kan. 738, 4 Am. & Eng. R. Cas. 554.

And there are many other cases to the same effect, holding children all the way from one to seven years old *non sui juris*, as a matter of law.

United States. — Morgan *v.* Illinois, etc., Bridge Co., 5 Dill. (U. S.) 96; Central Trust Co. *v.* Wabash, etc., R. Co., 31 Fed. Rep. 246.

Alabama. — Bay Shore R. Co. *v.* Harris, 67 Ala. 6.

California. — Meeks *v.* Southern Pac. R. Co., 52 Cal. 604.

Illinois. — Toledo, etc., R. Co. *v.* Grable, 88 Ill. 441; Gavin *v.* Chicago, 97 Ill. 66, 37 Am. Rep. 99; Chicago *v.* Starr, 42 Ill. 174, 89 Am. Dec. 422; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Chicago City R. Co. *v.* Wilcox, (Ill. 1890) 24 N. E. Rep. 419, 138 Ill. 370.

Indiana. — Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89; Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318; Jeffersonville, etc., R. Co. *v.* Boen, 40 Ind. 545; Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513, 92 Am. Dec. 269; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654.

Louisiana. — Barnes *v.* Shreveport City R. Co., 47 La. Ann. 1218.

Massachusetts. — Wright *v.* Malden, etc., R.

who have attained an age where they are not wholly irresponsible are not required to exercise the same care and prudence that would be demanded of an adult similarly situated, but only the care of a child of equal age and ordinary childish care and prudence.[1] And even when a child has reached

Co., 4 Allen (Mass.) 283; Callahan *v.* Bean, 9 Allen (Mass.) 401; McGeary *v.* Eastern R. Co., 135 Mass. 363, 15 Am. & Eng. R. Cas. 407.

Missouri. — O'Flaherty *v.* Union R. Co., 45 Mo. 70; Maschek *v.* St. Louis, etc., R. Co., 71 Mo. 276, 2 Am. & Eng. R. Cas. 38.

New York. — Kreig *v.* Wells, 1 E. D. Smith (N. Y.) 76; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455, 36 Barb. (N. Y.) 230; Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273; McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Lehman *v.* Brooklyn, 29 Barb. (N. Y.) 234; Jones *v.* Brooklyn Heights R. Co., 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 543.

North Carolina. — Bottoms *v.* Seaboard, etc., R. Co., 114 N. Car. 699, 41 Am. St. Rep. 799.

Pennsylvania. — Pittsburg, etc., Pass. R. Co. *v.* Caldwell, 74 Pa. St. 421; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Woeckner *v.* Erie Electric Motor Co., 176 Pa. St. 451.

South Carolina. — Bridger *v.* Asheville, etc., R. Co., 25 S. Car. 24.

Texas. — Texas, etc., R. Co. *v.* O'Donnell, 58 Tex. 27, 10 Am. & Eng. R. Cas. 712; St. Louis, etc., R. Co. *v.* Christian, 8 Tex. Civ. App. 246.

Virginia. — Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455.

West Virginia. — Gunn *v.* Ohio River R. Co., 42 W. Va. 676; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511.

Wisconsin. — Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186.

When Care of Child for the Jury. — But where there is a question whether the child is of sufficient age and discretion to be capable of some care for his own safety, the question of its capacity and its degree is for the jury.

United States. — Washington, etc., R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401.

California. — Karr *v.* Parks, 40 Cal. 188.

Illinois. — Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25, 84 Ill. 483; Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308.

Louisiana. — Barksdull *v.* New Orleans, etc., R. Co., 23 La. Ann. 180.

Massachusetts. — Lovett *v.* Salem, etc., R. Co., 9 Allen (Mass.) 557; Mulligan *v.* Curtis, 100 Mass. 512, 97 Am. Dec. 121.

Minnesota. — St. Paul *v.* Kuby, 8 Minn. 154.

Missouri. — Voegeli *v.* Pickel Marble, etc., Co., 49 Mo. App. 643; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 283.

New York. — Honegsberger *v.* Second Ave. R. Co., 1 Keyes (N. Y.) 570, 33 How. Pr. (N. Y.) 195; Drew *v.* Sixth Ave. R. Co., 26 N. Y. 49; Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310; Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361.

Pennsylvania. — West Philadelphia Pass. R. Co. *v.* Gallagher, 108 Pa. St. 524, 27 Am. & Eng. R. Cas. 204.

And in such cases it seems that the child's capacity for exercising care is to be determined by the same standard that would be applied in ascertaining its capacity to commit crime. Rockford, etc., R. Co. *v.* Delaney, 82 Ill. 198, 25 Am. Rep. 308; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 32; West Philadelphia Pass. R. Co. *v.* Gallagher, 108 Pa. St. 524, 27 Am. & Eng. R. Cas. 204. A "child" is a boy not above fourteen, or a girl not above twelve, years of age. Bell *v.* State, 18 Tex. App. 53, 51 Am. Rep. 293.

See also *infra*, this section, *Question for Jury*.

1. The "Ordinary Care" of a Child. — "If the jury find that the plaintiff was of such capacity that he was in the street without negligence, either on the part of himself or his parents, then the question arises, what degree of care he was bound to exercise. * * * Certainly the jury could not find that a boy nine years old must exercise the capacity of an adult; but it was implied that, if it was proper for him to be there, it was only necessary for him to exercise such capacity as he had. School children who are properly sent to school unattended must use such reasonable care as school children can. It must be reasonable care adapted to the circumstances, or, in other words, the ordinary care of school children." Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188.

"It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." Sioux City, etc., R. Co. *v.* Stout, 17 Wall. (U. S.) 657. And to the same effect see Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 44 Am. Rep. 586, 6 Am. & Eng. R. Cas. 182.

See also to the same effect the following:

United States. — Felton *v.* Aubrey, 43 U. S. App. 278; Union Pac. R. Co. *v.* McDonald, 152 U. S. 262; Cleveland, etc., R. Co. *v.* Phillips, 24 U. S. App. 504, 64 Fed. Rep. 830.

Colorado. — Pierce *v.* Conners, 20 Colo. 178, 46 Am. St. Rep. 279.

District of Columbia. — Baltimore, etc., R. Co. *v.* Webster, 23 Wash. L. Rep. (D. C.) 322; Metropolitan R. Co. *v.* Falvey, 23 Wash. L. Rep. (D. C.) 53.

Georgia. — East Tennessee, etc., R. Co. *v.* Hughes, 92 Ga. 388, 58 Am. & Eng. R. Cas. 373; Central R. Co. *v.* Phillips, 91 Ga. 526.

Illinois. — Norton *v.* Volzke, 158 Ill. 402; Linck *v.* Scheffel, 32 Ill. App. 17; Wabash R. Co. *v.* Jones, 53 Ill. App. 125; Springfield Consol. R. Co. *v.* Welsch, 155 Ill. 511; Pekin *v.* McMahon, 154 Ill. 141.

Indiana. — Louisville, etc., R. Co. *v.* Rush, 127 Ind. 545; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654.

Kansas. — Kinchlow *v.* Midland Elevator Co., 57 Kan. 374.

years of discretion, and become, as a matter of law, responsible for his conduct, no higher degree of care will be exacted of him than is usually exercised by persons of similar age, judgment, and experience.[1]

3. Care Required of Child Employee. — Thus a minor employee injured by the negligence of a fellow-servant, or by defects in machinery, or by obviously dangerous appliances, will not necessarily be barred from maintaining an action against his employer for the injuries, although guilty of conduct which in an adult would have amounted to contributory negligence or an assumption of the risk of injury.[2] In such cases, while a minor employee is held to have assumed the risks of the employment, yet it is only such risks as one of his age, discretion, and experience can be said to have comprehended that he will be charged with having assumed.[3] And he may recover for injuries resulting

Massachusetts. — McGuiness *v.* Butler, 159 Mass. 233; Wallace *v.* New York, etc., R. Co., 165 Mass. 236; Hayes *v.* Norcross, 162 Mass. 546.

Michigan. — Baker *v.* Flint, etc., R. Co., 68 Mich. 90.

Missouri. — Riley *v.* Missouri Pac. R. Co., 68 Mo. App. 652.

Nebraska. — Omaha, etc., R. Co. *v.* Cook, 42 Neb. 577.

New Jersey. — Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682.

New York. — Koehler *v.* Syracuse Specialty Mfg. Co., 12 N. Y. App. Div. 50; Newdoll *v.* Young, 80 Hun (N. Y.) 364; Guichard *v.* New, 84 Hun (N. Y.) 54; Scotti *v.* Behsmann, 81 Hun (N. Y.) 604; Sickles *v.* New Jersey Ice Co., 153 N. Y. 83; Hoehmann *v.* Moss Engraving Co., 4 Misc. Rep. (N. Y. C. Pl.) 163; Stone *v.* Dry Dock, etc., R. Co., 46 Hun (N. Y.) 184; Swift *v.* Staten Island Rapid Transit R. Co., 123 N. Y. 645, 25 N. E. Rep. 378, 45 Am. & Eng. R. Cas. 180; Keubler *v.* New York, (Supreme Ct.) 39 N. Y. St. Rep. 520, 15 N. Y. Supp. 187; Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 21 Am. St. Rep. 670; Schmidt *v.* Cook, 30 Abb. N. Cas. (N. Y. C. Pl.) 285, 4 Misc. Rep. (N. Y. C. Pl.) 85; Finkelstein *v.* Crane, 2 Misc. Rep. (N. Y. Super. Ct.) 545; Elze *v.* Baumann, 2 Misc. Rep. (N. Y. Super. Ct.) 72; Penny *v.* Rochester R. Co., 7 N. Y. App. Div. 595; Castoriano *v.* Miller, 15 N. Y. Misc. Rep. (Buffalo Super. Ct.) 254; Keller *v.* Haaker, 2 N.Y. App. Div. 245.

Ohio. — Lake Erie, etc., R. Co. *v.* Mackey, 53 Ohio St. 370.

Pennsylvania. — Rodgers *v.* Lees, 140 Pa. St. 475; Reinike *v.* Philadelphia Traction Co., 31 W. N. C. (Pa.) 471.

Tennessee. — Queen *v.* Dayton Coal, etc., Co., 95 Tenn. 458.

Virginia. — Norfolk, etc., R. Co. *v.* Stone, 88 Va. 310, 15 Va. L. J. 621.

West Virginia. — Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675.

1. "Due Care" of Child Not That of an Adult. — "It was necessary that the plaintiff, though a boy, should prove that he was in the exercise of due care; but due care on his part did not require the judgment and thoughtfulness which would be expected of an adult under the same circumstances. It is that degree of care which could reasonably be expected from a boy of his age and capacity." Plumley *v.* Birge, 124 Mass. 57, 26 Am. Rep. 645.

"The caution required is according to the maturity and capacity of the child; and this is to be determined in each case by the circumstances of that case." Washington, etc., R. Co. *v.* Gladmon, 15 Wall. (U. S.) 406.

See also: *Georgia.* — Western, etc., R. Co. *v.* Young, 81 Ga. 397, 12 Am. St. Rep. 320.

Michigan. — Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261.

Missouri. — Duffy *v.* Missouri Pac. R. Co., 19 Mo. App. 380.

New Jersey. — Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 46.

New York. — Kunz *v.* Troy, 104 N. Y. 344, 58 Am. Rep. 508; Goff *v.* Akers, 1 Misc. Rep. (N. Y. Superior Ct.) 468, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 43; Hoehmann *v.* Moss Engraving Co., 4 Misc. Rep. (N. Y. C. Pl.) 160.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

Texas. — Shelley *v.* Austin, 74 Tex. 608.

2. Care Required of a Child Employee. — In stepping over a revolving shaft at a point where there was a set-screw, a boy of seventeen years, in the employ of the defendant, sustained severe injuries by the set-screw catching the leg of his trousers. He knew of the presence of the shaft, but had never taken particular notice of the set-screw, and had received no warning of its dangers. In the course of an opinion holding that he could recover, it was said: "It is not a conclusion of law, from the fact that plaintiff was aware of the existence of the set-screw, and was seventeen years old, and sprightly for one of his years, that he was aware of the risk and danger of passing over the shaft while it was in motion." Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

"A servant knowing the facts may be utterly ignorant of the risks." Byles, J., in Clarke *v.* Holmes, 7 H. & N. 937. *Compare* Union Pac. R. Co. *v.* Fort, 17 Wall. (U. S.) 553.

3. Only Assumes Risk Within His Comprehension. — "If in this case the plaintiff was too young and inexperienced to appreciate the danger to which he was exposed, then conduct on his part which would be negligence in one aware of the danger might not be imputed as negligence in him. But if the jury should find that he was aware of the danger to which he was exposed, any negligence on his part which contributed directly to his injury

from dangers that, by reason of youth, immaturity, and inexperience, he was unable to fully apprehend, and the perils of which had not been explained to him.[1]

4. Natural Instincts of Childhood. — Nor will a child negligently injured upon a railroad, or by defects in a public highway, or by dangerous machinery, or explosives, or in any other way, be charged with contributory negligence, if, at the time of such injury, he was doing what might have been expected of an ordinarily careful and prudent child of the same age, making due allowance for the natural instincts of childhood.[2] Hence a person negligently injuring a child may be held liable under circumstances where contributory negligence would have barred an adult.[3]

5. Degree of Care Toward Child. — And conversely, a much higher grade of care and watchfulness must be exercised to avoid injuring children than would constitute ordinary care towards an adult; that is, what is ordinary care towards an adult of full capacity may be culpable negligence towards a child.[4]

6. Question for Jury. — As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, where the

will defeat his action." Dowling *v.* Allen, 88 Mo. 293.

1. May Recover When Injured by Uncomprehended Dangers. — "The rule contended for by the appellant, that the employee impliedly assumes the risks of the service, and of such dangers as are obvious and open to ordinary observation, does not embrace such risks as the employer knows, or which by the exercise of reasonable care he might have known, beforehand, that the employee, by reason of his immaturity and inexperience, is ignorant of, or such as the employer knows the employee, without experience, cannot appreciate or avoid without instruction or warning. * * * The gravamen of such a case is the omission of duty on the part of the employer, in failing to instruct an inexperienced servant, who, although he may see the danger, may nevertheless be utterly ignorant of the risk, or of the manner of performing the service so as to avoid injury therefrom." Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 24, 28 Am. & Eng. R. Cas. 308.

If the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery. Cockburn, C. J., in Grizzle *v.* Frost, 3 F. & F. 622.

2. Allowance Made for Childish Instincts. — "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." Cooley, C. J., in Powers *v.* Harlow, 53 Mich. 507, 51 Am. Rep. 154.

And see a recent interesting case in Ohio, where a dangerous torpedo was placed upon a railroad track by employees of the railway company, and left unwatched. A boy, going to the track, had his curiosity excited by the torpedo, and, picking it up, tried to open the box, during which operation it exploded, injuring the plaintiff, a boy of ten years, who with childish curiosity had drawn near to see what his comrade had found. In this case a recovery was sustained, and all the leading cases reviewed in the course of the elaborate opinion. Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507.

Turn-table Cases. — It is upon the principle stated in the text that what are known as the "turn-table cases" rest. In them children attracted by turn-tables left unguarded and unlocked, and injured while playing on the tables, have been permitted to recover — first, because it might have been apprehended that children would be attracted by such appliances; and, second, because the turn-tables served as implied invitations to children with childish instincts, and the railway companies were bound not to leave such temptations in their way. See the title TURN-TABLES.

3. Infancy and Helplessness Often Excuse. — "A child's age and helplessness may, however, often excuse where one of mature age would be adjudged in fault, and may also often make an act negligent as to him that would not be so as to one of riper years." Indianpolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 25 Am. & Eng. R. Cas. 313.

4. But Great Care Must Be Exercised Toward a Child. — "It is a reasonable and necessary rule that a higher degree of care should be exercised towards a child incapable of using discretion commensurate with the perils of his situation than one of mature age and capacity; hence, conduct which toward the general public might be up to the standard of due care, may be gross or wilful negligence when considered in reference to children of tender age and immature experience." Bransom *v.* Labrot, 81 Ky. 638, 50 Am. Rep. 193. See also Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law erects for determining what is ordinary care in a person of full age and capacity.[1]

7. Liability for Sudden Act of Child. — But this will not warrant a recovery when the child suddenly put himself in a dangerous place where there was no reason to expect him, and too late for the danger to be averted by the person inflicting the injury.[2]

8. Defendant Not Negligent — Apprehension of Danger by Infant. — And, of course, there can be no recovery if the injury did not result from negligence,[3] or if it came from a danger fully apprehended by the infant, and of which he had assumed the risks, having the capacity to comprehend and avoid danger.[4]

1. Ordinary Care of Child for the Jury, When. — "The question of discretion in the child, and of consequent responsibility for negligence, was not one for the court, and to be determined upon demurrer, but was for the jury. In no class of cases can this practical experience of juries be more wisely applied than in that we are considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence. A court cannot declare, as a matter of law, that a child of seven years is *sui juris;* and when from the age of the child there may be doubt upon that question, it should be submitted to the jury." Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 6 Am. & Eng. R. Cas. 182, 44 Am. Rep. 586.

Massachusetts. — Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; O'Shaughnessy *v.* Suffolk Brewing Co., 145 Mass. 569.

New Jersey. — Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 46.

New York. — Brown *v.* Syracuse, 77 Hun (N. Y.) 411; Crawford *v.* Wilson, etc., Mfg. Co., 8 N. Y. Misc. Rep. (Brooklyn City Ct.) 48.

Texas. — Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 6 Am. & Eng. R. Cas. 182, 44 Am. Rep. 586.

Virginia. — Trumbo *v.* City Street Car Co., 89 Va. 780, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 43.

2. No Liability for Sudden Act of Child. — Calumet, etc., R. Co. *v.* Van Pelt, 68 Ill. App. 582, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 46. "It is hence manifest that this accident occurred, not because of any defect in the vehicle, nor from the neglect of the person in charge of it, but from the sudden and unanticipated act of the child itself, which could neither be foreseen nor guarded against; and it is a fact that the thoughtless impulse of a child may bring about an accident for which even a railroad company will not be held liable." Hestonville Pass. R. Co. *v.* Connell, 88 Pa. St. 520, 32 Am. Rep. 472, *citing* Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544.

And upon this same ground the case of Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413, might well have been placed. But it was there held, as a matter of law, that a boy of fourteen years had been guilty of negligence.

3. If Defendant Not Negligent, Not Liable. — The youth of the plaintiff, as was said by Agnew, J., in Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251, "may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company." Hough, J., in Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423, 4 Am. & Eng. R. Cas. 589.

"Where the injury is caused by the actual negligence of the company, the incapacity of a child of this age [nineteen months] to know the danger, and to avoid it, shields it from responsibility for its acts. If there be no negligence on the part of the company, then the incapacity of the child creates no liability." Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628. To the same point, see the following:

Kansas. — Central Branch Union Pac. R. Co. *v.* Henigh, 23 Kan. 347, 33 Am. Rep. 167.

Pennsylvania. — Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 634; Cauley *v.* Pittsburgh, etc., R. Co., 95 Pa. St. 398, 4 Am. & Eng. R. Cas. 533, 40 Am. Rep. 664.

Rhode Island. — Bishop *v.* Union R. Co., 14 R. I. 314, 51 Am. Rep. 386.

4. Injury from Risks Assumed by Child. — Thus, in McGinnis *v.* Canada Southern Bridge Co., 49 Mich. 466, 8 Am. & Eng. R. Cas. 135, where the plaintiff claimed a right to recover, on the ground that, being immature and inexperienced, he had been sent by the defendant into danger the full extent of which he did not comprehend, it was said by the court: "The first ground was shown to be untenable by the plaintiff's own evidence. He was past twenty years of age; was not shown to be wanting in average intelligence of those of his age, and his duties were explained to him when he entered upon the employment. He besides understood the very danger into which he fell, and had in mind the purpose to avoid it. It was thus made to appear, by his own examination, that he was not sent into unknown dangers, and that he was not exposed to risks which he, through immaturity or for any other reason, failed to comprehend."

"It is said by the learned counsel for the

So if a minor has reached years of discretion, and is fully capable of comprehending danger and using sufficient care to avoid it, he may be guilty of contributory negligence as a matter of law.[1]

9. Injuries to Idiots, Lunatics, and Others of Weak Mind. — The foregoing principles apply with equal force to cases where injuries to idiots, lunatics, or weak-minded persons are in question, except that in such cases the very appearance of the person is not necessarily, as it is in the case of children of tender years, a warning to every one that he is not to be held to the adult standard of ordinary care.[2]

XV. Effect of Privity Between Plaintiff and Defendant — 1. In General. — In some relations, where one party owes the other a special duty, contractual or otherwise, a higher degree of care and foresight is required of the one owing the duty than of the one to whom it is owing. The test is still that of ordinary care; but what would be ordinary care for one party to the relation might be negligence in the other because of the higher duty resting upon him.[3]

respondent that infancy and inexperience do not modify the rule of fellow-servants. But that statement only holds good when it appears that such employee has been properly instructed by his employer as to the dangers of his employment, or has acquired knowledge of such dangers from other sources. When he has been properly instructed, and knows the dangers of his employment, then he stands on the same footing as any other employee, and cannot recover for any injury caused by the negligence of a fellow-servant." Jones *v.* Florence Min. Co., 66 Wis. 268, 57 Am. Rep. 276. To the same effect are:

Arkansas. — Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264.

Indiana. — Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798.

Kentucky. — Givens *v.* Kentucky Cent. R. Co., 12 Ky. L. Rep. 950, 89 Ky. 231.

Massachusetts. — Williams *v.* Churchill, 137 Mass. 243, 50 Am. Rep. 304; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Michigan. — Hamilton *v.* Detroit, 2 Detroit Leg. N 135.

Missouri. — Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

North Carolina. — Meredith *v.* Richmond, etc., R. Co., 108 N. Car. 616.

Tennessee. — McMillan Marble Co. *v.* Black, 89 Tenn. 118.

Washington. — Oregon, R. etc., Co. *v.* Egley, 2 Wash. 409, 26 Am. St. Rep. 860.

"Here again it should be observed that the master will not be thus liable if the circumstances are such as to show that the servant is competent to apprehend the danger, and expressly or impliedly assumes the risk." Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 167, 23 Am. & Eng. R. Cas. 418. And so where the minor employee, although not warned of the danger by his master, had obtained knowledge from other sources, and fully realized the risks he was taking. Sullivan *v.* India Mfg. Co., 113 Mass. 396. And see, to the same effect

Indiana. — Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798.

Massachusetts. — Sullivan *v.* India Mfg. Co., 113 Mass. 396; Williams *v.* Churchill, 137 Mass. 243, 50 Am. Rep. 304; Curran *v.* Merchants' Mfg. Co., 130 Mass. 374, 39 Am. Rep. 457; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Missouri. — Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

1. A Minor May Be Guilty of Negligence as Matter of Law. — Thus, when an intelligent boy of fourteen years, knowing of the dangers of machinery generally, and familiar with the railroad adjacent to his place of work, heedlessly ran upon the track in front of a locomotive, and was killed, it was held as a matter of law that he was guilty of contributory negligence. Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413. And see Dietrich *v.* Baltimore, etc., R. Co., 58 Md. 347, 11 Am. & Eng. R. Cas. 115, where, the facts being undisputed, a boy of fourteen was held guilty of negligence as a matter of law. *Contra*, Haycroft *v.* Lake Shore, etc., R. Co., 64 N. Y. 636, where it was held a question for the jury to say whether a girl of sixteen, injured because of her own heedlessness, had been guilty of contributory negligence.

See also the following:

Minnesota. — Twist *v.* Winona, etc., R. Co., 39 Minn. 164, 12 Am. St. Rep. 626.

Missouri. — Eswin *v.* St. Louis, etc., R. Co., 96 Mo. 290.

Massachusetts. — Gay *v.* Essex Electric St. R. Co., 159 Mass. 238, 38 Am. St. Rep. 415.

2. 1 Shearman & Redf. on Negligence (4th ed.), § 84; Deering on Negligence, § 20.

3. "Ordinary Care" in Relations of Privity. — This is only another way of stating the doctrine that ordinary care varies with the circumstances and conditions of the parties, and hence each party to a relation of privity must exercise that care which an ordinarily careful and prudent person so situated would exercise. 2 Woods Ry. Law, 1074 *et seq.*; Thompson on Carriers, 257.

Indiana. — Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228.

Massachusetts. — Sullivan *v.* Scripture, 3 Allen (Mass.) 566; Fallon *v.* Boston, 3 Allen (Mass.) 39; Cunningham *v.* Hall, 4 Allen (Mass.) 276.

Missouri. — Price *v.* St. Louis, etc., R. Co., 72 Mo. 414, 3 Am. & Eng. R. Cas. 365.

2. Carriers of Passengers. — The general rule is that in order for a passenger to recover for an injury on the ground of negligence on the part of the carrier, it must appear that the plaintiff was in the exercise of due care in respect to the occurrence from which the injury arose, or that the injury was in no part due to his own fault or want of care, and a recovery will be defeated as well where the negligence of the passenger exposes him to injury as where it co-operates in causing the misfortune from which the injury results.[1]

3. Travelers on Streets and Highways — *a.* A NON-CONTRACTUAL SPECIAL DUTY. — A non-contractual relation wherein greater care is required of the one party than of the other, is that which exists between a municipal corporation and a traveler on a public street or highway, when the law imposes upon the municipality the duty of keeping streets and highways reasonably safe for public travel, and renders it liable for injuries resulting from failure in this respect. It is the duty of such a municipality to keep its streets and highways reasonably safe for travel, and when they are in process of repair, defective, or unsafe, to see that proper signals and warnings of danger are given to travelers. A traveler upon a street or highway has a right to depend upon the performance of this duty without special investigation; and if injured by defects therein of which he had no notice, while traveling along the street in an ordinary manner, and relying upon the performance of duty by the municipality, he is not guilty of contributory negligence.[2]

b. USING DEFECTIVE HIGHWAY WITH KNOWLEDGE. — And it is not contributory negligence *per se* to use a highway, street, or bridge that is known to be defective; but if the traveler uses ordinary care to avoid injury from such defects, and is injured notwithstanding such care, it is a question for the jury

Pennsylvania. — Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

1. **For a Full Discussion** of this subject, see the title CARRIERS OF PASSENGERS, vol. 5, p. 645.

2. **Non-Contractual Special Duty** — *Alabama.* — Birmingham *v.* Starr, 112 Ala. 98; Birmingham *v.* Tayloe, 105 Ala. 170.

California. — Davis *v.* California St. Cable R. Co., 105 Cal. 131; Van Praag *v.* Gale, 107 Cal. 438.

Connecticut. — Dooley *v.* Meriden, 44 Conn. 117, 26 Am. Rep. 433; Lutton *v.* Vernon, 62 Conn. 1; Bunnell *v.* Berlin Iron Bridge Co., 66 Conn. 24.

Delaware. — Robinson *v.* Wilmington, 8 Houst. (Del.) 409.

Illinois. — Vieths *v.* Skinner, 47 Ill. App. 325; Chicago *v.* Babcock, 143 Ill. 358; Nokomis *v.* Salter, 61 Ill. App. 150.

Indiana. — Kenyon *v.* Indianapolis, 1 Wils. (Ind.) 129; Indianapolis *v.* Gaston, 58 Ind. 224; Elkhart *v.* Ritter, 66 Ind. 136; Howard County *v.* Legg, 110 Ind. 479; Fowler *v.* Linquist, 138 Ind. 566; Noblesville Gas, etc., Co. *v.* Loehr, 124 Ind. 79; Bluffton *v.* McAfee, 12 Ind. App. 490.

Kentucky. — Lebanon, etc., Turnpike Road Co. *v.* Purdy, 18 Ky. L. Rep. 612.

Kansas. — Atchison, etc., R. Co. *v.* Morrow, 4 Kan. App. 199.

Maryland. — Central R. Co. *v.* State, 82 Md. 647.

Massachusetts. — Thompson *v.* Bridgewater, 7 Pick. (Mass.) 188; Slee *v.* Lawrence, 162 Mass. 405.

Michigan. — Wakeham *v.* St. Clair Tp., 91 Mich. 15; Edwards *v.* Three Rivers, 107 Mich. 153.

Missouri. — Jordan *v.* Hannibal, 87 Mo. 673, 15 Am. & Eng. Corp. Cas. 246; Wiggin *v.* St. Louis, 135 Mo. 558; Gerdes *v.* Christopher, etc., Architectural Iron, etc., Co., 124 Mo. 347; McCormick *v.* Monroe, 64 Mo. App. 197.

Nebraska. — Plattsmouth *v.* Mitchell, 20 Neb. 228, 15 Am. & Eng. Corp. Cas. 233.

New York. — Beltz *v.* Yonkers, 74 Hun (N. Y.) 73; Roe *v.* Crimmins, 8 Misc. Rep. (N. Y. City Ct.) 496; Donnelly *v.* Cowen, 20 Misc. Rep. (N. Y. Supreme Ct.) 100; Sherman *v.* Oneonta, 59 Hun (N. Y.) 294, 49 N. Y. St. Rep. 267, *affirmed* 142 N. Y. 637; Jennings *v.* Van Schaick, 108 N. Y. 530, 2 Am. St. Rep. 459; Chisholm *v.* State, 141 N. Y. 246.

North Carolina. — Russell *v.* Monroe, 116 N. Car. 720.

Ohio. — Monroeville *v.* Weihl, 2 Ohio Dec. 343.

Oklahoma. — Oklahoma City *v.* Welsh, 3 Okla. 288.

Pennsylvania. — Stewart *v.* Chester, etc., Road Co., 6 Del. Co. Rep. (Pa.) 434; Lumis *v.* Philadelphia Traction Co., 181 Pa. St. 268; Schively *v.* Jenkintown, 180 Pa. St. 196; McLaughlin *v.* Philadelphia Traction Co., 175 Pa. St. 565; Manross *v.* Oil City, 178 Pa. St. 276; Glaub *v.* Goshen Tp., 7 Kulp (Pa.) 292; Fee *v.* Columbus, 168 Pa. St. 382; Robb *v.* Connellsville, 137 Pa. St. 42; Stackhouse *v.* Vendig, 166 Pa. St. 582.

Utah. — Tucker *v.* Salt Lake City, 10 Utah 173.

Virginia. — Moore *v.* Richmond, 85 Va. 538.

Wisconsin. — Hausmann *v.* Madison, 85 Wis. 187, 39 Am. St. Rep. 834; West *v.* Eau Claire, 89 Wis. 31; Simonds *v.* Baraboo, 93 Wis. 40; Cairncross *v.* Pewaukee, 86 Wis. 181; Slivitski *v.* Wien, 93 Wis. 460; Reed *v.* Madison, 83 Wis. 171, 7 Am. R. & Corp. Rep. 127.

whether he was guilty of contributory negligence in using the highway with knowledge of the defects.[1]

c. Want of Ordinary Care by Traveler. — But any want of ordinary care on the part of the traveler which contributes proximately to his injury will bar his recovery; and where his want of care is undeniable, he will be held guilty of contributory negligence as a matter of law.[2]

1. Using Defective Highway with Knowledge of Defects — *United States.* — New York L. Ins. Co. *v.* Savage, 19 U. S. App. 197, 58 Fed. Rep. 338; Chicago, etc., R. Co. *v.* Prescott, 59 Fed. Rep. 237.

Alabama. — Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

California. — Higgins *v.* Williams, 114 Cal. 176.

Colorado. — Highlands *v.* Raine, 23 Colo. 295.

Georgia. — Dempsey *v.* Rome, 94 Ga. 420.

Illinois. — Bunker Hill *v.* Pearson, 46 Ill. App. 47; St. Charles *v.* Hannon, 56 Ill. App. 515; Springfield *v.* Rosenmeyer, 52 Ill. App. 301; Mt. Carmel *v.* Blackburn, 53 Ill. App. 658; Sumner *v.* Scaggs, 52 Ill. App. 551; Waverly *v.* Henry, 67 Ill. App. 407; Coffeen *v.* Lang, 67 Ill. App. 359; Sandwich *v.* Dolan, 141 Ill. 430; Streator *v.* Hamilton, 61 Ill. App. 509.

Indiana. — Henry County Turnpike Co. *v.* Jackson, 86 Ind. 111, 44 Am. Rep. 274; Toledo, etc., R. Co. *v.* Brannagan, 75 Ind. 490, 5 Am. & Eng. R. Cas. 630; Indianapolis *v.* Cook, 99 Ind. 13; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Huntingburgh *v.* First, 15 Ind. App. 552; Shelby County *v.* Castetter, 7 Ind. App. 318.

Iowa. — Hanlon *v.* Keokuk, 7 Iowa 488, 74 Am. Dec. 276.

Kansas. — Kansas City *v.* Manning, 50 Kan. 373; Olathe *v.* Mizee, 48 Kan. 435, 30 Am. St. Rep. 308; Wichita *v.* Coggshall, 3 Kan. App. 540.

Maryland. — Prince George's County *v.* Burgess, 61 Md. 29.

Massachusetts. — Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Marble *v.* Worcester, 4 Gray (Mass.) 404; Frost *v.* Waltham, 12 Allen (Mass.) 86; Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 450, 85 Am. Dec. 720; Smith *v.* Lowell, 6 Allen (Mass.) 39; Norwood *v.* Somerville, 159 Mass. 105.

Michigan. — Sias *v.* Reed City, 103 Mich. 312; Germaine *v.* Muskegon, 105 Mich. 213; Finn *v.* Adrian, 93 Mich. 504; Wakeham *v.* St. Clair Tp., 91 Mich. 15.

Minnesota. — Estelle *v.* Lake Crystal, 27 Minn. 243; Maloy *v.* St. Paul, 54 Minn. 398.

Missouri. — Loewer *v.* Sedalia, 77 Mo. 431; Taylor *v.* Springfield, 1 Mo. App. Rep. 383; Culverson *v.* Maryville, 67 Mo. App. 343; Flynn *v.* Neosho, 114 Mo. 567; Smith *v.* Butler, 48 Mo. App. 663; Cohn *v.* Kansas City, 108 Mo. 387.

Montana. — Cannon *v.* Lewis, 18 Mont. 402.

New Hampshire. — Griffin *v.* Auburn, 58 N. H. 121.

New York. — Evans *v.* Utica, 69 N. Y. 166, 25 Am. Rep. 165; Weed *v.* Ballston Spa, 76 N. Y. 329; Bullock *v.* New York, 99 N. Y. 654; Dale *v.* Syracuse, 71 Hun (N. Y.) 449; O'Dwyer *v.* O'Brien, 13 N. Y. App. Div. 570; Stone *v.* Poughkeepsie, 15 N. Y. App. Div. 582; McGoldrick *v.* New York Cent., etc., R. Co., (Supreme Ct.) 49 N. Y. St. Rep. 566, 20 N. Y. Supp. 914; Ottendorff *v.* Willis, 80 Hun (N. Y.) 262.

North Carolina. — Thompson *v.* Winston, 118 N. Car. 662.

North Dakota. — Ouverson *v.* Grafton, 5 N. Dak. 281.

Oklahoma. — Pitman *v.* El Reno, 2 Okla. 414, 47 Am. & Eng. Corp. Cas. 29, 10 Am. R. & Corp. Rep. 698.

Pennsylvania. — Feather *v.* Reading, 155 Pa. St. 187; Allen *v.* Du Bois, 181 Pa. St. 184; McDonnell *v.* Philadelphia, 12 Pa. Co. Ct. Rep. 672; Hill *v.* Tionesta Tp., 146 Pa. St. 11; Brendlinger *v.* New Hanover Tp., 148 Pa. St. 93; Hentz *v.* Somerset, 2 Pa. Super. Ct. Rep. 225, 39 W. N. C. (Pa.) 66.

Texas. — Ball *v.* El Paso, 5 Tex. Civ. App. 221; Fort Worth *v.* Johnson, 84 Tex. 137.

Washington. — McQuillan *v.* Seattle, 10 Wash. 464, 45 Am. St. Rep. 799.

Wisconsin. — Kenworthy *v.* Ironton, 41 Wis. 647; Simonds *v.* Baraboo, 93 Wis. 40.

Failure to Take Another Route. — The fact that the traveler did not take another road, which may have been less accessible, does not defeat his right of recovery, where the traveler used ordinary care and was not cognizant of the great danger which he might have avoided.

Connecticut. — Carstesen *v.* Stratford, 67 Conn. 428.

Georgia. — Cook *v.* Atlanta, 94 Ga. 613.

Illinois. — Clayton *v.* Brooks, 150 Ill. 97; Peoria *v.* Walker, 47 Ill. App. 182.

Indiana. — Lyon *v.* Logansport, 9 Ind. App. 21; Fowler *v.* Linquist, 138 Ind. 566.

Iowa. — Cosner *v.* Centerville, 90 Iowa 33.

Pennsylvania. — Glaub *v.* Goshen Tp., 7 Kulp (Pa.) 292; Douglass *v.* Monongahela City Water Co., 172 Pa. St. 435; Walters *v.* Wayne Tp., 16 Pa. Co. Ct. Rep. 613; Wellman *v.* Susquehanna Depot, 167 Pa. St. 239; Chilton *v.* Carbondale, 160 Pa. St. 463; Smith *v.* Newcastle, 178 Pa. St. 298.

New York. — Kleng *v.* Buffalo, 72 Hun (N. Y.) 541.

Texas. — International, etc., R. Co. *v.* Robertson, (Tex. Civ. App. 1894) 27 S. W. Rep. 564.

Wisconsin. — Cairncross *v.* Pewaukee, 86 Wis. 181.

2. Any Want of Ordinary Care Will Bar Traveler — *England.* — Butterfield *v.* Forrester, 11 East 60.

Alabama. — Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

California. — Davis *v.* California St. Cable R. Co., 105 Cal. 131.

Connecticut. — O'Neil *v.* East Windsor, 63 Conn. 150.

District of Columbia. — District of Columbia *v.* Brewer, 7 App. Cas. (D. C.) 113.

4. Master and Servant — *a.* RISKS ASSUMED BY SERVANT. — When the relation of master and servant exists a special duty devolves upon the master to provide for the safety of his servant in many important respects.[1] In such relationship the servant assumes the risk of injury from all the ordinary dangers that necessarily accompany the employment, and from any unusual dangers incident to the employment of which he had notice before voluntarily

Georgia. — Atlanta St. R. Co. *v.* Walker, 93 Ga. 462.

Illinois. — Bloomington *v.* Perdue, 99 Ill. 329; Hutchison *v.* Collins, 90 Ill. 410; Aurora *v.* Hillman, 90 Ill. 61; Centralia *v.* Krouse, 64 Ill. 19; Waverly *v.* Henry, 67 Ill. App. 407; Rock Island *v.* Carlin, 44 Ill. App. 610; Rock Falls *v.* Wells, 59 Ill. App. 155.

Indiana. — Wilson *v.* Trafalgar, etc., Gravel Road Co., 93 Ind. 287; Mount Vernon *v.* Dusouchett, 2 Ind. 586, 54 Am. Dec. 467; Bruker *v.* Covington, 69 Ind. 33, 35 Am. Rep. 202; Indianapolis *v.* Cook, 99 Ind. 10; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Huntington *v.* Breen, 77 Ind. 29; Henry County Turnpike Co. *v.* Jackson, 86 Ind. 111, 44 Am. Rep. 274.

One who goes upon a sidewalk in the dark with full knowledge of its unsafe condition must, to be free from contributory negligence, exercise care proportioned to the known danger, and more than would have been required had he been ignorant of the defect. Bedford *v.* Neal, 143 Ind. 425; Bloomington *v.* Rogers, 9 Ind. App. 230.

Iowa. — McLaury *v.* McGregor, 54 Iowa 717; Munger *v.* Marshalltown, 56 Iowa 216, 59 Iowa 763; Parkhill *v.* Brighton, 61 Iowa 103; Hall *v.* Manson, 90 Iowa 585; Perry *v.* Cedar Falls, 87 Iowa 315.

Kansas. — Osage City *v.* Brown, 27 Kan. 74; Maultby *v.* Leavenworth, 28 Kan. 745; Corlett *v.* Leavenworth, 27 Kan. 673.

Maine. — Johnson *v.* Whitefield, 18 Me. 286, 36 Am. Dec. 721; French *v.* Brunswick, 21 Me. 29, 38 Am. Dec. 250; Baker *v.* Portland, 58 Me. 199, 4 Am. Rep. 274; Tasker *v.* Farmingdale, 88 Me. 103, 85 Me. 523.

Massachusetts. — Smith *v.* Smith, 2 Pick. (Mass.) 621, 13 Am. Dec. 464; Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Hibbard *v.* Thompson, 109 Mass. 288; Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; Gerald *v.* Boston, 108 Mass. 584; Steele *v.* Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; Dewire *v.* Bailey, 131 Mass. 169, 41 Am. Rep. 219; Wilson *v.* Charlestown, 8 Allen (Mass.) 137; Dipper *v.* Milford, 167 Mass. 555; Bourget *v.* Cambridge, 156 Mass. 391; Casey *v.* Fitchburg, 162 Mass. 321; McGuinness *v.* Worcester, 160 Mass. 272; Casey *v.* Malden, 163 Mass. 507, 47 Am. St. Rep. 473.

Michigan. — Kornetzski *v.* Detroit, 94 Mich. 341; Kuhn *v.* Walker Tp., 97 Mich. 306; Dittrich *v.* Detroit, 98 Mich. 245.

Minnesota. — Truntle *v.* North Star Woolen Mill Co., 57 Minn. 52; Wright *v.* St. Cloud, 54 Minn. 94.

Mississippi. — Vicksburg *v.* Hennessy, 54 Miss. 391, 28 Am. Rep. 354; Meridian *v.* Hyde, (Miss. 1891) 11 So. Rep. 108; Walker *v.* Vicksburg, 71 Miss. 899.

Missouri. — Loewer *v.* Sedalia, 77 Mo. 431; Sindlinger *v.* Kansas City, 126 Mo. 315; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322; Boyd *v.* Springfield, 62 Mo. App. 456; Lewis *v.* Independence, 54 Mo. App. 183.

Montana. — Whittaker *v.* Helena, 14 Mont. 124, 43 Am. St. Rep. 621.

New Jersey. — Durant *v.* Palmer, 29 N. J. L. 544.

New York. — Evans *v.* Utica, 69 N. Y. 166, 25 Am. Rep. 165; Weston *v.* New York El. R. Co., 73 N. Y. 595; Roe *v.* Crimmins, 10 Misc. Rep. (N. Y. C. Pl.) 711; Cleveland *v.* Pittsford, 72 Hun (N. Y.) 552; Neddo *v.* Ticonderoga, 77 Hun (N. Y.) 524; Whalen *v.* Citizens' Gas Light Co., 151 N. Y. 70; Somerville *v.* City R. Co., (Supreme Ct.) 43 N. Y. St. Rep. 425, 17 N. Y. Supp. 719; Taylor *v.* Constable, (Supreme Ct.) 40 N. Y. St. Rep. 60, 15 N. Y. Supp. 795; May *v.* Brooklyn, (Brooklyn City Ct.) 46 N. Y. St. Rep. 552, 19 N. Y. Supp. 670; Reens *v.* Mail, etc., Pub. Co., 10 Misc. Rep. (N. Y. C. Pl.) 122; Blaustein *v.* Guindon, 83 Hun (N. Y.) 5; McNish *v.* Peekskill, 91 Hun (N. Y.) 324; Akers *v.* New York, 14 Misc. Rep. (N. Y. C. Pl.) 524; Kirk *v.* Homer, 77 Hun (N. Y.) 459.

Ohio. — Schaefler *v.* Sandusky, 33 Ohio St. 246, 31 Am. Rep. 533; Conneaut *v.* Naef, 54 Ohio St. 529.

Pennsylvania. — King *v.* Thompson, 87 Pa. St. 365, 30 Am. Rep. 364; Erie *v.* Magill, 101 Pa. St. 616, 47 Am. Rep. 739; Crumlich *v.* Harrisburg, 162 Pa. St. 624; Boyle *v.* Mahanoy Citp, 19 Pa. Co. Ct. Rep. 195; Winner *v.* Oakland Tp., 158 Pa. St. 405; Mueller *v.* Ross Tp., 31 W. N. C. (Pa.) 409, 152 Pa. St. 399; Fruh *v.* Philadelphia, 1 Pa. Dist. Rep. 248, 11 Pa. Co. Ct Rep. 473; Stackhouse *v.* Vendig, 166 Pa. St. 582; Smith *v.* New Castle, 178 Pa. St. 298; Bruch *v.* Philadelphia, 5 Pa. Dist. Rep. 718.

Utah.—Tucker *v.* Salt Lake City, 10 Utah 173.

Vermont. — Drew *v.* Sutton, 55 Vt. 586, 45 Am. Rep. 644.

Washington. — Saylor *v.* Montesano, 11 Wash. 328.

For a Detailed Discussion, see the titles HIGHWAYS; STREETS AND SIDEWALKS.

1. Master and Servant: Special Duty of Master. — A detailed treatment of this subject will be found under the titles FELLOW SERVANTS and MASTER AND SERVANT. Here it is proposed to give a few of the applications of the general principles laid down in the early part of this article, with cases in support of the same.

The following cases are of special interest:

United States. — Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642; Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377; Hough *v.* Texas, etc., R. Co., 100 U. S. 213; Northern Pac. R. Co. *v.* Charless, 7 U. S. App. 359; Southern Pac. Co. *v.* Lafferty, 15 U. S. App. 193; Mather *v.* Rillston, 156 U. S. 391.

Massachusetts. — Farwell *v.* Boston, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339.

exposing himself to them.[1] But there is a marked distinction between

1. Risks Assumed by Servant — *England* — Priestley *v.* Fowler, 3 M. & W. 1; Lovell *v.* Howell, 1 C. P. Div. 167; Skipp *v.* Eastern Counties R. Co., 9 Exch. 223; Griffiths *v.* Gidlow, 3 H. & N. 654.

United States. — Bunt *v.* Sierra Buttes Gold Min. Co., 24 Fed. Rep. 847, and note; McCain *v.* Chicago, etc., R. Co., 76 Fed. Rep. 125; McPeck *v.* Central Vermont R. Co., 50 U. S. App. 27; Motey *v.* Pickle Marble, etc., Co., 74 Fed. Rep. 155; St. Louis, etc., R. Co. *v.* Schumacher, 152 U. S. 77; Gowen *v.* Harley, 56 Fed. Rep. 973, 56 Am. & Eng. R. Cas. 238; Hudson *v.* Charleston, etc., R. Co., 55 Fed. Rep. 248; Aerkfetz *v.* Humphreys, 145 U. S. 418; Martin *v.* Baltimore, etc., R. Co., 41 Fed. Rep. 125; Naylor *v.* New York Cent., etc., R. Co., 33 Fed. Rep. 801; Goff *v.* Norfolk, etc., R. Co., 36 Fed. Rep. 299; The Aspotogan, 49 Fed. Rep. 163; The Ida B. Cothell, 62 Fed. Rep. 765; Burke *v.* Anderson, 34 U. S. App. 132; Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. Rep. 353; Gleason *v.* Detroit, etc., R. Co., 43 U. S. App. 89; Lake Erie, etc., R. Co. *v.* Craig, 37 U. S. App. 654; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. Rep. 282; Patterson *v.* Foster, 25 U. S. App. 642; O'Neil *v.* St. Louis, etc., R. Co., 3 McCrary (U. S.) 423, 9 Fed. Rep. 337; Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. Rep. 711; Palmer *v.* Denver, etc., R. Co., 12 Fed. Rep. 392.

Alabama. — Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160; Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377 Alabama G. S. R. Co. *v.* Richie, 111 Ala. 297; Alabama G. S. R. Co. *v.* Roach, 110 Ala. 266; Brown *v.* Louisville, etc., R. Co., 111 Ala. 275; Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216; George *v.* Mobile, etc., R. Co., 109 Ala. 245; Richmond, etc., R. Co. *v.* Bivins, 103 Ala. 142; Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545; Andrews *v.* Birmingham Mineral R. Co., 99 Ala. 438; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 25 Am. St. Rep. 47; Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 24 Am. St. Rep. 863; Davis *v.* Western R. Co., 107 Ala. 626.

Arkansas. — St. Louis, etc., R. Co. *v.* Bloyd, 60 Ark. 637, 31 S. W. Rep. 457; Little Rock, etc., R. Co. *v.* Duffey, 35 Ark. 602, 4 Am. & Eng. R. Cas. 637; Southwestern Telephone Co. *v.* Woughter, 56 Ark. 206; Arkadelphia Lumber Co. *v.* Bethea, 57 Ark. 76; Bauer *v.* St. Louis, etc., R. Co., 46 Ark. 388.

California. — McGlynn *v.* Brodie, 31 Cal. 376; Long *v.* Coronado R. Co., 96 Cal. 269; Martin *v.* California Cent. R. Co., 94 Cal. 326; Brown *v.* Central Pac. R. Co., (Cal. 1887) 12 Pac. Rep. 512.

Colorado. — Anson *v.* Evans, 19 Colo. 274; Colorado Coal, etc., Co. *v.* Carpita, 6 Colo. App. 248; Deep Min., etc., Co. *v.* Fitzgerald, 21 Colo. 533; McGonigle *v.* Kane, 20 Colo. 292; Acme Coal Min. Co. *v.* McIver, 5 Colo. App. 267; Victor Coal Co. *v.* Muir, 20 Colo. 320, 46 Am. St. Rep. 299.

Connecticut. — Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Dakota. — Herbert *v.* Northern Pac. R. Co., 3 Dakota 38.

Delaware. — Foster *v.* Pusey, 8 Houst. (Del.) 168.

Georgia. — Brown *v.* Comer, 97 Ga. 801; Sundy *v.* Savannah St. R. Co., 96 Ga. 819; Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292; Central R., etc., Co. *v.* Sims, 80 Ga. 749; East Tennessee, etc., R. Co. *v.* Perkins, 88 Ga. 1; Devine *v.* Savannah, etc., R. Co., 89 Ga. 541; Richmond, etc., R. Co. *v.* Watts, 92 Ga. 88; East Tennessee, etc., R. Co. *v.* Head, 92 Ga. 723.

Illinois. — Chicago, etc., R. Co. *v.* Holdom, 66 Ill. App. 201; Chicago, etc., R. Co. *v.* Eggman, 59 Ill. App. 680; Terre Haute, etc., R. Co. *v.* Leeper, 60 Ill. App. 194; Peoria, etc., R. Co. *v.* Puckett, 52 Ill. App. 222, 42 Ill. App. 642; Jorgenson *v.* Johnson Chair Co., 67 Ill. App. 80; Foster *v.* Onderdonk, 54 Ill. App. 254; Werk *v.* Illinois Steel Co., 154 Ill. 427; East St. Louis Connecting R. Co. *v.* Enright, 47 Ill. App. 494; Chicago Packing, etc., Co. *v.* Rohan, 47 Ill. App. 640; Illinois Cent. R. Co. *v.* Harris, 53 Ill. App. 592; Toledo, etc., R. Co. *v.* Durkin, 76 Ill. 395; Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Chicago, etc., R. Co. *v.* Lonergan, 118 Ill. 41; Consolidated Coal Co. *v.* Haenni, 146 Ill. 614; Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 596; Clark *v.* Murton, 63 Ill. App. 49; Wabash, etc., R. Co., *v.* Conkling, 15 Ill. App. 157; Chicago, etc., R. Co. *v.* Travis, 44 Ill. App. 466; St. Louis, etc., R. Co. *v.* Corgan, 49 Ill. App. 229.

Indiana. — Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 556; Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798; Romona Oolitic Stone Co. *v.* Phillips, 11 Ind. App. 118; Salem Bedford Stone Co. *v.* O'Brien, 12 Ind. App. 217; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682; Griffin *v.* Ohio, etc., R. Co., 124 Ind. 326; Vincennes Water Supply Co. *v.* White, 124 Ind. 376; Louisville, etc., R. Co. *v.* Hobbs, 3 Ind. App. 445; Romona Oolitic Stone Co. *v.* Tate, 12 Ind. App. 57; Evansville, etc., R. Co. *v.* Krapf, 143 Ind. 647; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440; Taylor *v.* Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372; Griffin *v.* Ohio, etc., R. Co., 124 Ind. 326; Louisville, etc., R. Co. *v.* Corps, 124 Ind. 427; Louisville, etc., Consol. R. Co. *v.* Hanning, 131 Ind. 528, 31 Am. St. Rep. 443; O'Neal *v.* Chicago, etc., Coal R. Co., 132 Ind. 110; Hoosier Stone Co. *v.* McCain, 133 Ind. 231; Evansville, etc., R. Co. *v.* Doan, 3 Ind. App. 453.

Iowa. — Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357; Rasmussen *v.* Chicago, etc., R. Co., 65 Iowa 236, 18 Am. & Eng. R. Cas. 54; Galvin *v.* Old Colony R. Co., 162 Mass. 533; Magee *v.* Chicago, etc., R. Co., 82 Iowa 249, 89 Iowa 752; Kroener *v.* Chicago, etc., R. Co., 88 Iowa 16; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, 10 Ry. & Corp. L. J. 472, 48 Am. & Eng. R. Cas. 154.

Kansas. — Missouri, etc., R. Co. *v.* Young, 4 Kan. App. 219; Atchison, etc., R. Co. *v.* Tindall, 57 Kan. 719; Union Pac. R. Co. *v.* Estes, 37 Kan. 715; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701.

Kentucky. — Downey *v.* Pence, 98 Ky. 261; Louisville, etc., R. Co. *v.* Robinson, 13 Ky. L. Rep. 153 (Ky. 1891) 16 S. W. Rep. 707; Kentucky Cent. R. Co. *v.* Ryle, 13 Ky. L. Rep. 862, (Ky. 1892) 18 S. W. Rep. 938; Louisville, etc., R. Co. *v.* Law, 14 Ky. L. Rep. 850, (Ky. 1893) 21 S. W. Rep. 648.

Louisiana. — Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86; McCarthy *v.* Whitney Iron Works Co., 48 La. Ann. 978; Smith *v.* Sellars, 40 La. Ann. 527; Wallis *v.* Morgan's Louisiana, etc., R., etc., Co., 38 La. Ann. 156; Dandie *v.* Southern Pac. R. Co., 42 La. Ann. 080.

Maine. — Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212; Nelson *v.* Sanford Mills, 89 Me. 219; Coolbroth *v.* Maine Cent. R. Co., 77 Me. 165, 21 Am. & Eng. R. Cas. 599.

Maryland. — Michael *v.* Stanley, 75 Md. 464; Cumberland, etc., R. Co. *v.* State, 44 Md. 283, 45 Md. 229.

Massachusetts. — Farwell *v.* Boston, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339; Huddleston *v.* Lowell Mach. Shop, 106 Mass. 282; Coombs *v.* New Bedford Cordage Co., 102 Mass. 585, 3 Am. Rep. 506; Sullivan *v.* India Mfg. Co., 113 Mass. 398; Leary *v.* Boston, etc., R. Co., 139 Mass. 580, 23 Am. & Eng. R. Cas. 383, 52 Am. Rep. 733; Nihill *v.* New York, etc., R. Co., 167 Mass. 52; Warren *v.* Boston, etc., R. Co., 163 Mass. 484; McLean *v.* Chemical Paper Co., 165 Mass. 5; Murphy *v.* Webster, 156 Mass. 48; Hannah *v.* Connecticut River R. Co., 154 Mass. 529; Degnan *v.* Jordan, 164 Mass. 84; Gardner *v.* Cohannet Mills, 165 Mass. 507; Wilson *v.* Steel Edge Stamping, etc., Co., 163 Mass. 315; McPhee *v.* Scully, 163 Mass. 216; Thompson *v.* Boston, etc., R. Co., 153 Mass. 391; Browne *v.* New York, etc., R. Co., 158 Mass. 247; Yeaton *v.* Boston, etc., R. Corp., 135 Mass. 418, 15 Am. & Eng. R. Cas. 253.

Michigan. — Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364; Rodman *v.* Michigan Cent. R. Co., 55 Mich. 57, 54 Am. Rep. 348, 17 Am. & Eng. R. Cas. 521; Foley *v.* Chicago, etc., R. Co., 48 Mich. 622, 42 Am. Rep. 481, 6 Am. & Eng. R. Cas. 161, and see cases collected in 25 Am. & Eng. R. Cas. 521, note; Illick *v.* Flint, etc., R. Co., 67 Mich. 632; O'Donnell *v.* Duluth, etc., R. Co., 89 Mich. 174; Farmer *v.* Michigan Cent. R. Co., 99 Mich. 131; Mahan *v.* Clee, 87 Mich. 161; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205; McGinnis *v.* Canada Southern Bridge Co., 49 Mich. 466; Irvine *v.* Flint, etc., R. Co., 89 Mich. 416.

Minnesota. — Cook *v.* St. Paul, etc., R. Co., 34 Minn. 45; Corbin *v.* Winona, etc., R. Co., 64 Minn. 185; Moody *v.* Smith, 64 Minn. 524; Woods *v.* St. Paul, etc., R. Co., 39 Minn. 435; Smith *v.* Winona, etc., R. Co., 42 Minn. 87; Bengtson *v.* Chicago, etc., R. Co., 47 Minn. 486.

Mississippi. — New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258; Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178.

Missouri. — McDermott *v.* Pacific R. Co., 30 Mo. 115; Flynn *v.* Kansas City, etc., R. Co., 78 Mo. 195, 18 Am. & Eng. R. Cas. 23, 47 Am. Rep. 99; Junior *v.* Missouri Electric Light, etc., Co., 127 Mo. 79; Lucey *v.* Hannibal Oil Co., 129 Mo. 32; De Bolt *v.* Kansas City, etc., R. Co., 123 Mo. 496; Gleeson *v.* Excelsior Mfg. Co., 94 Mo. 201; Brown *v.* Hershey Land, etc., Co., 65 Mo. App. 162, 2 Mo. App. Rep. 1186; Renfro *v.* Chicago, etc., R. Co., 86 Mo. 302; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322; Taylor *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. Rep. 206; Craig *v.* Chicago, etc., R. Co., 54 Mo. App. 523; Henry *v.* Wabash Western R. Co., 109 Mo. 488.

New Hampshire. — Hanley *v.* Grand Trunk R. Co., 62 N. H. 274.

New York. — Warner *v.* Erie R. Co., 39 N. Y. 468; Sweeney *v.* Berlin, etc., Envelope Co., 101 N. Y. 520, 54 Am. Rep. 722; Doyle *v.* White, 9 N. Y. App. Div. 521; Glassheim *v.* New York Economical Printing Co., 13 Misc. Rep. (N. Y. C. Pl.) 174; McDugan *v.* New York Cent., etc., R. Co., 10 Misc. Rep. (N. Y. C. Pl.) 336; Schulz *v.* Rohe, 149 N. Y. 132; Reichert *v.* Buffalo Springs, etc., Co., 15 N. Y. Misc. Rep. (Buffalo Super. Ct.) 222; Moeller *v.* Brewster, (Ct. App.) 43 N. Y. St. Rep. 276, 131 N. Y. 606; Stuber *v.* McEntee, 61 N. Y. Super. Ct. 338; Murray *v.* Dwight, 15 N. Y. App. Div. 241; Morgan *v.* Hudson River Ore, etc., Co., (Ct. App.) 45 N. Y. St. Rep. 112, 133 N. Y. 666; Horton *v.* Vulcan Iron Works Co., 13 N. Y. App. Div. 508; Reinig *v.* Broadway R. Co., 49 Hun (N. Y.) 269; Thorn *v.* New York City Ice Co., 46 Hun (N. Y.) 497; Shields *v.* New York Cent., etc., R. Co., 133 N. Y. 557, 44 N. Y. St. Rep. 72; Toms *v.* Buffalo Creek R. Co., 70 Hun (N. Y.) 84; Hogan *v.* Smith, (Supreme Ct.) 9 N. Y. Supp. 881; Ekendahl *v.* Hayes, 10 N. Y. App. Div. 487; Johnson *v.* Steam Gauge, etc., Co., 72 Hun (N. Y.) 535; De Graff *v.* New York Cent., etc., R. Co., 76 N. Y. 125; Disher *v.* New York Cent., etc., R. Co., 114 N. Y. 619; Simmons *v.* Manhattan R. Co., 41 Hun (N. Y.) 643; McNeil *v.* New York, etc., R. Co., 71 Hun (N. Y.) 24.

North Dakota. — Bennett *v.* Northern Pac. R. Co., 2 N. Dak. 112, 10 Ry. and Corp. L. J. 243, 48 Am. & Eng. R. Cas. 182.

Ohio. — Columbus, etc., R. Co. *v.* Webb, 12 Ohio St. 475; Krause *v.* Morgan, 53 Ohio St. 26, 33 Ohio L. J. 304; Cincinnati, etc., R. Co. *v.* Bradshaw, 10 Ohio Cir. Ct. Rep. 645; Columbus, etc., R. Co. *v.* Burns, 9 Ohio Cir. Ct. Rep. 276.

Oregon. — Gibson *v.* Oregon Short Line R. Co., 23 Oregon 493.

Pennsylvania. — Campbell *v.* Pennsylvania R. Co., (Pa. 1886) 2 Atl. Rep. 489, 24 Am. & Eng. R. Cas. 427, and note; Kaufhold *v.* Arnold, 11 Lanc. L. Rev. 273, 163 Pa. St. 269; Nattress *v.* Philadelphia, etc., R. Co., 150 Pa. St. 527; Reese *v.* Clark, 146 Pa. St. 465; Cypher *v.* Huntingdon, etc., R., etc., Co., 149 Pa. St. 359; Rickert *v.* Stephens, 133 Pa. St. 538; Christner *v.* Cumberland, etc., Coal Co., 146 Pa. St. 67; Dell *v.* Phillips Glass Co., 169 Pa. St. 549.

Rhode Island. — Gaffney *v.* J. O. Inman Mfg. Co., 18 R. I. 781.

South Carolina. — Murray *v.* South Carolina R. Co., 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268, and note.

Tennessee. — Louisville, etc., Co. *v.* Wallace, 90 Tenn. 53.

Texas. — Austin, etc., R. Co. *v.* Beatty, 6 Tex. Civ. App. 650; St. Louis Southwestern R. Co. *v.* Threat, 12 Tex. Civ. App. 375; Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297;

assumption of the risk of injury and contributory negligence.[1] And where the servant is injured by the failure of his master to exercise ordinary care for his safety, his assumption of the risks of the employment will not prevent a recovery if he was in the use of ordinary care at the time of his injury, and was discharging his duties in a usual and ordinary manner.[2]

Missouri Pac. R. Co. *v.* Somers, 71 Tex. 700; Jones *v.* Galveston, etc., R. Co., 11 Tex. Civ. App. 39; Galveston, etc., R. Co. *v.* Lempe, 59 Tex. 19; Dallas *v.* Gulf, etc., R. Co., 61 Tex. 196; Houston, etc., R. Co. *v.* Conrad, 62 Tex 627; Missouri Pac. R. Co. *v.* Watts, 63 Tex. 549; Missouri Pac. R. Co. *v.* Callbreath, 66 Tex. 526; Texas, etc., R. Co. *v.* Dillard, 70 Tex. 62; Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623; Missouri Pac. R. Co. *v.* Crenshaw, 71 Tex. 340; Galveston, etc., R Co. *v.* Garrett, 73 Tex. 262, 15 Am. St. Rep. 781.

Utah. — Helfrich *v.* Ogden City R. Co., 7 Utah 186.

Virginia. — Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335, 15 Va. L. J. 440; Moore *v.* Norfolk, etc., R. Co., 87 Va. 489, 15 Va. L. J. 200; Norfolk, etc., R. Co. *v.* McDonald, 88 Va. 352, 15 Va. L. J. 699; Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165; Chesapeake, etc., R. Co. *v.* Hafner, 90 Va. 621; Richmond, etc., R. Co. *v.* De Butts, 90 Va. 405; Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512; Sexton *v.* Turner, 89 Va. 341.

Washington. — Jennings *v.* Tacoma R., etc., Co., 7 Wash. 275; Olson *v.* McMurray Cedar Lumber Co., 9 Wash. 500; Cooney *v.* Great Northern R. Co., 9 Wash. 292.

West Virginia. — Beall *v.* Pittsburgh, etc., R. Co., 38 W. Va. 525; Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206; Knight *v.* Cooper, 36 W. Va. 232; Beuhring *v.* Chesapeake, etc., R. Co., 37 W. Va. 502; Fort Wayne, etc., R. Co. *v.* Gruff, 132 Ind. 13; Reese *v.* Wheeling, etc., R. Co., 42 W. Va. 333; Young *v.* West Virginia, etc., R. Co., 42 W. Va. 112; Robinson *v.* West Virginia, etc., R. Co., 40 W. Va. 583; Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145.

Wisconsin. — Crane *v.* Chicago, etc., R. Co., 93 Wis. 487; Berlick *v.* Ashland Sulphite, etc., Co., 93 Wis. 437; Schultz *v.* C. C. Thompson Lumber Co., 91 Wis. 626; Jones *v.* Sutherland, 91 Wis. 587; Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32; Culbertson *v.* Milwaukee, etc., R. Co., 88 Wis. 567; Johnson *v.* Ashland Water Co., 77 Wis. 51; Corcoran *v.* Milwaukee Gas Light Co., 81 Wis. 191; Baltzer *v.* Chicago, etc., R. Co., 83 Wis. 459; Wilber *v.* Wisconsin Cent. Co., 86 Wis. 535; Schultz *v.* Chicago, etc., R. Co , 44 Wis. 638; Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74; Steffen *v.* Chicago, etc., R. Co., 46 Wis. 259.

1. Assumption of the Risks Not Contributory Negligence — *Alabama.* — Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185.

California. — Davies *v.* Oceanic Steamship Co., 89 Cal. 280; Gier *v.* Los Angeles Consol. Electric R. Co., 108 Cal. 129.

Connecticut. — Sprague *v.* New York, etc., R. Co., 68 Conn. 345.

Georgia. — Savannah, etc., R. Co. *v.* Day, 91 Ga. 676.

Illinois. — Taylor *v.* Felsing, 164 Ill. 331; St. Louis, etc., R. Co. *v.* Eggmann, 161 Ill. 155.

Indiana. — Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265; Louisville, etc., R. Co. *v.* Orr, 84 Ind. 53, 8 Am. & Eng. R. Cas. 94.

Iowa. — Baird *v.* Chicago, etc., R. Co., 61 Iowa 359, 12 Am. & Eng. R. Cas. 75; Eaton *v.* Cripps, 94 Iowa 176; Haas *v.* Chicago, etc., R. Co., 90 Iowa 259.

Kansas. — Atchison, etc., R. Co. *v.* Vincent, 56 Kan. 344; Atchison, etc., R. Co. *v.* Henry, 57 Kan. 154; Rouse *v.* Ledbetter, 56 Kan. 348; Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222.

Kentucky. — Martin *v.* Louisville, etc., R. Co., 16 Ky. L. Rep. 151.

Massachusetts. — Coombs *v.* New Bedford Cordage Co., 102 Mass. 596, 3 Am. Rep. 506; Murray *v.* Fitchburg R. Co., 165 Mass. 448; Martineau *v.* National Blank Book Co., 166 Mass. 4; Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214.

Minnesota. — Hall *v.* Chicago, etc., R. Co., 46 Minn. 439.

Missouri. — Waldhier *v.* Hannibal, etc., R. Co., 71 Mo. 519, 2 Am. & Eng. R. Cas. 146; Covey *v.* Hannibal, etc., R. Co., 86 Mo. 635, 28 Am. & Eng. R. Cas. 382; Flynn *v.* Kansas City, etc., R. Co., 78 Mo. 195, 18 Am. & Eng. R. Cas. 23, 47 Am. Rep. 99; Aldridge *v.* Midland Blast Furnace Co., 78 Mo. 564; Callahan *v.* Warne, 40 Mo. 136.

Montana. — Prosser *v.* Montana Cent. R. Co., 17 Mont. 372.

Ohio. — Craig *v.* Lake Erie, etc., R. Co., 35 Ohio L. J. 15.

Wisconsin. — Paine *v.* Eastern R. Co., 91 Wis. 340.

2. When Assumption of Risks Does Not Bar Servant — *United States.* — Hough *v.* Texas, etc., R. Co., 100 U. S. 213; Cleveland, etc., R. Co. *v.* Brown, 56 Fed. Rep. 804; Hudson *v.* Charleston, etc., R. Co., 55 Fed. Rep. 248; Northern Pac. R. Co. *v.* Egeland, 56 Fed. Rep. 200; Northern Pac. R. Co. *v.* Nickels, 50 Fed. Rep. 719, 4 U. S. App. 369; The Protos, 48 Fed. Rep. 919; Norman *v.* Wabash R. Co., 62 Fed. Rep. 727; Central Trust Co. *v.* East Tennessee, etc., R. Co., 73 Fed. Rep. 661.

Alabama. — Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218; Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 53 Am. & Eng. R. Cas. 115; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141; Alabama G. S. R. Co. *v.* Richie, 99 Ala. 346; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34.

California. — Bjorman *v.* Fort Bragg Redwood Co., 104 Cal. 626.

Colorado. — Denver, etc., Rapid Transit Co. *v.* Dwyer, 20 Colo. 132.

Connecticut. — McElligott *v.* Randolph, 61 Conn. 157, 29 Am. St. Rep. 181.

Georgia. — Rebb *v.* East Tennessee, etc., R. Co., 87 Ga. 631; Western, etc., R. Co. *v.* Bussey, 95 Ga. 584.

Illinois. — Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 43 Am. St. Rep. 259; Chicago, etc., R. Co. *v.* Flynn, 154 Ill. 448; Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227; Illinois Cent. R.

b. MASTER'S DUTIES AND LIABILITIES GENERALLY. — Thus the master is liable for an injury to a servant resulting from the master's failure to use ordinary care in any of the following respects, viz.:

To Warn the Servant of Extraneous Risks and unusual dangers known to the master but unknown to the servant.[1]

Co. *v.* Reardon, 56 Ill. App. 542; Wenona Coal Co. *v.* Holmquist, 51 Ill. App. 507; Illinois Cent. R. Co. *v.* Creighton, 63 Ill. App. 165; Pullman's Palace Car Co. *v.* Laack, 41 Ill. App. 34.

Indiana. — Indiana Car Co. *v.* Parker, 100 Ind. 182; Lake Shore, etc., R. Co. *v.* Wilson, 11 Ind. App. 488; Louisville, etc., R. Co. *v.* Hobbs, 3 Ind. App. 445; Pennsylvania Co. *v.* McCaffrey, 139 Ind. 430; Abbitt *v.* Lake Erie, etc., R. Co., (Ind. 1895) 40 N. E. Rep. 40.

Iowa. — Tobey *v.* Burlington, etc., R. Co., 94 Iowa 256; Horan *v.* Chicago, etc., R. Co., 89 Iowa 328; Haas *v.* Chicago, etc., R. Co., 90 Iowa 259; Conners *v.* Burlington, etc., R. Co., 87 Iowa 147; Light *v.* Chicago, etc., R. Co., 93 Iowa 83.

Kansas. — Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474; St. Louis, etc., R. Co. *v.* French, 56 Kan. 584.

Kentucky. — Louisville, etc., R. Co. *v.* Earl, 15 Ky. L. Rep. 184; Louisville, etc., R. Co. *v.* Shivell, 13 Ky. L. Rep. 902, (Ky. 1892) 18 S. W. Rep. 944; Louisville, etc., R. Co. *v.* Pott, 13 Ky. L. Rep. 344, (Ky. 1891) 17 S. W. Rep. 185.

Massachusetts. — Ford *v.* Fitchburg R. Co., 110 Mass. 241, 14 Am. Rep. 598; Holden *v.* Fitchburg R. Co., 129 Mass. 268, 37 Am. Rep. 343, 2 Am. & Eng. R. Cas. 94; Davis *v.* New York, etc., R. Co., 159 Mass. 532; Maher *v.* Boston, etc., R. Co., 158 Mass. 36.

Michigan. — Ashman *v.* Flint, etc., R. Co., 90 Mich. 567; Chadderdon *v.* Michigan Cent. R. Co., 100 Mich. 293; Shumway *v.* Walworth, etc., Mfg. Co., 98 Mich. 411.

Minnesota. — Evarts *v.* St. Paul, etc., R. Co., 56 Minn. 141, 45 Am. St. Rep. 460; Britton *v.* Northern Pac. R. Co., 47 Minn. 340.

Missouri. — Schlereth *v.* Missouri Pac. R. Co., (Mo. 1892) 19 S. W. Rep. 1134; Card *v.* Eddy, (Mo. 1893) 24 S. W. Rep. 746; Hughlett *v.* Ozark Lumber Co., 53 Mo. App. 87.

Montana. — Prosser *v.* Montana Cent. R. Co., 17 Mont. 372.

New York. — Booth *v.* Boston, etc., R. Co., 73 N. Y. 38, 29 Am. Rep. 97, and note; Vosburgh *v.* Lake Shore, etc., R. Co., 94 N. Y. 374, 15 Am. & Eng. R. Cas. 249, 46 Am. Rep. 148; Pantzar *v.* Tilly Foster Iron Min. Co., 99 N. Y. 368; Floettl *v.* Jonson Engineering, etc., Co., 19 N. Y. App. Div. 136; Kuhn *v.* Delaware, etc., R. Co., 92 Hun (N. Y.) 74; Vitto *v.* Farley, 15 Misc. Rep. (N. Y. C. Pl.) 153; Bird *v.* Long Island R. Co., 11 N. Y. App. Div. 134; Fox *v.* Le Comte, 2 N. Y. App. Div. 61; Berrigan *v.* New York, etc., R. Co., (Supreme Ct.) 37 N. Y. St. Rep. 414, 59 Hun (N. Y.) 627; Hollingsworth *v.* Long Island R. Co., 91 Hun (N. Y.) 641; Floettl *v.* Third Ave. R. Co., 10 N. Y. App. Div. 308; Krulder *v.* Woolverton, 11 Misc. Rep. (N. Y. Super. Ct.) 537; Whittaker *v.* Delaware, etc., Canal Co., 126 N. Y. 544.

North Dakota. — Bennett *v.* Northern Pac. R. Co., 3 N. Dak. 91.

Pennsylvania. — Stoltenberg *v.* Pittsburg, etc., R. Co., 165 Pa. St. 377.

Tennessee. — Taylor *v.* Louisville, etc., R. Co., 93 Tenn. 305.

Texas. — International, etc., R. Co. *v.* Hinzie, 82 Tex. 623; Eddy *v.* Bodkin, (Tex. Civ. App. 1894) 28 S. W. Rep. 54; Martin *v.* Wrought Iron Range Co., 4 Tex. Civ. App. 185; Sabine, etc., R. Co. *v.* Ewing, 1 Tex. Civ. App. 531; International, etc., R. Co. *v.* Sipole, (Tex. Civ. App. 1895) 29 S. W. Rep. 686.

Vermont. — Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

Virginia. — Michael *v.* Roanoke Mach. Works, 90 Va. 492, 44 Am. St. Rep. 927; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 16 Va. L. J. 96.

West Virginia. — Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 42–61; Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570; Daniel *v.* Chesapeake, etc., R. Co., 36 W. Va. 397, 32 Am. St. Rep. 870.

Wisconsin. — Stackman *v.* Chicago, etc., R. Co., 80 Wis. 428.

1. Extraneous Risks — Failure to Warn Servant of. — It is upon this principle that the case of Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, rests, and nothing more than this is decided by that case, which Mr. Beach (Cont. Neg., 2d ed., §§ 330, 331) and others seem disposed to regard as having overturned the doctrines of Farwell *v.* Boston, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339, and Barton's Hill Coal Co. *v.* Reid, 3 Macq. 295, but which is not, in reality, in conflict therewith. It is one of the legal duties of the master to give his servant warning of any extraneous and unusual danger to which he may be subjected; and if the master fails to use ordinary care to do so, and the servant is injured, the master is liable, because the injury did not flow from any risk assumed by the servant, but from the personal negligence of the master. Nor can the master avoid liability by making it the duty of an agent to give such warning, and then, if it is not given, say that the negligence was that of a fellow servant. In such cases the maxim *qui facit per alium facit per se* applies as between the master and the servant entitled to the warning; and the servant or agent appointed to give the warning, no matter what his grade or rank in the general service of the master, becomes, for such purpose, the *alter ego* of the master. His act is the master's act; his failure, the master's failure.

These distinctions are accurately and forcibly stated in the case of Indiana Car Co. *v.* Parker, 100 Ind. 181.

The Ross Case. — And this was the doctrine of Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377. In that case the plaintiff was injured while acting as engineer of a freight train on the defendant's road, by a collision between such

To Instruct an Immature or Inexperienced Servant, and warn him of dangers accompanying the work, but not obvious as such to one of his capacity and experience.[1]

train and a gravel train. It appeared that the plaintiff was not negligent, that his train was on time, and, in the absence of telegraphic orders to him, was entitled to the track. The company sent the gravel train out on the scheduled time of the freight train, and then sent telegraphic orders to the engineer and conductor, but delivered the messages to the conductor, making it his duty to convey the orders to the engineer. This he negligently failed to do, and the collision followed. It was correctly held that the conductor's negligence was that of the master, and not that of a fellow servant. Nothing more than this was necessary to the decision of the case; and further than this, it cannot be considered authoritative, four of the nine judges having dissented.

There Are Many Cases Supporting the Doctrine of the Text — *United States.* — McGowan *v.* La Plata Min., etc., Co., 3 McCrary (U. S.) 393; The Aspotogan, 49 Fed. Rep. 163.

Alabama. — Perry *v.* Marsh, 25 Ala. 659.

California. — Baxter *v.* Roberts, 44 Cal. 187, 13 Am. Rep. 160.

Connecticut. — Smithwick *v.* Hall, etc., Co., 59 Conn. 261, 21 Am. St. Rep. 104.

Indiana. — Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319; Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 7 Am. St. Rep. 432; Rush *v.* Coal Bluff Min. Co., 131 Ind. 135.

Louisiana. — Carey *v.* Sellers, 41 La. Ann. 500.

Massachusetts. — Wheeler *v.* Wason Mfg. Co., 135 Mass. 294; Walsh *v.* Peet Valve Co., 110 Mass. 23; Scanlon *v.* Boston, etc., R. Co., 147 Mass. 484, 9 Am. St. Rep. 733.

Michigan. — Smith *v.* Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542, 12 Am. & Eng. Corp. Cas. 269; Parkhurst *v.* Johnson, 50 Mich. 70, 45 Am. Rep. 28.

Minnesota. — McCarthy *v.* Lehigh Valley Transp. Co., 48 Minn. 533.

New Jersey. — Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535.

New York. — Spelman *v.* Fisher Iron Co., 56 Barb. (N. Y.) 151; Felice *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 345.

Texas. — Missouri Pac. R. Co. *v.* Callbreath, 6 Tex. L. Rev. 584, *cited* in 28 Am. & Eng. R. Cas. 557.

Utah. — Andreson *v.* Ogden Union R., etc., Co., 8 Utah 128.

Virginia. — Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. (Va.) 805.

Wisconsin. — Strahlendorf *v.* Rosenthal, 30 Wis. 674.

1. Master's Duty to Immature and Inexperienced Servant — *England.* — Grizzle *v.* Frost, 3 F. & F. 622; Barton's Hill Coal Co. *v.* Reid, 3 Macq. 266–295; Barton's Hill Coal Co. *v.* McGuire, 3 Macq. 300; Clarke *v.* Holmes, 7 H. & N. 937.

United States. — Union Pac. R. Co. *v.* Fort, 17 Wall. (U. S.) 553; Pullman's Palace Car Co. *v.* Harkins, 55 Fed. Rep. 932.

Arkansas. — Bauer *v.* St. Louis, etc., R. Co., 46 Ark. 388.

California. — Sowden *v.* Idaho Quartz Min. Co., 55 Cal. 443.

Colorado. — Orman *v.* Mannix, 17 Colo. 564, 31 Am. St. Rep. 340.

Illinois. — Fraser *v.* Schroeder, 163 Ill. 459.

Indiana. — Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 28 Am. & Eng. R. Cas. 308; Hill *v.* Gust, 55 Ind. 45; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 165, 23 Am. & Eng. R. Cas. 408; Stewart *v.* Patrick, 5 Ind. App. 50; Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371; Taylor *v.* Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 41 Am. & Eng. R. Cas. 437.

Iowa. — Allen *v.* Burlington, etc., R. Co., 57 Iowa 623.

Kentucky. — Louisville, etc., R. Co. *v.* Filbern, 6 Bush (Ky.) 574, 99 Am. Dec. 690.

Massachusetts. — Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Sullivan *v.* India Mfg. Co., 113 Mass. 396; O'Connor *v.* Adams, 120 Mass. 427; Wheeler *v.* Wason Mfg. Co., 135 Mass. 294; Patnode *v.* Warren Cotton Mills, 157 Mass. 283, 34 Am. St. Rep. 275; Connors *v.* Grilley, 155 Mass. 575.

Michigan. — Parkhurst *v.* Johnson, 50 Mich. 70, 45 Am. Rep. 28; Smith *v.* Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542, 12 Am. & Eng. Corp. Cas. 269; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205.

Missouri. — Goins *v.* Chicago, etc., R. Co., 37 Mo. App. 676; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322, 53 Am. & Eng. R. Cas. 436; Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298, 88 Mo. 293 (second hearing).

New Jersey. — Smith *v.* Irwin, 51 N. J. L. 507, 14 Am. St. Rep. 699; Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535.

Pennsylvania. — Kehler *v.* Schwenk, 151 Pa. St. 505, 31 Am. St. Rep. 777; Rummel *v.* Dilworth, 131 Pa. St. 509, 25 W. N. C. (Pa.) 409; Zurn *v.* Tetlow, 134 Pa. St. 213.

Texas. — Galveston, etc., R. Co. *v.* Garrett, 73 Tex. 262, 15 Am. St. Rep. 781.

Virginia. — Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531.

Wisconsin. — Cole *v.* Chicago, etc., R. Co., 71 Wis. 114, 5 Am. St. Rep. 201, 33 Am. & Eng. R. Cas. 274; Chamberlain *v.* Milwaukee, etc., R. Co., 18 Wis. 700; Jones *v.* Florence Min. Co., 66 Wis. 268, 57 Am. Rep. 269.

When Certain Doctrines Do Not Apply. — But the doctrines of the foregoing cases cannot be properly invoked in any case where the dangers were open and obvious, and the servant, although immature or inexperienced, had sufficient capacity to fully comprehend them: nor are they applicable when the servant, although not warned by the master, has from some other source obtained full information of the danger, and is of sufficient capacity to have avoided it after it became known to him.

Arkansas. — Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264.

Indiana. — Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18.

To Provide Suitable Machinery, tools, and appliances to carry on the business about which the servant is engaged.[1]

To Inspect and Repair Machinery, tools, and appliances.[2]

Massachusetts. — Williams *v.* Churchill, 137 Mass. 243, 50 Am. Rep. 304; Sullivan *v.* India Mfg. Co., 113 Mass. 396; Coombs *v.* New Bedford Cordage Co., 102 Mass. 595, 3 Am. Rep. 506; Rock *v.* Indian Orchard Mills, 142 Mass. 522, 16 Am. & Eng. Corp. Cas. 114.

Michigan. — Hathaway *v.* Michigan, Cent. R. Co., 51 Mich. 253, 47 Am. Rep. 569, 12 Am. & Eng. R. Cas. 249; McGinnis *v.* Canada Southern Bridge Co., 49 Mich. 466, 8 Am. & Eng. R. Cas. 135; Viets *v.* Toledo, etc., R. Co., 55 Mich. 120, 18 Am. & Eng. R. Cas. 11.

1. Duty as to Appliances — *United States.* — Bean *v.* Oceanic Steam Nav. Co., 24 Fed. Rep. 124; Hough *v.* Texas, etc., R. Co., 100 U. S. 213.

Alabama. — McDaniel *v.* Highland Ave., etc., R. Co., 90 Ala. 64.

Colorado. — Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 10 Ry. & Corp. L. J. 351, 48 Am. & Eng. R. Cas. 235.

Georgia. — Austin *v.* Appling, 88 Ga. 54.

Illinois. — Pennsylvania Co. *v.* Lynch, 90 Ill. 333; Chicago, etc., R. Co. *v.* Platt, 89 Ill. 141; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461, 18 Am. Rep. 626; Hale Elevator Co. *v.* Trude, 41 Ill. App. 253; Norton *v.* Volzke, 158 Ill. 402.

Indiana. — Indiana Car Co. *v.* Parker, 100 Ind. 181; Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570; Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319; Pennsylvania Co. *v.* McCormack, 131 Ind. 250; Shoner *v.* Pennsylvania Co., 130 Ind. 170.

Kansas. — St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701; Chicago, etc., R. Co. *v.* Blevins, 46 Kan. 370.

Kentucky. — Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 15 Ky. L. Rep. 17; Lawrence *v.* Hagemeyer, 93 Ky. 591, 14 Ky. L. Rep. 566.

Massachusetts. — Holden *v.* Fitchburg R. Co., 129 Mass. 268, 2 Am. & Eng. R. Cas. 94, 37 Am. Rep. 343.

Michigan. — Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 134.

Minnesota. — Rosenbaum *v.* St. Paul, etc., R. Co., 38 Minn. 173, 8 Am. St. Rep. 653.

Missouri. — Gibson *v.* Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 24 Am. St. Rep. 333; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322; Hogue *v.* Sligo Furnace Co., 62 Mo. App. 491; Sullivan *v.* Hannibal, etc., R. Co., 107 Mo. 66, 28 Am. St. Rep. 388.

Nebraska. — Sioux City, etc., R. Co. *v.* Finlayson, 16 Neb. 578, 49 Am. Rep. 724, 18 Am. & Eng. R. Cas. 68, and note.

New Jersey. — Maher *v.* Thropp, 59 N. J. L. 186.

New York. — Booth *v.* Boston, etc., R. Co., 67 N. Y. 593; Probst *v.* Delamater, 100 N. Y. 266; Kaare *v.* Troy Steel, etc., Co., (Supreme Ct.) 46 N. Y. St. Rep. 451, 19 N. Y. Supp. 789; Van Tassell *v.* New York, etc., R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 299; Thomas *v.* Henjes, (Supreme Ct.) 42 N. Y. St. Rep. 28, 16 N. Y. Supp. 700.

North Carolina. — Cowles *v.* Richmond, etc., R. Co., 84 N. Car. 309, 2 Am. & Eng. R. Cas. 90, 37 Am. Rep. 620.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Keenan, 103 Pa. St. 124.

Texas. — Texas, etc., R. Co. *v.* Crow, 3 Tex. Civ. App. 266; St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85.

Virginia. — Norfolk, etc., R. Co. *v.* Nunnally, 88 Va. 546, 16 Va. L. J. 731; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 16 Va. L. J. 96.

Where It Is Servant's Duty to Inspect, but where the duty devolves upon the injured party to inspect or keep the machinery, tools, and appliances in repair, and where by negligence on his part in the performance of this duty he is injured, he cannot recover as against the employer.

United States. — Texas, etc., R. Co. *v.* Smith, 67 Fed. Rep. 524.

Alabama. — Birmingham Furnace, etc., Mfg. Co. *v.* Gross, 97 Ala. 220.

Michigan. — Johnson *v.* Hovey, 98 Mich. 343.

New York. — Cordelia *v.* Dwyer, 9 N. Y. Misc. Rep. (Buffalo Super. Ct.) 399.

Virginia. — Richmond, etc., R. Co. *v.* Dudley, 90 Va. 304.

2. Master's Duty to Inspect and Repair. — "It will not do to say that, having furnished suitable and proper machinery and appliances, the corporation can thereafter remain passive. The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed. In ascertaining whether this has been done or not, the character of the business should be considered, and anything short of this would not be ordinary care." Brann *v.* Chicago, etc., R. Co., 53 Iowa 595, 36 Am. Rep. 243.

Alabama. — Smoot *v.* Mobile, etc., R. Co., 67 Ala. 13.

Georgia. — Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659.

Illinois. — Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560.

Indiana. — Indiana Car Co. *v.* Parker, 100 Ind. 181; Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 197.

Iowa. — Brann *v.* Chicago, etc., R. Co., 53 Iowa 595, 36 Am. Rep. 243.

Kansas. — Solomon R. Co. *v.* Jones, 30 Kan. 601, 15 Am. & Eng. R. Cas. 201.

Kentucky. — Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589; Lawrence *v.* Hagemeyer, 93 Ky. 591, 14 Ky. L. Rep. 566.

Maine. — Shanny *v.* Androscoggin Mills, 66 Me. 420.

Massachusetts. — Spicer *v.* South Boston Iron Co., 138 Mass. 426; Ford *v.* Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598.

Mississippi. — Welsh *v.* Alabama, etc., R. Co., 70 Miss. 20.

Missouri. — Long *v.* Pacific R. Co., 65 Mo. 225; Covey *v.* Hannibal, etc., R. Co., 86 Mo. 635, 28 Am. & Eng. R. Cas. 382.

New York. — Warner *v.* Erie R. Co., 39 N. Y. 468; Fuller *v.* Jewett, 80 N. Y. 46, 1 Am. &

To Provide a Safe Place for the Servant to do his work, the ordinary hazards of the business excepted.[1]

To Guard Against a Danger to the Servant of Which He Has Been Notified, and which he has promised to obviate, or assured the servant did not exist.[2]

Eng. R. Cas. 109, 36 Am. Rep. 575; Schulz *v.* Rohe, 4 Misc. Rep. (N. Y. Super. Ct.) 384.

North Carolina. — Johnson *v.* Richmond, etc., R. Co., 81 N. Car. 453.

Pennsylvania. — Baker *v.* Allegheny Valley R. Co., 95 Pa. St. 211, 8 Am. & Eng. R. Cas. 141, 40 Am. Rep. 634; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467.

Texas. — Houston, etc., R. Co. *v.* Dunham, 49 Tex. 181.

Vermont. — Davis *v.* Central Vermont R. Co., 55 Vt. 84, 11 Am. & Eng. R. Cas. 173, 45 Am. Rep. 590.

Wisconsin. — Goltz *v.* Milwaukee, etc., R. Co., 76 Wis. 136.

1. Master's Duty to Provide Safe Place to Work. — " In all cases at common law a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work." Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243.

See also, as supporting the proposition:

United States. — The France, 53 Fed. Rep. 843.

Alabama. — Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 53 Am. & Eng. R. Cas. 115.

Illinois. — Alton Line, etc., Co. *v.* Calvey, 47 Ill. App. 343; Catlett *v.* Young, 143 Ill. 74; Hess *v.* Rosenthal, 160 Ill. 621.

Indiana. — Hancock *v.* Keene, 5 Ind. App. 408; Standard Oil Co. *v.* Bowker, 141 Ind. 12; Salem Stone, etc., Co. *v.* Griffin, 139 Ind. 141; Cleveland, etc., R. Co. *v.* Sloan, 11 Ind. App. 401.

Kansas. — Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243; Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 587, 15 Am. & Eng. R. Cas. 325.

Massachusetts. — Ferren *v.* Old Colony R. Co., 143 Mass. 197; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Cayzer *v.* Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317; Arkerson *v.* Dennison, 117 Mass. 407.

Michigan. — Irvine *v.* Flint, etc., R. Co., 89 Mich. 416.

Missouri. — Moore *v.* Wabash, etc., R. Co., 85 Mo. 588, 21 Am. & Eng. R. Cas. 509; Boyd *v.* Graham, 5 Mo. App. 403.

New York. — Benzing *v.* Steinway, 101 N. Y. 547; Stringham *v.* Stewart, 100 N. Y. 516; Ryan *v.* Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Dunn *v.* Connell, 21 Misc. Rep. (N. Y. Supreme Ct.) 295; Felice *v.* New York Cent. etc., R. Co., 14 N. Y. App. Div. 345; McLean *v.* Standard Oil Co., (Supreme Ct.) 50 N. Y. St. Rep. 626, 21 N. Y. Supp. 874; LaCroy *v.* New York, etc., R. Co., 132 N. Y. 570, 30 N. E. Rep. 391.

Ohio. — Lake Shore, etc., R. Co. *v.* Lavalley, 36 Ohio St. 221, 5 Am. & Eng. R. Cas. 549.

2. Master's Duty to Obviate Danger of Which He Has Notice. — " If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held in that case to have himself risked the dangers which might result from the use of the engine in such defective condition. But ' there can be no doubt that where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.' Shearman & Redf. on Neg., § 96; Conroy *v.* Vulcan Iron Works, 62 Mo. 35; Patterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Leclair *v.* First Div. St. Paul, etc., R. Co., 20 Minn. 9; Brabbits *v.* Chicago, etc., R. Co., 38 Wis. 289. ' If the servant,' says Mr. Cooley in his work on Torts 559, ' having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume the risks.' And such seems to be the rule recognized in the English courts. Holmes *v.* Worthington, 2 F. & F. 533; Holmes *v.* Clarke, 6 H. & N. 349; Clarke *v.* Holmes, 7 H. & N. 937. We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without its being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part." Hough *v.* Texas, etc., R. Co., 100 U. S. 224. See also in support of the rule:

England. — Clarke *v.* Holmes, 7 H. & N. 937.

United States. — Hough *v.* Texas, etc., R. Co., 100 U. S. 224; Parody *v.* Chicago, etc., R. Co., 15 Fed. Rep. 205.

Illinois. — Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425.

Indiana. — Burns *v.* Windfall M'f'g Co., 146 Ind. 261, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 34, 64.

To Make and Promulgate Proper Rules and regulations for the conduct of the business about which the servant is engaged.[1]

To Employ and Retain Competent and Trustworthy Servants, and to see that he has enough such servants to safely and properly carry on the business in which the servant is engaged.[2]

Iowa. — Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357.

Massachusetts. — Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720; Huddleston *v.* Lowell Mach. Shop, 106 Mass. 282.

Minnesota. — Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248, 15 Am. & Eng. R. Cas. 214, 47 Am. Rep. 785; Gibson *v.* Minneapolis, etc., R. Co., 55 Minn. 177, 43 Am. St. Rep. 482.

Mississippi. — Welsh *v.* Alabama, etc., R. Co., 70 Miss. 20; Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178.

Missouri. — Porter *v.* Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454, 2 Am. & Eng. R. Cas. 44.

New York. — Daley *v.* Schaaf, 28 Hun (N. Y.) 314.

Ohio. — Manufacturing Co. *v.* Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669.

Rhode Island. — McGrath *v.* New York, etc., R. Co., 15 R. I. 95.

Tennessee. — East Tennessee, etc., R. Co. *v.* Duffield, 12 Lea (Tenn.) 63, 18 Am. & Eng. R. Cas. 35, 47 Am. Rep. 319.

Texas. — Galveston, etc., R. Co. *v.* Drew, 59 Tex. 10, 46 Am. Rep. 261.

1. Master's Duty to Make and Promulgate Rules — *England.* — Vose *v.* Lancashire, etc., R. Co., 2 H. & N. 728.

United States. — Kansas, etc., R. Co. *v.* Dye, 70 Fed. Rep. 24, 36 U. S. App. 23.

Alabama. — Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261; Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216; Brown *v.* Louisville, etc., R. Co., 111 Ala. 275; Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545; Pryor *v.* Louisville, etc., R. Co., 90 Ala. 32, 8 Ry. & Corp. L. J. 357; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 25 Am. St. Rep. 47; Louisville, etc., R. Co. *v.* Hawkins, 92 Ala. 241.

District of Columbia. — Mackey *v.* Baltimore, etc., R. Co., 18 Wash. L. Rep. (D. C.) 767.

Illinois. — Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461, 18 Am. Rep. 626.

Indiana. — Fort Wayne, etc., R. Co. *v.* Gruff, 132 Ind. 13.

Iowa. — Scagel *v.* Chicago, etc., R. Co., 83 Iowa 380; Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148.

Kansas. — Atchison, etc., R. Co. *v.* Slattery, 57 Kan. 499.

Michigan. — Jolly *v.* Detroit, etc., R. Co., 93 Mich. 370; Brennan *v.* Michigan Cent. R. Co., 93 Mich. 156; Conger *v.* Flint, etc., R. Co., 86 Mich. 76; Grand *v.* Michigan Cent. R. Co., 83 Mich. 564.

Minnesota. — Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117.

Missouri. — Francis *v.* Kansas City, etc., R. Co., 110 Mo. 387.

New York. — Boess *v.* Clausen, etc., Brewing Co., 12 N. Y. App. Div. 366.

Ohio. — Lake Shore, etc., R. Co. *v.* Lavalley, 36 Ohio St. 226, 5 Am. & Eng. R. Cas. 549.

Pennsylvania. — McMellen *v.* Union News Co., 144 Pa. St. 332, 9 Lanc. L. Rev. 49.

Tennessee. — Haynes *v.* East Tennessee, etc., R. Co., 3 Coldw. (Tenn.) 222.

Virginia. — Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 17 Va. L. J. 99.

West Virginia. — Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 53 Am. & Eng. R. Cas. 417.

2. Master's Duty to Employ and Retain Competent Servants — *England.* — Wiggett *v.* Fox, 36 Eng. L. & Eq. 486; Paterson *v.* Wallace, 1 Macq. 751; Tarrant *v.* Webb, 18 C. B. 797, 86 E. C. L. 797.

United States. — Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 11 Am. & Eng. R. Cas. 158; Mentzer *v.* Armour, 18 Fed. Rep. 373, 5 McCrary (U. S.) 617; Baltimore, etc., R. Co. *v.* Henthorne, 73 Fed. Rep. 634; Northern Pac. R. Co. *v.* Charless, 51 Fed. Rep. 562, 7 U. S. App. 359.

Alabama. — Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459; Tyson *v.* South, etc., Alabama R. Co., 61 Ala. 554, 32 Am. Rep. 8.

California. — Hogan *v.* Central Pac. R. Co., 49 Cal. 128; McDonald *v.* Hazletine, 53 Cal. 35.

Colorado. — Summerhays *v.* Kansas Pac. R. Co., 2 Colo. 484; Kindel *v.* Hall, 8 Colo. App. 63.

Connecticut. — Wilson *v.* Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653.

Georgia. — Central R., etc., Co. *v.* Brantley, 93 Ga. 259.

Idaho. — Snyder *v.* Viola Min., etc., Co., 2 Idaho 771.

Illinois. — Chicago, etc., R. Co. *v.* Merckes, 36 Ill. App. 195; Illinois Cent. R. Co. *v.* Jewell, 46 Ill. 99, 92 Am. Dec. 240; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Toledo, etc., R. Co. *v.* Durkin, 76 Ill. 397.

Indiana. — Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282; Indiana Mfg. Co. *v.* Millican, 87 Ind. 87; Mitchell *v.* Robinson, 80 Ind. 281, 41 Am. Rep. 812; Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554; Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682.

Iowa. — Keefe *v.* Chicago, etc., R. Co., 92 Iowa 182; Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357.

Kansas. — Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58.

Maine. — Beaulieu *v.* Portland Co., 48 Me. 291; Corson *v.* Maine Cent. R. Co., 76 Me. 244, 17 Am. & Eng. R. Cas. 634; Blake *v.* Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297.

Massachusetts. — King *v.* Boston, etc., R. Corp., 9 Cush. (Mass.) 112; Gilman *v.* Eastern R. Corp., 10 Allen (Mass.) 233, 87 Am. Dec.

c. MASTER MAY NOT DELEGATE HIS DUTIES. — The obligation resting upon the master to use ordinary care in these respects is personal in character, and cannot be delegated to another so as to relieve the master from liability. Hence the servant does not assume the risks of injury by reason of a negligent failure on the part of the master to perform such duties, and when injured by such failure is not guilty of contributory negligence, if he was at the time exercising ordinary care to avoid injury, and discharging his own duties in a careful and prudent manner.[1]

d. MASTER EXPOSING SERVANT TO UNUSUAL DANGERS. — And it is not

635; Wosbigian *v.* Washburn, etc., Mfg. Co., 167 Mass. 20.

Michigan. — Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364; Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510; Ryan *v.* Bagaley, 50 Mich. 179, 45 Am. Rep. 35; Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230; Hammond *v.* Chicago, etc., R. Co., 83 Mich. 334.

Minnesota.—McMahon *v.* Davidson, 12 Minn. 357.

Missouri. — Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353, 44 Mo. 488; Gibson *v.* Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Huffman *v.* Chicago, etc., R. Co., 78 Mo. 50, 17 Am. & Eng. R. Cas. 625; Kearsey *v.* Kansas City, etc., R. Co., 79 Mo. 362, 17 Am. & Eng. R. Cas. 638; Rohback *v.* Pacific R. Co., 43 Mo. 187; Maxwell *v.* Hannibal, etc., R. Co., 85 Mo. 95; Brothers *v.* Cartter, 52 Mo. 373, 14 Am. Rep. 424; McDermott *v.* Pacific R. Co., 30 Mo. 115; Moss *v.* Pacific R. Co., 49 Mo. 167, 8 Am. Rep. 126; Hogue *v.* Sligo Furnace Co., 62 Mo. App. 491; Roblin *v.* Kansas City, etc., R. Co., 119 Mo. 476.

New York. — Brickner *v.* New York Cent. R. Co., 49 N. Y. 672; Brown *v.* Maxwell, 6 Hill (N. Y.) 592, 41 Am. Dec. 771; Chapman *v.* Erie R. Co., 55 N. Y. 579; Booth *v.* Boston, etc., R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Haskin *v.* New York Cent., etc., R. Co., 65 Barb. (N. Y.) 129; Faulkner *v.* Erie R. Co., 49 Barb. (N. Y.) 324; Mann *v.* Delaware, etc., Canal Co., 91 N. Y. 495, 12 Am. & Eng. R. Cas. 199; O'Donnell *v.* East River Gas Co., 91 Hun (N. Y.) 184; Crowell *v.* Thomas, 90 Hun (N. Y.) 193; Shields *v.* Robins, 3 N. Y. App. Div. 582.

North Carolina. — Cowles *v.* Richmond, etc., R. Co., 84 N. Car. 309, 37 Am. Rep. 620, 2 Am. & Eng. R. Cas. 90.

Ohio. — Manville *v.* Cleveland, etc., R. Co., 11 Ohio St. 417.

Pennsylvania. — Caldwell *v.* Brown, 53 Pa. St. 453; Delaware, etc., Canal Co. *v.* Carroll, 89 Pa. St. 374; Huntingdon, etc., R., etc., Co. *v.* Decker, 82 Pa. St. 119.

South Carolina. — Gunter *v.* Graniteville, Mfg. Co., 18 S. Car. 262, 44 Am. Rep. 573.

Tennessee. — East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. Cas. 568.

Texas. — Houston, etc., R. Co. *v.* Oram, 49 Tex. 341.

Wisconsin. — Strahlendorf *v.* Rosenthal, 30 Wis. 674; Luebke *v.* Chicago, etc., R. Co., 59 Wis. 127, 48 Am. Rep. 483, 15 Am. & Eng. R. Cas. 183.

1. Master Cannot Delegate These Duties and Avoid Liability — *United States.* — Gowen *v.* Bush, 76 Fed. Rep. 349; Pike *v.* Chicago, etc., R. Co., 41 Fed. Rep. 95; Stockmeyer *v.* Reed, 55 Fed. Rep. 259; Northern Pac. R. Co. *v.* Charless, 51 Fed. Rep. 562, 7 U. S. App. 359, 51 Am. & Eng. R. Cas. 198; Baltimore, etc., R. Co. *v.* Henthorne, 43 U. S. App. 113.

Arkansas. — St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458, 44 Am. & Eng. R. Cas. 541.

District of Columbia. — Baltimore, etc., R. Co. *v.* Elliott, 9 App. Cas. (D. C.) 341.

Illinois. — Norton *v.* Volzke, 158 Ill. 402; Hess *v.* Rosenthal, 160 Ill. 621; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242; Chicago, etc., R. Co. *v.* Avery, 109 Ill. 314, *affirming* 10 Ill. App. 210, 17 Am. & Eng. R. Cas. 649.

Indiana. — Capper *v.* Louisville, etc., R. Co., 103 Ind. 305, 21 Am. & Eng. R. Cas. 525; Indiana Car Co. *v.* Parker, 100 Ind. 181.

Kansas. — Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 292.

Massachusetts. — Maher *v.* Boston, etc., R. Co, 158 Mass. 36.

Michigan. — Balhoff *v.* Michigan Cent. R. Co., 106 Mich. 606.

Minnesota. — Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39; Lindvall *v.* Woods, 41 Minn. 212, 39 Am. & Eng. R. Cas. 339.

Missouri. — Brothers *v.* Cartter, 52 Mo. 372, 14 Am. Rep. 424.

New Jersey. — Maher *v.* Thropp, 59 N. J. L. 186.

New York. — Benzing *v.* Steinway, 101 N. Y. 547; Stringham *v.* Stewart, 100 N. Y. 516; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 1 Am. St. Rep. 844; Wooden *v.* Western New York, etc., R. Co., (Buffalo Super. Ct.) 43 N. Y. St. Rep. 218, 16 N. Y. Supp. 840; Fuller *v.* Jewett, 80 N. Y. 46, 36 Am. Rep. 575, 1 Am. & Eng. R. Cas. 109; O'Donnell *v.* East River Gas Co., 91 Hun (N. Y.) 184; Rozelle *v.* Rose, 3 N. Y. App. Div. 132; Sciolina *v.* Erie Preserving Co., 7 N. Y. App. Div. 417; Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556.

Oregon. — Miller *v.* Southern Pac. Co., 20 Oregon 285, 48 Am. & Eng. R. Cas. 294; Knahtla *v.* Oregon Short Line, etc., R. Co., 21 Oregon 136.

Rhode Island. — Mulvey *v.* Rhode Island Locomotive Works, 14 R. I. 204.

Washington. — Ogle *v.* Jones, 16 Wash. 319.

West Virginia. — Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

Wisconsin. — Brabbits *v.* Chicago, etc., R. Co., 38 Wis. 289.

contributory negligence for the servant to obey the orders of the master, whereby he is exposed to an unusual and unexpected danger out of the line of his employment, unless the danger was fully realized by him, and was so imminent and obvious that it was apparent to a person of ordinary prudence that an injury would follow obedience.[1]

1. Master Exposing Servant to Unusual Dangers. — While the servant assumes the ordinary risks of his employment, and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in that respect; so that, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence or with the assumption of the risks of so doing. This proposition is, however, subject to the qualification that he must not rashly and deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. Cook *v.* St. Paul, etc., R. Co., 34 Minn. 45.

"It may be, as stated in Wood on Master and Servant, p. 900, that 'an order given by a foreman to do an act within the line of the servant's duty, in the execution of which an injury arises, is not such an act of authority, on the part of the foreman, as renders the master liable for the consequences;' but if the order is given to do an act at a time or under circumstances which renders the doing of the act extra-hazardous, the rule as stated can have no application. The principal is liable, unless to obey the order was plainly to imperil life or limb. Obedience is the primary duty of the servant, and he may, within reasonable bounds, trust to the superior judgment of the master." Stephens *v.* Hannibal, etc., R. Co., 86 Mo. 221, 28 Am. & Eng. R. Cas. 538.

These principles are supported by numerous cases:

England. — Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L. 439; Roberts *v.* Smith, 2 H. & N. 213; Thrussell *v.* Handyside, 20 Q. B. Div. 359; Heaven *v.* Pender, 11 Q. B. Div. 503; Thomas *v.* Quartermaine, 17 Q. B. Div. 414; Yarmouth *v.* France, 19 Q. B. Div. 647; Woodley *v.* Metropolitan Dist. R. Co., 2 Exch. Div. 384; Wiggett *v.* Fox, 11 Exch. 832; Collis *v.* Selden, L. R. 3 C. P. 495.

United States. — Union Pac. R. Co. *v.* Fort, 17 Wall. (U. S.) 553; English *v.* Chicago, etc., R. Co., 24 Fed. Rep. 906; Anderson *v.* Winston, 31 Fed. Rep. 528; Finley *v.* Richmond, etc., R. Co., 59 Fed. Rep. 419; Thompson *v.* Chicago, etc., R. Co., 4 McCrary (U. S.) 629, 14 Fed. Rep. 564.

Alabama. — Woodward Iron Co. *v.* Jones, 80 Ala. 123.

Arkansas. — St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458, 44 Am. & Eng. R. Cas. 541.

Georgia. — Baker *v.* Western, etc., R. Co., 68 Ga. 699; Western, etc., R. Co. *v.* Adams, 55 Ga. 279; Bell *v.* Western, etc., R. Co., 70 Ga. 566.

Illinois. — Lalor *v.* Chicago, etc., R. Co., 52 Ill. 401, 4 Am. Rep. 616; Fitzgerald *v.* Honkomp, 44 Ill. App. 365; Chicago, etc., R. Co. *v.* May, 108 Ill. 288; Honner *v.* Illinois Cent. R. Co., 15 Ill. 550; Illinois Cent. R. Co. *v.* Cox, 21 Ill. 20, 71 Am. Dec. 298.

Indiana. — Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 23 Am. & Eng. R. Cas. 408; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282; Capper *v.* Louisville, etc., R. Co., 103 Ind. 305, 21 Am. & Eng. R. Cas. 525; Hawkins *v.* Johnson, 105 Ind. 29, 55 Am. Rep. 169, and note; Nall *v.* Louisville, etc., R. Co., 129 Ind. 260, 48 Am. & Eng. R. Cas. 309; Louisville, etc., Consol. R. Co. *v.* Hanning, 131 Ind. 528, 31 Am. St. Rep. 443, 53 Am. & Eng. R. Cas. 452.

Iowa. — Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, 53 Am. & Eng. R. Cas. 430; Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181; Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357; Peterson *v.* Whitebreast Coal, etc., Co., 50 Iowa 673, 32 Am. Rep. 143; Light *v.* Chicago, etc., R. Co., 93 Iowa 83.

Kansas. — Atchison, etc., R. Co. *v.* Schroeder, 47 Kan. 315.

Kentucky. — Bradshaw *v.* Louisville, etc., R. Co., (Ky. 1893) 21 S. W. Rep. 346.

Maine. — Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 31 Am. & Eng. R. Cas. 272, 1 Am. St. Rep. 321.

Massachusetts. — Haley *v.* Case, 142 Mass. 316; Taylor *v.* Carew Mfg. Co., 140 Mass. 150; Leary *v.* Boston, etc., R. Co., 139 Mass. 580, 52 Am. Rep. 733, 23 Am. & Eng. R. Cas. 383; Patnode *v.* Warren Cotton Mills, 157 Mass. 283, 34 Am. St. Rep. 275; Gagnon *v.* Seaconnet Mills, 165 Mass. 221.

Michigan. — Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 208; Broderick *v.* Detroit Union R. Station, etc., Co., 56 Mich. 261, 56 Am. Rep. 382.

Minnesota. — Myhre *v.* Tromanhauser, 64 Minn. 541; Hungerford *v.* Chicago, etc., R. Co., 41 Minn. 444, 41 Am. & Eng. R. Cas. 269.

Mississippi. — New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356; Vicksburg, etc., R. Co. *v.* Wilkins, 47 Miss. 404.

Missouri. — Stephens *v.* Hannibal, etc., R. Co., 86 Mo. 221, 28 Am. & Eng. R. Cas. 538; Keegan *v.* Kavanaugh, 62 Mo. 230; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285, 28 Am. & Eng. R. Cas. 528; Cummings *v.* Collins, 61 Mo. 520; Beard *v.* American Car Co., 63 Mo. App. 382.

Nevada. — Patnode *v.* Harter, 20 Nev. 303.

New York. — Lofrano *v.* New York, etc., Water Co., 55 Hun (N. Y.) 452; Ross *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 488; Thompson *v.* Ross, 58 Hun (N. Y.) 608, 35 N. Y. St. Rep. 273, 12 N. Y. Supp. 151; Tonneson *v.* Ross, 58 Hun (N. Y.) 415; Wooden *v.* Western New York, etc., R. Co., 5 N. Y. Misc. Rep. (Buffalo Super. Ct.) 537; Flike *v.* Boston, etc.,

e. SERVANT'S CONTRIBUTORY NEGLIGENCE. — But in all cases where a servant's want of ordinary care, under the circumstances, proximately contributes to his injury he cannot recover, even though the master was guilty of negligence and neglect of the implied duties resting upon him.[1]

R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Connolly *v.* Poillon, 41 Barb. (N. Y.) 366; Keenan *v.* New York, etc., R. Co., 2 N. Y. Misc. Rep. (Buffalo Super. Ct.) 34.

Pennsylvania. — Patterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Campbell *v.* Pennsylvania R. Co., (Pa. 1886) 2 Atl. Rep. 489, 24 Am. & Eng. R. Cas. 427, and note.

Rhode Island. — Mann *v.* Oriental Print Works, 11 R. I. 152.

Tennessee. — East Tennessee, etc., R. Co. *v.* Duffield, 12 Lea (Tenn.) 63, 47 Am. Rep. 319, 18 Am. & Eng. R. Cas. 35; Guthrie *v.* Louisville, etc., R. Co., 11 Lea (Tenn.) 372, 47 Am. Rep. 286, 15 Am. & Eng. R. Cas. 209.

Texas. — Texas, etc., R. Co. *v.* French, (Tex. Civ. App. 1893) 22 S. W. Rep. 866; Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452, 8 Am. & Eng. R. Cas. 504.

Utah. — Harrison *v.* Denver, etc. R. Co., 7 Utah 523.

Virginia. — Norfolk, etc., R. Co. *v.* Ward, 90 Va. 687, 44 Am. St. Rep. 945.

Wisconsin. — Thompson *v.* Edward P. Allis Co., 89 Wis. 523; Cole *v.* Chicago, etc., R. Co., 71 Wis. 114, 33 Am. & Eng. R. Cas. 274, 5 Am. St. Rep. 201.

1. But Servant's Contributory Negligence in Such Case a Bar — *United States.* — Grand Trunk R. Co. *v.* Ives, 144 U. S. 408; Daub *v.* Northern Pac. R. Co., 18 Fed. Rep. 625; Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 617; Holland *v.* Chicago, etc., R. Co., 18 Fed. Rep. 243; The Tammerlane, 47 Fed. Rep. 822; The Julia Fowler, 49 Fed. Rep. 277; Aerkfetz *v.* Humphreys, 145 U. S. 418; Hudson *v.* Charleston, etc., R. Co., 55 Fed. Rep. 248; Aiken *v.* Smith, 54 Fed. Rep. 896; Gowen *v.* Harley, 56 Fed. Rep. 973; Dixon *v.* Western Union Tel. Co., 68 Fed. Rep. 630; Southern Pac. Co. *v.* Pool, 160 U. S. 438; Erskine *v.* Chino Valley Beet-Sugar Co., 71 Fed. Rep. 270.

Alabama. — Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 13 Am. St. Rep. 84; Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261; Andrews *v.* Birmingham Mineral R. Co., 99 Ala. 438; Burgin *v.* Louisville, etc., R. Co., 97 Ala. 274; Warden *v.* Louisville, etc., R. Co., 94 Ala. 277; Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545.

Arkansas. — Bauer *v.* St. Louis, etc., R. Co., 46 Ark. 388; St. Louis, etc., R. Co. *v.* Bloyd, 60 Ark. 637, 31 S. W. Rep. 457; St. Louis, etc., R. Co. *v.* Ross, 56 Ark. 271.

Colorado. — Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363; Victor Coal Co. *v.* Muir, 20 Colo. 320, 46 Am. St. Rep. 299.

Connecticut. — Slavin *v.* New York, etc., R. Co., 63 Conn. 573.

Georgia. — Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539; Georgia R., etc., Co. *v.* McDade, 59 Ga. 73; Central R., etc., Co. *v.* Kitchens, 83 Ga. 83; Brunswick, etc., R. Co. *v.* Smith, 97 Ga. 777; Countryman *v.* East Tennessee, etc., R. Co., 89 Ga. 835; Wolf *v.* East Tennessee, etc., R. Co., 88 Ga. 210; East Tennessee, etc., R. Co. *v.* Perkins, 88 Ga. 1.

Illinois. — Chicago, etc., R. Co. *v.* Holdom, 66 Ill. App. 201; Campbell *v.* Mullen, 60 Ill. App. 497; Stobba *v.* Fitzsimmons, etc., Co., 58 Ill. App. 427; Wabash R. Co. *v.* Elliott, 98 Ill. 481; Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Simmons *v.* Chicago, etc., R. Co., 110 Ill. 340; Lake Shore, etc., R. Co. *v.* Roy, 5 Ill. App. 82; Chicago, etc., R. Co. *v.* Avery, 8 Ill. App. 133; St. Louis Press Brick Co. *v.* Kenyon, 57 Ill. App. 640; Peoria, etc., R. Co. *v.* Ross, 55 Ill. App. 638; Illinois Cent. R. Co. *v.* Stassen, 56 Ill. App. 221; Illinois Cent. R. Co. *v.* Winslow, 56 Ill. App. 462; Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. App. 200; Chicago, etc., Smelting, etc., Co. *v.* Collins, 43 Ill. App. 478; Clark *v.* Chicago, etc., R. Co., 92 Ill. 43; Wabash, etc., R. Co. *v.* Thompson, 10 Ill. App. 271; D. M. Sechler Carriage Co. *v.* O'Neil, 41 Ill. App. 633; Chicago, etc., R. Co. *v.* Merckes, 36 Ill. App. 195.

Indiana. — Louisville, etc., R. Co. *v.* Hobbs, 3 Ind. App. 445; Shoner *v.* Pennsylvania Co., 130 Ind. 170; Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 554; Bedford Belt R. Co. *v.* Brown, 142 Ind. 659; McBride *v.* Indianapolis Frog, etc., Co., 5 Ind. App. 482; Stewart *v.* Patrick, 5 Ind. App. 50; Rush *v.* Coal Bluff Min. Co., 131 Ind. 135.

Iowa. — Deppe *v.* Chicago, etc., R. Co., 36 Iowa 52; Michaelson *v.* Sergeant Bluffs, etc., Brick Co., 94 Iowa 725; Nelling *v.* Chicago, etc., R. Co., (Iowa 1895) 63 N. W. Rep. 568; Baker *v.* Chicago, etc., R. Co., 95 Iowa 163; Beckman *v.* Consolidation Coal Co., 90 Iowa 252; Haggerty *v.* Chicago, etc., R. Co., 90 Iowa 405; Collins *v.* Burlington, etc., R. Co., 83 Iowa 346.

Kansas. — Missouri, etc., R. Co. *v.* Young, 4 Kan. App. 219; Union Pac. R. Co. *v.* Estes, 37 Kan. 715; Comstock *v.* Union Pac. R. Co., 56 Kan. 228.

Kentucky. — Helm *v.* Louisville, etc., R. Co., 17 Ky. L. Rep. 1004; Illinois Cent. R. Co. *v.* Hilliard, 18 Ky. L. Rep. 505; Briggs *v.* Newport News, etc., Co., 15 Ky. L. Rep. 618; Louisville, etc., R. Co. *v.* Kellem, 14 Ky. L. Rep. 734, (Ky. 1893) 21 S. W. Rep. 230.

Louisiana. — Dixon *v.* Louisiana Electric Light, etc., Co., 47 La. Ann. 1147; Paland *v.* Chicago, etc., R. Co., 44 La. Ann. 1003.

Maine. — Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 1 Am. St. Rep. 321; Walker *v.* Redington Lumber Co., 86 Me. 191.

Maryland. — Michael *v.* Stanley, 75 Md. 464.

Massachusetts. — Coughlan *v.* Cambridge, 166 Mass. 268; Levesque *v.* Janson, 165 Mass. 16; Wheeler *v.* Wason Mfg. Co., 135 Mass. 298; Houlihan *v.* Connecticut River R. Co., 164 Mass. 555; Kilroy *v.* Foss, 161 Mass. 138; Marnin *v.* Kitson Mach. Co., 159 Mass. 156;

Disobedience — Failure to Observe Rules. — And this is likewise true when injuries to a servant are proximately caused by his disobedience of the master's orders or failure to observe reasonable rules laid down for his guidance by the master.[1]

Browne *v.* New York, etc., R. Co., 158 Mass. 247; Riley *v.* Connecticut River R. Co., 135 Mass. 292; Murphy *v.* Webster, 156 Mass. 48; Rood *v.* Lawrence Mfg. Co., 155 Mass. 590.

Michigan. — Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, 47 Am. Rep. 569; Loranger *v.* Lake Shore, etc., R. Co., 104 Mich. 80; Johnson *v.* Hovey, 98 Mich. 343; Schaible *v.* Lake Shore, etc., R. Co., 97 Mich. 318; Robinson *v.* Wright, 94 Mich. 283; Wilson *v.* Michigan Cent. R. Co., 94 Mich. 20; Powers *v.* Thayer Lumber Co., 92 Mich. 533; O'Donnell *v.* Duluth, etc., R. Co., 89 Mich. 174.

Minnesota. — Hughes *v.* Winona, etc., R. Co., 27 Minn. 137; McCarthy *v.* Lehigh Valley Transp. Co., 48 Minn. 533; Freeberg *v.* St. Paul Plow-Works, 48 Minn. 99; Groff *v.* Duluth Imperial Mill Co., 58 Minn. 333; Truntle *v.* North Star Woolen-Mill Co., 57 Minn. 52.

Mississippi. — Vicksburg, etc., R. Co. *v.* Wilkins, 47 Miss. 404; Welsh *v.* Alabama, etc., R. Co., 70 Miss. 20.

Missouri. — Taylor *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. Rep. 206; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322; Francis *v.* Kansas City, etc., R. Co., 127 Mo. 658; Settle *v.* St. Louis, etc., R. Co., 127 Mo. 336, 48 Am. St. Rep. 633; Craig *v.* Chicago, etc., R. Co., 54 Mo. App. 523; Loring *v.* Kansas City, etc., R. Co., 128 Mo. 349; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408; York *v.* Kansas City, etc., R. Co., 117 Mo. 405; O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205; Towner *v.* Missouri Pac. R. Co., 52 Mo. App. 648.

New York. — Tomko *v.* Central R. Co., 1 N. Y. App. Div. 289; Le Bahn *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 116; Roll *v.* Northern Cent. R. Co., 15 Hun (N. Y.) 496, 80 N. Y. 647; Murphy *v.* New York Cent., etc., R. Co., 11 Daly (N. Y.) 122; Dieboldt *v.* U. S. Banking Co., 72 Hun (N. Y.) 403; Freeman *v.* Glens Falls Paper Mill Co., 70 Hun (N. Y.) 530; Hoehmann *v.* Moss Engraving Co., 4 Misc. Rep. (N. Y. C. Pl.) 160; Recka *v.* Ocean Steamship Co., 3 Misc. Rep. (N. Y. C. Pl.) 526; Finnell *v.* Delaware, etc., R. Co., 129 N. Y. 669, 42 N. Y. St. Rep. 354; Shields *v.* New York Cent., etc., R. Co., 133 N. Y. 557, 44 N. Y. St. Rep. 72.

Ohio. — Krause *v.* Morgan, 33 Ohio L. J. 304, 53 Ohio St. 26.

Oregon. — Stone *v.* Oregon City Mfg. Co., 4 Oregon 52.

Pennsylvania. — Dooner *v.* Delaware, etc., Canal Co., 171 Pa. St. 581; Pittsburgh, etc., R. Co. *v.* Evans, 53 Pa. St. 255; Cypher *v.* Huntingdon, etc., R., etc., Co., 1 Pa. Adv. Rep. 850, 149 Pa. St. 359; Christner *v.* Cumberland, etc., Coal Co., 146 Pa. St. 67.

Texas. — Fritz *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 85; Jones *v.* Galveston, etc., R. Co., 11 Tex. Civ. App. 39; Southern Pac. Co. *v.* Ryan, (Tex. Civ. App. 1895) 29 S. W. Rep. 527; Harrison *v.* Texas, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. Rep. 242; St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85; Texas, etc., R. Co. *v.* Young, (Tex. Civ. App. 1894) 27 S. W. Rep. 145; Texas, etc., R. Co. *v.* Cumpston, 4 Tex. Civ. App. 25; Missouri Pac. R. Co. *v.* McKernan, 82 Tex. 204; Houston, etc., R. Co. *v.* Conrad, 62 Tex. 627; Texas, etc., R. Co. *v.* Bingle, 9 Tex. Civ. App. 322.

Utah. — Cook *v.* Bullion-Beck, etc., Min. Co., 12 Utah 51.

Virginia. — Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 5 Am. St. Rep. 266; Chesapeake, etc., R. Co. *v.* Hafner, 90 Va. 621; Richmond, etc., R. Co. *v.* De Butts, 90 Va. 405; Sexton *v.* Turner, 16 Va. L. J. 584, 89 Va. 341; Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 17 Va. L. J. 99.

Washington. — Schulz *v.* Johnson, 7 Wash. 403; Brennen *v.* Front St. Cable R. Co., 8 Wash. 363; Morgan *v.* Carbon Hill Coal Co., 6 Wash. 577; Lewis *v.* Simpson, 3 Wash. 641.

West Virginia. — Robinson *v.* West Virginia, etc., R. Co., 40 W. Va. 583; Knight *v.* Cooper, 36 W. Va. 232; Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206; Beall *v.* Pittsburgh, etc., R. Co., 38 W. Va. 525; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 53 Am. & Eng. R. Cas. 417.

Wisconsin. — Culbertson *v.* Milwaukee, etc., R. Co., 88 Wis. 567; Writt *v.* Girard Lumber Co., 91 Wis. 496; Kennedy *v.* Lake Superior Terminal, etc., Co., 87 Wis. 28; Peffer *v.* Cutler, 83 Wis. 281; Williams *v.* Chicago, etc., R. Co., 64 Wis. 1; Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638; Holum *v.* Chicago, etc., R. Co., 80 Wis. 299; Bibby *v.* Wausau Lumber Co., 80 Wis. 367.

1. Disobedience of Servant: Failure to Observe Rules — *United States.* — Richmond, etc., R. Co. *v.* Finley, 25 U. S. App. 16, 63 Fed. Rep. 228; Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. Rep. 196; Atchison, etc., R. Co. *v.* Reesman, 60 Fed. Rep. 370; Finley *v.* Richmond, etc., R. Co., 59 Fed. Rep. 419; Russell *v.* Richmond, etc., R. Co., 47 Fed. Rep. 204, 10 Ry. & Corp. L. J. 413; Northern Pac. R. Co. *v.* Nickels, 50 Fed. Rep. 719, 12 Ry. & Corp. L. J. 86, 4 U. S. App. 369.

Alabama. — Louisville, etc., R. Co. *v.* Stutts, 105 Ala. 368; Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561; Richmond, etc., R. Co. *v.* Thomason, 99 Ala. 471; Richmond, etc., R. Co. *v.* Free, 97 Ala. 231.

California. — Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554.

Colorado. — McGonigle *v.* Kane, 20 Colo. 292.

Georgia. — Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292; Western, etc., R. Co. *v.* Bussey, 95 Ga. 584; Richmond, etc., R. Co. *v.* Mitchell, 92 Ga. 77; East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187.

Illinois. — Elgin, etc., R. Co. *v.* Docherty, 66 Ill. App. 17; Chicago, etc., R. Co. *v.* Flynn, 154 Ill. 448; Mischke *v.* Chicago, etc., R. Co., 56 Ill. App. 472; Chicago, etc., R. Co. *v.* Maney, 55 Ill. App. 588; Chicago, etc., R.

5. Certain Other Relations. — There are many other relations to which the principles illustrated in the last three subdivisions are applicable, and among them may be named innkeeper and guest, bailor and bailee, attorney and client, physician and patient, guardian and ward; and in all of them the rule is, that each party must exercise that care which a careful and prudent person so situated would exercise, and any failure to do so is a failure to use ordinary care. In determining as between such parties what is ordinary care, their privity of relationship must be taken into account, and their relative duties to and rights against each other.[1]

XVI. Effect of Absence of Privity Between Plaintiff and Defendant — 1. General Principles — Violation of Positive Law. — Where a relation of privity exists, the degree of care necessary to constitute ordinary care is higher upon the person owing affirmative duties than upon the one of whom only negative duties can be exacted; on the other hand, where no special duty is owing, either party doing a thing wrong in itself or in violation of a positive law will have to exercise greater care to avoid inflicting or receiving an injury, while a wrongdoer, than would otherwise be necessary, and the degree of carefulness necessary to constitute ordinary care is, in such cases, less for the non-wrongdoer than for the one engaged in violation of law. These principles have already been fully illustrated.[2]

Co. *v.* Matthews, 48 Ill. App. 361; Knickerbocker Ice Co. *v.* De Haas, 37 Ill. App. 195.

Indiana. — Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430.

Iowa. — Strong *v.* Iowa Cent. R. Co., 94 Iowa 380; Kerns *v.* Chicago, etc., R. Co., 94 Iowa 121; Coffman *v.* Chicago, etc., R. Co., 90 Iowa 462; Conners *v.* Burlington, etc., R. Co., 87 Iowa 147.

Kentucky. — Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 15 Ky. L. Rep. 17; Helm *v.* Louisville, etc., R. Co., 17 Ky. L. Rep. 1004; Newport News, etc., Co. *v.* Campbell, 15 Ky. L. Rep. 714.

Massachusetts. — O'Brien *v.* Staples Coal Co., 165 Mass. 435.

Michigan. — Wilson *v.* Michigan Cent. R. Co., 94 Mich. 20.

Mississippi. — White *v.* Louisville, etc., R. Co., 72 Miss. 12; Georgia Pac. R. Co. *v.* Bradfield, (Miss. 1892) 10 So. Rep. 577.

New York. — Gross *v.* Pennsylvania, etc., R. Co., (Supreme Ct.) 42 N. Y. St. Rep. 808, 16 N. Y. Supp. 616; Drake *v.* New York Cent. etc., R. Co., 80 Hun (N. Y.) 490; Bryant *v.* New York Cent., etc., R. Co., 81 Hun (N. Y.) 164; Cameron *v.* New York Cent., etc., R. Co., 145 N. Y. 400; Park *v.* New York Cent., etc., R. Co., 85 Hun (N. Y.) 184; Smith *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 468; McGucken *v.* Western New York, etc., R. Co., 77 Hun (N. Y.) 69.

North Carolina. — Styles *v.* Richmond, etc., R. Co., 118 N. Car. 1084; Mason *v.* Richmond, etc., R. Co., 114 N. Car. 718.

Ohio. — Johnson *v.* Cleveland, etc., R. Co., 11 Ohio Cir. Ct. Rep. 553; Lake Shore, etc., R. Co. *v.* Mau, 9 Ohio Cir. Ct. Rep. 173.

Pennsylvania. — McMellen *v.* Union News Co., 144 Pa. St. 332, 9 Lanc. L. Rev. 49.

Tennessee. — Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128.

Texas. — San Antonio, etc., R. Co. *v.* Way, 9 Tex. Civ. App. 214; Southern Pac. Co. *v.* Ryan, (Tex. Civ. App. 1895) 29 S. W. Rep. 527.

Virginia. — Richmond, etc., R. Co. *v.* Dudley, 90 Va. 304; Harris *v.* Norfolk, etc., R. Co., 88 Va. 560, 16 Va. L. J. 149; Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165.

West Virginia. — Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206; Knight *v.* Cooper, 36 W. Va. 232.

And a servant cannot recover for injuries sustained where he was acting outside the scope of his employment and against the direct instructions of his master, unless some great emergency is shown by the servant to justify his so acting.

Georgia. — Kane *v.* Savannah, etc., R. Co., 85 Ga. 858.

Massachusetts. — Mellor *v.* Merchants' Mfg. Co., 150 Mass. 362.

Minnesota. — Rahman *v.* Minnesota, etc., R. Co., 43 Minn. 42.

Pennsylvania. — Gillen *v.* Rowley, 134 Pa. St. 209; Rummel *v.* Dilworth, 131 Pa. St. 509, 25 W. N. C. (Pa.) 409.

Utah. — Seley *v.* Southern Pac. Co., 6 Utah 319.

1. Cases of Special Duty. — See the following by way of illustration:

England. — Coggs *v.* Bernard, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199.

United States. — Marsh *v.* Whitmore, 21 Wall. (U. S.) 178 (attorney and client).

Indiana. — Citizens' Loan Fund, etc., Assoc. *v.* Friedly, 123 Ind. 143 (attorney and client).

Iowa. — Whitesell *v.* Hill, (Iowa 1897) 70 N. W. Rep. 750 (physician and patient).

Massachusetts. — Spring *v.* Hager, 145 Mass. 186, 1 Am. St. Rep. 451 (innkeepers).

New Hampshire. — Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388 (physician and patient).

Pennsylvania. — Lowall *v.* Groman, 180 Pa. St. 532 (attorney and client); McHugh *v.* Schlosser, 159 Pa. St. 480, 39 Am. St. Rep. 699 (innkeepers); Shultz *v.* Wall, 134 Pa. St. 262, 19 Am. St. Rep. 686 (innkeepers).

2. Violation of Positive Law as Affecting Negligence — *United States.* — Bennett *v.* Louisville,

Rights and Duties Equal, Mutual, and Reciprocal. — But where no relation of privity exists, and neither party is guilty of any collateral wrongdoing at the time an injury occurs, the rights and duties of the parties are equal, mutual, and reciprocal, and the care which should be exercised by ordinarily careful and prudent persons so situated is all that is required of either.[1] In such cases the parties are strangers in law, having equal obligations imposed upon them to care for their own and each other's safety; and such obligations, and the care and duties flowing from them, vary widely, according to the character of the parties, and the circumstances and conditions which surround them and control their conduct.

The Test of "Ordinary Care under the Circumstances" is applied to determine when they have been negligent and when not, and it is quite unnecessary to enumerate all the special applications of the rules already laid down.[2] But their application in the concrete may be well illustrated by the doctrines relating to contributory negligence at railway crossings.[3]

2. Contributory Negligence at Railway Crossings — *a.* IN GENERAL — **Ordinary Care.** — At highway crossings a railway company is bound to exercise ordinary care to avoid injuring persons upon the crossing;[4] and the duty of persons

etc., R. Co., 102 U. S. 577, 1 Am. & Eng. R. Cas. 71.

Alabama. — Georgia Pac. R. Co. *v.* O'Shields, 90 Ala. 29.

Illinois. — Toledo, etc., R. Co. *v.* Grush, 67 Ill. 262, 16 Am. Rep. 618; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500, 22 Am. Rep. 112.

Iowa. — McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114.

Maine. — Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Tobin *v.* Portland, etc., R. Co., 59 Me. 183, 8 Am. Rep. 415.

Massachusetts. — Wendell *v.* Baxter, 12 Gray (Mass.) 494; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Severy *v.* Nickerson, 120 Mass. 306, 21 Am. Rep. 514.

Michigan. — McKone *v.* Michigan Cent. R. Co., 51 Mich. 601, 47 Am. Rep. 596.

Missouri. — Jennings *v.* St. Louis, etc., R. Co., 99 Mo. 394; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 43 Am. & Eng. R. Cas. 290.

Ohio. — Pittsburgh, etc., R. Co. *v.* Bingham, 29 Ohio St. 364, 23 Am. Rep. 751.

Pennsylvania. — Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317.

Texas. — Missouri Pac. R. Co. *v.* Burnett, 3 Tex. App. Civ. Cas., § 236; Missouri Pac. R. Co. *v.* Weisen, 65 Tex. 443.

1. When Rights and Duties Are Equal. — Indiana Cent. R. Co. *v.* Hudelson, 13 Ind. 328, 74 Am. Dec. 254.

2. The Standard of Ordinary Care Varies with Circumstances — *New York.* — New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30, 52; Wells *v.* New York Cent. R. Co., 24 N. Y. 188; Boniface *v.* Relyea, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 268, 36 How. Pr. (N. Y.) 465.

Ohio. — Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

3. As to Accidents at Crossings Generally, see the title CROSSINGS.

4. Railroad's Duty at Highway Crossings — *England.* — James *v.* Great Western R. Co., L. R. 2 C. P. 634, note 3; Bilbee *v.* London, etc., R. Co., 18 C. B. N. S. 584, 114 E. C. L. 584.

United States. — Continental Imp. Co. *v.* Stead, 95 U. S. 161.

Alabama. — Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672.

California. — Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670.

Connecticut. — Beers *v.* Housatonuc R. Co., 19 Conn. 566.

Illinois. — Chicago, etc., R. Co. *v.* Lee, 87 Ill. 454; Dimick *v.* Chicago, etc., R. Co., 80 Ill. 338.

Indiana. — Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196; Louisville, etc., R. Co. *v.* Head, 80 Ind. 117, 4 Am. & Eng. R. Cas. 619; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65.

Iowa. — Black *v.* Burlington, etc., R. Co., 38 Iowa 515; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 14 Am. & Eng. R. Cas. 640; Hosic *v.* Chicago, etc., R. Co., 75 Iowa 683, 9 Am. St. Rep. 518; Reeves *v.* Dubuque, etc., R. Co., 92 Iowa 32; Yeager *v.* Atchison, etc., R. Co., 94 Iowa 46.

Kansas. — Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 12 Ry. & Corp. L. J. 158.

Kentucky. — Hogan *v.* Kentucky Union R. Co., 14 Ky. L. Rep. 678.

Maryland. — State *v.* Baltimore, etc., R. Co., 24 Md. 84; Pennsylvania R. Co. *v.* State, 61 Md. 108, 19 Am. & Eng. R. Cas. 326.

Massachusetts. — Eaton *v.* Fitchburg R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183.

Michigan. — Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 4 Am. & Eng. R. Cas. 548; Thayer *v.* Flint, etc., R. Co., 93 Mich. 150.

Minnesota. — Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; Hutchinson *v.* St. Paul, etc., R. Co., 32 Minn. 398, 19 Am. & Eng. R. Cas. 280; Howard *v.* St. Paul, etc., R. Co., 32 Minn. 214, 19 Am. & Eng. R. Cas. 283.

Missouri. — Kennedy *v.* North Missouri R. Co., 36 Mo. 351; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22; Stillson *v.* Hannibal, etc., R. Co., 67 Mo. 671; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80, 8 Am. & Eng. R. Cas. 467; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280.

New Jersey. — Runyon *v.* Central R. Co., 25 N. J. L. 558; New Jersey R., etc., Co. *v.* West, 32 N. J. L. 91.

using the crossing is to exercise the same kind of care.[1] Those who attempt to cross a railroad track at a public highway crossing must exercise ordinary care, in view of all the surrounding circumstances, to avoid receiving an injury by collision with trains.[2] But, in the very nature of things, the standard of

New York. — Wilds *v.* Hudson River R. Co., 24 N. Y. 430, 29 N. Y. 315; Warner *v.* New York Cent. R. Co., 44 N. Y. 465; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13, 8 Am. & Eng. R. Cas. 445; Richardson *v.* New York Cent. R. Co., 45 N. Y. 846; Kissenger *v.* New York, etc., R. Co., 56 N. Y. 538; Brand *v.* Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368; McNamara *v.* New York Cent., etc., R. Co., (Supreme Ct.) 46 N. Y. St. Rep. 439, 19 N. Y. Supp. 497.

Ohio. — Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 676.

Pennsylvania. — Huyett *v.* Philadelphia, etc., R. Co., 23 Pa. St. 373; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

Tennessee. — Louisville, etc., R. Co. *v.* Milam, 9 Lea (Tenn.) 223, 13 Am. & Eng. R. Cas. 507.

Wisconsin. — Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 19 Am. & Eng. R. Cas. 285; Bohan *v.* Milwaukee, etc., R. Co., 58 Wis. 30, 15 Am. & Eng. R. Cas. 374, 61 Wis. 391, 19 Am. & Eng. R. Cas. 276.

1. Traveler's Duty at Railroad Crossings — *United States.* — Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245; Griffith *v.* Baltimore, etc., R. Co., 44 Fed. Rep. 574.

Illinois. — Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236, and cases cited in last note; Cleveland, etc., R. Co. *v.* Arbaugh, 47 Ill. App. 360.

Indiana. — Baltimore, etc., R. Co. *v.* Walborn, 127 Ind. 142; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261.

Kansas. — Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 12 Ry. & Corp. L. J. 158.

Louisiana. — White *v.* Vicksburg, etc., R. Co., 42 La. Ann. 990.

Michigan. — Potter *v.* Flint, etc., R. Co., 62 Mich. 22.

Missouri. — Kenney *v.* Hannibal, etc., R. Co., (Mo. 1891) 15 S. W. Rep. 983, *affirmed* 105 Mo. 289.

New York. — Whalen *v.* New York Cent., etc., R. Co., 58 Hun (N. Y.) 431.

Pennsylvania. — Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

2. It Is Ordinary Care Under the Circumstances. — "But while the road is held to this degree of care, it is equally the duty of a person crossing the track of a railroad to be on his guard, and to see that he is not incurring danger to himself and to his property. He has no right to shut his eyes and close his ears to the danger he is liable to incur at such a place; and if he does, then he must be responsible for the consequences of his carelessness." Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236.

United States. — Chicago, etc., R. Co. *v.* Houston, 95 U. S. 702; Continental Imp. Co. *v.* Stead, 95 U. S. 161; Horn *v.* Baltimore etc., R. Co., 54 Fed. Rep. 301; Renner *v.* Northern Pac. R. Co., 46 Fed. Rep. 344.

California. — Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161.

Georgia. — Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500.

Illinois. — Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Chicago, etc., R. Co. *v.* Halsey, 133 Ill. 248; Chicago, etc., R. Co. *v.* Fitzsimmons, 40 Ill. App. 360.

Indiana. — Cincinnati, etc, R. Co. *v.* Grames, 8 Ind. App. 112.

Iowa. — Richards *v.* Chicago, etc., R. Co., 81 Iowa 426, 45 Am. & Eng. R. Cas. 54.

Kansas. — Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 12 Ry. & Corp. L. J. 158.

Kentucky. — Peltier *v.* Louisville, etc., R. Co., 16 Ky. L. Rep. 500.

Louisiana. — White *v.* Vicksburg, etc., R. Co., 42 La. Ann. 990.

Maine. — Allen *v.* Maine Cent. R. Co., 82 Me. 111.

Maryland. — Baltimore, etc., R. Co. *v.* Owings, 65 Md. 502, 28 Am. & Eng. R. Cas. 639.

Massachusetts. — Moore *v.* Boston, etc., R. Co., 159 Mass. 399; Tyler *v.* Old Colony R. Co., 157 Mass. 336; Sullivan *v.* Old Colony R. Co., 153 Mass. 118.

Michigan. — Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; Van Auken *v.* Chicago, etc., R. Co., 96 Mich. 307; Gebhard *v.* Detroit, etc., R. Co., 79 Mich. 586; Bird *v.* Flint, etc., R. Co., 86 Mich. 79.

Missouri. — Hudson *v.* Wabash Western R. Co., 101 Mo. 13; Damrill *v.* St. Louis, etc., R. Co., 27 Mo. App. 202; Hayden *v.* Missouri etc., R. Co., 124 Mo. 566; Corcoran *v.* St. Louis, etc., R. Co., 105 Mo. 399, 24 Am. St. Rep. 394; Hicks *v.* Missouri Pac. R. Co., 46 Mo. App. 304; Easley *v.* Missouri Pac. R. Co., 113 Mo. 236; Maxey *v.* Missouri Pac. R. Co., 113 Mo. 1.

New York. — Krauss *v.* Wallkill Valley R. Co., 69 Hun (N. Y.) 482; Adams *v.* New York, etc., R. Co., (Supreme Ct.) 49 N. Y. St. Rep. 854, 21 N. Y. Supp. 681; Nash *v.* New York Cent., etc., R. Co., 125 N. Y. 715, 34 N. Y. St. Rep. 788; Daniels *v.* Staten Island Rapid Transit Co., 125 N. Y. 407.

North Carolina. — Parker *v.* Wilmington, etc., R. Co., 86 N. Car. 224, 8 Am. & Eng. R. Cas. 420.

Pennsylvania. — Ferguson *v.* Philadelphia Traction Co., 9 Pa. Co. Ct. Rep. 147; Cleary *v.* Philadelphia, etc., R. Co., 140 Pa. St. 19; Overdorfer *v.* Philadelphia, etc., R. Co., 1 Pa. Adv. Rep. 612.

Texas. — Texas, etc., R. Co. *v.* Brown, 2 Tex. Civ. App. 281.

Utah. — Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129.

Wisconsin. — Flynn *v.* Eastern R. Co., 83 Wis. 238; Olson *v.* Chicago, etc., R. Co., 81 Wis. 47; Winchell *v.* Abbot, 77 Wis. [illegible]; Regan *v.* Chicago, etc., R. Co., 85 Wis. 43

such care cannot be absolutely fixed.[1]

b. THE "STOP, LOOK, AND LISTEN" RULE — **Negligence Per Se.** — In some jurisdictions, however, it is held that a failure to stop, look, and listen, before entering upon a railway track, is not merely evidence of negligence, but is negligence *per se*,[2] and, as such, will bar a recovery, unless it affirmatively appears that it did not proximately contribute to the injury.[3]

Precaution Required in Pennsylvania. — And so stringent is the rule in Pennsylvania, that, when a traveler cannot otherwise determine whether a train is coming, it seems he must get out and go forward to the track before attempting to cross with his vehicle, or take the risk of being held guilty of contributory negligence.[4]

1. The Standard Cannot Be Absolutely Fixed. — "'Ordinary care' is a term that has relation to the situation of parties and the business in which they are engaged. It is used here as synonymous with the term 'reasonable care' as used by the courts of England. 'Care and diligence should vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted.'" Fletcher *v.* Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695.

The strict rules applicable to crossing steam railways cannot be applied to drivers of vehicles in city streets through which street railroads are operated. Smith *v.* Metropolitan St. R. Co., 7 N. Y. App. Div. 253.

See also as to the main proposition:

Massachusetts. — Fletcher *v.* Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695; Holly *v.* Boston Gas Light Co., 8 Gray (Mass.) 131, 69 Am. Dec. 233.

New York. — Sauerborn *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 429.

Ohio. — Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

Pennsylvania. — Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322.

Wisconsin. — Ward *v.* Chicago, etc., R. Co., 85 Wis. 601.

2. The "Stop, Look, and Listen" Rule. — "There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court." Sharswood, J., in Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753; North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60, 88 Am. Dec. 482. "It was unquestionably the decedent's duty * * * to stop, and look and listen for approaching trains, before attempting to cross the track of defendant's road; and if he failed to observe this precaution, his failure was not merely evidence of negligence, it was negligence in itself." Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407.

Alabama. — Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262.

Colorado. — Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98.

Indiana. — Cincinnati, etc., R. Co. *v.* Duncan, 143 Ind. 524.

Iowa. — Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248.

Maryland. — Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 59 Am. Rep. 159.

Pennsylvania. — Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30; Seamans *v.* Delaware, etc., R. Co., 174 Pa. St. 421; Smith *v.* Philadelphia, etc., R. Co., 160 Pa. St. 117.

3. When the Rule Does Not Govern. — It should not be overlooked that the *Pennsylvania* rule, that a failure to stop, look, and listen is negligence *per se*, has no application to a case where the failure to stop, look, and listen was not a proximate cause of a subsequent injury. Thus when the plaintiff drove on a crossing without stopping to look or listen, but would have crossed in safety if his horse's foot had not become fast by reason of a defect in the crossing, and his horse and vehicle were injured several minutes later by the negligent management of a train, while he was trying to extricate his horse's foot from the crossing, it was held that the failure to stop, look, and listen did not contribute to the injury, and would not bar a recovery. Baughman *v.* Shenango, etc., R. Co., 92 Pa. St. 335, 6 Am. & Eng. R. Cas. 51, 37 Am. Rep. 690.

But where it does not thus affirmatively appear that the failure to stop, look, and listen was not a proximate cause of the injury, it seems that in Pennsylvania and other states holding such failure negligence *per se*, it will be presumed to have contributed to the injury. Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 59 Am. Rep. 159; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

California. — Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161.

Illinois. — Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 45 Am. & Eng. R. Cas. 150.

Maryland. — Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 59 Am. Rep. 159.

Minnesota. — Magner *v.* Truesdale, 53 Minn. 436.

New Hampshire. — Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 45 Am. & Eng. R. Cas. 163.

Pennsylvania. — Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753; Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610; Central R. Co. *v.* Feller, 84 Pa. St. 226; Pennsylvania R. Co. *v.* Ackerman, 74 Pa. St. 265.

Wisconsin. — Phillips *v.* Milwaukee, etc., R. Co., 77 Wis. 349.

4. When Traveler Must Lead His Horse — Pennsylvania Rule. — "If the traveler cannot see

But in Other Jurisdictions such a precaution is not necessary to constitute "ordinary care;" [1] and the general rule is, that a person about to cross a track must bear in mind the dangers attendant upon crossing, and vigilantly use his senses of sight and hearing in the endeavor to avoid injury.[2] And if the

the track by looking out, whether from fog or other cause, he should get out, and, if necessary, lead his horse and wagon." Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753.

To the same effect see Ellis *v.* Lake Shore, etc., R. Co., 27 W. N. C. (Pa.) 145, 138 Pa. St. 506, 21 Am. St. Rep. 914, 21 Pittsb. L. J. N. S. 361, 48 Phila. Leg. Int. 336; Robertson *v.* Pennsylvania R. Co., 180 Pa. St. 43; Bare *v.* Pennsylvania R. Co., 135 Pa. St. 95; Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610; Central R. Co. *v.* Feller, 84 Pa. St. 226. But see Pennsylvania R. Co. *v.* Ackerman, 74 Pa. St. 265.

1. Such Precaution Not Required Elsewhere — *United States.* — Continental Imp. Co. *v.* Stead, 95 U. S. 161; Cincinnati, etc., R. Co. *v.* Farra, 66 Fed. Rep. 496.

Illinois. — Cleveland, etc., R. Co. *v.* Bruce, 63 Ill. App. 233; Chicago, etc., R. Co. *v.* Reith, 65 Ill. App. 461.

Indiana. — Pittsburgh, etc., R. Co. *v.* Wright, 80 Ind. 182, 5 Am. & Eng. R. Cas. 628.

Kansas. — Chicago, etc., R. Co. *v.* Hinds, 56 Kan. 758.

Kentucky. — Cincinnati, etc., R. Co. *v.* Wright, 17 Ky. L. Rep. 1277.

Minnesota. — Clark *v.* Northern Pac. R. Co., 47 Minn. 380.

Missouri. — Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659; Masterson *v.* Chicago, etc., R. Co., 58 Mo. App. 572; Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525.

New York. — Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400; Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451, 67 N. Y. 587; Neudoerffer *v.* Brooklyn Heights R. Co., 9 N. Y. App. Div. 66.

Wisconsin. — Duffy *v.* Chicago, etc., R. Co., 32 Wis. 269.

In a *Missouri* case it was expressly held that the law did not require a traveler to take such precautions as the dictum of Judge Sharswood in the Beale case would seem to require. Huckshold *v.* St. Louis, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659.

2. General Rule as to Care Required of Traveler — *England.* — Stubley *v.* London, etc., R. Co., L. R. 1 Exch. 13; Cliff *v.* Midland R. Co., L. R. 5 Q. B. 258; Dublin, etc., R. Co. *v.* Slattery, L. R. 3 App. 1155, I. R. 8 C. L. 531, I. R. 10 C. L. 256; Nicholls *v.* Great Western R. Co., 27 U. C. Q. B. 382; Daniel *v.* Metropolitan R. Co., L. R. 5 H. L. 45, L. R. 3 C. P. 591.

United States. — Field *v.* Chicago, etc., R. Co., 4 McCrary (U. S.) 573; Schofield *v.* Chicago, etc., R. Co., 2 McCrary (U. S.) 268, 114 U. S. 615, 19 Am. & Eng. R. Cas. 353; Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697; Continental Imp. Co. *v.* Stead, 95 U. S. 161; Walker *v.* Kinnare, 76 Fed. Rep. 101; Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245; Horn *v.* Baltimore, etc., R. Co., 54 Fed. Rep. 301; Eddy *v.* Powell, 4 U. S. App. 259, 49 Fed. Rep. 814; Philadelphia, etc., R. Co. *v.* Peebles, 67 Fed. Rep. 591; McGhee *v.* White, 66 Fed. Rep. 502.

Alabama. — Gothard *v.* Alabama G. S. R. Co., 67 Ala. 114; South, etc., Alabama R. Co. *v.* Thompson, 62 Ala. 494.

Arkansas. — Martin *v.* Little Rock, etc., R. Co., 62 Ark. 156.

California. — Flemming *v.* Western Pac. R. Co., 49 Cal. 253.

Delaware. — Lynam *v.* Philadelphia, etc., R. Co., 4 Houst. (Del.) 583.

Illinois. — Chicago, etc., R. Co. *v.* Hatch, 79 Ill. 137; Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88; Rockford, etc., R. Co. *v.* Byam, 80 Ill. 528; Chicago, etc., R. Co. *v.* Damerell, 81 Ill. 450; Illinois Cent. R. Co. *v.* Hetherington, 83 Ill. 510; Chicago, etc., R. Co. *v.* Becker, 84 Ill. 483; Lake Shore, etc., R. Co. *v.* Sunderland, 2 Ill. App. 307; Lake Shore, etc., R. Co. *v.* Clemens, 5 Ill. App. 77; Chicago, etc., R. Co. *v.* Dimick, 96 Ill. 42, 2 Am. & Eng. R. Cas. 201; Pennsylvania Co. *v.* Rudel, 100 Ill. 603, 6 Am. & Eng. R. Cas. 30; Peoria, etc., R. Co. *v.* Clayberg, 107 Ill. 644, 15 Am. & Eng. R. Cas. 356; Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 82; Chicago, etc., R. Co. *v.* Sweeney, 52 Ill. 325; Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Illinois Cent. R. Co. *v.* Goddard, 72 Ill. 567; Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 512; St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379; Chicago, etc., R. Co. *v.* McKean, 40 Ill. 218; Chicago, etc., R. Co. *v.* Florens, 32 Ill. App. 365; Cleveland, etc., R. Co. *v.* Arbaugh, 47 Ill. App. 360; Chicago, etc., R. Co. *v.* Greenfield, 53 Ill. App. 424; Illinois Cent. R. Co. *v.* James, 67 Ill. App. 649; Illinois Cent. R. Co. *v.* Johnson, 67 Ill. 312; Illinois Cent. R. Co. *v.* Borders, 61 Ill. App. 55.

Indiana. — Bellefontaine R. Co. *v.* Hunter 33 Ind. 335, 5 Am. Rep. 201; Toledo, etc., R. Co. *v.* Shuckman, 50 Ind. 42; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476, 8 Am. & Eng. R. Cas. 256; Thornton *v.* Cleveland, etc., R. Co., 131 Ind. 492; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 19 Am. St. Rep. 96; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35; Engrer *v.* Ohio, etc., R. Co., 142 Ind. 618.

Iowa. — Artz *v.* Chicago, etc., R. Co., 34 Iowa 153, 38 Iowa 293, 44 Iowa 284; Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316, 31 Iowa 370; Benton *v.* Central R. Co., 42 Iowa 192; Lang *v.* Holiday Creek R., etc., Min. Co., 49 Iowa 469; Starry *v.* Dubuque, etc., R. Co., 51 Iowa 419; Laverenz *v.* Chicago, etc., R. Co., 56 Iowa 689, 6 Am. & Eng. R. Cas. 274; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 14 Am. & Eng. R. Cas. 640; Moore *v.* Keokuk, etc., R. Co., 89 Iowa 223; Nixon *v.* Chicago, etc., R. Co., 84 Iowa 331, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 70; Winey *v.* Chicago, etc., R. Co., 92 Iowa 622.

traveler looked and listened, or did all that a prudent man would have done under the circumstances, it will not be said, as matter of law, that he should

Kansas. — Union Pac. R. Co. *v.* Adams, 33 Kan. 427; Clark *v.* Missouri Pac. R. Co., 35 Kan. 350; Wichita, etc., R. Co. *v.* Davis, 37 Kan. 743, 1 Am. St. Rep. 275; Roach *v.* St. Joseph, etc., R. Co., 55 Kan. 654.

Kentucky. — Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

Louisiana. — Mercier *v.* New Orleans, etc., R. Co., 23 La. Ann. 264; Brown *v.* Texas, etc., R. Co., 42 La. Ann. 350, 21 Am. St. Rep. 374; Vincent *v.* Morgan's Louisiana, etc., R., etc., Co., 48 La. Ann. 933.

Maine. — Grows *v.* Maine Cent. R. Co., 67 Me. 100; State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622, 19 Am. & Eng. R. Cas. 312; Plummer *v.* Eastern R. Co., 73 Me. 591, 6 Am. & Eng. R. Cas. 165; Webb *v.* Portland, etc., R. Co., 57 Me. 117; Giberson *v.* Bangor, etc., R. Co., 89 Me. 337.

Maryland. — Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; Baltimore, etc., R. Co. *v.* Breinig, 25 Md. 378, 90 Am. Dec. 49.

Massachusetts. — Butterfield *v.* Western R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678; Allyn *v.* Boston, etc., R. Co., 105 Mass. 77; Brooks *v.* Somerville, 106 Mass. 271; Wheelwright *v.* Boston, etc., R. Co., 135 Mass. 225, 16 Am. & Eng. R. Cas. 315; Tully *v.* Fitchburg R. Co., 134 Mass. 499, 14 Am. & Eng. R. Cas. 682; Randall *v.* Connecticut River R. Co., 132 Mass. 269; Wilson *v.* Charlestown, 8 Allen (Mass.) 138; Linfield *v.* Old Colony R. Corp., 10 Cush. (Mass.) 562, 57 Am. Dec. 124; Hicks *v.* New York, etc., R. Co., 164 Mass. 424; Sprow *v.* Boston, etc., R. Co., 163 Mass. 330; Debbins *v.* Old Colony R. Co., 154 Mass. 402, 47 Am. & Eng. R. Cas. 531; Bradford *v.* Boston, etc., R. Co., 160 Mass. 392; Allerton *v.* Boston, etc., R. Co., 146 Mass. 241.

Michigan. — Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 290; Guta *v.* Lake Shore, etc., R. Co., 81 Mich. 291; Duvall *v.* Michigan Cent. R. Co., 105 Mich. 386; Kelly *v.* Hendrie, 26 Mich. 255.

Minnesota. — Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165; Heininger *v.* Great Northern R. Co., 59 Minn. 458; Marty *v.* Chicago, etc., R. Co., 38 Minn. 108; Studley *v.* St. Paul, etc., R. Co., 48 Minn. 249.

Mississippi. — New Orleans, etc., R. Co. *v.* Mitchell, 52 Miss. 808.

Missouri. — Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80, 8 Am. & Eng. R. Cas. 467; Fletcher *v.* Atlantic, etc., R. Co., 64 Mo. 484; Leduke *v.* St. Louis, etc., R. Co., 4 Mo. App. 485; Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476; Johnson *v.* Chicago, etc., R. Co., 77 Mo. 546; Drake *v.* Chicago, etc., R. Co., 51 Mo. App. 562; Maxey *v.* Missouri Pac. R. Co., 113 Mo. 1; Huggart *v.* Missouri Pac. R. Co., 134 Mo. 673; Stevens *v.* Missouri Pac. R. Co., 67 Mo. App. 356; Lane *v.* Missouri Pac. R. Co., 132 Mo. 4; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405; Lloyd *v.* St. Louis, etc., R. Co., 128 Mo. 595; Caldwell *v.* Kansas City, etc., R. Co., 58 Mo. App. 453; Jones *v.* Barnard, 63 Mo. App. 501; Kennedy *v.* North Missouri R. Co., 36 Mo. 351; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323.

Nevada. — Solen *v.* Virginia, etc., R. Co., 13 Nev. 106.

New Hampshire. — State *v.* Manchester, etc., R. Co., 52 N. H. 528.

New Jersey. — Central R. Co. *v.* Moore, 24 N. J. L. 824; Blaker *v.* New Jersey Midland R. Co., 30 N. J. Eq. 240; Morris, etc., R. Co. *v.* Haslan, 33 N. J. L. 147; Telfer *v.* Northern R. Co., 30 N. J. L. 188.

New York. — Beisegel *v.* New York Cent. R. Co., 14 Abb. Pr. N. S. (N. Y. Ct. App.) 29, 40 N. Y. 9; Eaton *v.* Erie R. Co., 51 N. Y. 544; Maginnis *v.* New York Cent., etc., R. Co., 52 N. Y. 215; Cordell *v.* New York Cent., etc., R. Co., 75 N. Y. 330, 70 N. Y. 119, 26 Am. Rep. 550, 64 N. Y. 535; Adolph *v.* Central Park, etc., R. Co., 76 N. Y. 530, 65 N. Y. 554; Sheffield *v.* Rochester, etc., R. Co., 21 Barb. (N. Y.) 339; Brooks *v.* Buffalo, etc., R. Co., 25 Barb. (N. Y.) 600; Dascomb *v.* Buffalo, etc., R. Co., 27 Barb. (N. Y.) 221; Havens *v.* Erie R. Co., 53 Barb. (N. Y.) 328; Haight *v.* New York Cent. R. Co., 7 Lans. (N. Y.) 11; Elwood *v.* New York Cent., etc., R. Co., 4 Hun (N. Y.) 808; Bunn *v.* Delaware, etc., R. Co., 6 Hun (N. Y.) 303; Sutherland *v.* New York Cent., etc., R. Co., 41 N. Y. Super. Ct. 17; Bernhard *v.* Rensselaer, etc., R. Co., 1 Abb. App. Dec. (N. Y.) 131, 32 Barb. (N. Y.) 165, 18 How. Pr. (N. Y.) 427, 19 How. Pr. (N. Y.) 199; Steves *v.* Oswego, etc., R. Co., 18 N. Y 422; Wilds *v.* Hudson River R. Co., 29 N. Y. 315, 24 N. Y. 440; Ernst *v.* Hudson River R. Co., 39 N. Y. 61, 100 Am. Dec. 405, 35 N. Y. 9, 90 Am. Dec. 761, 32 Barb. (N. Y.) 159; Wilcox *v.* Rome, etc., R. Co., 39 N. Y. 358, 100 Am. Dec. 440; Harty *v.* Central R. Co., 42 N. Y. 469; Gorton *v.* Erie R. Co., 45 N. Y. 660; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400; Reynolds *v.* New York Cent., etc., R. Co., 58 N. Y. 248, 2 Thomp. & C. (N. Y.) 644; Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451, 67 N. Y. 587; McGrath *v.* New York Cent., etc., R. Co., 59 N. Y. 468, 17 Am. Rep. 359, 1 Hun (N. Y.) 437, 3 Thomp. & C. (N. Y.) 776; Mitchell *v.* New York Cent., etc., R. Co., 64 N. Y. 655; Salter *v.* Utica, etc., R. Co., 75 N. Y. 273, 13 Hun (N. Y.) 187; McCall *v.* New York Cent. R. Co., 54 N. Y. 642; Gillespie *v.* Newburgh, 54 N. Y. 468; Belton *v.* Baxter, 54 N. Y. 245, 13 Am. Rep. 578; Stackus *v.* New York Cent., etc., R. Co., 79 N. Y. 464; Howard *v.* Northern Cent. R. Co., (Supreme Ct.) 1 N. Y. Supp. 528; Nash *v.* New York Cent., etc., R. Co., (Supreme Ct.) 1 N. Y. Supp. 269; Tucker *v.* New York Cent., etc., R. Co., 124 N. Y. 308, 21 Am. St. Rep. 670; Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526; Daniels *v.* Staten Island Rapid Transit Co., 125 N. Y. 407; Mehegan *v.* New York Cent., etc., R. Co., (Supreme Ct.) 46 N. Y. St. Rep. 497, 19 N. Y. Supp. 444; Henavie *v.* New York Cent., etc., R. Co., 10 N. Y. App. Div. 64; Von Atzinger *v.* New York Cent., etc., R. Co., 83 Hun (N. Y.) 120; Bates *v.* New York Cent., etc., R. Co., 84 Hun (N. Y.) 287; Campbell *v.*

have stopped;[1] nor will a failure to stop, look, and listen be held negligent when the circumstances were such that an observance of these precautions

Union R. Co., 9 Misc. Rep. (N. Y. C. Pl.) 484; Scaggs *v.* Delaware, etc., Canal Co., 145 N. Y. 201; Allen *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 589; Collins *v.* New York, etc., R. Co., 92 Hun (N. Y.) 563; Belch *v.* New York Cent., etc., R. Co., 90 Hun (N. Y.) 477; Skinner *v.* Prospect Park, etc., R. Co., (Supreme Ct.) 51 N. Y. St. Rep. 554; Crone *v.* New York Cent., etc., R. Co., (Buffalo Super. Ct.) 48 N. Y. St. Rep. 408; Martus *v.* Delaware, etc., R. Co, 15 N. Y. Misc. Rep. (Buffalo Super. Ct.) 248; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549; Judson *v.* Central Vermont R. Co. 91 Hun (N. Y.) 1; Manley *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div., 420; Kilbride *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 177; Berzevizy *v.* Delaware, etc., R. Co., 19 N. Y. App. Div. 309; Hennessy *v.* Northern Cent. R. Co., 17 N. Y. App. Div. 162.

North Carolina. — Gilmore *v.* Cape Fear, etc., R. Co., 115 N. Car. 657.

Ohio. — Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670, 18 Ohio St. 399, 98 Am. Dec. 175; Pennsylvania Co., etc. *v.* Rathgeb, 32 Ohio St. 66; Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627, 24 Ohio St. 642; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633.

Pennsylvania. — Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30; Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361; Baughman *v.* Shenango, etc., R. Co., 92 Pa. St. 335, 6 Am. & Eng. R. Cas. 51, 37 Am. Rep. 690; Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 464, 72 Am. Dec. 713; North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60, 88 Am. Dec. 482; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413; Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; Sullivan *v.* New York, etc., R. Co., 175 Pa. St. 361; McNeal *v.* Pittsburgh, etc., R. Co., 131 Pa. St. 184, 25 W. N. C. (Pa.) 181; Schmidt *v.* Philadelphia, etc., R. Co., 1 Pa. Adv. Rep. 773; Martin *v.* Pennsylvania R. Co , 176 Pa. St. 444.

South Carolina. — Zeigler *v.* Northeastern R. Co., 5 S. Car. 221, 7 S. Car. 402.

Texas. — Galveston, etc., R. Co. *v.* Bracken, 59 Tex. 71, 14 Am. & Eng. R. Cas. 691; International, etc., R. Co. *v.* Graves, 59 Tex. 330; Gulf, etc., R. Co. *v.* Anderson, 76 Tex. 244; International, etc., R. Co. *v.* Dyer, 76 Tex. 156, Missouri, etc., R. Co. *v.* Cox, (Tex. Civ. App. 1894) 27 S. W. Rep. 1050.

Vermont. — Manley *v.* Delaware, etc., Canal Co., 69 Vt. 104, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 68.

Virginia. — Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. (Va.) 629; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 68–78.

Washington. — Lewis *v.* Puget Sound Shore R. Co., 4 Wash. 188.

Wisconsin. — Haas *v.* Chicago, etc., R. Co., 41 Wis. 44; Ward *v.* Chicago, etc., R. Co., 85 Wis. 601; Schmolze *v.* Chicago, etc., R. Co., 83 Wis. 659; Schlimgen *v.* Chicago, etc., R. Co., 90 Wis. 186; Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123; Duame *v.* Chicago, etc., R. Co., 72 Wis. 523, 7 Am. St. Rep. 879.

The best general statement of the rule is that of Mr. Pierce, who says: "A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing, in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If by neglect of this duty he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate." Pierce on Railroads, p. 343.

1. Not Negligence, Per Se, Not to Stop — *Alabama.* — Alabama G. S. R. Co. *v.* Anderson, 109 Ala. 299.

Illinois. — Garland *v.* Chicago, etc., R. Co., 8 Ill. App. 571.

Indiana. — Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168, 6 Am. & Eng. R. Cas. 84.

Iowa. — Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55.

Maryland. — Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391, 19 Am. & Eng. R. Cas. 261; Union R. Co. *v.* State, 72 Md. 153.

Massachusetts. — Tyler *v.* New York, etc., R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas. 296.

Minnesota. — Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 32 Am. St. Rep. 540.

Missouri. — Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 673; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618.

New York. — Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Kellogg *v.* New York Cent., etc., R. Co., 79 N. Y. 72; Enders *v.* Lake Shore, etc., R. Co., (Buffalo Super. Ct.) 2 N. Y. Supp. 719.

Vermont. — Manley *v.* Delaware, etc., Canal Co., 69 Vt. 104, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 68.

Wisconsin. — Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606.

Canada. — Peart *v.* Grand Trunk R. Co., 10 Ont. App. 191.

"With respect to the degree of care with which a person traveling on a highway should approach a railroad crossing, the court below was right in its instruction to the jury that it is not in all cases his duty to stop and listen to ascertain if a train may be coming; that his duty in that regard must depend on the circumstances of the case, of which the jury are to judge." Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185.

"The plaintiff was riding in a wagon, and did not stop his horse to listen for the cars. The defendant contends that this fact should,

would have been unavailing as a guard against injury.[1] Hence a failure to stop, look, and listen is not contributory negligence *per se*.[2]

Yet When the Facts Are Undisputed, and it appears that a failure to stop, look, and listen proximately contributed to an injury which would otherwise have been

as matter of law, preclude the plaintiff from recovering in this action. The fact is not conclusive evidence of negligence; it was for the judgment of the jury in connection with its circumstances." Tyler *v.* New York, etc., R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas. 296.

1. Failure to Stop, Look, and Listen: When Not Negligent — *England.* — Fordham *v.* London, etc., R. Co., L. R. 3 C. P. 368; Stubley *v.* London, etc., R. Co., L. R. 1 Exch. 13.

United States. — Continental Imp. Co. *v.* Stead, 95 U. S. 161.

Arkansas. — St. Louis, etc., R. Co. *v.* Amos, 54 Ark. 159.

Illinois. — Pennsylvania Co. *v.* Rudel, 100 Ill. 603, 6 Am. & Eng. R. Cas. 30; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83.

Indiana. — Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 406, 25 Am. & Eng. R. Cas. 550; Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253.

Iowa. — Laverenz *v.* Chicago, etc., R. Co., 56 Iowa 689, 6 Am. & Eng. R. Cas 274; Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316; Benton *v.* Central R. Co., 42 Iowa 192; Artz *v.* Chicago, etc., R. Co., 34 Iowa 153.

Louisiana. — Herlisch *v.* Louisville, etc., R. Co., 44 La. Ann. 280.

Maine. — Webb *v.* Portland, etc., R. Co., 57 Me. 117.

Massachusetts. — Com. *v.* Fitchburg R. Co., 10 Allen (Mass.) 189; Craig *v.* New York, etc., R. Co., 118 Mass. 431; French *v.* Taunton Branch R. Co., 116 Mass. 537; Hinckley *v.* Cape Cod R. Co., 120 Mass. 257.

New York. — Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13, 8 Am. & Eng. R. Cas. 445; Johnson *v.* Hudson River R. Co., 20 N. Y. 66, 75 Am. Dec. 375; Terry *v.* Jewett, 78 N. Y. 338; Warfield *v.* New York, etc., R. Co., 8 N. Y. App. Div. 479; Brassell *v.* New York Cent., etc., R. Co., 84 N. Y. 241.

Ohio. — Cleveland, etc., R. Co. *v.* Schneider, 45 Ohio St. 678.

Pennsylvania. — Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322.

Wisconsin. — Butler *v.* Milwaukee, etc., R. Co., 28 Wis. 487; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304.

"A person thus about to cross a railroad, to be free from negligence, must take such precaution as could reasonably be expected of an ordinarily prudent person under like circumstances. It is upon this reason that the requirement to look and listen is based. So far as the precaution would be useless, it is not required. Whether reasonable caution was exercised by the intestate in approaching depended upon the nature and extent of his knowledge of facts, and his opportunity for knowledge. He was required to act like an ordinarily prudent man. A prudent man's attention may be diverted so that he will fail to look and listen, and the evidence may be such as to make it proper to leave to the jury the question whether it was negligence for him to so fail. There may be circumstances which excuse the taking of the usually necessary precaution of looking and listening." Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 406, 25 Am. & Eng. R. Cas. 550.

2. Failure to Stop, Look, and Listen, Not Negligence Per Se. — This follows of necessity if the doctrines of the cases cited in the two preceding notes are good law; and the principles laid down in them seem to be incontrovertible. Nor is this doctrine at all in conflict with the rule "that ordinary prudence requires one who enters upon so dangerous a place as a railroad crossing to use his senses, to listen, to look, or to take some precaution for the purpose of ascertaining whether he may cross in safety." Ormsbee *v.* Boston, etc., R. Corp., 14 R. I. 102, 51 Am. Rep. 354. There is no doubt that where it appears beyond controversy that a failure to stop, look, and listen was a proximate cause of an injury, the courts will hold such failure contributory negligence as a matter of law. Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615, 19 Am. & Eng. R. Cas. 353; Hixson *v.* St. Louis, etc., R. Co., 80 Mo. 335. But this is a very different matter from holding a failure to stop, look, and listen negligence *per se* sufficient to bar a recovery. In the one line of cases it is properly held that a failure to stop, look, or listen was negligence, as a matter of law, upon the undisputed facts, because ordinary care required the precaution, and the failure to take it was a proximate cause of the injury that followed. In other words, there is a difference between negligence *per se*, without regard to the surrounding circumstances, and negligence as a matter of law, in view of all the circumstances. And it will be noticed that in most, if not all, the cases, including those in Pennsylvania, where the doctrine that it is negligence *per se* not to stop, look, and listen is enunciated, the facts were such that the court would have been justified in holding that there had been contributory negligence as matter of law, because the failure to stop, look, or listen had been a proximate cause of the injury, which would have been avoided by ordinary care. See Patterson's Ry. Acc. Law, § 175.

Indiana. — Grand Rapids, etc., R. Co. *v.* Cox, 8 Ind. App. 29; Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112.

Iowa. — Reed *v.* Chicago, etc., R. Co., 74 Iowa 188.

Missouri — Gratiot *v.* Missouri Pac. R. Co., (Mo. 1891) 19 S. W. Rep. 31, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 72.

New York. — Neudoerffer *v.* Brooklyn Heights R. Co., 9 N. Y. App. Div. 66; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400.

Oregon. — McBride *v.* Northern Pac. R. Co., 19 Oregon 64.

Texas. — Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553.

Utah. — Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129; Smith *v.* Rio Grande Western R. Co., 9 Utah 141.

avoided, such failure should be held contributory negligence as a matter of law.[1]

But if the Facts Are Disputed, or it is doubtful whether, under the circumstances, the failure to stop, look, and listen was negligence proximately contributing to the injury, the question of a failure to use ordinary care, and of the effect of a failure to stop, look, and listen, should be left to the jury.[2]

1. But Such Failure May Be Negligence as a Matter of Law — *United States.* — Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615, 19 Am. & Eng. R. Cas. 353; Littaur *v.* Narragansett Pier R. Co., 61 Fed. Rep. 591.

Alabama. — Highland Ave., etc., R. Co. *v.* Maddox, 100 Ala. 618. See also Louisville, etc., R. Co. *v.* Webb, 90 Ala. 185, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 70, 72, 73.

California. — Flemming *v.* Western Pac. R. Co., 49 Cal. 253.

Illinois. — Chicago, etc., R. Co. *v.* Hansen, 166 Ill. 623.

Indiana. — Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168, 6 Am. & Eng. R. Cas. 84.

Iowa. — Schaefert *v.* Chicago, etc., R. Co., 62 Iowa 624, 14 Am. & Eng. R. Cas. 696; Pence *v.* Chicago, etc., R. Co., 63 Iowa 746, 19 Am. & Eng. R. Cas. 366; Bloomfield *v.* Burlington, etc., R. Co., 74 Iowa 607.

Kansas. — Union Pac. R. Co. *v.* Adams, 33 Kan. 427, 19 Am. & Eng. R. Cas. 376.

Maryland. — Baltimore, etc., R. Co. *v.* Hobbs, (Md. 1884) 19 Am. & Eng. R. Cas. 327; Baltimore, etc., R. Co. *v.* Mali, 66 Md. 53, 28 Am. & Eng. R. Cas. 628; State *v.* Baltimore, etc., R. Co., 58 Md. 482, 15 Am. & Eng. R. Cas. 409.

Massachusetts. — Tully *v.* Fitchburg R. Co., 134 Mass. 499, 14 Am. & Eng. R. Cas. 682.

Michigan. — Mynning *v.* Detroit, etc., R. Co., 64 Mich. 93, 8 Am. St. Rep. 804, 28 Am. & Eng. R. Cas. 667; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; McCullough *v.* Minneapolis, etc., R. Co., 101 Mich. 234.

Minnesota. — Harris *v.* Minneapolis, etc., R. Co., 37 Minn. 47; Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165; Abbett *v.* Chicago, etc., R. Co., 30 Minn. 482; Rogstad *v.* St. Paul, etc., R. Co., 31 Minn. 208, 14 Am. & Eng. R. Cas. 648; Nettersheim *v.* Chicago, etc., R. Co., 58 Minn. 10.

Mississippi. — Jobe *v.* Memphis, etc., R. Co., 71 Miss. 734.

Missouri. — Hixson *v.* St. Louis, etc., R. Co., 80 Mo. 335; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; Turner *v.* Hannibal, etc., R. Co., 74 Mo. 603, 6 Am. & Eng. R. Cas. 38; Henze *v.* St. Louis, etc., R. Co., 71 Mo. 636, 2 Am. & Eng. R. Cas. 212; Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457; Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80, 8 Am. & Eng. R. Cas. 467; Fox *v.* Missouri Pac. R. Co., 85 Mo. 679; McNown *v.* Wabash R. Co., 55 Mo. App. 585.

New Jersey. — Merkle *v.* New York, etc., R. Co., 49 N. J. L. 473; Pennsylvania R. Co. *v.* Leary, 56 N. J. L. 705.

New York. — Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, 23 Am. & Eng. R. Cas. 313, 50 Am. Rep. 649; Fowler *v.* New York Cent., etc., R. Co., 74 Hun (N. Y.) 141; Stopp *v.* Fitchburg R. Co., 80 Hun (N. Y.) 178; Howard *v.* Northern Cent. R. Co., (Supreme Ct.) 1 N. Y. Supp. 528; Powell *v.* New York Cent., etc., R. Co., 109 N. Y. 613, 14 N. Y. St. Rep. 74; Crandall *v.* Lehigh Valley R. Co., 72 Hun (N. Y.) 431.

Ohio. — Pennsylvania Co. *v.* Morel, 40 Ohio St. 338; Cleveland, etc., R. Co. *v.* Elliott, 28 Ohio St. 340.

Pennsylvania. — Kelly *v.* Pennsylvania R. Co., (Pa. 1887) 8 Atl. Rep. 856; Butler *v.* Gettysburg, etc., R. Co., 126 Pa. St. 160.

Texas. — Houston, etc., R. Co. *v.* Richards, 59 Tex. 373, 12 Am. & Eng. R. Cas. 70; Brown *v.* Griffin, 71 Tex. 654; Gulf, etc., R. Co. *v.* Moss, 4 Tex. Civ. App. 318.

Wisconsin. — McKinney *v.* Chicago, etc., R. Co., 87 Wis. 282; Piper *v.* Chicago, etc., R. Co., 77 Wis. 247; Schilling *v.* Chicago, etc., R. Co., 71 Wis. 255.

" Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure." Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697.

2. The Question Generally for the Jury — *United States.* — Hathaway *v.* East Tennessee, etc., R. Co., 29 Fed. Rep. 489; Jones *v.* East Tennessee, etc., R. Co., 128 U. S. 443.

California. — Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670.

Iowa. — Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 14 Am. & Eng. R. Cas. 640.

Massachusetts. — Tyler *v.* New York, etc., R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas 296; Copley *v.* New Haven, etc., Co., 136 Mass. 6, 19 Am. & Eng. R. Cas. 373; Hanks *v.* Boston, etc., R. Co., 147 Mass. 495.

Michigan. — Breckenfelder *v.* Lake Shore, etc., R. Co., 79 Mich. 560; Palmer *v.* Detroit, etc., R. Co., 56 Mich. 1; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Minnesota. — Hutchinson *v.* St. Paul, etc., R. Co., 32 Minn. 398, 19 Am. & Eng. R. Cas.

Greater the Danger, Greater the Care. — The traveler, however, is rigidly required to do all that care and prudence would dictate to avoid injury; and the greater the danger, the greater the care that must be exercised to avoid it.[1] And where, because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances, it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary; and, under such circumstances, there can be no excuse for a failure to adopt such reasonable precautions as would probably have prevented the injury.[2]

280; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305.

Missouri. — Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618; Drain *v.* St. Louis, etc., R. Co., 86 Mo. 574.

Nebraska. — Lincoln *v.* Gillilan, 18 Neb. 114; Johnson *v.* Missouri Pac. R. Co., 18 Neb. 690.

New Jersey. — Orange, etc., Horse R. Co. *v.* Ward, 47 N. J. L. 560.

New York. — Greany *v.* Long Island R. Co., 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473; Stackus *v.* New York Cent., etc., R. Co., 79 N. Y. 464; Beisiegel *v.* New York Cent. R. Co., 34 N. Y. 622, 90 Am. Dec. 741; Crawford *v.* Delaware, etc., R. Co., 54 N. Y. Super. Ct. 262; Nash *v.* New York Cent., etc., R. Co., (Supreme Ct.) 1 N. Y. Supp. 269; Thompson *v.* New York Cent., etc., R. Co., 110 N. Y. 636, 17 N. E. Rep. 690; Blaiser *v.* New York, etc., R. Co., 110 N. Y. 638, 17 N. E. Rep. 692; Enders *v.* Lake Shore, etc., R. Co., (Buffalo Super. Ct.) 2 N. Y. Supp. 719.

North Carolina. — Scott *v.* Wilmington, etc., R. Co., 96 N. Car. 428.

Ohio. — Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633.

Pennsylvania. — Wilson *v.* Pennsylvania R. Co., 132 Pa. St. 27; Pennsylvania R. Co. *v.* Garvey, 108 Pa. St. 369.

Washington. — Northern Pac. R. Co. *v.* Holmes, 3 Wash. Ter. 543.

Wisconsin. — Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 19 Am. & Eng. R. Cas. 285; Leavitt *v.* Chicago, etc., R. Co., 64 Wis. 228.

Thus the Supreme Court of *Ohio* say: "Again, the failure to look or listen for an approaching train, though such failure may contribute to the injury, cannot, under all circumstances, be regarded as negligence. * * * When, therefore, a person about to cross a railroad track, under a given state of circumstances, exercises that degree and amount of care which prudent persons usually exercise under like circumstances, he is without fault. In other words, when the circumstances are such that prudent persons would not ordinarily look or listen for an approaching train, there is no negligence in omitting to look or listen. If this be correct, it is plain, as a general rule, that whether contributory negligence existed or not is a mixed question of law and fact; that is to say, a fact for the jury to find from such testimony as the law regards as competent to prove it, and to be found in accordance with such rules as the court may give to the jury for their guidance." Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633.

1. The Greater the Danger, the Greater the Care — *Alabama.* — Louisville, etc., R. Co. *v.* Richards, 100 Ala. 365.

New York. — Beckwith *v.* New York Cent., etc., R. Co., 54 Hun (N. Y.) 446.

Ohio. — Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627.

Texas. — Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553.

2. Unusual Difficulties Require Unusual Precautions — *United States.* — Owens *v.* Pennsylvania R. Co., 41 Fed. Rep. 187; Cincinnati, etc., R. Co. *v.* Farra, 66 Fed. Rep. 496; Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. Rep. 665.

California. — Pepper *v.* Southern Pac. Co., 105 Cal. 389.

Colorado. — Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30.

Illinois. — Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Illinois Cent. R. Co. *v.* Ebert, 74 Ill. 399; Louisville, etc., R. Co. *v.* Patchen, 66 Ill. App. 206; Chicago, etc., R. Co. *v.* Hansen, 166 Ill. 623; Illinois Cent. R. Co. *v.* James, 67 Ill. App. 649; Atchison, etc., R. Co. *v.* Booth, 53 Ill. App. 303; Cleveland, etc., R. Co. *v.* Monks, 52 Ill. App. 627.

Indiana. — Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35; Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 380; Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405; Reeves *v.* Dubuque, etc., R. Co., 92 Iowa 32; Partlow *v.* Illinois Cent. R. Co., 51 Ill. App. 597, 150 Ill. 321.

Kansas. — Atchison, etc., R. Co. *v.* Townsend, 39 Kan. 115; Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 45 Am. St. Rep. 278.

Kentucky. — Gividen *v.* Louisville, etc., R. Co., 17 Ky. L. Rep. 789.

Maryland. — Pennsylvania R. Co. *v.* State, 61 Md. 108, 19 Am. & Eng. R. Cas. 326.

Massachusetts. — Butterfield *v.* Western R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678; Elkins *v.* Boston, etc., R. Co., 115 Mass. 190; Debbins *v.* Old Colony R. Co., 154 Mass. 402.

Michigan. — Shufelt *v.* Flint, etc., R. Co., 96 Mich. 327; Houghton *v.* Chicago, etc., R. Co., 99 Mich. 308; Jensen *v.* Michigan Cent. R. Co., 102 Mich. 176.

Mississippi. — Louisville, etc., R. Co. *v.* French, 69 Miss. 121.

New Jersey. — West Jersey R. Co. *v.* Ewan, 55 N. J. L. 574.

New York. — Nicholson *v.* Erie R. Co., 41 N. Y. 525; Steves *v.* Oswego, etc., R. Co., 18 N. Y. 422; Sheffield *v.* Rochester, etc., R. Co., 21 Barb. (N. Y.) 339; McNamara *v.* New York Cent., etc., R. Co., (Supreme Ct.) 46 N. Y. St. Rep. 439; Whalen *v.* New York Cent., etc., R. Co., (Supreme Ct.) 40 N. Y. St. Rep. 566; Hermans *v.* New York Cent., etc., R. Co., (Supreme Ct.) 43 N. Y. St. Rep. 900; Foran *v.* New York Cent., etc., R. Co., 64 Hun (N. Y.)

c. STATUTORY WARNINGS AND PRECAUTIONS. — Nor will a failure upon the part of the railway company to give warnings or take precautions required by statute excuse a want of ordinary care, upon the part of a traveler at a highway crossing, which directly contributes to his injury.[1] But if the company is guilty of conduct that would render the statutory warnings unavailing, and a traveler is injured in consequence, when he would otherwise have escaped injury, the misconduct of the company is the sole proximate cause of the injury.[2]

510; Kilbride *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 177; Lamb *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 579; Vahue *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 452; Manley *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 420; Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290; Judson *v.* Central Vermont R. Co., 91 Hun (N. Y.) 1; Lortz *v.* New York Cent., etc., R. Co., 83 Hun (N. Y.) 271; Purdy *v.* New York Cent., etc., R. Co., 87 Hun (N. Y.) 97; Wilbur *v.* Delaware, etc., R. Co., 85 Hun (N. Y.) 155; Shires *v.* Fonda, etc., R. Co., 80 Hun (N. Y.) 92; Brown *v.* Rome, etc., R. Co., (Supreme Ct.) 1 N. Y. Supp. 286.

North Carolina. — Tankard *v.* Roanoke R., etc., Co., 117 N. Car. 558; Syme *v.* Richmond, etc., R. Co., 113 N. Car. 558.

Ohio. — Lake Shore, etc., R. Co. *v.* Geiger, 8 Ohio Cir. Ct. Rep. 41.

Oregon. — Durbin *v.* Oregon R., etc., Co., 17 Oregon 5, 11 Am. St. Rep. 778.

Pennsylvania. — Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Pennsylvania R. Co. *v.* Werner, 89 Pa. St. 59; Beynon *v.* Pennsylvania R. Co., 168 Pa. St. 642, 3 Pa. Dist. Rep. 308; Hughes *v.* Delaware, etc., Canal Co., 176 Pa. St. 254; Plummer *v.* New York, etc., River R. Co., 168 Pa. St. 62; Urias *v.* Pennsylvania R. Co., 31 W. N. C. (Pa.) 353, 152 Pa. St. 326; Fisher *v.* Monongahela Connecting R. Co., 131 Pa. St. 292, 25 W. N. C. (Pa.) 161; Kraus *v.* Pennsylvania R. Co., 139 Pa. St. 272; Blight *v.* Camden, etc., R. Co., 28 W. N. C. (Pa.) 172, 22 Pittsb. L. J. N. S. 4, 48 Phila. Leg. Int. 362; Philpott *v.* Pennsylvania R. Co., 175 Pa. St. 570; Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243.

Texas. — Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660; Missouri Pac. R. Co. *v.* Peay, (Tex. 1892) 20 S. W. Rep. 57.

Virginia. — Nash *v.* Richmond, etc., R. Co., 82 Va. 55; Campbell *v.* Richmond, etc., R. Co., (Va. 1895) 21 S. E. Rep. 480.

Wisconsin. — Rothe *v.* Milwaukee, etc., R. Co., 21 Wis. 256; Heath *v.* Stewart, 90 Wis. 418; Nelson *v.* Duluth, etc., R. Co., 88 Wis. 392; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304.

1. Failure of Company to Give Statutory Signals — *United States.* — Chicago, etc., R. Co. *v.* Sharp, 63 Fed. Rep. 532; Horn *v.* Baltimore, etc., R. Co., 54 Fed. Rep. 301; Blount *v.* Grand Trunk R. Co., 61 Fed. Rep. 375; Ward *v.* Richmond, etc., R. Co., 43 Fed. Rep. 422, 8 Ry. & Corp. L. J. 495.

Alabama. — Leak *v.* Georgia Pac. R. Co., 90 Ala. 161, 8 Ry. & Corp. L. J. 517; Louisville, etc., R. Co. *v.* Webb, 90 Ala. 185, 43 Alb. L. J. 248, 9 Ry. & Corp. L. J. 244.

Arkansas. — Little Rock, etc., R. Co. *v.* Cullen, 54 Ark. 431.

Illinois. — Wabash, etc., R. Co. *v.* Wallace, 110 Ill. 114, 19 Am. & Eng. R. Cas. 359.

Indiana. — Miller *v.* Terre Haute, etc., R. Co., 144 Ind. 323; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35; Cadwallader *v.* Louisville, etc., R. Co., 128 Ind. 518; Aleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) pp. 73, 74; Smith *v.* Wabash R. Co., 141 Ind. 92.

Louisiana. — Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268.

Maine. — Romeo *v.* Boston, etc., R. Co., 87 Me. 540.

Massachusetts. — Hinckley *v.* Cape Cod R. Co., 120 Mass. 257; Merrigan *v.* Boston, etc., R. Co., 154 Mass. 189.

Michigan. — Dawe *v.* Flint, etc., R. Co., 102 Mich. 307; Gardner *v.* Detroit, etc., R. Co., 97 Mich. 240.

Missouri. — Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

New Jersey. — Ross *v.* Delaware, etc., R. Co., 12 N. J. L. J. 235; Delaware, etc., R. Co. *v.* Hefferan, 57 N. J. L. 149.

New York. — Shaw *v.* Jewett, 86 N. Y. 616, 6 Am. & Eng. R. Cas. 111; Whalen *v.* New York Cent., etc., R. Co., 58 Hun (N. Y.) 431; McQuade *v.* Metropolitan St. R. Co., 17 Misc. Rep. (N. Y. Supreme Ct.) 154; Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526.

North Carolina. — Russell *v.* Carolina Cent. R. Co., 118 N. Car. 1098.

Ohio. — Cleveland, etc., R. Co. *v.* Elliott, 28 Ohio St. 340; New York, etc., R. Co. *v.* Swartout, 3 Ohio Dec. 636.

Pennsylvania. — Connerton *v.* Delaware, etc., Canal Co., 169 Pa. St. 339; Sheehan *v.* Philadelphia, etc., R. Co., 166 Pa. St. 354, 3 Pa. Dist. Rep. 325.

South Carolina. — Strother *v.* South Carolina, etc., R. Co., 47 S. Car. 375.

Texas. — Houston, etc., R. Co. *v.* Nixon, 52 Tex. 19; Gulf, etc., R. Co. *v.* Riordan, (Tex. Civ. App. 1893) 22 S. W. Rep. 519; Missouri, etc., R. Co. *v.* Moore, (Tex. App. 1891) 15 S. W. Rep. 714.

West Virginia. — Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 45 Am. & Eng. R. Cas. 188.

Wisconsin. — Williams *v.* Chicago, etc., R. Co., 64 Wis. 1, 23 Am. & Eng. R. Cas. 274. In this case the rule is thus stated: Although the whistle is not blown, nor the bell rung, on the locomotive, before crossing the highway, as required by statute, the railroad company is not liable for an injury resulting from a collision at such a crossing if the negligence of the person injured contributed thereto.

2. Statutory Warnings Rendered Unavailing — *United States.* — Western, etc., R. Co. *v.* Roberson, 61 Fed. Rep. 592.

d. WILFUL INJURIES — REMOTE NEGLIGENCE OF PLAINTIFF. — So a person injured upon a highway-railway crossing can recover, in spite of his own negligence, if the injury was inflicted upon him wilfully.[1] And notwithstanding negligence upon the part of the person injured, he may recover if the railway company, after such negligence occurred, could, by the exercise of ordinary care, have discovered it in time to have avoided inflicting the injury.[2]

e. INVITATION OR DIRECTION TO CROSS — KNOWLEDGE OF APPROACH OF TRAIN. — So if a railway company, by its servants, invites or directs a traveler to cross, he has a right to presume that the company's agent knows what the company's conduct will be, and is not guilty of contributory negligence in obeying, even though a train be approaching.[3]

Colorado. — Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30; Chicago, etc., R. Co. *v.* Nuney, 19 Colo. 36.

Indiana. — Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 23 Am. & Eng. R. Cas. 282, 51 Am. Rep. 761; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92.

Massachusetts. — Robbins *v.* Fitchburg R. Co., 161 Mass. 145.

Minnesota. — Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185.

New Jersey. — New York, etc., R. Co. *v.* Randel, 47 N. J. L. 144, 23 Am. & Eng. R. Cas. 308; New Jersey R., etc., Co. *v.* West, 32 N. J. L. 91.

New York. — Leonard *v.* New York Cent., etc., R. Co., 42 N. Y. Super. Ct. 225; Powell *v.* New York Cent., etc., R. Co, 22 Hun (N. Y.) 56; Beisiegel *v.* New York Cent. R. Co., 34 N. Y. 622, 90 Am. Dec. 741; Casey *v.* New York, etc., R. Co., 78 N. Y. 518; McNamara *v.* New York Cent., etc., R. Co., (Ct. App.) 49 N. Y. St. Rep. 395, 136 N. Y. 650.

Pennsylvania. — Pennsylvania R. Co. *v.* Fortney, 90 Pa. St. 323, 1 Am. & Eng. R. Cas. 128.

It is negligence in a railroad company to run trains so near together at a highway crossing as to make the statutory signals unavailing to warn travelers on the highway; and where an injury follows, that would probably have been avoided had not the train been so run, that is, when it appears that the plaintiff exercised such care as could have avoided the injury had the signals availed to warn him of danger, a recovery may be sustained. Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 23 Am. & Eng. R. Cas. 282, 51 Am. Rep. 761.

1. Injury Wilful — *Arkansas.* — Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257.

Georgia. — Rome R. Co. *v.* Barnett, 89 Ga. 718.

Illinois. — Chicago, etc., R. Co. *v.* Hogarth, 38 Ill. 370.

Indiana. — Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77; Carter *v.* Louisville, etc., R. Co., 98 Ind. 552, 49 Am. Rep. 780, 22 Am. & Eng. R. Cas. 360; Louisville, etc., R. Co. *v.* Schmidt, 106 Ind. 73; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185.

2. Plaintiff's Negligence Remote — *Georgia.* — Richmond, etc., R. Co. *v.* Johnston, 89 Ga. 560.

Indiana. — Ohio, etc., R. Co. *v.* Hill, 7 Ind. App. 255.

Iowa. — Morris *v.* Chicago, etc., R. Co., 45 Iowa 29.

Kansas. — Atchison, etc., R. Co. *v.* Shaw, 56 Kan. 519.

Missouri. — Keim *v.* Union R., etc., Co., 90 Mo. 314; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22; Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553 41 Am. Rep. 333, 7 Am. & Eng. R. Cas. 414; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 673; Werner *v.* Citizens' R. Co., 81 Mo. 374; Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280.

Texas. — Gulf, etc., R. Co. *v.* Shieder, (Tex. Civ. App. 1894) 26 S. W. Rep. 509; McDonald *v.* International, etc., R. Co., 86 Tex. 1.

West Virginia. — Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180.

"Counsel indulges in a criticism of the cases in which this court has held that if the negligence of a defendant, which contributed directly to cause the injury, occurred after the danger in which the injured party had placed himself by his own negligence, was, or by the exercise of reasonable care might have been, discovered by the defendant in time to have averted the injury, then defendant is liable, however gross the negligence of the injured party may have been in placing himself in such position of danger. Such is the well-established doctrine of this court." Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 673, *quoting* Werner *v.* Citizens' R. Co., 81 Mo. 374.

3. Invitation to Cross — *United States.* — Chicago, etc., R. Co *v.* Prescott, 59 Fed. Rep. 237.

Alabama. — Alabama G. S. R. Co. *v.* Anderson, 109 Ala. 299.

Indiana. — Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 10 Am. St. Rep. 136.

Iowa. — Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55.

Massachusetts. — Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Wheelock *v.* Boston, etc., R. Co., 105 Mass. 203; Bayley *v.* Eastern R. Co., 125 Mass. 62; Conaty *v.* New York, etc., R. Co., 164 Mass. 572; Clark *v.* Boston, etc., R. Co., 164 Mass. 434.

Michigan. — Peck *v.* Michigan Cent. R. Co., 57 Mich. 3, 19 Am. & Eng. R. Cas. 257.

Missouri. — Fusili *v.* Missouri Pac. R. Co., 45 Mo. App. 535.

New York. — Ernst *v.* Hudson River R.

When Injury Certain. — Yet this presumption will not avail him when it would have been apparent to an ordinarily prudent man that an injury would certainly follow an attempt to cross;[1] and if, with full knowledge of the near approach of a train, a traveler attempts to cross in advance of it, and merely miscalculates his ability to do so in safety, there can be no recovery for a resulting injury.[2] But there are cases where it is not negligence, as a matter of law, to attempt to cross in front of an advancing train.[3]

Co., 35 N. Y. 9, 90 Am. Dec. 761, 39 N. Y. 61, 100 Am. Dec. 405; Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Glushing *v.* Sharp, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372; Borst *v.* Lake Shore, etc., R. Co., 4 Hun (N. Y.) 346; Henning *v.* Caldwell, (Supreme Ct.) 45 N. Y. St. Rep. 375; Callaghan *v.* Delaware, etc., R. Co., 52 Hun (N. Y.) 276; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549; Hurley *v.* New York Cent., etc., R. Co., 90 Hun (N. Y.) 1; Bond *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 476; Scaggs *v.* Delaware, etc., Canal Co., 74 Hun (N. Y.) 198.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405; Roberts *v.* Delaware, etc., Canal Co., 177 Pa. St. 183.

1. When Presumption Will Not Avail. — Chicago, etc., R. Co. *v.* Spring, 13 Ill. App. 174.

2. Crossing in Front of Approaching Train — Knowledge of Same — *United States.* — Horn *v.* Baltimore, etc., R. Co., 54 Fed. Rep. 301.

Illinois. — Chicago, etc., R. Co. *v.* Spring, 13 Ill. App. 174; Chicago, etc., R. Co. *v.* Fears, 53 Ill. 115; Chicago, etc., R. Co. *v.* Holdom, 66 Ill. App. 201; Chicago, etc., R. Co. *v.* Nelson, 59 Ill. App. 308.

Indiana. — Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Rep. 201; Cones *v.* Cincinnati, etc., R. Co., 114 Ind. 328; Thornton *v.* Cleveland, etc., R. Co., 131 Ind. 492.

Iowa. — Banning *v.* Chicago, etc., R. Co., 89 Iowa 74.

Maine. — Romeo *v.* Boston, etc., R. Co., 87 Me. 540.

Massachusetts. — Granger *v.* Boston, etc., R. Co., 146 Mass. 276; Debbins *v.* Old Colony R. Co., 154 Mass. 402, 47 Am. & Eng. R. Cas. 531; Young *v.* Old Colony R. Co., 156 Mass. 178.

Michigan. — Frost *v.* Milwaukee, etc., R. Co., 96 Mich. 470; Graf *v.* Chicago, etc., R. Co., 94 Mich. 579; French *v.* Detroit, etc., R. Co., 89 Mich. 537.

Minnesota. — Studley *v.* St. Paul, etc., R. Co., 48 Minn. 249.

Missouri. — Sullivan *v.* Missouri Pac. R. Co., 117 Mo. 214; Kelsay *v.* Missouri Pac. R. Co., 129 Mo. 362; McKenna *v.* Missouri Pac. R. Co., 54 Mo. App. 161.

Nebraska. — Stephens *v.* Omaha, etc., R. Co., 41 Neb. 167.

New Jersey. — Delaware, etc., R. Co. *v.* Hefferan, 57 N. J. L. 149.

New York. — Collins *v.* Long Island R. Co., (Brooklyn City Ct.) 10 N. Y. Supp. 701; Schwartz *v.* Hudson River R. Co., 4 Robt. (N. Y.) 347; Miller *v.* New York Cent., etc., R. Co., 81 Hun (N. Y.) 152; Bremiller *v.* Buffalo, etc., R. Co., 90 Hun (N. Y.) 226; McPeak *v.* New York Cent., etc., R. Co., 85 Hun (N. Y.) 107; Morris *v.* Lake Shore, etc., R. Co., 148 N. Y. 182; Lurie *v.* Metropolitan St. R. Co., 18 Misc. Rep. (N. Y. Supreme Ct.) 81; Bello *v.* Metropolitan St. R. Co., 2 N. Y. App. Div. 313; Doyle *v.* Albany R. Co., 5 N. Y. App. Div. 601; Doller *v.* Union R. Co., 7 N. Y. App. Div. 283; Mehegan *v.* New York Cent., etc., R. Co., (Supreme Ct.) 46 N. Y. St. Rep. 497, 19 N. Y. Supp. 444; Enk *v.* Brooklyn City R. Co., (Supreme Ct.) 45 N. Y. St. Rep. 627, 19 N. Y. Supp. 130; Whalen *v.* New York Cent., etc., R. Co., (Supreme Ct.) 40 N. Y. St. Rep. 566, 15 N. Y. Supp. 941.

Ohio. — Lake Shore, etc., R. Co. *v.* Geiger 8 Ohio Cir. Ct. Rep. 41.

Pennsylvania. — Gangawer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 265; Hauser *v.* Central R. Co., 29 W. N. C. (Pa.) 471, 147 Pa. St. 440; Allen *v.* Pennsylvania R. Co., (Pa. 1888) 12 Atl. Rep. 493; Myers *v.* Baltimore, etc., R. Co., 150 Pa. St. 386, 30 W. N. C. (Pa.) 492; Lees *v.* Philadelphia, etc., R. Co., 154 Pa. St. 46.

Texas. — Texas, etc., R. Co. *v.* Zachery, (Tex. Civ. App. 1894) 27 S. W. Rep. 221; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582; Eddy *v.* Sedgwick, (Tex. 1892) 18 S. W. Rep. 564; Missouri Pac. R. Co. *v.* Peay, (Tex. 1892) 20 S. W. Rep. 57.

Virginia. — Hogan *v.* Tyler, 90 Va. 19.

Washington. — Lewis *v.* Puget Sound Shore R. Co., 4 Wash. 188.

West Virginia. — Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 45 Am. & Eng. R. Cas. 188.

Wisconsin. — McCadden *v.* Abbot, 92 Wis. 551; Nolan *v.* Milwaukee, etc., R. Co., 91 Wis. 16; Hansen *v.* Chicago, etc., R. Co., 83 Wis. 631; Dullea *v.* Chicago, etc., R. Co., 86 Wis. 173; Brunette *v.* Chicago, etc., R. Co., 86 Wis. 197.

3. Not Always Negligent to Cross in Front of Advancing Train — *United States.* — Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. Rep. 665.

Indiana. — Grand Rapids, etc., R. Co. *v.* Cox, 8 Ind. App. 29.

Kansas. — Chicago, etc., R. Co. *v.* Kennedy, 2 Kan. App. 693.

Massachusetts. — Doyle *v.* Boston, etc., R. Co., 145 Mass. 386.

Michigan. — Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

New York. — Aaron *v.* Second Ave. R. Co., 2 Daly (N. Y.) 127; Baxter *v.* Second Ave. R. Co., 30 How. Pr. (N. Y. Super. Ct.) 219, 3 Robt. (N. Y.) 510; Reilly *v.* Third Ave. R. Co., 16 Misc. Rep. (N. Y. Supreme Ct.) 11; Lhowe *v.* Third Ave. R. Co., 14 Misc. Rep. (N. Y. C. Pl.) 612; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549.

Ohio. — Lake Shore, etc., R. Co. *v.* Beall, 2 Ohio Dec. 538.

Pennsylvania. — Downey *v.* Pittsburg, etc., Traction Co., 161 Pa. St. 131; Hoffmeister *v.* Pennsylvania R. Co., 160 Pa. St. 568.

Texas. — International, etc., R. Co. *v.* Neff, (Tex. Civ. App. 1894) 26 S. W. Rep. 784.

f. PRESUMPTION OF NEGLIGENCE FROM INJURY — BURDEN OF PROOF. — It has been held that negligence upon the part of the person injured will be presumed from the mere fact of the injury at a railway crossing;[1] and on the other hand it has been held that, in the absence of evidence of his negligence, the presumption that the injured person exercised care will prevail.[2] This conflict seems to arise from the different rules prevailing as to the burden of proof being upon the plaintiff or the defendant in cases where contributory negligence is an issue.[3] But the rule is that there is no presumption either way, and when negligence on the part of the railway company sufficient to account for the injury has been shown, and there is no evidence of contributory fault, the burden of the issue should shift, and the plaintiff be entitled to recover, unless contributory negligence be affirmatively proved; the principle

Wisconsin. — Langhoff *v.* Milwaukee, etc., R. Co., 19 Wis. 489.

1. Presumption of Negligence. — In an *Indiana* case this doctrine was carried to the extent of holding that where a person was killed upon a railway crossing, and it was not affirmatively shown that he had been free from negligence, the presumption would be that he had been guilty of contributory negligence, and consequently that no recovery could be had, even though there was evidence of negligence upon the part of the railroad company and no evidence of negligence on the part of the deceased. In the course of the opinion Mitchell, J., said: "It will not do to say, however, as the instruction in effect does, that if the plaintiff can show the defendant's neglect and his injury, he may leave his own conduct to conjecture, and recover. He must show the facts, as well those which relate to his share in the transaction as those which relate to the defendant's; and if, upon the whole case, an inference of negligence arises against the defendant, and of due care on his part, he may recover. The fact that a person traveling on a highway comes in collision with a train on a railway crossing is of itself sufficient to suggest a presumption of contributory negligence against him in a suit for compensation." And in accordance with this doctrine an instruction was held erroneous that stated the law to be, that if negligence of the defendant was proved, and no contributory neglect, or ground for inferring it, was shown by the evidence, the plaintiff had sufficiently shown the deceased free from fault, and "in the absence of circumstances to show or suggest it, there is no presumption of contributory negligence." Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 55 Am. Rep. 736, 25 Am. & Eng. R. Cas. 322.

So it has been held in *Maine*. In an action for the death of a traveler on a highway at a railway crossing, there is no presumption that he used due care, and evidence as to his character and habits of carefulness is incompetent. Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744, 19 Am. & Eng. R. Cas. 356; State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622, 19 Am. & Eng. R. Cas. 312.

2. Presumption of Due Care. — Thus in *Pennsylvania*, where the "stop, look, and listen" doctrine is applied most rigidly, it is held that it is not incumbent on the plaintiff to show affirmatively that the decedent, killed upon a railway crossing, stopped, looked, and listened, before attempting to cross the track. In a case of this character, the Supreme Court of Pennsylvania says: "The common-law presumption is that every one does his duty, until the contrary is proved; and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed. In the case at bar no witness was called who saw the occurrence; there is no evidence whatever, whether, in fact, the decedent did stop and look and listen; the presumption is that he did; proof of that fact was no part of the plaintiff's case. The presumption is of fact merely, and may be rebutted; but we are without evidence on the subject. All that we have is, that, as he came upon the railroad, he was struck down by the locomotive." And it was held that a recovery could be sustained. Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468. See also:

Alabama. — Bromley *v.* Birmingham, etc., R. Co., 95 Ala. 403, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 76.

Missouri. — Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 626.

Pennsylvania. — Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407.

And It Has Been Held that a Jury May Infer Due Care, and the absence of contributory negligence, on the part of a deceased person, from the general and well-known disposition of mankind to take care of themselves and keep out of danger.

California. — Gay *v.* Winter, 34 Cal. 153.

Maryland. — Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

New York. — Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375.

Pennsylvania. — Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361.

3. Reason of This Conflict of Authorities — *Arkansas.* — Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460.

California. — Glascock *v.* Central Pac. R. Co., 73 Cal. 137.

Indiana. — Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 55 Am. Rep. 736, 25 Am. & Eng. R. Cas. 322; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262.

Missouri. — Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 626.

being that a sufficient cause having been shown, and no intervening efficient cause appearing, the negligence of the company should be held the sole proximate cause of the injury.[1] As the mere fact of the injury raises no presumption that the railway company was negligent, it certainly should not raise one that the injured person was.[2]

1. **The True Rule: No Presumption Either Way.** — "In cases where such issues are made, the question of contributory negligence on the part of the plaintiff or his intestate, and of negligence on the part of the defendant, causing the injury complained of, should be considered and determined upon the same principles and by the same rules exactly. There is no presumption of negligence as against either party, except such as arises upon the facts proved. Indeed, the presumption of law is, that neither party was guilty of negligence; and such presumption must prevail until overcome by proof." Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633.

"But it is urged that, inasmuch as no witness testifies that the intestate looked to see, or listened to hear, if the defendant's train was approaching, it must be assumed that he did not, and that such omission was negligence on his part. We know of no such rule. While it is true that a traveler, on approaching a railroad crossing, is bound to look and listen for an approaching train before undertaking to cross, it is only where it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that a jury is authorized to find that he did not look, and did not listen." Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13, 8 Am. & Eng. R. Cas. 445.

"When the plaintiff shows negligence on the part of the defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that the plaintiff was guilty of negligence." Cassidy *v.* Angell, 12 R. I. 447, 34 Am. Rep. 690.

"While those on the highway, when about crossing a railroad track, must exercise proper diligence and care with reference to their own safety, where there is an absence of evidence as to the care exercised by the party injured, as in this case, it is not to be presumed that the deceased recklessly or carelessly imperiled his own life, or entered upon the track of the road knowing of the train's approach." Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

So the doctrine of the text, that when an efficient, adequate cause appears it must be held the sole proximate cause in the absence of evidence of any other, is easily supported. Thus, "an efficient, adequate cause being found must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result." Adams *v.* Young, 44 Ohio St. 80, 58 Am. Rep. 789; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

In Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, it was said: "Where then is no intermediate, efficient cause, the original wrong must be considered as reaching to the effect and proximate to it." In such cases it is necessary to determine the proximate cause of the injury or death; and the defendant's negligence once established, and no other proximate cause being shown, such negligence should be held the sole proximate cause.

To the same effect see:

United States. — Mutual Ins. Co. *v.* Tweed, 7 Wall. (U. S.) 44; Scheffer *v.* Washington City R. Co., 105 U. S. 251, 8 Am. & Eng. R. Cas. 59.

Michigan. — Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 57 Mich. 488.

Pennsylvania. — Pennsylvania Co. *v.* Marshall, 119 Ill. 399.

Texas. — Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 181.

In an *Illinois* case the doctrine stated in the text seems to have been directly declared. It was there held that at the conclusion of the plaintiff's evidence it would have been proper to nonsuit the plaintiff, because no evidence had been given of negligence upon the part of the defendant, but that when it appeared from the evidence given for the defendant that it had been guilty of negligence, a recovery could be sustained without direct proof that the deceased was free from fault. Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115. See to the same effect:

Georgia. — Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644.

Iowa. — Raymond *v.* Burlington, etc., R. Co., 65 Iowa 152, 18 Am. & Eng. R. Cas. 217.

Maryland. — Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36.

New York. — Jones *v.* New York Cent. R. Co., 28 Hun (N. Y.) 364; Smedis *v.* Brooklyn, etc., R. Co., 23 Hun (N. Y.) 279.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

"If the plaintiff's evidence shows an injury by defendant's negligence, and does not raise an implication that his own contributed, the burden of proving such contributory negligence as will defeat a recovery rests upon defendant." Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 630. See also Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329.

It may be thought that these principles are only applicable in jurisdictions where the burden of proof of contributory negligence is upon the defendant, but a little reflection will show that this is not true. Even where the burden of proving freedom from contributory negligence is on the plaintiff, it is quite sufficient, on principle, to show that the defendant's negligence was adequate to have caused the injury, and that there is no evidence of any other sufficient cause; that is, no evidence of fault on the plaintiff's part, or on that of the deceased. In such case the law must ascribe the injury to the only cause found.

2. **Why No Presumption Should Arise.** — "Indeed, the presumption of law is that neither

g. QUALIFICATIONS — RULE AS TO CHILDREN. — The rules here laid down, like most other doctrines of the law of negligence, are founded upon the care to be expected of a careful and prudent man under the given circumstances, and, in accord with principles already stated, they are somewhat modified in their application to children of tender years; or, rather, the railway company is charged with notice of the fact that children as well as adults may be upon the highway, and must exercise greater care to avoid injuring them than an adult is entitled to demand.[1]

XVII. INTOXICATION — 1. Intoxication Not Negligence Per Se. — The fact that a person when injured was intoxicated does not constitute contributory negligence *per se*,[2] but it is a circumstance that may be considered as bearing upon the question of due care,[3] and if the intoxication actually contributed to the injury the plaintiff cannot recover.[4] The principle is that a person cannot

party was guilty of negligence, and such presumption must prevail until overcome by proof. As a general rule, the existence of negligence, on either side, is a fact to be ascertained by the jury under proper instructions from the court." Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697, 29 Am. & Eng. R. Cas. 274.

"In actions for injury from negligence, where there is nothing in plaintiff's evidence tending to show contributory negligence, the presumption will be that there is no contributory negligence, and this presumption remains until the contrary is shown." Pittsburgh, etc., R. Co. *v.* Fleming, 30 Ohio St. 485.

1. Modification of Doctrine When Persons Non Sui Juris. — See *supra*, this title, *Contributory Negligence of Children*.

It is held that more care is required towards children of tender years, at crossings, than towards adults. Thurber *v.* Harlem Bridge, etc., R. Co., 60 N. Y. 326.

United States. — Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. Rep. 830.

Alabama. — Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 567, 8 Am. & Eng. R. Cas. 340.

California. — Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670.

Georgia. — Central R., etc., Co. *v.* Golden, 93 Ga. 510.

Illinois. — Chicago, etc., R. Co. *v.* Becker, 84 Ill. 483; Chicago, etc., R. Co. *v.* Murray, 71 Ill. 601; St. Louis, etc., R. Co. *v.* Daley, 53 Ill. App. 614.

Kansas. — Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551.

Kentucky. — Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41; East Tennessee Coal Co. *v.* Harshaw, 16 Ky. L. Rep. 526.

Massachusetts. — Elkins *v.* Boston, etc., R. Co., 115 Mass. 196.

Missouri. — Boland *v.* Missouri R. Co., 36 Mo. 484; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405.

New York. — Wendell *v.* New York Cent., etc., R. Co., 91 N. Y. 420, 14 Am. & Eng. R. Cas. 663; Thurber *v.* Harlem Bridge, etc., R. Co., 60 N. Y. 326; O'Mara *v.* Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 421; Costello *v.* Syracuse, etc., R. Co., 65 Barb. (N. Y.) 92; Schwier *v.* New York Cent., etc., R. Co., 90 N. Y. 558, 14 Am. & Eng. R. Cas. 656.

Ohio. — Lake Shore, etc., R. Co. *v.* Orvis, 1 Ohio Dec. 492.

Wisconsin. — Lofdahl *v.* Minneapolis, etc., R. Co., 88 Wis. 421; Haas *v.* Chicago, etc., R. Co., 41 Wis. 44; Johnson *v.* Chicago, etc., R. Co., 49 Wis. 529, 1 Am. & Eng. R. Cas. 155.

2. Intoxication Not Negligence Per Se — *California.* — Robinson *v.* Pioche, 5 Cal. 460.

Connecticut. — Thorp *v.* Brookfield, 36 Conn. 320.

Iowa. — Weymire *v.* Wolfe, 52 Iowa 533.

Kansas. — Salina *v.* Trosper, 27 Kan. 545.

Maine. — Stuart *v.* Machias Port, 48 Me. 477; Baker *v.* Portland, 58 Me. 199, 4 Am. Rep. 274.

Massachusetts. — Alger *v.* Lowell, 3 Allen (Mass.) 403.

Missouri. — Loewer *v.* Sedalia, 77 Mo. 431, 2 Am. & Eng. Corp. Cas. 658.

New York. — Ditchett *v.* Spuyten Duyvil, etc., R. Co., 5 Hun (N. Y.) 165; Tompkins *v.* Oswego, (Supreme Ct.) 15 N. Y. Supp. 371.

Texas. — Houston, etc., R. Co. *v.* Reason, 61 Tex. 613.

Wisconsin. — Fitzgerald *v.* Weston, 52 Wis. 354; Ward *v.* Chicago, etc., R. Co., 85 Wis. 601.

3. But It May Be Evidence of Negligence — *Georgia.* — Southwestern R. Co. *v.* Hankerson, 61 Ga. 114.

Illinois. — Aurora *v.* Hillman, 90 Ill. 61.

Iowa. — Cramer *v.* Burlington, 42 Iowa 315; O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467.

Maryland. — Baltimore, etc., R. Co. *v.* Boteler, 38 Md. 568.

Michigan. — Marquette, etc., R. Co. *v.* Handford, 39 Mich. 537; Kingston *v.* Ft. Wayne, etc., R. Co. (Mich. 1897), 70 N. W. Rep. 315, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 79.

Missouri. — Yarnall *v.* St. Louis, etc., R. Co., 75 Mo. 575, 10 Am. & Eng. R. Cas. 726; Wallace *v.* St. Louis, etc., R. Co., 74 Mo. 594.

New York. — Healy *v.* New York, 3 Hun (N. Y.) 708; Button *v.* Hudson River R. Co., 18 N. Y. 248.

Wisconsin. — Burns *v.* Elba, 32 Wis. 605.

4. If a Proximate Cause of Injury, Is a Bar — *Arkansas.* — Little Rock, etc., R. Co. *v.* Pankhurst, 36 Ark. 371, 5 Am. & Eng. R. Cas. 635.

Colorado. — Denver Tramway Co. *v.* Reid, 4 Colo. App. 53.

Illinois. — Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

Indiana. — McClelland *v.* Louisville, etc., R.

voluntarily incapacitate himself from the ability to exercise ordinary care and then recover for an injury to which a want of ordinary care upon his part, while so intoxicated, proximately contributes.[1]

2. Defendant's Knowledge of Plaintiff's Intoxication. — The ordinary care required of an intoxicated person is the same care which would be required from a sober person;[2] but if the defendant knew of the plaintiff's intoxication before the injury, then the defendant would be required to exercise greater care to avoid inflicting an injury upon him than if he were sober.[3]

XVIII. BLINDNESS AND DEAFNESS. — That a person blind or deaf is injured in a public and dangerous place, where sight and hearing are ordinarily required, does not establish contributory negligence as a matter of law, but

Co., 94 Ind. 276, 18 Am. & Eng. R. Cas. 260; Woods *v.* Tipton County, 128 Ind. 289.

Massachusetts. — Maguire *v.* Middlesex R. Co., 115 Mass. 239.

Missouri. — Loewer *v.* Sedalia, 77 Mo. 431, 2 Am. & Eng. Corp. Cas. 658; Meyer *v.* Pacific R. Co., 40 Mo. 151.

New York. — Bradley *v.* Second Ave. R. Co., 8 Daly (N. Y.) 289; Wood *v.* Andes, 11 Hun (N. Y.) 543; Harder *v.* Rome, etc., R. Co., (Supreme Ct.) 2 N. Y. Supp. 70.

North Carolina. — Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728.

Oregon. — Davis *v.* Oregon, etc., R. Co., 8 Oregon 172; Ford *v.* Umatilla County, 15 Oregon 313.

Texas. — Houston, etc., R. Co. *v.* Reason, 61 Tex. 613.

Vermont. — Cassedy *v.* Stockbridge, 21 Vt. 391.

West Virginia. — Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 58 Am. & Eng. R. Cas. 337.

Wisconsin. — Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195.

1. Voluntary Incapacity No Excuse. — This doctrine is plainly deducible from the cases already cited. See also the following:

United States. — Northern Pac. R. Co. *v.* Craft, 69 Fed. Rep. 124.

Connecticut. — Thorp *v.* Brookfield, 36 Conn. 320.

Illinois. — Toledo, etc., R. Co. *v.* Riley, 47 Ill. 514.

Maryland. — Price *v.* Philadelphia, etc., R. Co., 84 Md. 506.

North Carolina. — Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 79.

Ohio. — Railroad Co. *v.* Valleley, 32 Ohio St. 345, 30 Am. Rep. 601.

2. Standard of "Ordinary Care" Governs — *Alabama.* — Johnson *v.* Louisville, etc., R. Co., 104 Ala. 241, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 78.

Illinois. — Chicago, etc., R. Co. *v.* Riley, 74 Ill. 70; Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Chicago City R. Co. *v.* Lewis, 5 Ill. App. 242; Chicago, etc., R. Co. *v.* Drake, 33 Ill. App. 114.

Maryland. — Kean *v.* Baltimore, etc., R. Co., 61 Md. 154, 19 Am. & Eng. R. Cas. 321; Price *v.* Philadelphia, etc. R. Co., 84 Md. 506.

Missouri. — Loewer *v.* Sedalia, 77 Mo. 431, 2 Am. & Eng. Corp. Cas. 658.

North Carolina. — Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728.

"It was the duty of the plaintiff to use every care and precaution to avoid falling from said bridge that a sober man of ordinary prudence would have used under the circumstances; and if he failed to use such care and precaution, and such failure contributed directly to causing his injuries, he cannot recover." Loewer *v.* Sedalia, 77 Mo. 431, 2 Am. & Eng. Corp. Cas. 658.

3. But Not if Defendant Had Notice. — "Preventive remedies must, therefore, always be proportioned to the case in its peculiar circumstances — to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. * * * An intoxicated man is lying in the traveled part of a highway, helpless if not unconscious; must I not use care to avoid him? May I say that he has no right to encumber the highway, and therefore carelessly continue my progress regardless of consequences? Or if such a man has taken refuge in a field of grass or a hedge of bushes, may the owner of the field, knowing the fact, continue to mow on, or fell trees, as if it were not so? Or if the intoxicated man has entered a private lane or byway, and will be run over if the owner does not stop his team which is passing through it, must he not stop them? * * * It must be so that an unnecessary injury, negligently inflicted, in these and kindred cases, is wrong and therefore unlawful." Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78. See also:

Arkansas. — St. Louis, etc., R. Co. *v.* Wilkerson, 46 Ark. 513.

California. — Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447.

Connecticut. — Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Iowa. — Weymire *v.* Wolfe, 52 Iowa 533.

Kentucky. — Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 625, 50 Am. Rep. 186, 16 Am. & Eng. R. Cas. 390.

Maryland. — Kean *v.* Baltimore, etc., R. Co., 61 Md. 154, 19 Am. & Eng. R. Cas. 321.

New Jersey. — Telfer *v.* Northern R. Co., 30 N. J. L. 188.

New York. — Gill *v.* Rochester, etc., R. Co., 37 Hun (N. Y.) 107.

Tennessee. — Dinwiddie *v.* Louisville, etc. R. Co., 9 Lea (Tenn.) 309, 15 Am. & Eng. R. Cas. 483.

Texas. — Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 38 Am. Rep. 632, 6 Am. & Eng. R. Cas. 11.

the blindness or deafness may be considered upon the question of due care, and as an evidence of contributory negligence; and if it appears that the defect of sight or hearing, coupled with the exposure to danger, was the cause of an injury which otherwise would not have occurred, it may be held that contributory negligence exists as a matter of law.[1] It is clear that the misfortune of being blind or deaf does not relieve the afflicted person from the duty to exercise ordinary care, but rather imposes upon him the duty of greater precautions to avoid injury.[2]

XIX. WILFUL INJURIES — 1. In General. — The doctrines of contributory negligence have no application in cases where the injury is inflicted by the wilful act or omission of the defendant; in such cases contributory negligence is not a defense, and in its legal sense cannot exist.[3]

2. Wilfulness and Negligence Distinguished. — Wilfulness and negligence are the opposites of each other, the one signifying the presence of intention or purpose, the other its absence.[4] This distinction has not always been

1. Effect of Blindness or Deafness on Doctrine of Negligence — *Illinois.* — Phillips *v.* Dickerson, 85 Ill. 11, 28 Am. Rep. 607.

Indiana. — Salem *v.* Goller, 76 Ind. 291.

Louisiana. — Schexnaydre *v.* Texas, etc., R. Co., 46 La. Ann. 248.

Massachusetts. — Shapleigh *v.* Wyman, 134 Mass. 118.

Missouri. — Maloy *v.* Wabash, etc., R. Co., 84 Mo. 270.

New York. — Harris *v.* Uebelhoer, 75 N. Y. 169; Davenport *v.* Ruckman, 10 Bosw. (N. Y.) 20, 37 N. Y. 568; O'Mara *v.* Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61.

Wisconsin. — Stewart *v.* Ripon, 38 Wis. 584.

2. Does Not Relieve from Duty of "Ordinary Care" — *Florida.* — Florida Cent., etc., R. Co. *v.* Williams, 37 Fla. 406.

Illinois. — Illinois Cent. R. Co. *v.* Buckner, 28 Ill. 299, 81 Am. Dec. 282; Centralia *v.* Krouse, 64 Ill. 19.

Kentucky. — Johnson *v.* Louisville, etc., R. Co., 91 Ky. 651.

Louisiana. — Schexnaydre *v.* Texas, etc., R. Co., 46 La. Ann. 248.

Maryland. — Fenneman *v.* Holden, 75 Md. 1.

Massachusetts. — Winn *v.* Lowell, 1 Allen (Mass.) 177; Elkins *v.* Boston, etc., R. Co., 115 Mass. 190.

Missouri. — Purl *v.* St. Louis, etc., R. Co., 72 Mo. 168; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; Candee *v.* Kansas City, etc., R. Co., 130 Mo. 142.

New Jersey. — Morris, etc., R. Co. *v.* Haslan, 33 N. J. L. 147.

New York. — Gonzales *v.* New York, etc., R. Co., 33 N. Y. Super. Ct. 57; Peach *v.* Utica, 10 Hun (N. Y.) 477; Lortz *v.* New York Cent., etc., R. Co., 7 N. Y. App. Div. 515; Davenport *v.* Ruckman, 37 N. Y. 568; Harris *v.* Uebelhoer, 75 N. Y. 169.

Ohio. — Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570.

Pennsylvania. — Central R. Co. *v.* Feller, 84 Pa. St. 226.

Tennessee. — Stewart *v.* Nashville, 96 Tenn. 50.

Texas. — Galveston, etc., R. Co. *v.* Ryon, 80 Tex. 59.

Virginia. — Marks *v.* Petersburg R. Co., 88 Va. 1, 15 Va. L. J. 501.

Wisconsin. — McKinney *v.* Chicago, etc., R. Co., 87 Wis. 282.

3. Wilful Injuries and Contributory Negligence. — "When wilfulness is an element in the conduct of the party charged, the case ceases to be one of negligence, and contributory negligence ceases to be a defense." Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 293, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77.

Alabama. — Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262; Jones *v.* Alabama Mineral R. Co., 107 Ala. 400; Louisville, etc., R. Co. *v.* Crawford, 89 Ala. 241, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) pp. 80, 81.

Colorado. — Hector Min. Co. *v.* Robertson, 22 Colo. 491.

Connecticut. — Rowen *v.* New York, etc., R. Co., 59 Conn. 364.

Florida. — Florida Southern R. Co. *v.* Hirst, 30 Fla. 1, 52 Am. & Eng. R. Cas. 409, 12 Ry. & Corp. L. J. 218.

Georgia. — Central R., etc., Co. *v.* Newman, 94 Ga. 560.

Illinois. — Wabash R. Co. *v.* Speer, 156 Ill. 244.

Indiana. — Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 293, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77; Carter *v.* Louisville, etc., R. Co., 98 Ind. 552, 49 Am. Rep. 780.

Iowa. — Ruter *v.* Foy, 46 Iowa 132.

Kansas. — Tennis *v.* Inter-State Consol. Rapid Transit R. Co., 45 Kan. 503.

Kentucky. — Louisville, etc., R. Co. *v.* Collins, 2 Duv. (Ky.) 114, 87 Am. Dec. 486; Nance *v.* Newport News, etc., R. Co., 13 Ky. L. Rep. 554, (Ky. 1891) 17 S. W. Rep. 570; Louisville, etc., R. Co. *v.* Earl, 94 Ky. 368, 15 Ky. L. Rep. 184.

Michigan. — Denman *v.* Johnston, 85 Mich. 387. *Compare* Richter *v.* Harper, 95 Mich. 221.

New Jersey. — Menger *v.* Laur, 55 N. J. L. 205, 47 Alb. L. J. 394.

New York. — Brownell *v.* Flagler, 5 Hill (N. Y.) 282; Sanford *v.* Eighth Ave R. Co., 23 N. Y. 343, 80 Am. Dec. 286.

Ohio. — Pittsburgh, etc., R. Co. *v.* Kelly, 1 Ohio Cir. Dec. 662.

Virginia. — Matthews *v.* Warner, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

West Virginia. — Eastburn *v.* Norfolk, etc., R. Co., 34 W. Va. 681.

4. Wilfulness Negatives Negligence. — "Where

observed, consequently there are cases that use the terms "gross" or "wilful" negligence to designate wilful injuries.[1] Late cases have made the distinction clear.[2] And the principle of the responsibility of the wilful wrongdoer for all the consequences of his misconduct is really an old one.[3]

XX. Lord Campbell's Act — Contributory Negligence of Decedent. — In most if not all the states of the United States there are statutes modeled upon, and preserving the main features of, the English statute known as "Lord Campbell's Act."[4] These statutes permit a recovery by the personal representatives of relatives of a person killed by the negligence of another; but all of them provide that no action can be maintained for an injury causing death unless the decedent, in his lifetime, could have maintained an action for injuries inflicted in the same manner and under the same circumstances. Under this provision of these statutes no action can be sustained if it appears that the decedent was guilty of contributory negligence,[5] but whether he was guilty of

an intention to commit the injury exists, whether that intention be actual or constructive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression." Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185.

"The words 'wilful' and 'negligent' used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and wilful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design. It seems to be supposed that by coupling the words together, a middle ground between negligence and wilfulness, between cases of nonfeasance and misfeasance, may be arrived at. It is only necessary to say that the distinction between cases falling within one class or the other is clear and well defined, and cases in neither class are aided by importing into them attributes pertaining to the other." Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 54. See also Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77.

In Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239, it is said: "Negligence, * * * even when gross, is but an omission of duty. It is not designed and intentional mischief."

1. "Gross" or "Wilful" Negligence a Misnomer — *England.* — Clark *v.* Chambers, 3 Q. B. Div. 327, 7 Cent. L. J. 11.

Illinois. — St. Louis, etc., R. Co. *v.* Todd, 36 Ill. 409.

Indiana. — Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120; Jeffersonville, etc., R. Co. *v.* Riley, 39 Ind. 568.

Kentucky. — Louisville, etc., R. Co. *v.* Yandell, 17 B. Mon. (Ky.) 586; Louisville, etc., R. Co. *v.* Collins, 2 Duv. (Ky.) 114, 87 Am. Dec. 486; Louisville, etc., R. Co. *v.* Robinson, 4 Bush (Ky.) 507; Louisville, etc., Canal Co. *v.* Murphy, 9 Bush (Ky.) 522; Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636.

New York. — Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273.

Ohio. — Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Pennsylvania. — Drake *v.* Kiely, 93 Pa. St. 492.

2. *Indiana.* — Indianapolis, etc., R. Co. *v.* McClaren, 62 Ind. 566; Louisville, etc., R. Co. *v.* Schmidt, 106 Ind. 73; Louisville, etc., R. Co. *v.* Ader, 110 Ind. 376; Ivens *v.* Cincinnati, etc., R. Co., 103 Ind. 27, 23 Am. & Eng. R. Cas. 258; Carter *v.* Louisville, etc., R. Co., 98 Ind. 552, 22 Am. & Eng. R. Cas. 360, 49 Am. Rep. 780; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 25 Am. & Eng. R. Cas. 550; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77.

3. Liability for Remote Consequences — *England.* — Reynolds *v.* Clarke, Ld. Raym. 1399, 1 Stra. 635; Scott *v.* Shepherd, 2 W. Bl. 892; Reg *v.* Hicklin, L. R. 3 Q. B. 360.

Illinois. — Weick *v.* Lander, 75 Ill. 93.

Indiana. — Binford *v.* Johnston, 82 Ind. 429, 42 Am. Rep. 508; Bloom *v.* Franklin L. Ins. Co., 97 Ind. 478, 49 Am. Rep. 469; Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 178, 40 Am. Rep. 230, 6 Am. & Eng. R. Cas. 41; Walls *v.* State, 7 Blackf. (Ind.) 573.

Massachusetts. — Marble *v.* Worcester, 4 Gray (Mass.) 405.

Missouri. — Forney *v.* Geldmacher, 75 Mo. 113, 42 Am. Rep. 388.

New Hampshire. — Ricker *v.* Freeman, 50 N. H. 420, 9 Am. Rep. 267.

New York. — Loop *v.* Litchfield, 42 N. Y. 360, 1 Am. Rep. 543; Conklin *v.* Thompson, 29 Barb. (N. Y.) 220; Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455, and note; Gibney *v.* State, 137 N. Y. 1, 33 Am. St. Rep. 690.

4. Liability for Injuries Causing Death. — For a Discussion of This Subject see the title Death by Wrongful Act.

5. Decedent's Contributory Negligence a Bar — *England.* — Witherley *v.* Regent's Canal Co., 12 C. B. N. S. 2, 104 E. C. L. 2.

Georgia. — Rowland *v.* Cannon, 35 Ga. 105; Martin *v.* Wallace, 40 Ga. 52.

Indiana. — Lofton *v.* Vogles, 17 Ind. 105.

Kentucky. — Louisville, etc., R. Co. *v.* Collins, 2 Duv. (Ky.) 114, 87 Am. Dec. 486.

New York. — Wilds *v.* Hudson River R. Co., 24 N. Y. 430; Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375; Button *v.* Hudson River R. Co., 18 N. Y. 248.

contributory negligence is determined by the rules that govern in ordinary cases.[1]

XXI. Imputable Contributory Negligence — 1. General Doctrine. — Imputable contributory negligence which will bar the plaintiff from recovery exists when the plaintiff, although not chargeable with personal negligence, has been by the negligence of a person in privity with him, and with whose fault he is chargeable, exposed to the injury which he received through the negligence of the defendant.[2] In cases of this character, if the negligence of the person exposing the plaintiff to injury is a proximate cause of the injury the plaintiff cannot recover, because the contributory negligence of such person will be imputed to him.[3]

2. Essentials. — But before the contributory negligence of a person other than the plaintiff himself can serve as a defense to an action for a negligent injury of the plaintiff, it must appear, first, that such person was guilty of negligence; second, that such negligence was a proximate cause of the injury; and third, that the plaintiff ought to be charged with such negligence as though it had been his own.[4]

3. The Several Classes of Cases Considered — *a.* In General. — These rules are clear as mere legal doctrines, but in their application much difficulty arises.[5] The application of the doctrine to cases of three classes is particularly in dis-

1. The Question Determined by the Usual Rules — *Indiana.* — Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120.

Virginia. — Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 750.

See, for a full discussion, the title Death by Wrongful Act.

2. The General Doctrine — *United States.* — Evans *v.* Lake Erie, etc., R. Co., 78 Fed. Rep. 782.

Indiana. — Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Grimes *v.* Louisville, etc., R. Co., 3 Ind. App. 573; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35.

Kansas. — Reading Tp. *v.* Telfer, 57 Kan. 798.

Michigan. — Mullen *v.* Owosso, 100 Mich. 103, 43 Am. St. Rep. 436.

Minnesota. — La Riviere *v.* Pemberton, 46 Minn. 5.

Missouri. — Minster *v.* Citizens' R. Co., 53 Mo. App. 276.

Nebraska. — Omaha, etc., R. Co. *v.* Talbot, 48 Neb. 627.

New Jersey. — Pennsylvania R. Co. *v.* Goodenough, 55 N. J. L. 577.

New York. — Schular *v.* Hudson River R. Co., 38 Barb. (N. Y.) 653; Beck *v.* East River Ferry Co., 6 Robt. (N. Y.) 82; Seaman *v.* Koehler, 122 N. Y. 646, 33 N. Y. St. Rep. 729; Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290; Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591; Titus *v.* New Scotland, 90 Hun (N. Y.) 468; De Loge *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 149; Smith *v.* N. Y. Cent., etc., R. Co., 4 App. Div. (N. Y. Supreme Ct.) 493, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 82.

Ohio. — Puterbaugh *v.* Reasor, 9 Ohio St. 484.

Texas. — Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473.

West Virginia. — Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180.

3. Bars When a Proximate Cause of Injury — *Connecticut.* — Peck *v.* New York, etc., R. Co., 50 Conn. 379, 14 Am. & Eng. R. Cas. 633.

Illinois. — Joliet *v.* Seward, 86 Ill. 402, 29 Am. Rep. 35; Ohio, etc., R. Co. *v.* Stratton, 78 Ill. 88; Chicago, etc., R. Co. *v.* Bentz, 38 Ill. App. 485.

Indiana. — Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185.

Iowa. — Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492.

Michigan. — Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274.

New York. — Callahan *v.* Sharp, 27 Hun (N. Y.) 85.

Ohio. — Puterbaugh *v.* Reasor, 9 Ohio St. 484.

Pennsylvania. — Forks Tp. *v.* King, 84 Pa. St. 230; Boehm *v.* Bethlehem, 4 Pa. Super. Ct. Rep. 385.

Texas. — Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322.

Vermont. — Carlisle *v.* Sheldon, 38 Vt. 440.

Wisconsin. — Otis *v.* Janesville, 47 Wis. 422.

4. What Must Appear to Make Imputable — Beach on Cont. Neg. (2d ed.), § 103.

United States. — Gray *v.* Philadelphia, etc., R. Co., 23 Blatchf. (U. S.) 263, 22 Am. & Eng. R. Cas. 351.

Minnesota. — Follman *v.* Mankato, 35 Minn. 522, 15 Am. & Eng. Corp. Cas. 238.

New York. — Robinson *v.* New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Beck *v.* East River Ferry Co., 6 Robt. (N. Y.) 82.

Ohio. — St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 54 Am. Rep. 802, 23 Am. & Eng. R. Cas. 269.

Pennsylvania. — Boehm *v.* Bethlehem, 4 Pa. Super. Ct. Rep. 385.

5. Difficulties in Application of Rule — *United States.* — Gray *v.* Philadelphia, etc., R. Co., 23 Blatchf. (U. S.) 263, 22 Am. & Eng. R. Cas. 351, and note.

Minnesota. — Follman *v.* Mankato, 35 Minn. 522, 15 Am. & Eng. Corp. Cas. 238.

Wisconsin. — Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

pute: viz., (1) To cases where a passenger is injured by the contributory negligence of his carrier and the negligence of a third person. (2) To cases where the question is whether the person injured is chargeable with the contributory negligence of a driver or person with whom he was riding as a guest by special invitation, or because of some special relationship, as, for example, that of husband and wife. (3) To cases where a child so young as to be *non sui juris*, and incapable of personal negligence, is exposed to danger by the neglect of its parents, guardian, or custodian, and is injured, while so exposed, by the negligence of a third person.[1]

b. OCCUPANTS OF PUBLIC CONVEYANCES. — Considering these cases in their order, it may be said that in the first class of cases it is now the rule in the United States Courts, in England, and in most of the states of the Union, that the contributory negligence of a carrier is not attributable to a passenger;[2]

1. Where the Main Conflict Arises. — The conflict among text-writers and courts upon the question whether the doctrines of imputable negligence are applicable in any one of the cases stated may readily be seen by a comparison of the text-books and cases. See Pollock on Torts, 382–385; Thomp. on Car. of Pass. 284–294; Wharton on Neg., §§ 309–322, 395; Patterson's Ry. Accident Law, 78–87, 90–94; 1 Shearman & Redf. on Neg. (4th ed.), § 66 *et seq.*; 2 Thomp. on Neg. 1180–1190; Beach on Cont. Neg. (2d ed.), § 103 *et seq.*; Deering on Neg., §§ 27, 28; Whittaker's Smith on Neg., 405–418; note to Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 677; Carlisle *v.* Brisbane, 113 Pa. St. 544, 57 Am. Rep. 483, and note; Gray *v.* Philadelphia, etc., R. Co., 24 Fed. Rep. 168, 22 Am. & Eng. R. Cas. 351, and note. For particular points of difference see the notes that follow.

2. Carrier and Passenger — General Rule — *England.* — The Bernina, 12 Prob. Div. 58, 57 Am. Rep. 494, note; Tuff *v.* Warman, 5 C. B. N. S. 573, 94 E. C. L. 573; The Milan, Lush. 388.

United States. — Little *v.* Hackett, 116 U. S. 366; Gray *v.* Philadelphia, etc., R. Co., 23 Blatchf. (U. S.) 263; Missouri Pac. R. Co. *v.* Texas Pac. R. Co., 41 Fed. Rep. 316; Evans *v.* Lake Erie, etc., R. Co., 78 Fed. Rep. 782; Sheffield *v.* Central Union Telephone Co., 36 Fed. Rep. 164; Lapsley *v.* Union Pac. R. Co., 50 Fed. Rep. 172, *affirmed* in 51 Fed. Rep. 174; Pyle *v.* Clark, 75 Fed. Rep. 644, 5 Am. & Eng. R. Cas. N. S. 156.

Alabama. — Elyton Land Co. *v.* Mingea, 89 Ala. 521.

California. — Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 18 Am. & Eng. R. Cas. 144.

District of Columbia. — Woodley *v.* Baltimore, etc., R. Co., 19 Wash. L. Rep. (D. C.) 211.

Georgia. — East Tennessee, etc., R. Co. *v.* Markens, 88 Ga. 60.

Illinois. — Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791, 12 Am. & Eng. R. Cas. 166; Carmi *v.* Ervin, 59 Ill. App. 555; West Chicago St. R. Co. *v.* Piper, 64 Ill. App. 605.

Indiana. — Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186, 21 Am. & Eng. R. Cas. 478; Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139, 49 Am. & Eng. R. Cas. 451; Knightstown *v.* Musgrove, 116 Ind. 121, 9 Am. St. Rep. 827; Brannen *v.* Kokomo Gravel, etc., Road Co., 115 Ind. 115.

Iowa. — Nesbit *v.* Garner, 75 Iowa 314, 9 Am. St. Rep. 486. See also the Iowa cases in the notes following.

Kansas. — Leavenworth *v.* Hatch, 57 Kan. 57.

Kentucky. — Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119; Louisville, etc., R. Co. *v.* Case, 9 Bush (Ky.) 728; Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 13 Ky. L. Rep. 714, 49 Am. & Eng. R. Cas. 390.

Louisiana. — Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177.

Maine. — State *v.* Boston, etc., R. Co., 80 Me. 430.

Maryland. — Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 59 Am. Rep. 159.

Massachusetts. — Eaton *v.* Boston, etc., R. Co., 11 Allen (Mass.) 500, 87 Am. Dec. 730; Randolph *v.* O'Riordon, 155 Mass. 331.

Michigan. — Cuddy *v.* Horn, 46 Mich. 596, 41 Am. Rep. 178; Malmsten *v.* Marquette, etc., R. Co., 49 Mich. 94, 8 Am. & Eng. R. Cas. 291.

Minnesota. — Follman *v.* Mankato, 35 Minn. 522, 15 Am. & Eng. Corp. Cas. 238.

Missouri. — Becke *v.* Missouri Pac. R. Co., 102 Mo. 544; Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491.

New Jersey. — Bennett *v.* New Jersey R. etc., Co., 36 N. J. L. 225, 13 Am. Rep. 435; New York, etc., R. Co. *v.* Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126, 23 Am. & Eng. R. Cas. 330.

New York. — Masterson *v.* New York, etc., R. Co., 84 N. Y. 247, 38 Am. Rep. 510, 3 Am. & Eng. R. Cas. 408; McCallum *v.* Long Island R. Co., 38 Hun (N. Y.) 569; Chapman *v.* New Haven R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Webster *v.* Hudson River R. Co., 38 N. Y. 262; Perry *v.* Lansing, 17 Hun (N. Y.) 37; Robinson *v.* New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Dyer *v.* Erie R. Co., 71 N. Y. 228; McCaffrey *v.* Delaware, etc., Canal Co., (Supreme Ct.) 41 N. Y. St. Rep. 221, 16 N. Y. Supp. 495; Bennett *v.* New York Cent., etc., R. Co., (Supreme Ct.) 40 N. Y. St. Rep. 948, 16 N. Y. Supp. 765; Mills *v.* Woolverton, 9 N. Y. App. Div. 82; Kessler *v.* Brooklyn Heights R. Co., 3 N. Y. App. Div. 426; Weldon *v.* Third Ave. R. Co., 3 N. Y. App. Div. 370; Strauss *v.* Newburgh Electric R. Co., 6 N. Y. App. Div. 264; Hurley *v.* New York, etc., Brewing Co., 13 N. Y. App. Div. 167; Phillips *v.* New York,

but in some of the United States the doctrine that it is imputable and will bar a recovery has been established.[1] Yet it would seem that the absolute repudiation of the doctrine of Thorogood *v.* Bryan,[2] by the Supreme Court of the United States,[3] and the distinct manner in which that case has now been overruled in England,[4] indicate an entire abandonment of the doctrine that the contributory negligence of a carrier should be imputed to a passenger.[5]

c. OCCUPANTS OF PRIVATE CONVEYANCES. — In the second class of cases there has been, and still is, much conflict among the authorities, but the true principle seems to be that when a person is injured by the negligence of the

Cent., etc., R. Co., 127 N. Y. 657, 27 N. E. Rep. 978.

Ohio. — Covington Transfer Co. *v.* Kelly, 36 Ohio St. 86, 3 Am. & Eng. R. Cas. 335, 38 Am. Rep. 558; St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 23 Am. & Eng. R. Cas. 269, 54 Am. Rep. 802; Memphis, etc., Packet Co. *v.* Fogarty, 8 Ohio Cir. Ct. Rep. 418, 2 Ohio Dec. 706; Cincinnati St. R. Co. *v.* Wright, 54 Ohio St. 181.

1. The Minority Rule — *Pennsylvania.* — Lockhart *v.* Lichtenthaler, 46 Pa. St. 151; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172. But see Bunting *v.* Hogsett, 139 Pa. St. 363, 23 Am. St. Rep. 192. The Pennsylvania court refuses, however, to apply the rule except to public carriers, and holds that a person injured by the negligence of a third person and the contributory negligence of the driver of a private vehicle in which the injured person is riding is not barred in an action against such third person by the driver's contributory negligence. See the succeeding subdivision.

On the other hand, in *Iowa* and *Wisconsin*, the rule of Thorogood *v.* Bryan, 8 C. B. 115, 65 E. C. L. 115, has been applied in the cases of persons injured by the contributory negligence of the driver while driving in private vehicles.

Iowa. — Artz *v.* Chicago, etc., R. Co., 34 Iowa 153; Payne *v.* Chicago, etc., R. Co., 39 Iowa 523; Slater *v.* Burlington, etc., R. Co., 71 Iowa 209. But see Nesbit *v.* Garner, 75 Iowa 314, 9 Am. St. Rep. 486, wherein the court, after reviewing prior decisions, said: "The holding of those cases, then, is (1) that when several parties are engaged in a common enterprise, and one is injured by the joint negligence of one of his associates and another, the negligence of his associate will be imputed to him, and will defeat all right of recovery against the other party; and (2) that when a person is injured through the common negligence of one who, from their relation, is bound to care for and protect him, and another, the negligence of the former will be imputed to him, and will defeat a recovery against the other party. But that is as far as this court has gone." See also the cases from this state in the notes following.

Wisconsin. — Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Houfe *v.* Fulton, 29 Wis. 296, 9 Am. Rep. 568, 34 Wis. 608, 17 Am. Rep. 463; Otis *v.* Janesville, 47 Wis. 422.

So there are cases which hold the contributory negligence of a husband, driving a private vehicle, a bar to an action brought by a wife to recover for injuries resulting from the negligence of a third person while she was in such vehicle so driven by her husband.

United States. — Huntoon *v.* Trumbull, 2 McCrary (U. S.) 314.

Iowa. — Yahn *v.* Ottumwa, 60 Iowa 429.

New York. — Platz *v.* Cohoes, 24 Hun (N. Y.) 101.

Texas. — Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322.

Vermont. — Carlisle *v.* Sheldon, 38 Vt. 440.

And it has been held that the contributory negligence of a master bars a servant. Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274.

2. Thorogood *v.* Bryan, 8 C. B. 115, 65 E. C. L. 115. In this case it was held that a passenger in an omnibus, injured by the negligence of the driver of another omnibus, had no action against the latter, because the driver of the omnibus carrying the passenger, by his negligence, contributed to the injury. It was said that the plaintiff, being a passenger voluntarily, was so far identified with the carriage in which he was traveling that want of care on the part of the driver of such carriage would bar the plaintiff's action. The passenger was said to stand in the position of a master responsible for the acts of the driver as though those of a servant. See opinions of Coltman, Maule, Cresswell, and Williams, judges.

3. Little *v.* Hackett, 116 U. S. 366. This case contains an able opinion by Mr. Justice Field, in the course of which many cases are reviewed.

4. Case of the Bernina. — The Bernina, 12 Prob. Div. 58, 57 Am. Rep. 494, note.

5. When the Rule Properly Applicable. — An examination of the cases cited will show a marked tendency to the entire abandonment of the doctrine of imputable negligence in cases of the class now under discussion. It may be questioned whether the rule has any proper application, except in cases where the maxim *qui facit per alium facit per se* can be invoked.

England. — Reedie *v.* London, etc., R. Co., 4 Exch. 244; Quarman *v.* Burnett, 6 M. & W. 499; The Bernina, 12 Prob. Div. 58.

United States. — Little *v.* Hackett, 116 U. S. 366.

Michigan. — Cuddy *v.* Horn, 46 Mich. 596, 41 Am. Rep. 178.

Minnesota. — Follman *v.* Mankato, 35 Minn. 522, 15 Am. & Eng. Corp. Cas. 238.

New Jersey. — New York, etc., R. Co. *v.* Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126, and note, 23 Am. & Eng. R. Cas. 330.

Ohio. — St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 54 Am. Rep. 802, 23 Am. & Eng. R. Cas. 269.

defendant and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person;[1] while, on the other hand, it may be imputable when the injured person is in a position to exercise authority or control over the driver.[2]

d. LEGAL CUSTODIAN OF CHILD — **Child's Negligence Imputable — Jurisdictions Favoring the View.** — In the third class of cases the doctrine of Hartfield *v.* Roper[3] is followed in some jurisdictions; and it is held that the negligent

1. **Negligence of Driver — When Not Imputable** — *United States.* — Union Pac. R. Co. *v.* Lapsley, 4 U. S. App. 542, 32 Am. L. Reg. & Rev. N. S. 373, 51 Fed. Rep. 174; Sheffield *v.* Central Union Telephone Co., 36 Fed. Rep. 164.

Alabama. — Elyton Land Co. *v.* Mingea, 89 Ala. 521.

Georgia. — Roach *v.* Western, etc., R. Co., 93 Ga. 785.

Indiana. — Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 32 Am. L. Reg. & Rev. N. S. 763; Knightstown *v.* Musgrove, 116 Ind. 121, 9 Am. St. Rep. 827; Michigan City *v.* Boeckling, 122 Ind. 39.

Iowa. — Nesbit *v.* Garner, 75 Iowa 314, 9 Am. St. Rep. 486.

Kentucky. — Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345.

Maine. — State *v.* Boston, etc., R. Co., 80 Me. 430.

Maryland. — Baltimore, etc., R. Co. *v.* State, 79 Md. 335, 47 Am. St. Rep. 415.

Michigan. — Mullen *v.* Owosso, 100 Mich. 103, 43 Am. St. Rep. 436.

Minnesota. — Follman *v.* Mankato, 35 Minn. 522.

Mississippi. — Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444.

New York. — Reich *v.* Peck, 83 Hun (N. Y.) 214; De Loge *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 149; Bennett *v.* New York Cent., etc., R. Co., 133 N. Y. 563; Robinson *v.* New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Bailey *v.* Jourdan, 18 N. Y. App. Div. 387; Masterson *v.* New York Cent., etc., R. Co., 84 N. Y. 247; Dyer *v.* Erie R. Co., 71 N. Y. 228; Platz *v.* Cohoes, 24 Hun (N. Y.) 101; Hoag *v.* New York Cent., etc., R. Co., 111 N. Y. 199; McGoldrick *v.* New York Cent., etc., R. Co., 142 N. Y. 640; Miller *v.* New York Cent., etc., R. Co., 82 Hun (N. Y.) 164; Crawford *v.* Delaware, etc., R. Co., 121 N. Y. 652; Weldon *v.* Third Ave. R. Co., 3 N. Y. App. Div. 370; Hennessy *v.* Brooklyn City R. Co., 73 Hun (N. Y.) 569; Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290; Strauss *v.* Newburgh Electric R. Co., 6 N. Y. App. Div. 264; Kessler *v.* Brooklyn Heights R. Co., 3 N. Y. App. Div. 426; Callahan *v.* Sharp, 3 N. Y. App. Div. 428, note; Pettingill *v.* Olean, (Supreme Ct.) 48 N. Y. St. Rep. 96, 20 N. Y. Supp. 367; Van Vranken *v.* Clifton Springs, 86 Hun (N. Y.) 67; McCaffrey *v.* Delaware, etc., Canal Co., (Supreme Ct.) 41 N. Y. St. Rep. 221.

Pennsylvania. — Carlisle *v.* Brisbane, 113 Pa. St. 544, 57 Am. Rep. 483; Dean *v.* Pennsylvania R. Co., 129 Pa. St. 514, 15 Am. St. Rep. 733; Carr *v.* Easton, 142 Pa. St. 139.

Texas. — Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643; Houston City St. R. Co. *v.* Reichart, 87 Tex. 539.

2. **Negligence of Driver — When Imputable.** — See citations to preceding note, also the following cases:

Iowa. — Payne *v.* Chicago, etc., R. Co., 39 Iowa 523; Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492.

New York. — Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290; Harris *v.* Uebelhoer, 75 N. Y. 177.

Texas. — Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139.

There can be no such thing as imputable negligence except in cases where that privity which exists in law between master and servant and principal and agent is found. In order that the negligence of one person be properly imputable to another, the one to whom it is imputed must stand in such a relation of privity to the negligent person that the maxim *qui facit per alium facit per se* is directly applicable. See the title NEGLIGENCE.

3. **Imputable Negligence of Parents — Hartfield v. Roper.** — Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273. In this case it was held that parents permitting a child two years old to be in a public highway unattended are guilty of such contributory negligence as will defeat an action in the child's name for an injury done to it by the negligence of a traveler in the highway.

Parent's Duty of Care. — It is undoubtedly the rule that parents, even though poor, must exercise over their children such care as is reasonably to be expected of them in order to guard against injuries to the children, regard being had to all the surrounding circumstances.

Illinois. — Aurora *v.* Seidelman, 34 Ill. App. 285; Chicago West Div. R. Co. *v.* Ryan, 31 Ill. App. 621.

Indiana. — Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654.

Kansas. — Atchison, etc., R. Co. *v.* McFarland, 2 Kan. App. 662.

Louisiana. — Westerfield *v.* Levis, 43 La. Ann. 63.

Massachusetts. — Slattery *v.* O'Connell, 153 Mass. 94; Grant *v.* Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449.

Minnesota. — Weissner *v.* St. Paul City R. Co., 47 Minn. 468.

Missouri. — Senn *v.* Southern R. Co., 124 Mo. 621; Rosenkranz *v.* Lindell R. Co., 108 Mo. 9, 32 Am. St. Rep. 588.

New York. — McVee *v.* Watertown, 92 Hun (N. Y.) 306; Canavan *v.* Stuyvesant, 12 Misc Rep. (N. Y. C. Pl.) 74; McKenna *v.* Buffalo Brass Bedstead Co., 12 N. Y. Misc. Rep. (Buffalo Super. Ct.) 485; Jones *v.* Brooklyn Heights R. Co., 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 543; Skelton *v.* Larkin, 82 Hun (N. Y.) 388; Ehrman *v.* Brooklyn City R. Co., (Su-

conduct of a parent, guardian, or custodian in allowing a child *non sui juris* to be negligently injured is contributory negligence which must be imputed to the child.[1]

preme Ct.) 38 N. Y. St. Rep. 990, 14 N. Y. Supp. 336; Huerzeler *v.* Central Cross Town R. Co., 139 N. Y. 490.

Ohio. — Cincinnati *v.* Gregory, 3 Ohio N. P. 142.

Oregon. — Hedin *v.* Suburban R. Co., 26 Oregon 155.

Pennsylvania. — Winans *v.* Randolph, 169 Pa. St. 606; Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 44 Am. St. Rep. 644.

Utah. — Riley *v.* Salt Lake Rapid Transit Co., 10 Utah 428.

1. Negligence Held Imputable to Child. — As to the jurisdictions where negligence is held imputable to children, and under what circumstances, and various distinctions, compare the following cases:

California. — Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447; Meeks *v.* Southern Pac. R. Co., 52 Cal. 604, 56 Cal. 513, 38 Am. Rep. 67.

Delaware. — Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185.

Indiana. — Jeffersonville, etc., R. Co. *v.* Bowen, 40 Ind. 545; Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513, 92 Am. Dec. 269; Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26; Indiana Mfg. Co. *v.* Millican, 87 Ind. 87; Terre Haute St. R. Co. *v.* Tappenbeck, 9 Ind. App. 422; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654.

Kansas. — Atchison, etc., R. Co. *v.* Smith, 28 Kan. 541, 8 Am. & Eng. R. Cas. 327; Horton *v.* Trompeter, (Kan. 1894) 35 Pac. Rep. 1106.

Maine. — Leslie *v.* Lewiston, 62 Me. 468; Brown *v.* European, etc., R. Co., 58 Me. 384; O'Brien *v.* McGlinchy, 68 Me. 552.

Maryland. — McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534.

Massachusetts. — Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; Gibbons *v.* Williams, 135 Mass. 333; McGeary *v.* Eastern R. Co., 135 Mass. 363, 15 Am. & Eng. R. Cas. 407; O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352, 15 Am. & Eng. R. Cas. 362; Wright *v.* Walden, etc., R. Co., 4 Allen (Mass.) 283; Grant *v.* Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449; Casey *v.* Smith, 152 Mass. 294, 23 Am. St. Rep. 842. *Compare* Wiswell *v.* Doyle, 160 Mass. 42, 39 Am. St. Rep. 451.

Minnesota. — Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, 8 Am. & Eng. R. Cas. 310, 43 Am. Rep. 212.

New York. — Ihl *v.* Forty-second St., etc., R. Co., 47 N. Y. 323, 7 Am. Rep. 450; Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; McVee *v.* Watertown, 92 Hun (N. Y.) 306; Stackus *v.* New York Cent., etc., R. Co., 79 N. Y. 464; Weil *v.* Dry Dock, etc., R. Co., 119 N. Y. 147; Huerzeler *v.* Central Cross Town R. Co., 139 N. Y. 490; Kitchell *v.* Brooklyn Heights R. Co., 6 N. Y. App. Div. 99; Stone *v.* Dry Dock, etc., R. Co., 115 N. Y. 104; Bennett *v.* Brooklyn Heights R. Co., 1 N. Y. App. Div. 205; Lannen *v.* Albany Gas-Light Co., 44 N. Y. 459; Mangam *v.* Brooklyn R. Co., 38 N. Y. 456; Cumming *v.* Brooklyn City R. Co., 104 N. Y. 669, 5 N. Y. St. Rep. 737; Albert *v.* Albany R. Co., 5 N. Y. App. Div. 544; Canavan *v.* Stuyvesant, 12 Misc. Rep. (N. Y. C. Pl.) 74, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 87; Muller *v.* Minken, 5 Misc. Rep. (N. Y. Super. Ct.) 444. But see Hennessey *v.* Brooklyn City R. Co., 6 N. Y. App. Div. 206, an action brought by an infant less than two years of age, to recover for injuries sustained by a collision with the defendant's train when he was riding in the lap of his mother, the father driving the carriage. It was held that under the circumstances the negligence of the father could not be imputed to the child, as the latter was in the immediate custody of the mother, whose negligence only was imputable to the child. And see also Metcalfe *v.* Rochester R. Co., 12 N. Y. App. Div. 147; Coghlan *v.* Third Ave. R. Co., 7 N. Y. App. Div. 124.

Parent Barred When Child Not. — In considering these and similar cases, it should not be overlooked that there is a marked distinction between cases brought in the name of the child itself, and cases brought by the parents to recover for the injuries sustained by them by reason of the homicide or injury of the child. Thus, when the parents sue, their negligence in exposing the child to injury will bar their recovery.

District of Columbia. — Moore *v.* Metropolitan R. Co., 2 Mackey (D. C.) 437.

Michigan. — Battishill *v.* Humphreys, 64 Mich. 514, 28 Am. & Eng. R. Cas. 597.

Mississippi. — Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560, 14 Am. St. Rep. 587.

Pennsylvania. — Smith *v.* Hestonville, etc., Pass. R. Co., 92 Pa. St. 450, 2 Am. & Eng. R. Cas. 12, 37 Am. Rep. 705; Westerberg *v.* Kinzua Creek, etc., R. Co., 142 Pa. St. 471, 24 Am. St. Rep. 510.

Tennessee. — Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18.

Texas. — Williams *v.* Texas, etc., R. Co., 60 Tex. 205, 15 Am. & Eng. R. Cas. 403.

And this is a correct rule in all jurisdictions. But, as the cases just cited show, the contributory negligence of the parent will not keep the child from recovering, except in jurisdictions that have fully adopted the rule in Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273. And see Erie City Pass. R. Co. *v.* Schuster, 113 Pa. St. 412, 57 Am. Rep. 471; Glassey *v.* Hestonville, etc., Pass. R. Co., 57 Pa. St. 172; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187. See also the cases cited in the preceding notes.

And the Question of Imputability for the Jury. — It will also be noted that in some of the cases the rule of Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, is held in the modified form, the question of the contributory negligence of the parents which will bar the child being held a question of fact for the jury, not of law for the court.

Jurisdictions Denying the Doctrine. — But in other jurisdictions it is held that the negligence of the parent, guardian, or custodian is not imputable to the child, because it is in no way responsible for the danger, had no volition in establishing the relation of privity with the person whose negligence it is sought to impute to it, and should not be charged with the fault of such person in allowing it to be exposed to danger which it had not the capacity either to know or to avoid.[1]

Person in Actual Custody of Child. — In *England* it has been held that the negligence of a person in the actual custody of a child at the time of its injury which contributes to the injury may be imputed to the child.[2] And in some of the

Massachusetts. — McGeary *v.* Eastern R. Co., 135 Mass. 363, 15 Am. & Eng. R. Cas. 407; O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352, 15 Am. & Eng. R. Cas. 362.

Texas. — Texas Mexican R. Co. *v.* Herbeck, 60 Tex. 602; Galveston, etc., R. Co. *v.* Moore, 59 Tex. 64, 10 Am. & Eng. R. Cas. 746, 46 Am. Rep. 265.

Wisconsin. — See Parish *v.* Eden, 62 Wis. 272; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357.

1. Where Held Not Imputable — *United States.* — Berry *v.* Lake Erie, etc., R. Co., 70 Fed. Rep. 679. Here it was further held that the question was one of general law, to be decided by a federal court according to its own views, uncontrolled by the decisions of the state court. The decision is contrary to the rule of the courts of *Indiana*, in which state the case arose.

Alabama. — Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Bay Shore R. Co. *v.* Harris, 67 Ala. 6.

Connecticut. — Birge *v.* Gardner, 19 Conn. 507, 50 Am. Dec. 261; Bronson *v.* Southbury, 37 Conn. 199; Daley *v.* Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413.

Georgia. — Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102; Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145.

Illinois. — Chicago City R. Co. *v.* Wilcox, (Ill. 1890) 24 N. E. Rep. 419, 44 Alb. L. J. 70, 138 Ill. 370, *affirming* 33 Ill. App. 450, *explaining* Hund *v.* Geier, 72 Ill. 393; Toledo, etc., R. Co. *v.* Grable, 88 Ill. 441; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Chicago *v.* Starr, 42 Ill. 174, 89 Am. Dec. 422; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25, 84 Ill. 483; Gavin *v.* Chicago, 97 Ill. 66, 37 Am. Rep. 99; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Pittsburg, etc., R. Co. *v.* Bumstead, 48 Ill. 221, 95 Am. Dec. 539; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585; Chester *v.* Porter, 47 Ill. 66.

Iowa. — McCaull *v.* Bruner, 91 Iowa 214; Wymore *v.* Mahaska County, 78 Iowa 396, 16 Am. St. Rep. 449.

Louisiana. — Westerfield *v.* Levis, 43 La. Ann. 63.

Michigan. — Battishill *v.* Humphreys, 28 Am. & Eng. R. Cas. 597, 57 Am. Rep. 474, note; Shippy *v.* Au Sable, 85 Mich. 280. *Compare* Apsey *v.* Detroit, etc., R. Co., 83 Mich. 432.

Missouri. — Frick *v.* St. Louis, etc., R. Co., 75 Mo. 542, 595, 8 Am. & Eng. R. Cas. 280; Boland *v.* Missouri R. Co., 36 Mo. 490; Winters *v.* Kansas City Cable R. Co., 99 Mo. 509, 17 Am. St. Rep. 591. *Compare* Shaw *v.* Missouri Pac. R. Co., 104 Mo. 648.

Nebraska. — Huff *v.* Ames, 16 Neb. 139, 49 Am. Rep. 716.

New Hampshire. — Bisaillon *v.* Blood, 64 N. H. 565.

New Jersey. — Newman *v.* Phillipsburg Horse Car R. Co., 52 N. J. L. 446.

New York. — Hennessey *v.* Brooklyn City R. Co., 6 N. Y. App. Div. 206; Coghlan *v.* Third Ave. R. Co., 7 N. Y. App. Div. 124.

North Carolina. — Bottoms *v.* Seaboard, etc., R. Co., 114 N. Car. 699, 41 Am. St. Rep. 799.

Ohio. — Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 400, 98 Am. Dec. 175; Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451; St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 54 Am. Rep. 802, 23 Am. & Eng. R. Cas. 269.

Pennsylvania. — Erie City Pass. R. Co. *v.* Schuster, 113 Pa. St. 412, 57 Am. Rep. 471; Philadelphia, etc., R. Co. *v.* Long, 75 Pa. St. 257; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Smith *v.* O'Connor, 48 Pa. St. 218, 86 Am. Dec. 582.

Tennessee. — Whirley *v.* Whiteman, 1 Head (Tenn.) 610.

Texas. — Douglas *v.* Central Texas, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. Rep. 892; Texas, etc., R. Co. *v.* Fletcher, 6 Tex. Civ. App. 736; Western Union Tel. Co. *v.* Hoffman, 80 Tex. 420, 9 Ry. & Corp. L. J. 455; Allen *v.* Texas, etc., R. Co., (Tex. Civ. App. 1894), 27 S. W. Rep. 943.

Vermont. — Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

Virginia. — Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455; Norfolk, etc., R Co. *v.* Groseclose, 88 Va. 267, 29 Am. St. Rep. 718, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 88.

Washington. — Roth *v.* Union Depot Co., 13 Wash. 525.

West Virginia. — Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 88.

2. Negligence of Actual Custodian Imputable. — Waite *v.* North Eastern R. Co., El. Bl. & El. 719, 96 E. C. L. 719; Beach on Cont. Neg. (2d ed.), §§ 126-129; 2 Thomp. on Neg. 1182, § 32; Thomp. on Car. 291, § 7.

But Mr. Pollock regards this case as resting upon the principle that the foundation of the defendant's liability was not shown, because it did not appear that the negligence of the defendant, rather than that of the custodian, was the proximate cause of the child's injury. Pollock on Torts 382.

United States similar decisions have been made.[1] But it seems that these cases may be rested upon the doctrine of the identification of the child and its custodian at the moment of the injury; and in some of the English cases it is implied that the contractual obligations of the defendant to the custodian form the only ground of action against the defendant, and therefore it would only be liable to the child when it would have been liable to the custodian.[2]

Modifications of Rule. — The doctrine of Hartfield *v.* Roper is not applicable when the injured child, although *non sui juris*, has exercised ordinary care to avoid the injury,[3] or when the defendant, by the exercise of ordinary care, could have discovered the danger of the child in time to have avoided inflicting the injury;[4] and neither should it be applied in cases where the child is old enough to exercise a reasonable degree of care for its own safety, and is because of this fact released from the immediate custody of its parents or guardian.[5] The question then becomes the usual one of ordinary care, and the child may recover, for it has exercised the ordinary care of a child.[6]

XXII. Apportionment of Damages — 1. In General. — In cases of contributory negligence, at common law, there can be no apportionment of damages

1. *United States.* — Grethen *v.* Chicago, etc., R. Co., 22 Fed. Rep. 609, 19 Am. & Eng. R. Cas. 342; The Burgundia, 29 Fed. Rep. 464.
Illinois. — Ohio, etc., R. Co. *v.* Stratton, 78 Ill. 88; Baltimore, etc., R. Co. *v.* Pletz, 61 Ill. App. 161; Chicago, etc., R. Co. *v.* Logue, 158 Ill. 621.
Massachusetts. — Holly *v.* Boston Gas Light Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Carter *v.* Towne, 98 Mass. 567, 103 Mass. 507, 96 Am. Dec. 682.
Michigan. — East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.
Missouri. — Stillson *v.* Hannibal, etc., R. Co., 67 Mo. 671.
New York. — Lannen *v.* Albany Gas Light Co., 46 Barb. (N. Y.) 264, 44 N. Y. 459; Morrison *v.* Erie R. Co., 56 N. Y. 302.
Ohio. — Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 400, 98 Am. Dec. 175.
Pennsylvania. — Kay *v.* Pennsylvania R. Co., 65 Pa. St. 276, 3 Am. Rep. 628; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Pittsburg, etc., Pass. R. Co. *v.* Caldwell, 74 Pa. St. 421.
But where the person in actual custody of the child is not in privity with it, and has no right to control it, his negligence is not attributable to the child. Thus where a stranger rescued a child from one danger, and, while holding it in his arms, immediately exposed it to another danger, it was held that the child's right of action was not barred by the negligence of the stranger who held it. North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187. And see Pittsburg, etc., Pass. R. Co. *v.* Caldwell, 74 Pa. St. 421; East Saginaw City R. Co *v.* Bohn, 27 Mich. 503; Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 400, 98 Am. Dec. 175.

2. This Rests on Contract and Doctrine of Identification. — Patterson's Ry. Acc. Law, §§ 89, 93, 94; Thomp. Car. of Pass. 291, § 7; Beach on Cont. Neg. (2d ed.), § 126; 2 Thomp. on Neg. 1182, 1188, §§ 32, 36; 1 Shearman & Redf. on Neg. (4th ed.), § 77.
England. — Waite *v.* North Eastern R. Co., El. Bl. & El. 719, 96 E. C. L. 719.

3. When Child Used Due Care, No Imputability — *Illinois.* — Pittsburg, etc., R. Co. *v.* Bumstead, 48 Ill. 221, 95 Am. Dec. 539.
Maine. — O'Brien *v.* McGlinchy, 68 Me. 552.
Maryland. — McMahon *v.* Northern Cent. R. Co., 39 Md. 438.
Massachusetts. — Mulligan *v.* Curtis, 100 Mass. 512, 97 Am. Dec. 121; Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; Collins *v.* South Boston R. Co., 142 Mass. 301, 26 Am. & Eng. R. Cas. 371, 56 Am. Rep. 676; Munn *v.* Reed, 4 Allen (Mass.) 431.
New York. — Lannen *v.* Albany Gas Light Co., 46 Barb. (N. Y.) 264, 44 N. Y. 459; Ihl *v.* Forty-second St., etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450; McGarry *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510.

4. When Defendant Could Have Avoided Inflicting Injury — *England.* — Davies *v.* Mann, 10 M. & W. 546.
California. — Meeks *v.* Southern Pac. R. Co., 56 Cal. 513, 38 Am. Rep. 67.
Maryland. — Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 551.
Texas. — Galveston, etc., R. Co. *v.* Moore, 59 Tex. 64, 10 Am. & Eng. R. Cas. 746, 46 Am. Rep. 268.

5. If Child Sui Juris, No Imputability. — 1 Shearman & Redf. on Neg. (4th ed.), § 83; 2 Thomp. on Neg. 1180, § 31.
England. — Lynch *v.* Nurdin, 1 Q. B. 29, 41 E. C. L. 422.
United States. — Washington, etc., R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401.
Massachusetts. — Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188.
New York. — McMahon *v.* New York, 33 N. Y. 642.
Pennsylvania. — Oakland R. Co. *v.* Fielding, 48 Pa. St. 320.

6. Then a Question of "Ordinary Care of Child." — Beach on Cont. Neg. (2d ed.), § 136.
Massachusetts. — Plumley *v.* Birge, 124 Mass. 57, 26 Am. Rep. 645.
New York. — Thurber *v.* Harlem Bridge, etc., R. Co., 60 N. Y. 326.
Vermont. — Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.
Wisconsin. — Meibus *v.* Dodge, 38 Wis. 300, 20 Am. Rep. 6.

as there is in courts of admiralty.[1]

2. Plaintiff's Subsequent Negligence. — But where the negligence of a defendant has been the sole cause of an injury to the plaintiff, and the plaintiff's subsequent negligence has enhanced the injury unnecessarily, the damages should be limited to the injury which would have resulted from the defendant's negligence had the plaintiff exercised ordinary care after the injury.[2]

3. In Case of Disease. — Yet when the plaintiff has exercised ordinary care he can recover for an enhancement or aggravation of the injuries caused by the defendant, when such enhancement or aggravation results from an existing disease, or the development of a latent disease, or the perversion of a natural function or condition.[3]

Disease May Be Evidence of Contributory Negligence. — The existence of such disease or condition in the plaintiff is not negligence; but it would seem that there may be cases in which a person sick or diseased is barred from recovering for an aggravation or enhancement of such sickness or disease by the negligence of another, when, without notice to that other, he has exposed himself to injury while in such a condition as to make the results of a very slight injury serious.[4]

Disease in Mitigation of Damages. — Under such circumstances, if the negligence of the defendant would not ordinarily have resulted in injury to a person situated as the plaintiff was, it is doubtful whether the defendant is liable, and he should not be held for any consequences except those directly caused by his negligence, and which might have been foreseen as its consequences.[5]

1. No Apportionment at Common Law. — Beach on Cont. Neg. (2d ed.), § 69.

England. — Greenland *v.* Chaplin, 5 Exch. 243.

Ohio. — "The law does not apportion the damages between parties whose joint negligence caused to one of them an injury." Cleveland, etc., R. Co. *v.* Elliott, 28 Ohio St. 353.

Pennsylvania. — Little Schuylkill Nav. R., etc., Co. *v.* Norton, 24 Pa. St. 465, 64 Am. Dec. 674.

2. But Damages Should Be Limited to Actual Effects — *England.* — Nitro-Phosphate, etc., Chemical Manure Co. *v.* London, etc., Docks Co., 9 Ch. Div. 503; Sills *v.* Brown, 9 C. & P. 601, 38 E. C. L. 245.

United States. — The Serapis, 49 Fed. Rep. 393; Secord *v.* St. Paul, etc., R. Co., 5 McCrary (U. S.) 515, 18 Fed. Rep. 221.

Indiana. — Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522.

Massachusetts. — Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343; Sherman *v.* Fall River Iron Works Co., 2 Allen (Mass.) 524, 79 Am. Dec. 799; Hibbard *v.* Thompson, 109 Mass. 286.

New York. — Lyons *v.* Erie R. Co., 57 N. Y. 489.

Ohio. — Geiselman *v.* Scott, 25 Ohio St. 86.

Pennsylvania. — Gould *v.* McKenna, 86 Pa. St. 297, 27 Am. Rep. 705.

Tennessee. — Nashville, etc., R. Co. *v.* Smith, 6 Heisk. (Tenn.) 174.

Vermont. — Stebbins *v.* Central Vermont R. Co., 54 Vt. 464, 11 Am. & Eng. R. Cas. 79, 41 Am. Rep. 855.

Virginia. — Matthews *v.* Warner, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

3. Yet Plaintiff May Recover for Enhancement by Disease — *Indiana.* — Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 28 Am. & Eng. R. Cas. 170; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522.

Iowa. — Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

New York. — Ehrgott *v.* New York, 96 N. Y. 264, 48 Am. Rep. 622.

Texas. — Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83, 9 Am. & Eng. R. Cas. 407.

Wisconsin. — Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 41 Am. Rep. 41, 3 Am. & Eng. R. Cas. 444.

See *supra*, this title, *Injury Enhanced by Disease.*

4. But Disease May Be Evidence of Contributory Negligence. — To the extent stated in the text, the case of Pullman Palace Car Co. *v.* Barker, 4 Colo. 344, 34 Am. Rep. 89, although often denied and criticised, may be sustained. The real trouble in that case was, that a correct principle was wrongly applied to a natural function or condition of common occurrence, and the existence of which in its female passengers the railroad company might reasonably have foreseen. Indeed, in its ultimate analysis, the question under consideration is always one of proximate cause. With notice of the existence of an unusual condition liable to enhance the results of a slight injury, liability for an enhancement by negligence arises when, without such negligence, there would be no liability, because the defendant would only be liable for such consequences as might reasonably have been foreseen. See also Kitteringham *v.* Sioux City, etc., R. Co., 62 Iowa 285, 18 Am. & Eng. R. Cas. 14.

And see the following as supporting the text:

England. — Hobbs *v.* London, etc., R. Co., L. R. 10 Q. B. 111.

Mississippi. — New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478.

Pennsylvania. — Reading City Pass. R. Co. *v.* Eckert, (Pa. 1886) 2 Cent. Rep. 793.

5. When Diseased Condition Should Go in Mitigation of Damages. — This rests upon the principle that for consequences which could not

XXIII. The Burden of Proof — 1. View that Burden on Plaintiff. — It is a mooted question whether the burden of proving contributory negligence, or its absence, rests on the plaintiff or the defendant.[1] In some jurisdictions it is held that, as the plaintiff cannot recover unless he was in the exercise of ordinary care at the time of the injury, he must both allege and prove that the injury occurred without negligence on his part;[2] and it is even said that there is a presumption that he was not using ordinary care.[3]

2. View that Burden on Defendant. — On the other hand, it is held by a majority of the courts and most text-writers, that there is a presumption of ordinary care in favor of the plaintiff and the defendant both, and that it devolves on the plaintiff to prove a want of ordinary care on the defendant's part, and on the defendant to prove a want of such care on the part of the plaintiff, contributing to his injury.[4]

have been foreseen, and which would not have resulted in ordinary cases, there can be no liability unless the negligent person had notice, or by the exercise of ordinary care might have known, of the diseased condition or the tendency to disease that would enhance the effects of a slight injury; and in such cases it would seem that the proximate cause of such enhancement would be the negligence of the person injured in exposing himself to serious injury from a cause that ordinarily would not be productive of such injuries, without giving notice of the danger to the person guilty of the negligence that ordinarily would only have resulted in a slight injury, perhaps none at all. See upon this question of proximate and remote causes, the following authorities:

1 Shearman & Redf. on Neg. (4th ed.), § 28 *et seq.*

England. — Sharp *v.* Powell, L. R. 7 C. P. 253, 2 Moak 567; Shepherd *v.* Midland R. Co., 25 L. T. N. S. 879.

Missouri. — Brown *v.* Wabash, etc., R. Co., 20 Mo. App. 222; Francis *v.* St. Louis Transfer Co., 5 Mo. App. 7.

Pennsylvania. — Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 298, 27 Am. Rep. 653; Oil City Gas. Co. *v.* Robinson, 99 Pa. St. 1.

See *supra*, this title, *Injury Enhanced by Disease.*

1. The Burden of Proof Question — Cooley on Torts (2d ed.) *673; 2 Thomp. on Neg. 1175, § 24, 1235, § 8; 1 Shearman & Redf. on Neg. (4th ed.), §§ 106–109; Wharton on Neg., §§ 423–427; Patterson's Ry. Acc. Law 435, § 374; Pierce on Railroads 298–300, 320; Beach on Cont. Neg. (2d ed.), §§ 417–443; 2 Woods Ry. Law 1258–1261; Whittaker's Smith on Neg. 381–384, notes.

Connecticut. — Button *v.* Frink, 51 Conn. 342, 50 Am. Rep. 24.

2. Where Burden Held on the Plaintiff — *Illinois.* — Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

Indiana. — Mount Vernon *v.* Dusouchett, 2 Ind. 586, 54 Am. Dec. 467; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262; Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 25 Am. & Eng. R. Cas. 322, 55 Am. Rep. 736; Louisville, etc., R. Co. *v.* Orr, 84 Ind. 50.

Iowa. — Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181; Slosson *v.* Burlington, etc., R. Co., 51 Iowa 294, 7 Am. & Eng. R. Cas. 509; Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 28 Am. & Eng. R. Cas. 409, 58 Am. Rep. 227.

Louisiana. — Moore *v.* Shreveport, 3 La. Ann. 645.

Maine. — State *v.* Maine Cent. R. Co., 76 Me. 357, 19 Am. & Eng. R. Cas. 312, 49 Am. Rep. 622; Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Massachusetts. — Hinckley *v.* Cape Cod R. Co., 120 Mass. 257; Stock *v.* Wood, 136 Mass. 353.

Michigan. — Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99; Teipel *v.* Hilsendegen, 44 Mich. 461; Mitchell *v.* Chicago, etc., R. Co., 51 Mich. 236, 12 Am. & Eng. R. Cas. 163, 47 Am. Rep. 566.

Mississippi. — Vicksburg *v.* Hennessy, 54 Miss. 391, 28 Am. Rep. 354.

North Carolina. — Doggett *v.* Richmond, etc., R. Co., 78 N. Car. 305.

Oregon. — Walsh *v.* Oregon R., etc., Co., 10 Oregon 250.

3. The Presumption of Negligence Again — *Indiana.* — Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 55 Am. Rep. 736, 25 Am. & Eng. R. Cas. 322.

Maine. — State *v.* Maine Cent. R. Co., 76 Me. 357, 19 Am. & Eng. R. Cas. 312, 49 Am. Rep. 622; Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744, 19 Am. & Eng. R. Cas. 356.

Pennsylvania. — Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407.

Rhode Island. — Cassidy *v.* Angell, 12 R. I. 447, 34 Am. Rep. 690.

4. Where the Burden Held on Defendant — *England.* — Holden *v.* Liverpool New Gas, etc., Co., 3 C. B. 1; Bridge *v.* Grand Junction R. Co., 3 M. & W. 244, 54 E. C. L. 1; Martin *v.* Great Northern R. Co., 16 C. B. 179, 81 E. C. L. 179.

United States. — Hough *v.* Texas, etc., R. Co., 100 U. S. 213; Washington, etc., R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291.

Alabama. — Smoot *v.* Wetumpka, 24 Ala. 112; Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 569, 8 Am. & Eng. R. Cas. 340; Thompson *v.* Duncan, 76 Ala. 334.

Arizona. — Lopez *v.* Central Arizona Min Co., 1 Arizona 464.

3. Where Plaintiff's Evidence Shows Contributory Negligence. — But in all jurisdictions, if the plaintiff's declaration or evidence establishes his own contributory negligence, it bars his recovery, no matter where the burden rests.[1]

4. Nature of Proof Required of Plaintiff When Burden on Defendant. — And in jurisdictions where the burden of proving contributory negligence is on the defendant, the plaintiff is only required to prove that the negligence of the defendant was a cause of his injury in order to entitle him to recover, it being held sufficient for him to show a proximate cause adequate to account for the injury.[2]

Arkansas. — Texas, etc., R. Co. *v.* Orr, 46 Ark. 182; Little Rock, etc., R. Co. *v.* Atkins, 46 Ark. 423; Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460.

California. — MacDougall *v.* Central R. Co., 63 Cal. 431, 12 Am. & Eng. R. Cas. 143; May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135; Gay *v.* Winter, 34 Cal. 153.

Colorado. — Sanderson *v.* Frazier, 8 Colo. 79, 54 Am. Rep. 547.

Dakota. — Mares *v.* Northern Pac. R. Co., 3 Dakota 336, 17 Am. & Eng. R. Cas. 620.

District of Columbia. — Muller *v.* District of Columbia, 5 Mackey (D. C.) 286.

Georgia. — Thompson *v.* Central, etc., R., etc., Co., 54 Ga. 509.

Kansas. — St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 28 Am. & Eng. R. Cas. 341.

Kentucky. — Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41; Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. Cas. 79; Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

Maryland. — Prince George's County *v.* Burgess, 61 Md. 29; State *v.* Baltimore, etc., R. Co., 58 Md. 482, 15 Am. & Eng. R. Cas. 409.

Minnesota. — Hocum *v.* Weitherick, 22 Minn. 152.

Missouri. — Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503.

Nebraska. — Lincoln *v.* Walker, 18 Neb. 244, 5 Am. & Eng. Corp. Cas. 610.

New Hampshire. — Smith *v.* Eastern R. Co., 35 N. H. 356.

New Jersey. — New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434.

Ohio. — Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627.

Rhode Island. — Cassidy *v.* Angell, 12 R. I. 447, 34 Am. Rep. 690.

South Carolina. — Carter *v.* Columbia, etc., R. Co., 19 S. Car. 20, 15 Am. & Eng. R. Cas. 414, 45 Am. Rep. 754; Roof *v.* Charlotte, etc., R. Co., 4 S. Car. 61.

Texas. — Houston, etc., R. Co. *v.* Cowser, 57 Tex. 293; Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 21 Am. & Eng. R. Cas. 160, 48 Am. Rep. 297; Lee *v.* International, etc., R. Co. (Tex. 1896), 36 S. W. Rep. 63, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 91; Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152; Texas Pac. R. Co. *v.* Davidson, 68 Tex. 370.

Vermont. — Hill *v.* New Haven, 37 Vt. 501, 88 Am. Dec. 613; Bovee *v.* Danville, 53 Vt. 183.

West Virginia. — Sheff *v.* Huntington, 16 W. Va. 307; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579, 8 Am. & Eng. R. Cas. 480.

Wisconsin. — Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Hoth *v.* Peters, 55 Wis. 405.

The Doctrine of the New York and Pennsylvania Courts will be stated further on. Perhaps they establish the true rule upon the question of the burden of proof. See *infra*, this section, *Summary — The True Doctrine.*

1. How When Plaintiff's Evidence Shows Contributory Negligence — *United States.* — Washington, etc., R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401.

California. — McQuilken *v.* Central Pac. R. Co., 50 Cal. 7.

Louisiana. — Ryan *v.* Louisville, etc., R. Co., 44 La. Ann. 806, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 92.

Maryland. — Frech *v.* Philadelphia, etc., R. Co., 39 Md. 574.

Nebraska. — Lincoln *v.* Walker, 18 Neb. 244, 5 Am. & Eng. Corp. Cas. 610.

New Hampshire. — Winship *v.* Enfield, 42 N. H. 197.

New Jersey. — New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434; Berry *v.* Pennsylvania R. Co., 48 N. J. L. 141, 26 Am. & Eng. R. Cas. 396.

Ohio. — Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627.

Rhode Island. — Boss *v.* Providence, etc., R. Co., 15 R. I. 149, 21 Am. & Eng. R. Cas. 364.

Wisconsin. — Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

2. Proof Required of Plaintiff When Burden on Defendant. — "In view of the conflict in the authorities, we are compelled to adopt such rule as may seem most consonant with justice. This being so, there certainly is no presumption that the plaintiff was negligent. We therefore hold the rule to be, that if the plaintiff can prove his case without showing contributory negligence, it is a matter of defense to be proved by the defendant." Lincoln *v.* Walker, 18 Neb. 244, 5 Am. & Eng. Corp. Cas. 611.

To the same effect are:

England. — Daniel *v.* Metropolitan R. Co., L. R. 3 C. P. 591, L. R. 5 H. L. 45.

New York. — Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375, and note.

Tennessee. — Stewart *v.* Nashville, 96 Tenn. 50, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 93.

Wisconsin. — Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Hoyt *v.* Hudson, 41 Wis. 105, 22 Am. Rep. 714; Milwaukee, etc., R. Co. *v.* Hunter, 11 Wis. 160, 78 Am. Dec. 699.

"It would seem that a plaintiff would be entitled in every case of this character to recover

5. **Summary — The True Doctrine.** — Perhaps the true doctrine is, that there is no presumption of either negligence or care which is applicable as a general rule in all cases, but that the question of the burden of proof should be determined on the facts of each case according to whether they show a duty of care on the plaintiff or the defendant.[1] On principle, it would seem sufficient to entitle the plaintiff to recover, for him to show a negligent injury by the defendant, with nothing in the circumstances establishing contributory negligence on his part; and this done, it would devolve upon the defendant to show the plaintiff's contributory negligence affirmatively.[2]

upon evidence which clearly makes a *prima facie* case, unless such case be rebutted by testimony offered by himself or by the defendant." Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297. See also:

Missouri. — Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503, note.

Pennsylvania. — Kingston Tp. *v.* Gibbons, (Pa. 1886) 5 Cent. Rep. 222.

1. The True Rule as to the Burden of Proof. — "I am of opinion that it is not a rule of law of universal application, that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts." Denio, J., in Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375. And such seems to be still the rule in New York, although Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649, 23 Am. & Eng. R. Cas. 313, has been cited as establishing the rule that the plaintiff must affirmatively prove due care. Beach, Cont. Neg. 446. The real effect of the decision in the Johnson case is to hold that the plaintiff may recover by showing negligence on the part of the defendant adequate to account for the injury inflicted, when the circumstances establishing so much are also consistent with the exercise of ordinary care on the plaintiff's part. This rests upon the principle that, a sufficient direct cause of an injury appearing, it will be held the sole proximate cause in the absence of evidence of any other cause. Adams *v.* Young, 44 Ohio St. 80, 58 Am. Rep. 789; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469. And that the Tolman case does not depart from the general New York rule may be seen when it is considered that in that case the contributory negligence of the deceased affirmatively appeared, and it was impossible to infer from the facts and circumstances that he was in the exercise of due care. In another case reported in the same volume, it was held that the plaintiff need not negative contributory negligence in his complaint. Lee *v.* Troy Citizens' Gaslight Co., 98 N. Y. 115. And the effect of this decision is, that when the plaintiff has shown the negligence of the defendant as a proximate cause sufficient to account for the injury, without showing fault on his own part, he is entitled to recover. And such is the doctrine in New York, as the learned editor of the American Reports understands it. Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503, note; Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 58 Am. Rep. 230, 28 Am. & Eng. R. Cas. 409. See also Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 93.

Where it is possible to infer due care the question is for the jury.

Massachusetts. — McKimble *v.* Boston, etc., R. Co., 139 Mass. 542, 21 Am. & Eng. R. Cas. 213.

New York. — Byrne *v.* New York Cent., etc., R. Co., 104 N. Y. 362, 58 Am. Rep. 512, 83 N. Y. 620; Greany *v.* Long Island R. Co., 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473.

Pennsylvania. — Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 469; Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407; Cleveland, etc., R. Co. *v.* Rowan, 66 Pa. St. 393.

And see generally, as to the doctrine upon the question of where the burden of proof lies, the following:

Iowa. — Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 28 Am. & Eng. R. Cas. 409, 58 Am. Rep. 227, and note.

Massachusetts. — Mayo *v.* Boston, etc., R. Co., 104 Mass. 137; Smith *v.* Boston Gas Light Co., 129 Mass. 318; Com. *v.* Boston, etc., R. Corp., 126 Mass. 61.

Michigan. — Teipel *v.* Hilsendegen, 44 Mich. 461.

New York. — Hart *v.* Hudson River Bridge Co., 80 N. Y. 622.

Ohio. — Street R. Co. *v.* Nolthenius, 40 Ohio St. 376, 19 Am. & Eng. R. Cas. 191; Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 636, 15 Am. Rep. 633.

2. The Underlying Principle. — Wharton on Neg., §§ 423–426; Stephens Dig. of Ev., art. 96; Patterson's Ry. Acc. L., § 374.

Illinois. — Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

Iowa. — Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 28 Am. & Eng. R. Cas. 409, 58 Am. Rep. 227.

Kentucky. — Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

Maryland. — Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36.

Missouri. — Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503, and note.

Nebraska. — Lincoln *v.* Walker, 18 Neb. 244, 5 Am. & Eng. Corp. Cas. 610.

Pennsylvania. — Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329; Hays *v.* Gallagher, 72 Pa. St. 136; Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407; Schum *v.*

XXIV. QUESTIONS OF LAW AND FACT — 1. When a Question of Fact for Jury. — When the facts are disputed, or more than one inference can be fairly drawn from them as to the care, or want of care, of the plaintiff, the question of contributory negligence is for the jury.[1]

2. When a Question of Law for Court. — But when the facts are undisputed, and but one inference regarding the care of the plaintiff can be drawn from them, the question is one of law for the court.[2]

Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; Kingston Tp. *v.* Gibbons, (Pa. 1886) 5 Cent. Rep. 222.

Rhode Island. — Cassidy *v.* Angell, 12 R. I. 447, 34 Am. Rep. 690.

Texas. — Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 21 Am. & Eng. R. Cas. 160, 48 Am. Rep. 297.

Wisconsin. — Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

"There is no presumption of negligence as against either party, except such as arises from the facts proved. Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail until overcome by proof. In actions for injury from negligence, where there is nothing in plaintiff's evidence tending to show contributory negligence, the presumption will be that there is no contributory negligence, and this presumption remains until the contrary is shown." Pittsburgh, etc., R. Co. *v.* Fleming, 30 Ohio St. 485; Ruffner *v.* Cincinnati, etc., R. Co., 34 Ohio St. 96. But see Hinckley *v.* Cape Cod R. Co., 120 Mass. 257, where it is said that "mere proof that the negligence of the defendant was a cause adequate to have produced the injury will not enable a plaintiff to recover, as it does not necessarily give rise to the inference of due care upon his part, proof of which is essential to his case."

1. Contributory Negligence: When for the Jury — *United States.* — Hathaway *v.* East Tennessee, etc., R. Co., 29 Fed. Rep. 489; Northern Pac. R. Co. *v.* Amato, 144 U. S. 465.

Alabama. — Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34; Elyton Land Co. *v.* Mingea, 89 Ala. 521.

Colorado. — New York, etc., Min. Syndicate *v.* Rogers, 11 Colo. 6, 7 Am. St. Rep. 198.

Georgia. — Central R., etc., Co. *v.* Kent, 87 Ga. 402; Orr *v.* Garabold, 85 Ga. 373.

Illinois. — Ohio, etc., R. Co. *v.* Wangelin, 43 Ill. App. 324.

Indiana. — Cincinnati, etc., R. Co. *v.* St. Claire, 6 Ind. App. 390.

Kansas. — Langan *v.* Atchison, 35 Kan. 318, 57 Am. Rep. 165.

Maine. — Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 6 Am. St. Rep. 151.

Massachusetts. — Cleaves *v.* Pigeon Hill Granite Co., 145 Mass. 541; Coates *v.* Boston, etc., R. Co., 153 Mass. 297; Donahue *v.* Drown, 154 Mass. 21.

Michigan. — Ashton *v.* Detroit City R. Co., 78 Mich. 587; Engel *v.* Smith, 82 Mich. 1, 21 Am. St. Rep. 549; Brezee *v.* Powers, 80 Mich. 172.

Missouri. — Dougherty *v.* Missouri R. Co., 97 Mo. 647.

New York. — Hoag *v.* New York Cent., etc., R. Co., 111 N. Y. 199; Pitcher *v.* Lake Shore, etc., R. Co., (Supreme Ct.) 8 N. Y. Supp. 389; Kane *v.* New York, etc., R. Co., (Supreme Ct.) 9 N. Y. Supp. 879; Kelly *v.* New York Cent., etc., R. Co., (Supreme Ct.) 9 N. Y. Supp. 90; Wallace *v.* Central Vermont R. Co., 138 N. Y. 302.

North Dakota. — Bennett *v.* Northern Pac. R. Co., 3 N. Dak. 91.

Pennsylvania. — North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60, 88 Am. Dec. 482, 1 Thomp. on Neg. 401; Chautauqua Lake Ice Co. *v.* McLuckey, (Pa. 1887) 11 Atl. Rep. 616; Gates *v.* Pennsylvania R. Co., 154 Pa. St. 566, 32 W. N. C. (Pa.) 333.

Texas. — Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157; Missouri Pac. R. Co. *v.* White, 80 Tex. 202.

"When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." Cooley, C. J., in Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 122.

California. — Fernandes *v.* Sacramento City R. Co., 52 Cal. 45.

Michigan. — Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99; Strand *v.* Chicago, etc., R. Co., 64 Mich. 216, 28 Am. & Eng. R. Cas. 213.

Missouri. — Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618.

New York. — Hart *v.* Hudson River Bridge Co., 80 N. Y. 622.

Pennsylvania. — Lehigh Valley R. Co. *v.* Greiner, 113 Pa. St. 600, 28 Am. & Eng. R. Cas. 397.

Rhode Island. — Boss *v.* Providence, etc., R. Co., 15 R. I. 149, 21 Am. & Eng. R. Cas. 364.

Wisconsin. — Jochem *v.* Robinson, 66 Wis. 638, 57 Am. Rep. 298.

2. When for the Court — *United States.* — Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615, 19 Am. & Eng. R. Cas. 353.

Indiana. — Indianapolis *v.* Cook, 99 Ind. 10; Levey *v.* Bigelow, 6 Ind. App. 677.

Maine. — Merrill *v.* North Yarmouth, 78 Me. 200, 57 Am. Rep. 794.

Maryland. — State *v.* Baltimore, etc., R. Co., 69 Md. 339.

Massachusetts. — Todd *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49.

Michigan. — Potter *v.* Moran, 61 Mich. 60.

Minnesota. — Rollseth *v.* Smith, 38 Minn. 14, 8 Am. St. Rep. 637.

New York. — Larmore *v.* Crown Point Iron Co., 101 N. Y. 391, 54 Am. Rep. 718; Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, 23 Am. &

3. Mixed Questions of Law and Fact. — It is often said that negligence and contributory negligence are usually mixed questions of law and fact;[1] and, in a certain sense, this is true when the court does not determine the question as one of law alone; for when the case goes to the jury it is the duty of the court to tell the jury what facts, if proved, will constitute negligence or contributory negligence, and to explain and state the rule of proximate cause.[2] This done, the jury must determine the facts, and apply to the facts proved the law as laid down by the court.[3]

CONTRIVANCE. — A "contrivance" is a thing contrived, invented, or planned.[4]

CONTROL. — "Control" means to check, restrain, govern, dominate, direct, regulate; have under command; to hold in restraint or check, subject to authority.[5]

Eng. R. Cas. 313, 50 Am. Rep. 649; Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327.

Pennsylvania. — Baker *v.* Fehr, 97 Pa. St. 70; Lehigh Valley R. Co. *v.* Greiner, 113 Pa. St. 600, 28 Am. & Eng. R. Cas. 397; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

Vermont. — Pierce *v.* Whitcomb, 48 Vt. 127, 21 Am. Rep. 120.

1. A Mixed Question of Law and Fact. — Beach on Cont. Neg. (2d ed.), § 445; Wharton on Neg., § 420.

California. — Fernandes *v.* Sacramento City R. Co., 52 Cal. 50.

Missouri. — Dunn *v.* Cass Ave., etc., R. Co., 21 Mo. App. 188.

Ohio. — Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 585.

Vermont. — Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191.

And see, on submitting question of proximate cause to the jury, opinion of Thompson, J., in Dunn *v.* Cass Ave., etc., R. Co., 21 Mo. App. 188.

2. What This Means. — Pierce on Railroads, 322; Bigelow's Lead. Cas. on Torts, 580 *et seq.*

England. — Jackson *v.* Metropolitan R. Co., 2 C. P. Div. 125.

United States. — Pleasants *v.* Fant, 22 Wall. (U. S.) 121.

Alabama. — Montgomery *v.* Wright, 72 Ala. 411, 47 Am. Rep. 422.

Illinois. — Pennsylvania Coal Co. *v.* Conlan, 101 Ill. 93, 6 Am. & Eng. R. Cas. 243; Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219.

Indiana. — Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185.

Kansas. — Missouri Pac. R. Co. *v.* Cassity, 44 Kan. 207.

Maryland. — Baltimore, etc., R. Co. *v.* State, 36 Md. 366; Cumberland, etc., R. Co. *v.* State, 37 Md. 157.

Michigan. — Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 118; McKeller *v.* Monitor Tp., 78 Mich. 485.

Mississippi. — Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri. — Brown *v.* Hannibal, etc., R. Co., 31 Mo. App. 661, *affirmed* 99 Mo. 310.

New York. — Kelly *v.* Doody, 116 N. Y. 575.

3. Duty of Jury. — Pierce onRailroads, 311; 2 Thomp. on Neg. 1255, § 10.

4. Gaming. — Webster's Dict., *quoted* in State *v.* Blackstone, 115 Mo. 427. It was further said that the term ***contrivance*** was a synonym of "device." See also DEVICE. And see the title GAMING.

It has been held that "French pool" or "Paris mutual" is a "***contrivance*** used in betting." Com. *v.* Simonds, 3 Ky. L. Rep. 380.

5. Wolffe *v.* Loeb, 98 Ala. 432; Laundry License Case, 22 Fed. Rep. 702; Anderson *v.* Stockdale, 62 Tex. 61.

Management and Control. (See MANAGE.) — In Gray *v.* Parke, 162 Mass. 584, it was held that the terms "management" and ***control*** were synonymous, where the term ***control*** was used in a statute providing for the punishment of a trespasser against the order of one having ***control*** of the premises.

Manage and Control. — In Anderson *v.* Stockdale, 62 Tex. 61, it is said that the usual and ordinary signification of the word ***control*** is the same as the word "manage," which is "to have authority over a particular matter, to check, to restrain, to govern with reference thereto."

Same — Power to Sell. — It has been held that a power to manage and ***control*** does not include the power to sell. Blanton *v.* Mayes, 58 Tex. 422; Anderson *v.* Stockdale, 62 Tex. 61.

Exclusion. — A constitutional provision that certain officers should have ***control*** of the examination of school teachers was held not to exclude legislation on the subject. The court said: "It is not asserted that there is any express prohibition, nor does the use of the word ***control*** necessarily imply that the power of legislation upon the subject in question is prohibited to the legislature. Apparently inconsistent provisions must be harmonized, and each given some effect, if that be possible. To give the word ***control*** the effect given it by the court below, some qualifying word, such as 'exclusive,' 'absolute,' or 'unlimited,' must be implied, since without such implication that word does not necessarily imply that the legislature had no power to declare that holders of the specified diplomas should be entitled to certificates of the grammar grade." Mitchell *v.* Winnek, 117 Cal. 520.

Control and Regulation. — In Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 164, it is said that ***control*** is a necessary incident of regulation, and it was therefore held that a power to

CONTROVERSY. (See also CASE, vol. 5, p. 784; CAUSE, vol. 5, p. 777; SUIT.) — A dispute between two or more persons.[1]

regulate streets conferred exclusive ***control*** of them.

License. (See also the titles OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; LICENSES. And see REGULATE.) — In Laundry License Case, 22 Fed. Rep. 702, Deady, J., says: "The words to ***control*** and 'to regulate,' *ex vi termini*, imply to restrain, to check, to rule and direct. And, in my judgment, the power to do either of these implies the right to license, as a convenient and proper means to that end."

Control by Landlord. — An indictment on the *Massachusetts* Pub. Stat., c. 101, § 9, alleging ***control*** by a landlord over a liquor nuisance, is negatived by proof that the tenant is in possession under a lease. Com. *v.* Wentworth, 146 Mass. 36.

Wills. (See also the title WILLS.) — A testator bequeathed all his property to his wife "to be at her ***control*** during her natural life." It was held that the wife did not take the fee. The court said: "This clause of the will cannot, taken alone, vest a fee simple estate in Mrs. Fulwood, under our statute, because a less estate is mentioned and limited in the bequest or devise. The word ***control*** cannot mean that she shall have an absolute fee simple, the power of sale, so as to pass a fee during her natural life. It cannot be used in a different sense from its usual signification and import. The testator, it is manifest, did not use it in any other sense. He intended that she should have authority over it, the management, superintendence, and use of it, during her natural life." Porter *v.* Thomas, 23 Ga. 471.

When a will provides that the wife of the testator shall be the sole ***controller*** of his estate, the word ***controller*** does not imply the power of absolute disposition, but of the management and authority over it. Wolffe *v.* Loeb, 98 Ala. 426.

Control of a Corporation. — In Pennsylvania R. Co. *v.* Com., (Pa. 1886) 29 Am. & Eng. R. Cas. 145, it was held that the acquisition of a majority of the stock was equivalent to a contract for the ***control*** of the company; and that a claim that it was not so because the ownership of the stock of the corporation does not give ***control*** thereof, was not tenable.

But, in Pullman Palace Car Co. *v.* Missouri Pac. R. Co., 11 Fed. Rep. 634, it was held that an acquisition of more than a majority of the stock was not an acquisition of the ***control*** of a road, within a contract by a railroad concerning all roads which it might ***control***. This case was affirmed by the United States Supreme Court; Waite, C. J., saying: "It has all the advantages of a ***control*** of the road, but that is not in law the ***control*** itself. Practically it may ***control*** the company, but the company alone ***controls*** its road. In a sense the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate ***control*** of its affairs." Pullman's Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587.

Control of Securities. — In an action against the surety upon a promissory note, the defense was that the defendant was discharged by reason of the surrender by the plaintiff to the principal debtor of certain bonds which it held as collateral security: and the court instructed that if the plaintiff ***controlled*** such bonds at the time the note was executed, as security for the debt secured by the note, and afterwards surrendered them without the defendant's consent, then the defendant was discharged. It was held that the word ***controlled***, as used, implied a delivery of the bonds to the plaintiff, and an acceptance of them by it. Monroe Bank *v.* Gifford, 79 Iowa 300.

Joint Control. — Funds for the erection of a bridge were to be expended under the joint ***control*** of the commissioners and two persons to be appointed by the county board. In construing this provision the court said: "But to ***control*** the expenditure is to hinder, restrain, or check it in the exercise of a free will. The legislature provided that the appointees of the county should act jointly with the commissioners, not merely in expending but also in ***controlling*** the expenditure of the fund; and if the power extends at all beyond the mere act of disbursement, we think it must, for the same reason, extend to the free exercise of judgment and choice between all the different specific objects presented as necessary and proper to effectuate the general purpose of the expenditure." Mercer County *v.* New Boston, 13 Ill. App. 279.

Control Distinguished from Undue Influence. (See the title UNDUE INFLUENCE.) — In Noble *v.* Enos, 19 Ind. 79, it is said: "It is manifest that this term will not include the acts complained of. It has been held that there is a manifest distinction between ***control*** and undue influence. '***Control*** is more easily capable of a description approaching to a definition, because it necessarily imports something of the nature of duress or fear.' Stulz *v.* Schaeffle, 18 Eng. L. & Eq. 579."

Control of Tramways. — An English statute provided for the ***control*** of tramways by the local authorities. It has been held that a refusal to approve of a particular paving was an exercise of ***control***. Lindley, L. J., said: "I think that it is impossible to say that the corporation did not exercise ***control*** over the construction of these rails, or over the substances or materials which were to be used in order to keep the rails in place. They had a right to disapprove of any material suggested by the tramway company, except possibly wood. I say, except possibly wood, because I am not quite sure about the construction of the section as to that. If I prohibit a man from doing a thing, I ***control*** him to that extent." The Reg. *v.* Croydon, etc., Tramways Co., 18 Q. B. Div. 42.

Dogs. — It seems that within the English statute for the regulation of dogs, a dog is not under ***control*** unless muzzled or led; but the question is one of fact. *In re* Hay, 3 Times Rep. 24. See generally the title ANIMALS, vol. 2, p. 366.

1. Bouvier's Law Dict., *quoted* in Barber *v.* Kennedy, 18 Minn. 216.

Dispute and Controversy Held Synonymous. — Keith *v.* Levi, 1 McCrary (U. S.) 345.

CONVENIENT. — "Convenient" means fit, or adapted to an end; suitable; becoming; appropriate.[1]

Controversy Distinguished from Case. — In Fisk *v.* Henarie, 32 Fed. Rep. 423, it is said there may be a ***controversy*** in a case which is less than the whole of it.

Controversy or Disagreement.— A statute authorized justices of the Supreme Court to refer ***controversies*** arising between receivers and members of mutual insurance companies. It was held that the words "***controversy*** or disagreement" included actions regularly commenced by summons and complaint, and in which an answer had been put in. The court said: "Surely, where an action has been commenced by the receiver, and an answer has been put in denying the receiver's right to recover, a ***controversy*** has arisen both within the letter and the spirit of the Act." Sands *v.* Harvey, 4 Abb. App. Dec. (N. Y.) 148.

Failure to Make Defense — Appeal. — In Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 299, it is said: "It is claimed that because the defendant failed to plead or deny the plaintiff's cause of action, there was no ***controversy*** in this case; that the word ***controversy*** implies not only a suit, but a suit in which something is affirmed upon the one side and denied upon the other, in which there is a dispute, an issue to be tried. If this be conceded to be the true interpretation of the word ***controversy*** in the constitution, then by applying the same interpretation to the statute, under which the defendant seeks to maintain its appeal in the Circuit Court, the right of appeal does not exist in this case. The statute declares that in all cases an appeal shall lie from the judgment of a justice to the Circuit Court, 'when the amount in ***controversy*** on the trial before the justice exceeds fifteen dollars.' Section 163, c. 50, Amend. Code, p. 416. It therefore inevitably follows that if there was nothing in ***controversy*** on the trial before the justice, the defendant was not entitled to an appeal to the Circuit Court."

Removal of Causes. (See ENCYC. OF PLEADING AND PRACTICE, title REMOVAL OF CAUSES.) — In Craigie *v.* McArthur, 4 Dill. (U. S.) 474, a contest in regard to the distribution of the estate of a deceased person was held a ***controversy***, and as such removable to a federal court. The court said: "All the essential elements of a ***controversy*** exist. There are parties, and a contest in reference to property, and informal pleadings under which the disputed matters are to be settled by a court."

In Gaines *v.* Fuentes, 92 U. S. 20, Mr. Justice Field said a ***controversy*** was involved, in the sense of the statute, whenever any property or claim of the parties capable of pecuniary estimation was the subject of litigation, and was presented by the pleadings for judicial determination. See also Bybee *v.* Hawkett, 5 Fed. Rep. 7; Schunk *v.* Moline, etc., Co., 147 U. S. 500; Hilton *v.* Dickinson, 108 U. S. 165.

In Fisk *v.* Henarie, 32 Fed. Rep. 423, it is said: "It is sufficient if there is a ***controversy*** involved in the suit between two such persons, the one being a citizen of the state in which it is brought, whatever may be the citizenship of the other plaintiffs or defendants. Nor can the right of removal thus given to 'any' defendant having the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include 'all' the defendants, and so be denied to 'any' unless 'all' have such citizenship."

Jurisdiction of United States Courts. — See the titles JURISDICTION; UNITED STATES COURTS.

Witnesses — Action or Suit. — The Code of *West Virginia* provided that a husband or wife might testify for or against each other in an action or suit between husband and wife. It has been held that the terms "action or suit" are to be construed as synonymous with ***controversy***. The court said: "We hold that the words 'action, suit, or other proceeding,' as used in the first clause, and the words 'action or suit' as used in said fifth exception, are to be taken and held as synonymous with ***controversy***, and not merely as designating the particular mode in which the ***controversy*** may be presented to the court by 'action' (at law), 'suit' (in equity), or 'other proceeding;' and that this ***controversy***, in whatever form presented, must be between the husband and wife, before either can be a witness for or against the other; and that they cannot evade the force of this common-law rule of evidence, where the ***controversy*** is between one or both of them and a stranger, by one of them becoming plaintiff and suing the other as a defendant with such stranger. This court will ascertain where the ***controversy*** in fact is, and between whom it arises. If the ***controversy*** arises between a stranger and the husband and wife, or between him and either the husband or wife, then in such a ***controversy*** both husband and wife are incompetent as witnesses for or against each other." Anderson *v.* Snyder, 21 W. Va. 645. See also the title WITNESSES.

Amount in Controversy. — See ENCYC. OF PLEADING AND PRACTICE, vol. 1, p. 702.

1. Grand Island *v.* Oberschulte, 36 Neb. 699. In this case the plaintiff in error objected to an instruction of the trial court that it was the duty of a city to maintain its sidewalks in good repair for the safe and ***convenient*** use of the traveling public. The appellate court held that this was no error. See generally the title STREETS AND SIDEWALKS.

Convenient Use. — ***Convenient*** use means the fit, appropriate, advantageous use. Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 609.

Charter of Railroad. — A railroad was authorized by its charter to cross a river by a bridge or ferry, as might be most ***convenient***. It was held that the company was the judge as to which would be most ***convenient***, and that the ***convenience*** of both the navigation and the railroad interests was to be regarded. Atty.-Gen. *v.* New York, etc., R. Co., 24 N. J. Eq. 49.

Conveniently Found. — A statute provided that a justice might appoint a special constable when no regular constable could be ***conveniently*** found. It was held that the justice might not appoint a special officer of his own motion, nor at the request of a litigant, unless

CONVENTION. — See the title CONSTITUTIONAL LAW, vol. 6, pp. 892, 895, 902.

there existed a legal necessity for the appointment. The court said: "If the phrase may be so applied, the *convenience* must be a legal one. This is manifest from the general policy of the law." Cunningham *v.* Bostwick, 7 Colo. App. 169.

Where the *California* statute of 1862 (p. 398, § 11), relating to streets, required the contractor, in order to preserve his lien for street assessments, "to call upon the persons so assessed, or their agents, if they can be *conveniently* found, and demand payment of the amount assessed to each," it was held that a return by the contractor upon the warrants of the superintendent of streets, "that he could not *conveniently* find" the defendant, without anything to show what steps he had taken to find him, was insufficient; the court, by Rhodes, J., saying: "He must make diligent search and inquiry for the person assessed. The word *conveniently*, in the section requiring the contractor to call on the person assessed, if he can *conveniently* be found, and demand payment, is very unusual in such a connection, though the proper interpretation may not be doubtful. It certainly does not mean that he should call on the owner of the lot if it suits his *convenience*. It may, in one sense, be *inconvenient* for him to leave his residence, or to pass along a single block, or to enter the lot-owner's place of business, to demand payment; but that interpretation would make the requirement a useless and absurd one. Whatever it is the duty of an officer to do while engaged in the performance of services enjoined upon him by law, and may be accomplished by the exercise of reasonable diligence, that, it may be said, can *conveniently* be done by him. The effort must be made to find the person assessed, before going in search of his agent; and the return must show that fact. If he is a nonresident of the city or state, or if he is temporarily absent, or if he has absconded, or if, after an attempt in good faith to find him, he cannot be found, there is no difficulty in stating the fact." Guerin *v.* Reese, 33 Cal. 292.

Reasonable. — Where a father made a promise to A. that if he should marry his daughter, "he [the father] would endeavor to do her equal justice with the rest of his daughters, as fast as it is in his power with *convenience*," and the marriage was afterwards had with his consent, it was held that such a promise was sufficiently certain and obligatory, and that in such a case the father had not his lifetime to perform it in, but in a reasonable time after the marriage (taking into consideration his property and other circumstances) he was bound to make an advancement to A. and to his daughter, A.'s wife, equal to the largest made to his other daughters. Chichester *v.* Vass, 1 Munf. (Va.) 98.

Same — Payment. (See also the title PAYMENT). — So where the maker of a note made a payment thereon before it was legally demandable, in consideration of which the holder agreed to extend the time for payment of the balance of the note, after it should, by its terms, become due, until it was *convenient* for the maker to pay it, it was held that this extended the time of the note for such period as, under all the circumstances of the case, should be reasonable. Newsam *v.* Finch, 25 Barb. (N. Y.) 175.

A promise to settle whenever *convenient* has been held equivalent to a promise to settle within a reasonable time. The court, by Bronson, J., said: "The language is, 'whenever it is *convenient* to make a final settlement.' The legal effect of such a stipulation is, I think, that the act shall be done within a reasonable time. It cannot mean that the thing shall be done on the demand of the party, for then he might demand immediately, and before a proper time had elapsed. *Convenient*, as here used, must mean such a time for doing the act as, under all the circumstances of the case, should be reasonable." Howes *v.* Woodruff, 21 Wend. (N. Y.) 642.

In Crayshay *v.* Hornstedt, 3 Times Rep. 426, it was held that a contract to pay at a person's *convenience* was equivalent to a contract to pay when he was reasonably able, and that the phrase was not equivalent to "at his will or pleasure."

Same — Payable as Convenient. — This expression in a written contract providing for the payment of a certain sum is an extension of credit only; it cannot be construed to mean "not payable at all." Black *v.* Bachelder, 120 Mass. 171.

Same — Pre-emption Right. — Where a state statute required a settler on public lands to return, in case of a temporary nonresidence, as early as *convenient*, it was held that the phrase "as early as *convenient*" meant as early as the settler reasonably could. Jacobs *v.* Figard, 25 Pa. St. 47, 48.

Same — With All Convenient Speed. — When such and kindred expressions are used in wills as to the payment of legacies, it has been held that the court will examine into the principles of *convenience*, and not leave the matter to the discretion of the executors. The legacies will be payable within a reasonable time, which has been generally considered to be one year. Sitwell *v.* Bernard, 6 Ves. Jr. 520; Elwin *v.* Elwin, 8 Ves. Jr. 547; Gillon *v.* Turnbull, 1 McCord Eq. (S. Car.) 148. See the titles EXECUTORS AND ADMINISTRATORS; LEGACIES AND DEVISES.

Thus the expression "as soon as *conveniently* may be," in wills, has been held not to confer a large discretion; and a court of equity will take care that powers confided to trustee shall be honestly exercised for the benefit of the *cestui que trust*. See Walker *v.* Shore, 19 Ves. Jr. 387.

With All Convenient Speed. — The stipulations in a charter-party that the vessel shall sail with all *convenient* speed, are not conditions precedent to the charterer's obligation to load, unless, by the breach of such stipulations, the object of the voyage is wholly frustrated. In this case the court, by Pollock, C. B., said: "An intention to make any particu-

CONVENTIONAL. — The term "conventional" means depending on, or

lar stipulation a condition precedent should be clearly and unambiguously expressed. There can be no doubt about a particular day; but what is a '*convenient* speed,' or a 'reasonable time,' must always be a subject of contention. We may therefore fairly say, that, where a particular day is named, the time is unambiguously expressed; but, where the terms are so lax and ambiguous as to lead to a difference of opinion, then the stipulation is not a condition precedent." Tarrabochia *v.* Hickie, 1 H. & N. 183. See the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTY.

Removal as Convenient. — Where the trustees of an almshouse were empowered by letters-patent of incorporation to appoint and remove twenty-four inmates *toties quoties sibi conveniens fore videbitur*, on motion to expunge the names of the inmates from the registered list of freeholders, it was argued by counsel for the inmates as follows: "The appointment of the * * * inmates of the hospital must be presumed to be an appointment for life, defeasible on certain conditions: they are, therefore, tenants for life. It is true that by the charter of Elizabeth the governors have the power of removing the inmates 'as often as it shall seem to be *convenient* to them;' but the term *convenient* had not the same meaning then as now. It now means commodious. In Ainsworth's Dictionary the word *conveniens* is rendered 'meet, suitable.' The meaning of the charter, therefore is, that the inmates may be discharged only upon suitable or proper occasions, such as their misconduct would give rise to. This consequently is not like an appointment *durante bene placito*." But it was held that the inmates appointed under this charter did not take an estate for life in the property enjoyed by them as such inmates, and were therefore not entitled to be registered as freeholders; the court, by Tindal, C. J., saying: "The patent of incorporation contains a power conferred upon the governors to nominate whom they may think proper as inmates of the hospital, and also a power to remove such inmates, which is given in the most general terms: 'So often as it shall seem to be *convenient* to them or the greater number of them.' I can scarcely conceive words of more general import than these, or conferring a wider exercise of discretion." Davis *v.* Waddington, 7 M. & G. 37, 49 E. C. L. 37.

Nuisance — Convenient Place. (See also the title NUISANCES.) — A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not, within the meaning of the law, a *convenient* place. Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 279, 280; Tipping *v.* St. Helen's Smelting Co., 4 B. & S. 608, 116 E. C. L. 608, 11 H. L. Cas. 642. Lord Cranworth (11 H. L. Cas. 652) said: "In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor. He says: 'It must be plain, that persons using a limekiln, or other works which emit noxious vapors, may not do an actionable injury to another; and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a *convenient* place.'"

Convenient Certainty. (See CERTAINTY, vol. 5, p. 798; and see 6 ENCYC. OF PL. AND PR., p. 248.) — Convenient certainty in pleading is explained to be so much as will describe the thing to a common understanding; not such as would exclude all imaginary intendments. Kendrick *v.* Dallum, Cooke (Tenn.) 224, 1 Overt. (Tenn.) 492; Rex *v.* Horne, 2 Cowp. 682; First Cummings Dig. 57-317. See also Kemble *v.* Herndon, 28 W. Va. 530.

Way — As Is Most Convenient. — Where dower in certain lands was set out, "with privilege to pass and repass," etc., "as is most *convenient*," it was held that that expression meant the *convenience* of the tenant in dower; the court, by Park, J., saying: "The court further instructed the jury that the phrase 'as is most *convenient*' had reference solely to the *convenience* of the plaintiff. We see no error in this instruction. The distribution says that the plaintiff shall have the right to pass and repass to the rooms particularly described 'as is most *convenient*.' *Convenient* to whom? Manifestly to the person to whom the right of passage is given. No other person is mentioned or referred to. The minds of the distributors are occupied in defining her rights. The first part of the clause gives her the right of passage; and the latter part, 'as is most *convenient*,' merely defines the way set out to her." Miles *v.* Douglas, 34 Conn. 393.

Convenient Court. — "Any court *convenient* thereto," in the English County Court Act of 1888, has been held not necessarily to mean one near to the court of the district in which the defendant dwells, but one which is *convenient*, having regard to its facility to the parties. Parsons *v.* Lakenheath School Board, 58 L. J. Q. B. 371, 5 Times Rep. 497.

Convenient Court-house. — The County Board of Supervisors being empowered in Mississippi to erect and keep in repair in each county a "good and *convenient* court-house," it was held that they had the right to make an appropriation for setting shade trees in the grounds connected with the court-house; the court, by Campbell, J., saying: "Shade rees may be necessary to make a court-house 'good and *convenient*.' There is no express grant of power to have fences made around the court-house yard, or to dig wells or cisterns, or to protect the ground against washing; but as the law empowers the boards of supervisors to acquire so much ground as may be necessary and *convenient* for the building and use of the court-house, and requires the erection and keeping in repair in each county of a 'good and *convenient* court-house,' it is incident to this to make *convenient* and protect this property by the means usually employed in such cases." Allgood *v.* Hill, 54 Miss. 666.

Conveniences. — Where a turnpike act authorized any five or more trustees to make turnpikes, with such suitable outbuildings and *conveniences* as they thought necessary, on the intended line of the road, and the owner of the soil next adjoining a tollhouse (erected in pursuance of the act) contracted with one of

arising from, the mutual agreement of parties.[1]

CONVENTIONAL COMMUNITY. — See the title COMMUNITY PROPERTY, vol. 6, p. 296.

CONVENTIONAL SUBROGATION. — See the title SUBROGATION.

CONVERSANT. — Living or residing; having one's abode; residence.[2]

CONVERSE. — "Converse" means to hold intercourse, to talk familiarly.[3]

CONVERSION. — See the title TROVER AND CONVERSION.

the trustees on behalf of the rest to sink a well for the *convenience* of the tollhouse, the expense to be borne by each party equally, on the execution of the work suit was brought on behalf of the trustees to recover a moiety of the cost. It was objected that the sinking of the well in question was not within the scope or authority of the trustees and consequently that the action was not maintainable; but the court sustained the verdict for the trustees, saying: "The trustees are to make so many turnpikes as they shall think necessary on the line of the road, together with such suitable outbuildings and *conveniences* as are necessary for the occupation of the turnpike and the collection of the tolls payable. Can it be doubted that a well is a suitable *convenience* within the scope of the clause empowering the trustees to make turnpikes? Is the tollgate keeper to live in the tollhouse without water?" Newman *v.* Fletcher, 1 D. & R. 202, 16 E. C. L. 33.

Convenient Time — Lease. (See also the titles LANDLORD AND TENANT; LEASE.) — It was stipulated that a lessor was at liberty to view the premises at *convenient* times. In construing this agreement, Denman, C. J., in Doe *v.* Bird, 6 C. & P. 195, 25 E. C. L. 352, said: "I think he ought to give notice that he is coming, and if he does not give notice it is not to be considered a *convenient* time, as it cannot be expected that where any business is carried on, they can allow the landlord to go all over the premises without they have previous notice of his coming."

1. Conventional Estates. — Those freeholds, not of inheritance, or estates for life, which are created by the express acts of the parties, in contradistinction to those which are legal, and arise from the operation and construction of law. 2 Blackstone 120. See generally the title ESTATES.

Conventional Services. — Those reserved by tenures upon grants made out of the crown or knight's service. Hale's Analysis of the Common Law, p. 46. See generally the title REAL PROPERTY.

2. A term of ancient law, as is seen by the following case: Declaration for goods sold and delivered; defendant pleads in abatement, and traverses the "inhabitancy;" plaintiff demurs, that the statute of additions expresses the word *conversant;* that Rastall, and all the old entries, are so; and, indeed, some modern entries are "commorant," but none "inhabitant." This objection was held good; for a man may lodge in one parish and work in another; he is *conversant* where he works. Judgment for plaintiff that defendant answer over. Shields *v.* Cuthbertson, Barnes 162. See INHABITANT; RESIDENCE; and the title DOMICIL.

3. Jury. — An oath administered to an officer, not to allow the jury to *converse*, etc., is substantially the same as not allow them to "communicate." In this case the court, by Deaderick, C. J., said: "The officers were sworn to keep [the jury] together separate and apart from other citizens, and not permit them to *converse* with any person, or to *converse* with them themselves, about the case. It is insisted that the oath should have been that they should not communicate, etc., and that the officers should not *converse* with each other in their presence, etc. The oath as administered is substantially that insisted on. Webster defines *converse* to mean, 'to hold intercourse, to talk familiarly.' If kept separate and apart, and prevented from holding intercourse with others, the jury would certainly be free from the danger of corruption." Scott *v.* State, 7 Lea (Tenn.) 232.

CONVERSION AND RECONVERSION.

By Briscoe B. Clark.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles:* CURTESY; DOWER; ELECTION; EQUITY; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; HUSBAND AND WIFE; INFANTS; INSANITY; LEGACIES AND DEVISES; MARRIAGE SETTLEMENTS; PARTNERSHIP; SUCCESSION; TRUSTS AND TRUSTEES; WILLS.

I. CONVERSION — DEFINITION AND ORIGIN OF DOCTRINE — 1. Definition. — Equitable conversion is a constructive alteration in the nature of property by which, in equity, real estate is regarded as personalty or personal estate as realty.[1]

Double Conversion takes place where land is directed to be sold and the proceeds invested in other lands, or where land is directed to be purchased with personalty, and afterwards resold; it does not differ from single conversion, and the property is treated as if already converted into that species of property into which it is directed to be changed, irrespective of the number of steps necessary for the change.[2]

2. Origin of the Doctrine — *a.* IN GENERAL. — The doctrine of equitable conversion has its origin in the maxim that equity looks upon that as done which ought to have been done,[3] and is one of the familiar and well-settled

1. Definition. — Haward *v.* Peavey, 128 Ill. 430, 15 Am. St. Rep. 120. See also Wheless *v.* Wheless, 92 Tenn. 295, *citing* 6 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 664, 665.

In Fletcher *v.* Ashburner, 1 Bro. C. C. 499, it is said that nothing is "better established than this principle; that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted."

2. Double Conversion. — De Vaughan *v.* McLeroy, 82 Ga. 687; Haggard *v.* Rout, 6 B. Mon. (Ky.) 247; Ford *v.* Ford, 80 Mich. 43; Lorillard *v.* Coster, 5 Paige (N. Y.) 172. See also White *v.* Howard, 46 N. Y. 144; Matter of Pedder's Trusts, 5 De G. M. & G. 890.

3. Origin of Doctrine — *England.* — Guidot *v.* Guidot, 3 Atk. 254; Crabtree *v.* Bramble, 3 Atk. 680; Foone *v.* Blount, 2 Cowp. 464; Fitzgerald *v.* Jervoise, 5 Madd. 26; Lechmere *v.* Carlisle, 3 P. Wms. 211.

United States. — Craig *v.* Leslie, 3 Wheat.

principles of equity jurisprudence.[1]

b. EQUITABLE DOCTRINE ONLY. — The doctrine of equitable or constructive conversion is a doctrine solely of courts of equity, and cannot be given any effect in courts of law.[2]

II. CONVERSION — HOW EFFECTED — 1. By Act of Parties — *a.* BY WILL — (1) *In General.* — The most usual way in which an equitable conversion is effected is by will wherein the testator expressly directs the sale of his land and the application of the proceeds in a certain manner, or where he directs the investment of personal property in land.[3]

(2) *Sufficiency of Direction for Conversion* — **Intention of Testator Controlling.** — The question of conversion is to be determined from the intention of the testator as shown by the provisions of the will; for where it is once ascertained from the will that it was the testator's intention that a conversion should take place, that intention is as binding as though expressed in the form of a positive direction, and is the final and decisive test.[4] Such intention, however, must be made to appear clearly and explicitly,[5] and the conversion must be made obligatory upon the executor or trustee.[6]

(U. S.) 563; Peter *v.* Beverly, 10 Pet. (U. S.) 562; Taylor *v.* Benham, 5 How. (U. S.) 269.

Illinois. — Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205; Haward *v.* Peavey, 128 Ill. 430, 15 Am. St. Rep. 120.

New Jersey. — Fluke *v.* Fluke, 16 N. J. Eq. 478; Roy *v.* Monroe, 47 N. J. Eq. 356.

New York. — Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190; Lorillard *v.* Coster, 5 Paige (N. Y.) 218; Hawley *v.* James, 5 Paige (N. Y.) 444; Moncrief *v.* Ross, 50 N. Y. 431.

North Dakota. — Penfield *v.* Tower, 1 N. Dak. 216.

Virginia. — Com. *v.* Martin, 5 Munf. (Va.) 117; McClanachan *v.* Siter, 2 Gratt. (Va.) 295.

See the title EQUITY.

In Craig *v.* Leslie, 3 Wheat. (U. S.) 578, Washington, J., said: "The principle upon which the whole of this doctrine is founded is that a court of equity, regarding the substance and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule that equity considers that to be done which is agreed to be done will comprehend the cases which come under this head of equity."

In Lorillard *v.* Coster, 5 Paige (N. Y.) 218, Walworth, Ch., said: "The whole doctrine of equitable conversion depends upon the well-established and familiar principle that a court of equity looks upon that as done which the parties to an agreement or marriage settlement have contracted to do, or which the testator by his will has directed to be done, so far as the contract of the parties or the will of the decedent could have been carried into effect without violating any equitable principle or rule of law."

1. Early Recognition of Doctrine. — In Allison *v.* Wilson, 13 S. & R. (Pa.) 332, Gibson, J., said: "In equity no rule is of more frequent occurrence in practice than that by which land directed to be converted into money, or money directed to be converted into land, is to be treated as that species of property into which the one or the other is so directed to be converted."

In Hawley *v.* James, 5 Paige (N. Y.) 444, Walworth, Ch., said: "A court of equity considers money which the testator has directed to be invested in the purchase of land, and land which he has directed to be sold and turned into money, as that species of property into which he has directed it to be converted, for all the valid purposes of the will, * * * so far as the objects for which the conversion was directed by the testator are legal and can be carried into effect."

See also the title EQUITY.

2. Doctrine Recognized in Equity Only. — Keep *v.* Miller, 42 N. J. Eq. 100; Teneick *v.* Flagg, 29 N. J. L. 25; Sulphur Mines Co. *v.* Thompson, 93 Va. 293.

3. Land into Money. — Peter *v.* Beverly, 10 Pet. (U. S.) 562; McCulloh *v.* Dashiell, 1 Har. & G. (Md.) 96; Smithers *v.* Hooper, 23 Md. 273; Thomas *v.* Wood, 1 Md. Ch. 296; Hood *v.* Hood, 85 N. Y. 561; Morrow *v.* Brenizer, 2 Rawle (Pa.) 185; Tazewell *v.* Smith, 1 Rand. (Va.) 313, 10 Am. Dec. 533.

Money into Land. — Sperling *v.* Toll, 1 Ves. 70.

4. Intention of Testator Controlling. — Penfield *v.* Tower, 1 N. Dak. 216; Smith *v.* Gage, 41 Barb. (N. Y.) 60; Gould *v.* Taylor Orphan Asylum, 46 Wis. 106.

5. Intention Must Be Clearly Evidenced. — Wheldale *v.* Partridge, 5 Ves. Jr. 388; Walker *v.* Denne, 2 Ves. Jr. 184; Samuel *v.* Samuel, 4 B. Mon. (Ky.) 255; Clift *v.* Moses, 116 N. Y. 144, *citing* 6 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 665; Becker's Estate, 150 Pa. St. 524; Scholle *v.* Scholle, 113 N. Y. 270; Vaudewalker *v.* Rollins, 63 N. H. 460; King *v.* King, 13 R. I. 501, wherein Durfee, C. J., *quoting* 2 Story Eq. Juris., § 214, said: "Courts of equity do not incline to interfere to change the quality of the property as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite character, either as money or as land." See also Lynn *v.* Gephart, 27 Md. 547.

6. Conversion Must Be Obligatory. — Janes *v.* Throckmorton, 57 Cal. 368; Lee *v.* Tower, 58 Hun (N. Y.) 606, 34 N. Y. St. Rep. 829; Com. *v.* Gordon, (Pa. 1886) 7 Atl. Rep. 229; Becker's Estate, 150 Pa. St. 524.

How Evidenced. — Such intention may be shown by either (1) a positive direction for a conversion; or (2) an absolute necessity to sell in order to carry out the provisions of the will, the conversion arising on the theory that the testator must have intended that everything essential to his scheme should be done;[1] or (3) such a blending of the real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both real and personal estate and to bequeath the fund as money.[2]

1. Intention — How Evidenced — Necessitated by Provisions of Will. — Roy *v.* Monroe, 47 N. J. Eq. 356; Dodge *v.* Pond, 23 N. Y. 69; Power *v.* Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; Lent *v.* Howard, 89 N. Y. 169; Asche *v.* Asche, 113 N. Y. 232; Fraser *v.* United Presb. Church, 124 N. Y. 479; Clarke *v.* Clarke, 46 S. Car. 230; Stallman's Estate, 2 Pa. Dist. Rep. 265; Fahnestock *v.* Fahnestock, 152 Pa. St. 56, 34 Am. St. Rep. 623; Webster *v.* Morris, 66 Wis. 368, 57 Am. Rep. 278.

A conversion will, however, never be presumed unless it is necessary to carry out the valid provisions of the will. Orrick *v.* Boehm, 49 Md. 72; Chamberlain *v.* Taylor, 105 N. Y. 185; Parker *v.* Linden, 113 N. Y. 28.

A Direction for the Sale of Land and the Disposition of the Proceeds works a conversion.

England. — Burrell *v.* Baskerfield, 11 Beav. 525; *In re* Raw, 26 Ch. Div. 601. *Compare* Cornick *v.* Pearse, 7 Hare 477.

United States. — Beadle *v.* Beadle, 2 McCrary (U. S.) 586.

Maryland. — Thomas *v.* Wood, 1 Md. Ch. 296.

Massachusetts. — Perkins *v.* Coughlan, 148 Mass. 30.

New Jersey. — Fluke *v.* Fluke, 16 N. J. Eq. 478; Smith *v.* First Presb. Church, 26 N. J. Eq. 132; Parker *v.* Glover, 42 N. J. Eq. 559; Forsyth *v.* Forsyth, 46 N. J. Eq. 400.

New York. — Cottman *v.* Grace, 112 N. Y. 299; Kane *v.* Gott, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; Parker *v.* Linden, 44 Hun (N. Y.) 518; Matter of Fuller, 86 Hun (N. Y.) 47; Hatch *v.* Bassett, 52 N. Y. 359; Power *v.* Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; Greenland *v.* Waddell, 116 N. Y. 234, 15 Am. St. Rep. 400; McDonald *v.* O'Hara, 144 N. Y. 566; Flanagan *v.* Flanagan, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 413; Matter of Wheeler's Estate, 1 Misc. Rep. (N. Y. Surrogate Ct.) 450; Mutual L. Ins. Co. *v.* Woods, (Supreme Ct.) 4 N. Y. Supp. 133; Bowditch *v.* Ayrault, 138 N. Y. 222.

North Carolina. — *Ex p.* McBee, 63 N. Car. 332.

Ohio. — Collier *v.* Collier, 3 Ohio St. 369.

Pennsylvania. — Parkinson's Appeal, 32 Pa. St. 455; Leiper *v.* Thomson, 60 Pa. St. 177; McClure's Appeal, 72 Pa. St. 414; Laird's Appeal, 85 Pa. St. 339; Sebastian's Estate, 4 Phila. (Pa.) 236; Burr *v.* Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48; Marshall's Estate, 147 Pa. St. 77.

South Carolina. — Dunlap *v.* Garlington, 17 S. Car. 567.

Virginia. — Ropp *v.* Minor, 33 Gratt. (Va.) 97.

Sufficiency of Direction to Sell. — In Clarke *v.* Clarke, 46 S. Car. 230, where the testatrix gave her property to trustees to be divided equally between her husband and her children, with direction to "pay over" the whole sum when the children arrived at a certain age, but without express authority to sell the land, it was held that the land was converted into personalty.

Insufficient Direction to Sell. — In Matter of Bingham, 127 N. Y. 296, however, a residuary gift to the testator's "heirs and next of kin," with power of sale to the executors, and direction for distribution of the estate in "cash," was held not to work a conversion.

In Lindley's Appeal, 102 Pa. St. 235, a will directing the division of the testator's estate among his heirs and next of kin, and empowering the trustees to sell for the purposes of the will, was held not to work a conversion.

And in Miller *v.* Gilbert, 3 N. Y. Misc. Rep. (Brooklyn City Ct.) 43, a direction for the sale of the testator's land and division of proceeds among his children or "heirs" was held not to work a conversion. See also Lahiff's Estate, 86 Cal. 151; Hovey *v.* Dary, 154 Mass. 7.

A Direction to Sell and Loan the Proceeds works a conversion. Davenport *v.* Kirkland, 156 Ill. 169.

A Direction for the Sale of Land Sufficient for the Payment of the Testator's Debts works a conversion to such extent. Perkins *v.* Coughlan, 148 Mass. 30.

Failure to Name a Person by Whom the Sale Is to Be Made will not prevent a conversion.

Alabama. — Winston *v.* Jones, 6 Ala. 550.

Illinois. — Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

Maine. — Putnam Free School *v.* Fisher, 30 Me. 523.

Massachusetts. — Hale *v.* Hale, 137 Mass. 168; Going *v.* Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645.

Michigan. — Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61.

New Jersey. — Lippincott *v.* Lippincott, 19 N. J. Eq. 121; Haggerty *v.* Lanterman, 30 N. J. Eq. 37; Hollman *v.* Tigges, 42 N. J. Eq. 127.

North Carolina. — Smith *v.* McCrary, 3 Ired. Eq. (38 N. Car.) 204.

Pennsylvania. — Gray *v.* Henderson, 71 Pa. St. 368.

A Direction for the Purchase of Land in a Foreign State will not prevent a conversion. Ford *v.* Ford, 80 Mich. 43.

2. By Blending Realty and Personalty. — Fletcher *v.* Ashburner, 1 Bro. C. C. 497; Vanness *v.* Jacobus, 17 N. J. Eq. 153; Askew *v.* Douglass, (N. J. 1886) 2 Cent. Rep. 210; Delafield *v.* Barlow, 107 N. Y. 535; Paist's Appeal, (Pa. 1889) 17 Atl. Rep. 6.

Particular Wills Working Conversion — Direction for Sale Not Mandatory in Terms. — Where the testatrix directed that in case of a sale of certain land, before or after her death, she

(3) *Discretionary Power of Sale.* — Since in order to work a conversion the duty to sell must be obligatory upon the executor or trustee, a mere power of sale, leaving it discretionary with him whether he will sell or not, will not work a conversion.[1]

Actual Sale under Power of Sale. — An actual sale under a discretionary power of sale will, of course, work a conversion.[2]

gave an annuity to her husband and other bequests from the proceeds, with power of sale to her executors, it was held that there was a conversion. Matter of Mitchell, 61 Hun (N. Y.) 372. And see Marshall's Estate, 147 Pa. St. 77; Dodge *v.* Pond, 23 N. Y. 69; Phelps *v.* Phelps, 28 Barb. (N. Y.) 121.

In Wurts *v.* Page, 19 N. J. Eq. 365, it was held that a will authorizing and empowering the executors to sell land, and ordering and directing the investment of the proceeds, worked a conversion.

In Craig *v.* Leslie, 3 Wheat. (U. S.) 563, it was held that a will giving lands in trust that the trustees " will sell " and pay the proceeds to an alien worked a conversion.

In Brothers *v.* Cartwright, 2 Jones Eq. (55 N. Car.) 113, 64 Am. Dec. 563, a will providing that the testator wished the land sold after his death and the proceeds divided among his children was held to work a conversion.

In Ramsey *v.* Hanlon, 33 Fed. Rep. 425, a will providing that "I allow " my estate to be sold, and " it is my will " that the proceeds be divided in a certain way, was held to work a conversion.

Personalty into Realty. — Direction that the residue of the testator's personalty be laid out in lands, or at interest, and the imposition of limitations upon the trust applicable only to real estate, works a conversion. Cowley *v.* Hartstonge, 1 Dow. 361. See also Cookson *v.* Reay, 5 Beav. 22; Hereford *v.* Ravenhill, 5 Beav. 51.

Not to Work Conversion. — A direction that the residue of the testator's estate shall remain in the hands of his executor for investment, to be distributed among his grandchildren, will not work a conversion. Hobson *v.* Hale, 95 N. Y. 588.

A devise of the residuary estate as a " fund " for a charity does not work a conversion. Lawrence *v.* Elliott, 3 Redf. (N. Y.) 235.

1. Mere Power or Authority to Sell — *England.* — Stamper *v.* Millar, 3 Atk. 212; Lucas *v.* Brandreth, 28 Beav. 273; Buchanan *v.* Angus, 4 Macq. H. L. Cas. 374; Atwell *v.* Atwell, L. R. 13 Eq. 23; Glover *v.* Heelis, 32 L. T. N. S. 534; Marshall *v.* Bremner, 2 Sm. & G. 237; Polley *v.* Seymour, 2 Y. & Coll. 708.

California. — James *v.* Throckmorton, 57 Cal. 382.

Kentucky. — Haggard *v.* Rout, 6 B. Mon. (Ky.) 249.

Mississippi. — Montgomery *v.* Milliken, Smed. & M. Ch. (Miss.) 495.

Missouri. — Eneberg *v.* Carter, 98 Mo. 647, 14 Am. St. Rep. 664.

New Jersey. — Cook *v.* Cook, 20 N. J. Eq. 375; Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Kouvalinka *v.* Geibel, 40 N. J. Eq. 443; Parker *v.* Glover, 42 N. J. Eq. 560.

New York. — McCarty *v.* Deming, 4 Lans. (N. Y.) 440; Newell *v.* Nichols, 12 Hun (N. Y.) 604; Mellen *v.* Banning, 72 Hun (N. Y.) 176; Slocum *v.* Slocum, 4 Edw. Ch. (N. Y.) 613; White *v.* Howard, 46 N. Y. 144; Gourley *v.* Campbell, 66 N. Y. 169; Lent *v.* Howard, 89 N. Y. 169; Chamberlain *v.* Taylor, 105 N. Y. 185; Hobson *v.* Hale, 95 N. Y. 605; Scholle *v.* Scholle, 113 N. Y. 261; Harris *v.* Clark, 7 N. Y. 242; Sage *v.* Lockman, 53 How. Pr. (N. Y. Supreme Ct.) 276; Graham *v.* De Witt, 3 Bradf. (N. Y.) 186; Matter of Bolton, 5 Misc. Rep. (N. Y. Surrogate Ct.) 475; Matter of Cobbs, 14 Misc. Rep. (N. Y. Surrogate Ct.) 409; Clift *v.* Moses, 116 N. Y. 144.

North Carolina. — Taylor *v.* Maris, 90 N. Car. 619; Mills *v.* Harris, 104 N. Car. 626.

North Dakota. — Penfield *v.* Tower, 1 N. Dak. 216.

Pennsylvania. — Brown *v.* Dysinger, 1 Rawle (Pa.) 408; Bleight *v.* Manufacturers', etc., Bank, 10 Pa. St. 131; Chew *v.* Nicklin, 45 Pa. St. 84; Edwards's Appeal, 47 Pa. St. 144; Peterson's Appeal, 88 Pa. St. 397; Hunt's Appeals, 105 Pa. St. 128; Darlington *v.* Darlington, 160 Pa. St. 65; Ingersoll's Estate, 167 Pa. St. 536; Sheridan *v.* Sheridan, 136 Pa. St. 14; Taylor *v.* Haskell, 178 Pa. St. 106.

Rhode Island. — King *v.* King, 13 R. I. 501.

Virginia. — Evans *v.* Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

Illustrations. — A will directing that the executors " shall " at their " discretion " sell and invest the proceeds does not work a conversion. Ford *v.* Ford, 70 Wis. 19, 5 Am. St. Rep. 117.

A will, " I authorize my executors to sell " certain land, does not work a conversion. Mills *v.* Harris, 104 N. Car. 626.

A will, " I recommend to my executor that as soon after my decease as he shall think it expedient * * * he sell " my lands, etc., does not work a conversion. Holland *v.* Cruft, 3 Gray (Mass.) 162.

Discretionary power of sale, limited to a sale to the testator's son, will not work a conversion. Haward *v.* Peavey, 128 Ill. 430, 15 Am. St. Rep. 120.

Power to settle up the testator's estate, with authority to sell after a certain time, does not work a conversion. Solliday's Estate, 175 Pa. St. 114.

A will directing that the heirs may sell the land at any time, and that the proceeds shall be divided equally among the heirs, does not work a conversion. Greenough *v.* Small, 137 Pa. St. 128.

Discretionary power of sale will not work a conversion so as to prevent a mechanic's lien from attaching to the land after the death of the testator. Ness *v.* Davidson, 49 Minn. 469.

2. Sale under Power of Sale. — Kouvalinka *v.* Geibel, 40 N. J. Eq. 443; White *v.* Howard, 46 N. Y. 162; Matter of Bolton, 83 Hun (N. Y.) 259; Willing *v.* Peters, 7 Pa. St. 287; Whar-

(4) *Discretion as to Time or Manner of Sale* — (a) **Discretion Given Executor or Trustee.** — Discretion given the trustee or executor as to the time or manner of sale, when the duty to sell is obligatory, will not prevent a conversion.[1]

(b) **Discretion Given Beneficiary.** — Nor will the fact that the beneficiary is given discretion as to the time of sale prevent a conversion.[2]

(5) *Sale at Future Time.* — The fact that the sale is directed to be made at a future date, either after the death of the life tenant or after the expiration of a specified number of years, does not prevent a conversion.[3]

(6) *Sale Dependent upon Request or Consent.* — Where the sale is dependent upon the consent or request of the beneficiaries, there is no conversion until the request is made or the consent is given.[4]

(7) *Option of Purchase by or Conveyance to Beneficiary.* — A direction for a sale may work a conversion though an option is given the beneficiary to take the land at its appraised value,[5] and also though the executor is given dis-

ton *v.* Shaw, 3 W. & S. (Pa.) 124; Ingersoll's Estate, 167 Pa. St. 536; Lackey's Estate, 149 Pa. St. 7.

Where power of sale is given the executor, the taking of the land under power of eminent domain will not work a conversion. Holland *v.* Cruft, 3 Gray (Mass.) 162.

Sale by Executors to Themselves. — A sale by executors to themselves will not work an actual conversion. Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Ingle *v.* Richards, 28 Beav. 361.

Ground Rent — Payment by Ground Tenant — Effect. — And payment of a ground rent to the trustees by the ground tenant, acting under his legal right, will not work a conversion into personalty, though the trustees had discretionary power to sell. Ingersoll's Estate, 167 Pa. St. 536.

Accounting for Proceeds — Jurisdiction of Surrogate Court. — Actual sale under power of sale works a conversion so as to give the Surrogate Court jurisdiction to compel an accounting by the executor. Matter of Blauvelt, 60 Hun (N. Y.) 394.

1. Discretion as to Time or Manner of Sale — *England.* — Doughty *v.* Bull, 2 P. Wms. 320; Flint *v.* Warren, 14 Sim. 554.

New Jersey. — Wurts *v.* Page, 19 N. J. Eq. 365.

New York. — Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190; Graham *v.* Livingston, 7 Hun (N. Y.) 11; Hancox *v.* Wall, 28 Hun (N. Y.) 214; Fisher *v.* Banta, 66 N. Y. 468; Murray *v.* Murray, 2 Chan. Sent. (N. Y.) 23; Martin *v.* Sherman, 2 Sandf. Ch. (N. Y.) 341; Sayles *v.* Best, 66 Hun (N. Y.) 628, 49 N. Y. St. Rep. 460.

Pennsylvania. — Roland *v.* Miller, 100 Pa. St. 47.

South Carolina. — Bell *v.* Bell, 25 S. Car. 149.

Wisconsin. — Chandler's Appeal, 34 Wis. 505.

Illustrations. — Direction to sell as soon as "practicable" and "proper" in the reasonable judgment of the executor, at most within a year, will not prevent a conversion. Ingrem *v.* Mackey, 5 Redf. (N. Y.) 357.

Direction to sell from time to time, "when" and in the best manner the executor can, works a conver ion. Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190.

Direction to sell in such manner as the executor shall deem best works a conversion. Carr *v.* Branch, 85 Va. 597. *Compare*, however, Christler *v.* Meddis, 6 B. Mon. (Ky.) 35, wherein it was held that where discretion is given the trustee as to the time of sale, there is no conversion until actual sale.

2. Crane *v.* Bolles, 49 N. J. Eq. 373.

Permission to the widow to detain the sale until her death will not prevent a conversion. Mellon *v.* Reed, 123 Pa. St. 1.

3. Sale After Death of Life Tenant. — Allen *v.* Watts, 98 Ala. 384; Rumsey *v.* Durham, 5 Ind. 71; Reiff *v.* Strite, 54 Md. 298; Carr *v.* Ireland, 4 Md. Ch. 251; Eisner *v.* Curiel, 2 N. Y. App. Div. 522; McClure's Appeal, 72 Pa. St. 414; Allison *v.* Wilson, 13 S. & R. (Pa.) 330; Thomman's Estate, 161 Pa. St. 444; Ropp *v.* Minor, 33 Gratt. (Va.) 97.

After Specified Period. — Ford *v.* Ford, 70 Wis. 19, 5 Am. St. Rep. 117; Parker *v.* Glover, 42 N. J. Eq. 559; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317; Philadelphia's Appeal, 112 Pa. St. 470; Harcum *v.* Hudnall, 14 Gratt. (Va.) 369.

Peremptory direction to sell after a specified time, with discretionary power of sale before then, works a conversion. Roland *v.* Miller, 100 Pa. St. 47.

Direction for sale after the testator's child reaches a certain age works a conversion. High *v.* Worley, 33 Ala. 196.

4. Sale Dependent on Request or Consent. — De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524; Keller *v.* Harper, 64 Md. 74; Machemer's Estate, 140 Pa. St. 544; Henry *v.* McCloskey, 9 Watts (Pa.) 145; Nagle's Appeal, 13 Pa. St. 260; Stoner *v.* Zimmerman, 21 Pa. St. 394; Pyott's Estate, 160 Pa. St. 441; Ingersoll's Estate, 3 Pa. Dist. Rep. 399; Irwin *v.* Patchen, 164 Pa. St. 51.

In Hereford *v.* Ravenhill, 5 Beav. 51, however, it was held that a will directing the investment of personalty in land, with the consent of the widow, worked a conversion.

Approbation of Court. — Where the direction for a sale was conditioned on the approbation of the Orphans' Court, it was held to work a conversion. Stevenson's Estate, 2 Del. Ch. 197.

Actual Sale. — Where the executor is authorized to sell with the consent of the life tenant, a sale with his consent works a conversion. Lackey's Estate, 149 Pa. St. 7.

5. Option of Purchase by or Conveyance to Beneficiary. — London Imp. Act, 30 Beav. 266; Parish *v.* Parish, 3 L. J. Ch. 21; Hammond *v.* Putnam, 110 Mass. 232; Anewalt's Appeal, 42

cretionary power to convey the land to the legatee of the proceeds, in satisfaction of the legacy.[1]

(8) *Conditional Direction for Sale.* — Where the direction for a sale is conditional, it is insufficient to work a conversion.[2]

(9) *Property Convertible.* — Conversion may be of any estate in land, including an estate in remainder as well as an estate in possession.[3]

(10) *Election to Take Against Will — Effect.* — When a testator directs a conversion, and the widow elects to take against the will, there is no conversion so as to entitle the widow to a share in the realty, as personalty.[4]

(11) *Time of Conversion* — (a) **In General.** — As a general rule, where the will works a conversion but does not specify the time when the conversion shall be effected, the conversion dates from the death of the testator.[5]

Pa. St. 414; Laird's Appeal, 85 Pa. St. 339; Jones *v.* Caldwell, 97 Pa. St. 42; Pyle's Appeal, 102 Pa. St. 317; *In re* Rankin, 13 Pa. Co. Ct. Rep. 617.

In Fahnestock *v.* Fahnestock, 152 Pa. St. 56, 34 Am. St. Rep. 623, it was said that the grant of a privilege to a beneficiary to purchase at an appraised value is even additional evidence that a conversion was intended.

In Wood's Estate, 9 Pa. Co. Ct. Rep. 429, it was held that a will giving the residuary real and personal estate to the testator's children and directing that one of the children might take a certain piece of land at its appraised value, but on his failure to do so that it should then be sold, did not work a conversion.

Option Exercised — Effect. — Direction to the executor to sell land and divide the proceeds between the testator's two children, with the option, however, to one to take the land at half its appraised value, works a conversion, though the option is exercised through the husband of such child. Pratt *v.* Taliaferro, 3 Leigh (Va.) 419.

And when the option is given the life tenant to enjoy the land or receive a certain amount from its proceeds, and he elects to take the money, there is a conversion of his interest into personalty though he died before the sale of the land. Washington *v.* Abraham, 6 Gratt. (Va.) 67.

1. Miller *v.* Com., 111 Pa. St. 321.

A devise, however, of land to be taken by the devisee at its appraised value, as so much of his share of the testator's estate, does not work a conversion. Farmer *v.* Spell, 11 Rich. Eq. (S. Car.) 541.

2. Conditional Direction for Sale. — Boshart *v.* Evans, 5 Whart. (Pa.) 551; Stoner *v.* Zimmerman, 21 Pa. St. 394; Anewalt's Appeal, 42 Pa. St. 414; Wood's Estate, 9 Pa. Co. Ct. Rep. 429; Evans *v.* Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779; White *v.* Howard, 46 N. Y. 144.

In Buchanan *v.* Angus, 4 Macq. H. L. Cas. 374, where the testator directed his executors, to whom he had conveyed his estate in trust, to "pay over" to certain persons the balance of the estate after payment of certain legacies, with power of sale "if necessary," it was held that there was no conversion.

And in Neely *v.* Grantham, 58 Pa. St. 433, it was said that a direction for the sale of the testator's land and division of the proceeds, on failure of the testator's children to agree to a division of the land itself, did not work a conversion. *Per* Thompson, C. J., and Read, J. (Sharswood, J., *dissenting*).

Direction to sell if necessary to pay debts will not work a conversion. Pascalis *v.* Canfield, 1 Edw. Ch. (N. Y.) 201; Sill *v.* Blaney, 159 Pa. St. 264.

Sale Contingent upon Price. — Direction to sell at not less than a certain price will not work a conversion. Ford *v.* Ford, 70 Wis. 19, 5 Am. St. Rep. 117.

In Benbow *v.* Moore, 114 N. Car. 263, however, a direction for the sale of land to a certain person, at a certain price, was held to work a conversion.

And also a direction to sell when the property will bring its value has been held to have a like effect. Churchman *v.* Wright, 3 Penny (Pa.) 149.

3. Property Convertible — Estate in Remainder. — Tazewell *v.* Smith, 1 Rand. (Va.) 313, 10 Am. Dec. 533.

4. Election to Take Against Will. — Barnett *v.* Barnett, 1 Metc. (Ky.) 258; Hoover *v.* Landis, 76 Pa. St. 354; *In re* Barber, 14 Pa. Co. Ct. Rep. 167.

5. Time of Conversion — Death of Testator — *England.* — Robinson *v.* Robinson, 19 Beav. 494; *In re* Raw, 26 Ch. Div. 601; Walker *v.* Shore, 19 Ves. Jr. 387.

Arkansas. — Loftis *v.* Glass, 15 Ark. 680.

Delaware. — Stevenson's Estate, 2 Del. Ch. 197.

Kentucky. — Loughborough *v.* Loughborough, 14 B. Mon. (Ky.) 441; Arnold *v.* Arnold, 11 B. Mon. (Ky.) 88; Gedges *v.* Western Baptist Theological Institute, 13 B. Mon. (Ky.) 537.

Massachusetts. — Perkins *v.* Coughlan, 148 Mass. 30.

New Jersey. — Cook *v.* Cook, 20 N. J. Eq. 377; Dutton *v.* Pugh, 45 N. J. Eq. 426; Crane *v.* Bolles, 49 N. J. Eq. 373; Moore *v.* Robbins, 53 N. J. Eq. 137.

New York. — Johnson *v.* Bennett, 39 Barb. (N. Y.) 237; Gallup *v.* Wright, 61 How. Pr. (N. Y. Supreme Ct.) 286; Stagg *v.* Jackson, 1 N. Y. 206; Savage *v.* Burnham, 17 N. Y. 561; Fisher *v.* Banta, 66 N. Y. 468; Lent *v.* Howard, 89 N. Y. 169; Robert *v.* Corning, 89 N. Y. 239; Cottman *v.* Grace, 112 N. Y. 299; Underwood *v.* Curtis, 127 N. Y. 533; Mutual L. Ins. Co. *v.* Woods, (Supreme Ct.) 4 N. Y. Supp. 133; Murray *v.* Murray, 2 Chan. Sent. (N. Y.) 23; Kearney *v.* Missionary Soc., 10 Abb. N. Cas. (N. Y. Supreme Ct.) 274; Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190; Irish *v.* Huested, 39 Barb. (N. Y.) 411.

But Where the Sale Is Not Obligatory, the executor or trustee being given merely a discretionary power of sale, the conversion only dates from the time of sale.[1]

(b) **Sale at Future Date.** — Where the will provides in terms that the sale shall be made at some specified future date, the decisions as to when the conversion takes place are conflicting, some courts holding that the conversion does not take place until after the expiration of the specified time,[2] whereas other courts hold that the conversion dates from the death of the testator.[3]

(c) **Sale Dependent on Contingency.** — Where the sale is dependent upon a contingency, the conversion does not take effect until the happening of the contingency.[4]

b. By Contract — (1) *Marriage Settlements.* — A conversion of money into land, or land into money, may be effected by marriage settlements, though no actual change is made in the property.[5]

Investment Dependent on Request. — Where the marriage settlement requires a change in the character of the property on the request of the *cestuis que trustent*, thereby giving them the option to take the property unchanged, there is no constructive conversion.[6]

North Carolina. — *Ex p.* McBee, 63 N. Car. 332.

Pennsylvania. — Brolasky *v.* Gally, 51 Pa. St. 509.

Virginia. — Effinger *v.* Hall, 81 Va. 94.

Wisconsin. — Dodge *v.* Williams, 46 Wis. 70.

1. Mills *v.* Harris, 104 N. Car. 626; Compton *v.* McMahan, 19 Mo. App. 494; Haggard *v.* Rout, 6 B. Mon. (Ky.) 247.

2. **Sale at Future Date — Conversion After Expiration of Time Specified.** — Massey *v.* Modawell, 73 Ala. 421; Shumway *v.* Harmon, 6 Thomp. & C. (N. Y.) 626; Gano *v.* McCunn, 56 How. Pr. (N. Y. Supreme Ct.) 337; Trowbridge *v.* Metcalf, 5 N. Y. App. Div. 318; De Wolf *v.* Lawson, 61 Wis. 469, 50 Am. Rep. 148.

Sale After Death of Life Tenant. — Keller *v.* Harper, 64 Md. 74; Moncrief *v.* Ross, 50 N. Y. 431; Savage *v.* Burnham, 17 N. Y. 574; Eisner *v.* Curiel, 2 N. Y. App. Div. 522; Ross *v.* Roberts, 2 Hun (N. Y.) 90; De Peyster *v.* Clendining, 8 Paige (N. Y.) 295.

Discretionary power to sell before death of testator, with mandatory direction to sell within a certain time after his death, works a conversion as of the date of the testator's death. Underwood *v.* Curtis, 127 N. Y. 523.

3. **Conversion from Death of Testator.** — Rinehart *v.* Harrison, 1 Baldw. (U. S.) 177; Reading *v.* Blackwell, 1 Baldw. (U. S.) 166; Cropley *v.* Cooper, 7 D. C. 226, *affirmed* in 19 Wall. (U. S.) 167; Hocker *v.* Gentry, 3 Metc. (Ky.) 473; Rawlings *v.* Landes, 2 Bush (Ky.) 160; Leiper *v.* Thomson, 60 Pa. St. 177; Heberton's Estate, 3 Phila. (Pa.) 436; McWilliams' Appeal, 117 Pa. St. 111.

Sale After Death of Life Tenant. — Reading *v.* Blackwell, 1 Baldw. (U. S.) 166; Ramsey *v.* Hanlon, 33 Fed. Rep. 425; Allen *v.* Watts, 98 Ala. 384, *citing* 6 Am. and Eng. Encyc. of Law (1st ed.), p. 670; Fairly *v.* Kline, 3 N. J. L. 322, 4 Am. Dec. 414; Parkinson's Appeal, 32 Pa. St. 455; Thomman's Estate, 161 Pa. St. 444. *Compare* McClure's Appeal, 72 Pa. St. 414.

In Smith *v.* McCrary, 3 Ired. Eq. (38 N. Car.) 204, it was held, under a will directing the sale of the testator's land after the death of the life tenant and the division of the proceeds among certain beneficiaries, that in case of the death of a beneficiary before the death of the life tenant, his interest would go to his personal representative to be disposed of as personalty. But see Brothers *v.* Cartwright, 2 Jones Eq. (55 N. Car.) 113, 64 Am. Dec. 563.

4. **Sale Dependent on Contingency.** — Massey *v.* Modawell, 73 Ala. 421; Keller *v.* Harper, 64 Md. 74; Brothers *v.* Cartwright, 2 Jones Eq. (55 N. Car.) 113, 64 Am. Dec. 563; Tayloe *v.* Johnson, 63 N. Car. 381; Tickel *v.* Quinn, 1 Dem. (N. Y.) 425; Underwood *v.* Curtis, 127 N. Y. 533.

Removal of Life Tenant from Land. — De Peyster *v.* Clendining, 8 Paige (N. Y.) 295.

Marriage of Life Tenant. — Keller *v.* Harper, 64 Md. 74; Brunce *v.* Vander Grift, 8 Paige (N. Y.) 37.

Dependent on Request. — Kouvalinka *v.* Geibel, 40 N. J. Eq. 443; Ross *v.* Drake, 37 Pa. St. 373. See, however, Thornton *v.* Hawley, 10 Ves. Jr. 129.

Dependent on Land Becoming Unprofitable. — *In re* Ransom, (Surrogate Ct.) 10 N. Y. Supp. 16.

5. **Marriage Settlement.** — *In re* Greaves's Settlement Trusts, 23 Ch. Div. 313; Lingen *v.* Sowray, 1 P. Wms. 172; Lechmere *v.* Carlisle, 3 P. Wms. 211; Symons *v.* Rutter, 2 Vern. 227; Bristow *v.* Warde, 2 Ves. Jr. 336; *In re* Cleveland's Settled Estates, 13 R. Mar. 139, note, (1893) 3 Ch. 244; Collins *v.* Champ, 15 B. Mon. (Ky.) 122, 61 Am. Dec. 179.

Discretionary Power in Trustee. — As in case of a will, a mere discretionary power in the trustee to change the character of the investment will not work a conversion. Stamper *v.* Millar, 3 Atk. 212; Atty.-Gen. *v.* Dodd, 10 Reports 177, (1894) 2 Q. B. 150.

6. **Conversion Dependent on Request.** — Van *v.* Barnett, 19 Ves. Jr. 102; Wheldale *v.* Partridge, 5 Ves. Jr. 388; Davies *v.* Goodhew, 6 Sim. 585; Russell *v.* Smythies, 1 Cox 215; *Re* Taylor's Settlement, 9 Hare 596.

In Thornton *v.* Hawley, 10 Ves. Jr. 129, however, a provision in a marriage settlement for the investment of money in land, with all convenient speed " after request " of the wife, was held insufficient to prevent a conversion, the other provisions of the contract showing an intention to work a conversion. And see

(2) *Contracts of Sale.* — A contract for the sale of land also works a conversion, equity treating the vendor as holding the land in trust for the vendee, and the vendee as a trustee of the purchase price for the vendor.[1]

(3) *Optional Purchases.* — A contract giving an option to purchase land will work a conversion of the land, though not exercised until after the death of the vendor.[2]

Time of Conversion. — And it has been held that when the option is exercised the conversion, as between the heir and representatives of the vendor, relates back to the date of the contract.[3]

(4) *Conveyances to Trustees.* — The doctrine of equitable conversion is also

Atty.-Gen. *v.* Dodd, 10 Reports 177, (1894) 2 Q. B. 150; Wrightson *v.* Macaulay, 4 Hare 487.

1. Contract for Sale of Land — *England.* — Mayer *v.* Gowland, Dick 563; Greenhill *v.* Greenhill, 2 Vern. 679.

Alabama. — Masterson *v.* Pullen, 62 Ala. 146.

Massachusetts. — Loring *v.* Cunningham, 9 Cush. (Mass.) 87.

New Jersey. — Huffman *v.* Hummer, 17 N. J. Eq. 263; King *v.* Ruckman, 21 N. J. Eq. 599; Haughwout *v.* Murphy, 22 N. J. Eq. 531.

New York. — Griffith *v.* Beecher, 10 Barb. (N. Y.) 432; Hawley *v.* James, 5 Paige (N. Y.) 318; Johnson *v.* Corbett, 11 Paige (N. Y.) 265.

Pennsylvania. — *In re* Drenkle, 3 Pa. St. 377; Sutter *v.* Ling, 25 Pa. St. 466; Maffet's Estate, 8 Kulp (Pa.) 184; Rose *v.* Jessup, 19 Pa. St. 280.

Laches of Vendee — Effect. — A conversion by contract of sale will not be defeated on account of the laches of the vendee preventing specific performance of the contract. Curre *v.* Bowyer, 5 Beav. 6.

Laches of Heirs of the Vendor, preventing specific performance from being decreed, will not defeat conversion, and thereby deprive the widow of the vendor of her interest in the purchase price as personalty. Keep *v.* Miller, 42 N. J. Eq. 100.

A Verbal Contract adopted by the heir of the vendor may work a conversion as by the decedent. Frayne *v.* Taylor, 10 Jur. N. S. 119. But not a verbal contract of the decedent, unless so adopted, though accompanied by possession of the land and payment of part of the purchase money. Mills *v.* Harris, 104 N. Car. 626.

Compromise Between Adverse Claimants. — In Hardey *v.* Hawkshaw, 12 Beav. 552, an agreement between persons having conflicting claims to land, for its conveyance to a trustee for sale and division of the proceeds, was held to work a conversion.

The Rescission of the Contract by the Vendor, under a power contained in the contract of sale, will not defeat a conversion of the purchase price so as to prevent the heir at law of the vendee from being entitled thereto. Hudson *v.* Cook, L. R. 13 Eq. 417.

A Provision for Forfeiture of the vendee's right on his failure to comply with the terms of sale will not prevent a conversion, in case of the vendor's death before default by the vendee. Williams *v.* Haddock, 145 N. Y. 144. Nor will the recovery of the land on default of the vendee, after the death of the vendor, defeat the conversion. Maffet's Estate, 8 Kulp (Pa.) 184.

Failure of the Vendor's Title to a material part of the land, thereby preventing the completion of the sale, defeats a conversion. *In re* Thomas, 34 Ch. Div. 166.

Effect on Lien Creditors. — Of course a contract for the sale of land cannot work a conversion as against lien creditors. Leiper *v.* Irvine, 26 Pa. St. 54.

A Residuary Legatee of the vendor is entitled to the purchase price of land as against the devisee of the land. Newport Water-Works *v.* Sisson, 18 R. I. 411.

2. Options. — Lawes *v.* Bennet, 1 Cox 168; Goold *v.* Teague, 5 Jur. N. S. 116; Townley *v.* Bedwell, 14 Ves. Jr. 591; Newport Water-Works *v.* Sisson, 18 R. I. 411.

Lease with Option to Purchase. — Townley *v.* Bedwell, 14 Ves. Jr. 591; *In re* Crofton, 1 Ir. Eq. Rep. 204; Collingwood *v.* Row, 3 Jur. N. S. 785; Buckwalter *v.* Klein, 2 Am. L. Rec. 347; Shepherd's Estate, 8 Pa. Co. Ct. Rep. 520; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526; Hirst's Estate, 147 Pa. St. 319. But see *Re* Graves, 15 Ir. Ch. Rep. 357.

Devise of Land Subject to Option. — A devise by specific description, of land leased with option of purchase, will carry the purchase price in case the option is exercised after the death of the testator. Drant *v.* Vause, 1 Y. & Coll. Ch. 580.

In case, however, of an optional contract of purchase executed after a devise of the land, the price, if the option is exercised after the death of the vendor, is personalty so as to pass to the residuary legatee. Weeding *v.* Weeding, 1 John. & H. 424.

3. Time of Conversion. — Townley *v.* Bedwell, 14 Ves. Jr. 591; *In re* Crofton, 1 Ir. Eq. Rep. 204; Lawes *v.* Bennet, 1 Cox 167; Collingwood *v.* Row, 3 Jur. N. S. 785; Goold *v.* Teague, 5 Jur. N. S. 116; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526; Weeding *v.* Weeding, 1 John. & H. 424; *In re* Isaacs, 8 Reports 660, (1894) 3 Ch. 506.

In Smith *v.* Loewenstein, 50 Ohio St. 346, however, it was held that on exercise of the option after death of the lessor, the conversion did not relate back to the date of the contract so as to entitle the personal representative to the proceeds as against the heir. See also Drant *v.* Vause, 1 Y. & Coll. Ch. 580.

Until the option is exercised the land is realty. London Imp. Act, 30 Beav. 206; White's Estate, 167 Pa. St. 206.

As between vendor and vendee the conversion does not relate back to the date of the contract so as to entitle the vendee to insurance money on a loss incurred prior to the time the option is exercised. Edwards *v.* West, 7 Ch. Div. 858.

applicable to conveyances of land to trustees with directions to sell and hold the proceeds for the benefit of the grantor or third persons.[1]

(5) *Partnership Property* — **United States.** — In the United States land owned by a partnership, whether brought into the partnership by the individuals or purchased with the funds of the partnership, is treated as personalty to the extent necessary for the payment of partnership debts and the settlement of the equities between the parties.[2] The extent of the conversion, however, is only so far as is necessary for the settlement of the partnership affairs, after which the surplus regains its character as realty.[3] Of course, a conversion out

1. Conveyances in Trust. — Biggs *v.* Andrews, 5 Sim. 424; Loughborough *v.* Loughborough, 14 B. Mon. (Ky.) 441; Paisley *v.* Holzshu, 83 Md. 325; Dobson's Estate, 11 Phila. (Pa.) 81; Hunter *v.* Anderson, 152 Pa. St. 386; McClanachan *v.* Siter, 2 Gratt. (Va.) 294; Zane *v.* Sawtell, 11 W. Va. 43.

A conveyance to trustees for sale may work a conversion though the grantor reserves the right to fix the price. Turner *v.* Davis, 41 Ark. 270.

Discretionary Power of sale in trustee, however, will not work a conversion. Bleight *v.* Manufacturers', etc., Bank, 10 Pa. St. 132; Wheless *v.* Wheless, 92 Tenn. 293.

Dependent on Request. — A conveyance to trustees as security, with direction to sell at the request of the creditor, will not work a conversion. Evans *v.* Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

Request of Grantor. — Nor where the sale is dependent on the request of the grantor. Lynn *v.* Gephart, 27 Md. 547.

2. Partnership Land. — Logan *v.* Greenlaw, 25 Fed. Rep. 299; Lenow *v.* Fones, 48 Ark. 557; Paige *v.* Paige, 71 Iowa 318, 60 Am. Rep. 799; Mallory *v.* Russell, 71 Iowa 63, 60 Am. Rep. 776; King *v.* Remington, 36 Minn. 15; Collumb *v.* Read, 24 N. Y. 505; Williamson *v.* Fontain, 7 Baxt. (Tenn.) 212; Gariffey *v.* Northcutt, 5 Heisk. (Tenn.) 746; Davis *v.* Christian, 15 Gratt. (Va.) 11; Martin *v.* Morris, 62 Wis. 419.

A judgment against the executor of a deceased partner and the surviving partner will bind the heir as to the interest of the deceased partner in the partnership land. Logan *v.* Greenlaw, 25 Fed. Rep. 299.

Judgment Liens. — A judgment against a partnership creates a lien on the partnership realty. Lauffer *v.* Cavett, 87 Pa. St. 479; Pitts *v.* Spotts, 86 Va. 71; *In re* Codding, 9 Fed. Rep. 849.

See the title PARTNERSHIP.

3. Extent of Conversion — *United States.* — *In re* Codding, 9 Fed. Rep. 849; Logan *v.* Greenlaw, 25 Fed. Rep. 299; Riddle *v.* Whitehill, 135 U. S. 621.

Alabama. — Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533; Abernathy *v.* Moses, 73 Ala. 381.

Illinois. — Strong *v.* Lord, 107 Ill. 25.

Indiana. — Matlock *v.* Matlock, 5 Ind. 403; Holland *v.* Fuller, 13 Ind. 195.

Kentucky. — Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631; Lowe *v.* Lowe, 13 Bush (Ky.) 688.

Maryland. — Goodburn *v.* Stevens, 5 Gill (Md.) 1.

Massachusetts. — Burnside *v.* Merrick, 4 Met. (Mass.) 537; Dyer *v.* Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Howard *v.* Priest, 5 Met. (Mass.) 582; Peck *v.* Fisher, 7 Cush. (Mass.) 386; Wesson *v.* Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181; Shearer *v.* Shearer, 98 Mass. 107; Harris *v.* Harris, 153 Mass. 439.

Mississippi. — Scruggs *v.* Blair, 44 Miss. 406.

Missouri. — Collins *v.* Warren, 29 Mo. 236.

New York. — Buckley *v.* Buckley, 11 Barb. (N. Y.) 43; Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Coster *v.* Clarke, 3 Edw. Ch. (N. Y.) 428; Fairchild *v.* Fairchild, 64 N. Y. 471; Greenwood *v.* Marvin, 111 N. Y. 423.

North Carolina. — Hanff *v.* Howard, 3 Jones Eq. (56 N. Car.) 440.

Ohio. — Greene *v.* Greene, 1 Ohio 535, 13 Am. Dec. 642; Sumner *v.* Hampson, 8 Ohio 358, 32 Am. Dec. 722.

Pennsylvania. — Lancaster Bank *v.* Myley, 13 Pa. St. 544; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Foster *v.* Barnes, 81 Pa. St. 377; McAvoy's Estate, 12 Phila. (Pa.) 83.

Rhode Island. — Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

Tennessee. — Boyers *v.* Elliott, 7 Humph. (Tenn.) 204.

Vermont. — Rice *v.* Barnard, 20 Vt. 479, 50 Am. Dec. 54.

Virginia. — Jones *v.* Neale, 2 Patt. & H. (Va.) 339.

Wisconsin. — Pierce *v.* Covert, 39 Wis. 252; Martin *v.* Morris, 62 Wis. 418.

Hawaii. — Aldrich *v.* Robinson, 2 Hawaiian 609.

Dower in Partnership Lands. — The widow of a deceased partner is entitled to dower in the surplus of partnership lands, after payment of firm debts and the settlement of the equities between the partners. Coster *v.* Clarke, 3 Edw. Ch. (N. Y.) 428; Smith *v.* Jackson, 2 Edw. Ch. (N. Y.) 28; Brewer *v.* Browne, 68 Ala. 210; Lenow *v.* Fones, 48 Ark. 557; Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631; Goodburn *v.* Stevens, 5 Gill (Md.) 1; Dyer *v.* Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Howard *v.* Priest, 5 Met. (Mass.) 582; Campbell *v.* Campbell, 30 N. J. Eq. 415. *Contra*, Pierce *v.* Trigg, 10 Leigh (Va.) 423. See, however, dicta in Davis *v.* Christian, 15 Gratt. (Va.) 11. The right to dower extends only to such surplus. *In re* Ransom, 17 Fed. Rep. 331; Paige *v.* Paige, 71 Iowa 318, 60 Am. Rep. 799; Duhring *v.* Duhring, 20 Mo. 174; Hamilton *v.* Halpin, 68 Miss. 99; Greene *v.* Greene, 1 Ohio 535, 13 Am. Dec. 642; Martin *v.* Smith, 25 W. Va. 579.

Nor is the widow entitled to dower in improvements placed by the firm, for partnership purposes, on the land of one of the deceased partners. Grissom *v.* Moore, 106 Ind. 296, 55 Am. Rep. 742.

and out of partnership land may be effected by the articles of partnership.[1]

England. — In England, however, the courts extend the conversion beyond the extent necessary for the payment of the partnership debts and the settlement of the equities between the partners, but do not consider it personalty for all purposes, though there are dicta to the contrary.[2] Of course, to work a conversion the land must be the property of the partnership and be held as partnership property, the mere right to the use of the land during the partnership being insufficient for a conversion.[3]

2. By Act of Law — Order of Court — *a.* IN GENERAL. — In case of the sale of land by order of court, whether for the purpose of administration, partition, or payment of debts, the questions arise as to the extent of the conversion and the time when the conversion takes place, and also, in case of the management of estates belonging to persons *non sui juris*, as to whether the property, though actually converted, retains its original character.

b. EXTENT OF CONVERSION. — As a general rule, where land is directed to be sold by an order of court for certain purposes, the surplus of the proceeds not necessary for the purpose of sale retains its original character as realty.[4]

c. TIME OF CONVERSION. — In case of sales by order of court the decisions are conflicting as to the time of the conversion, some courts holding that the conversion dates from the order of sale, though there has in fact been no sale,[5] whereas other courts hold that there is no conversion before actual

See the titles DOWER; PARTNERSHIP.

Inheritance. — Such surplus also descends to the heir at law of the deceased partner, instead of to the next of kin. Logan *v.* Greenlaw, 25 Fed. Rep. 299; Lenow *v.* Fones, 48 Ark. 557; Fairchild *v.* Fairchild, 64 N. Y. 471; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Williamson *v.* Fontain, 7 Baxt. (Tenn.) 212; Griffey *v.* Northcutt, 5 Heisk. (Tenn.) 746; Martin *v.* Morris, 62 Wis. 419.

Taxation. — Land held by a partnership is taxable as real estate. Hubbard *v.* Winsor, 15 Mich. 146.

Time of Reconversion. — The reconversion of partnership land takes place as soon as the partnership is wound up and it is determined that the land is unnecessary for the payment of firm debts, and the settlement of the equities between the partners. Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

1. Where the Articles of Partnership Provide for the purchase by one partner of the share of a deceased partner, there is a conversion for all purposes, so that the interest of a deceased partner passes to his next of kin. Maddock *v.* Astbury, 32 N. J. Eq. 181. And see Leaf's Appeal, 105 Pa. St. 505.

Conversion So as to Deprive the Widow of Dower. — Mallory *v.* Russell, 71 Iowa 63, 60 Am. Rep. 776.

2. Probate Duty. — The share of a deceased partner in the partnership realty is not personalty so as to be subject to the probate duty. Custance *v.* Bradshaw, 9 Jur. 486. See *contra*, Atty.-Gen. *v.* Hubbuck, 13 Q. B. Div. 275.

Mortmain Statute. — The share of a deceased partner in the partnership realty is realty so as to render void a gift thereof to a religious corporation. Ashworth *v.* Munn, 15 Ch. Div. 363.

Inheritance. — The share of a deceased partner in the partnership lands is personalty so as to pass to his next of kin, instead of to the heir at law. Houghton *v.* Houghton, 11 Sim. 491; Holroyd *v.* Holroyd, 28 L. J. Ch. 902; Essex *v.* Essex, 20 Beav. 442; Waterer *v.* Waterer, L. R. 15 Eq. 402; Murtagh *v.* Costello, L. R. 7 Ir. 428; Ripley *v.* Waterworth, 7 Ves. Jr. 425; Darby *v.* Darby, 3 Drew 495; Mackintosh *v.* Devaynes, 3 Bro. C. C. 200, note *a*; Phillips *v.* Phillips, 1 Myl. & K. 649; Broom *v.* Broom, 3 Myl. & K. 443; Selkrig *v.* Davies, 2 Dow. 230. See, *contra*, Thornton *v.* Dixon, 3 Bro. C. C. 199; Bell *v.* Phyn, 7 Ves. Jr. 453; Balmain *v.* Shore, 9 Ves. Jr. 500.

Statute of Frauds. — It seems that a conveyance by one partner of his interest in the partnership land is within the statute of frauds. Gray *v.* Smith, 43 Ch. Div. 208. See the title FRAUDS, STATUTE OF.

3. Cookson *v.* Cookson, 8 Sim. 529; Randall *v.* Randall, 7 Sim. 271; *Ex p.* M'Kenna, 3 De G. F. & J. 629; Berry *v.* Folkes, 60 Miss. 576.

4. Extent of Conversion. — Cooke *v.* Dealey, 22 Beav. 196; Jermy *v.* Preston, 13 Sim. 356; Cook *v.* Cook, 20 N. J. Eq. 375; Jones *v.* Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327. See, however, Flanagan *v.* Flanagan, *cited* in 1 Bro. C. C. 500, wherein the proceeds of land sold by order of court under mistake, for payment of a decedent's debts, were held personalty so as to pass to the personal representative of the devisee of the land. See also Walker *v.* Denne, 2 Ves. Jr. 176.

Land Held in Trust. — Where land held in trust is converted by sale in partition the proceeds remain realty subject to the same trusts. Chapin, Petitioner, 148 Mass. 589.

5. Time of Conversion — From Order of Sale. — Allan *v.* Hoffman, 83 Va. 129.

Sale in Administration. — Wallace *v.* Greenwood, 16 Ch. Div. 362; Hyett *v.* Mekin, 25 Ch. Div. 735.

Conversion of one of the heir's shares in land is complete when recognizance is given by the other heir and the land is adjudged to him. Ebbs *v.* Com., 11 Pa. St. 374; Spangler's

sale and compliance by the purchaser with the terms of sale.[1]

d. Partition of Property of Persons Non Sui Juris. — In case of the sale in partition suits of the interest in land of a person *non sui juris*, the proceeds are generally held to retain the character of realty, as between the heirs and representatives of such persons.[2]

e. Infants', Lunatics', and Trust Estates. — Where, in the management of trust estates or the estates of infants or lunatics, property of one nature is applied for the benefit of property of another nature, equity, as a general rule, will regard the property so applied as continuing its original nature, so as to protect the contingent interest of the heirs and representatives of such persons.[3]

Appeal, 24 Pa. St. 424; State *v.* Hirons, 1 Houst. (Del.) 252.

Sale in Partition Suit. — Arnold *v.* Dixon, L. R. 19 Eq. 113.

The Pendency of a Partition Suit does not work a conversion. Thompson *v.* Owen, 8 Kulp. (Pa.) 36.

1. From Compliance by Purchaser with Terms of Sale. — Betts *v.* Wirt, 3 Md. Ch. 113; Nelson *v.* Hagerstown Bank, 27 Md. 51; Early *v.* Dorsett, 45 Md. 462; Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717; Biggert's Estate, 20 Pa. St. 17.

Partition Suits. — Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717; Dalrymple *v.* Taneyhill, 4 Md. Ch. 171; Manship *v.* Evitts, 2 Md. Ch. 366; Biggert's Estate, 20 Pa. St. 17.

On failure of the purchaser to comply with the terms of sale, and an order for a resale, there is no conversion. Dalrymple *v.* Taneyhill, 4 Md. Ch. 171.

2. Married Women. — Topham *v.* Burgoyne, 49 L. J. Ch. 213; Turner *v.* Dawson, 80 Va. 841; Mildmay *v.* Quicke, 6 Ch. Div. 553. See, however, Wallace *v.* Greenwood, 16 Ch. Div. 362; Jones *v.* Plummer, 20 Md. 416.

In Leadenham *v.* Nicholson, 1 Har. & G. (Md.) 267, the interest of a married woman in the proceeds of land was held to remain realty until distribution.

Infants. — Foster *v.* Foster, 1 Ch. Div. 588; Mordaunt *v.* Benwell, 19 Ch. Div. 302; *In re* Simmons, 55 Ark. 485; Wetherill *v.* Hough, 52 N. J. Eq. 683; Horton *v.* McCoy, 47 N. Y. 21; Findley *v.* Findley, 42 W. Va. 372. See, however, Biggert's Estate, 20 Pa. St. 17; Steed *v.* Preece, L. R. 18 Eq. 192.

And *In re* Simmons, 55 Ark. 485, wherein it was held, under Mansfield Dig., §§ 4802, 4811, providing that a judgment in partition shall be a bar against all parties, and sections 4808, 4812, providing that no guardian shall be interested in the purchase of land of his ward, and that the interest of the infant in the proceeds shall be paid to him, his guardian, or personal representative, that the interest of an infant in the proceeds of land so sold became personalty.

Duration of Conversion. — Though the interest of infants in the proceeds of land sold in partition remains realty for the purpose of succession, it immediately becomes personalty in the hands of the heir of the infant. Mordaunt *v.* Benwell, 19 Ch. Div. 302; Wentz's Appeal, 126 Pa. St. 541. See also Collins *v.* Champ, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179. *Compare In re* Wharton, 18 Jur. 299.

Lunatics. — Payment into court of the portion of a lunatic in the proceeds of land sold in partition is not a payment to a person "absolutely entitled" thereto, so as to render it thereafter personalty. *In re* Barker, 17 Ch. Div. 241.

3. Infants. — Ware *v.* Polhill, 11 Ves. Jr. 278 Ashburton *v.* Ashburton, 6 Ves. Jr. 6; Steed *v.* Preece, L. R. 18 Eq. 192; Sergeson *v.* Sealey, 2 Atk. 413; Fitzpatrick *v.* Fitzpatrick, 6 Ont. Pr. Rep. 134; Foreman *v.* Foreman, 7 Barb. (N. Y.) 215, *affirmed* 11 N. Y. 544; Davison *v.* De Freest, 3 Sandf. Ch. (N. Y.) 456; Pyott's Estate, 160 Pa. St. 441.

In Grider *v.* McClay, 11 S. & R. (Pa.) 224, however, it was held that a sale of land under a decree of court for payment of debts of the decedent works a conversion of the interest of an infant heir of the decedent. See also Withers's Appeal, 14 S. & R. (Pa.) 185, 16 Am. Dec. 488; McCarthy's Estate, 32 Leg. Int. (Pa.) 249.

Lunatics. — Matter of Wharton, 5 De G. M. & G. 33; Awdley *v.* Awdley, 2 Vern. 192; Anandale *v.* Anandale, 2 Ves. 381; *Ex p.* Bright, 10 Ch. Div. 566; Lloyd *v.* Hart, 2 Pa. St. 473, 45 Am. Dec. 612.

Trust Estate — Proceeds of an Insurance Policy for a loss to real estate held in trust are real estate so as to pass to the reversioner on termination of the trust estate. Hawes *v.* Lathrop, 38 Cal. 493.

Timber Cut on Land of Infant. — Where the guardian of an infant cuts timber from the infant's land, the proceeds are to be treated as personalty if the infant does not own the fee simple, and realty if he does. Tullit *v.* Tullit, Ambl. 370.

Timber Cut on Land of Lunatic. — The proceeds of timber cut from a lunatic's land are personalty. Oxenden *v.* Compton, 2 Ves. Jr. 69; *Ex p.* Bromfield, 1 Ves. Jr. 463.

Payment of a land tax on a lunatic's estate from proceeds of timber cut from the land raises no equity in favor of the next of kin. *Ex p.* Phillips, 19 Ves. Jr. 118.

Land Purchased with Personalty of an infant's estate is regarded as personalty. Collins *v.* Champ, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179.

The Sale of Land under Power of Sale given by a testator works a conversion of the interest of an infant devisee. Horton *v.* McCoy, 47 N. Y. 21.

Reasons of Doctrine. — The reason why an infant's personalty turned into realty is treated as personalty is that the ages at which an infant may dispose of real and personal estate differ. Pierson *v.* Shore, 1 Atk. 480.

Other courts state the doctrine as based on

3. By Statutory Authority — Eminent Domain. — Where the land of persons *sui juris* is taken under the power of eminent domain, the proceeds, of course, become personalty.[1] Where, however, the land is held in trust, or is held by an infant or a lunatic, the proceeds will be regarded as continuing their character as realty.[2]

III. Effects of Conversion — 1. In General — Land into Money. — The effect of the conversion is to give to the property the character of that into which it is directed to be converted; and where land is converted into money, the interest of the beneficiary will pass to his personal representatives instead of to his heirs,[3]

the equities of the heirs and next of kin. Ware *v.* Polhill, 11 Ves. Jr. 279.

Benefit of Infant. — A conversion of an infant's land into personalty may be effected by order of court if for the benefit of the infant. *Ex p.* Jordan, 4 Del. Ch. 615; Dorsey *v.* Gilbert, 11 Gill & J. (Md.) 87.

Discretion of Chancery Court — Trust Estates. — The chancery court has discretion to change the character of the trust fund when clearly for the benefit of the trust estate. *Ex p.* Jordan, 4 Del. Ch. 615.

Conversion by Legislative Act. — And land of an infant may be sold by order of the legislature and converted into personalty, as between the heir and the personal representatives. Snowhill *v.* Snowhill, 3 N. J. Eq. 20.

In Campbell *v.* Campbell, 19 Grant's Ch. (U. C.) 254, it was held that an Act of Parliament authorizing the sale of an intestate's land and the investment of the share of a lunatic heir in government securities and mortgages for the benefit of the lunatic and "his representatives" did not convert the interest of the lunatic into personalty, but that it retained the character of realty and was to be divided between his real representatives and not his next of kin.

Reconversion. — Where lands of a minor are sold, a reconversion of the proceeds into personalty takes place immediately on the transmission thereof to a third person, though an infant. Collins *v.* Champ, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179.

And such reconversion also takes place on the infant accepting the proceeds when of age. Forman *v.* Marsh, 11 N. Y. 544.

And in case of the investment of personalty in land, where the infant, after maturity, receives for a year the rents of the land. Inwood *v.* Twyne, Ambl. 417.

In *In re* Wharton, 18 Jur. 299, however, it was held that the proceeds of a lunatic's land continue realty through successive descents, until a person capable of election elects.

1. Conversion under Power of Eminent Domain. — Cadman *v.* Cadman, L. R. 13 Eq. 470; *In re* London Bridge Approaches Act, 13 Sim. 569; *In re* Manchester, etc., R. Co., 19 Beav. 365.

In Richards *v.* Atty.-Gen., 13 Jur. 197, it was said that it was difficult to distinguish between the case of a conversion by a voluntary agreement for sale and a conversion effected by a sale which the legislature has rendered compulsory on the vendor, and which acts as a conveyance of his interest.

Emancipation of Slaves Held as Realty. — Compensation to be paid therefor by the government is personalty. Pleasant's Appeal, 77 Pa. St. 356; Richards *v.* Atty.-Gen., 13 Jur. 197.

Advowsons Abolished. — Compensation provided by the Irish Church Act has been held to pass as personalty. Frewen *v.* Frewen, L. R. 10 Ch. 610.

Tax Sale. — Claim to the surplus on a sale of land under the Direct Tax Act is personalty. Cromwell *v.* U. S., 23 Ct. of Cl. 303; Chaplin *v.* U. S., 19 Ct. of Cl. 424; Chisholm *v.* U. S., 19 Ct. of Cl. 435; Graham *v.* U. S., 21 Ct. of Cl. 47.

Time of Conversion. — Where the price in case of a compulsory sale of land to a railway company is agreed upon, the conversion is complete, though the money is not paid into court until after the death of the owner. *In re* London Bridge Approaches Act, 13 Sim. 569; *In re* Manchester, etc., R. Co., 19 Beav. 365.

In re Walker, 17 Jur. 706, 1 Drew. 508, 22 L. J. Ch. 888, wherein an agreement between a landowner and a company having compulsory powers to take land, giving the company the right to take any amount of the land it desired, at a certain price, was held not to work a conversion as before the landowner's death, in case the land is not taken until after his death.

Notice of an Intention to take the land does not work a conversion. *In re* Battersea Park Acts, 9 Jur. N. S. 883; Haynes *v.* Haynes, 7 Jur. N. S. 595, 30 L. J. Ch. 578; Righton *v.* Righton, 36 L. J. Ch. 61.

Forfeiture. — Nor will a conversion be held to have been effected by payment of the price into court for the purpose of forfeiture to the crown on the owner's being convicted of a felony. Harrop's Estate, 3 Jur. N. S. 380.

2. Trusts. — *In re* Skeggs's Settlement, 2 De G. J. & S. 533; *Re* Bagot, 31 L. J. Ch. 772; Simonds *v.* Simonds, 112 Mass. 157; Gibson *v.* Cooke, 1 Met. (Mass.) 75; Holland *v.* Cruft, 3 Gray (Mass.) 162; Hough's Estate, 3 Pa. Dist. Rep. 187.

Infants. — Kelland *v.* Fulford, 6 Ch. Div. 491; London Imp. Act, 30 Beav. 206; *Re* Robertson, 26 L. J. Ch. 349.

Lunatics. — Dixie *v.* Wright, 32 Beav. 662; Midland Counties R. Co. *v.* Oswin, 1 Colly. 80; *In re* Tugwell, 27 Ch. Div. 309; Matter of Cross's Estate, 1 Sim. N. S. 260.

3. Effect of Conversion on Descent of Property. — Bartholomew *v.* Meredith, 1 Vern. 276; Elliott *v.* Fisher, 12 Sim. 505; Gillies *v.* Longlands, 15 Jur. 570; Gover *v.* Davis, 29 Beav. 222; Craig *v.* Leslie, 3 Wheat. (U. S.) 563; Hammond *v.* Putnam, 110 Mass. 232; Scudder *v.* Vanarsdale, 13 N. J. Eq. 109; Bunce *v.* Vander Grift, 8 Paige (N. Y.) 37; Freeman *v.* Smith, 60 How. Pr. (N. Y. Supreme Ct.) 311; Graham *v.* De Witt, 3 Bradf. (N. Y.) 186; Smith *v.* McCrary, 3 Ired. Eq. (38 N. Car.) 204.

Contract of Sale. — When a contract is entered

or may be disposed of by will as personalty,[1] or by assignment.[2]

Money into Land. — And likewise where personalty is converted into land it will descend as real estate, though no actual conversion has been made,[3] or will pass under a devise of all the beneficiary's lands.[4]

2. Liability to Judgment Lien or Sale on Execution. — Where land has been equitably converted into money, a judgment against the beneficiary does not create any lien upon his interest in the land, nor is his interest subject to sale on execution.[5] But where money is converted into land, it seems that a judgment against the beneficiary will create a lien upon his interest.[6]

3. Dower and Curtesy. — The husband is entitled to curtesy in money directed to be converted into land,[7] but in the early decisions the widow was denied dower therein;[8] the later decisions, however, hold that she is entitled to dower.[9] The question has arisen whether a gift of the proceeds of land is in lieu of dower; and though there are decisions to the contrary,[10] the weight of authority seems to be that it is a gift of an interest in land, so as to put the widow to her election.[11]

4. Validity of the Provisions of the Will. — Where a conversion has been directed by the testator, in determining the validity of the provisions of the will the property is to be considered as having that character into which it has been directed to be converted.[12]

into for the sale of lands the interest of the vendor is personalty so as to pass to his personal representative. Farrar *v.* Winterton, 5 Beav. 1; Garnett *v.* Acton, 28 Beav. 333; Lawes *v.* Bennet, 1 Cox 167; Moore *v.* Burrows, 34 Barb. (N. Y.) 173.

Optional Purchase. — The interest of the vendor in land subject to an option of purchase passes to the residuary legatee, though the option is not exercised until after the death of the vendor. Weeding *v.* Weeding, 1 John. & H. 424.

Extent of Conversion. — The conversion extends, however, only to the extent of accomplishing the purpose of the conversion. Hereford *v.* Ravenhill, 5 Beav. 51; *In re* Vandervoort, 1 Redf. (N. Y.) 270; Parker *v.* Linden, 113 N. Y. 28; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553. See, however, Evans's Appeal, 63 Pa. St. 183, wherein a direction to sell and apply proceeds to a charitable use was held to work a conversion, though the charitable bequest was void.

1. Allen *v.* Watts, 98 Ala. 384; Spencer *v.* Wilson, L. R. 16 Eq. 501; Craig *v.* Leslie, 3 Wheat. (U. S.) 563.

2. Snover *v.* Squire, (N. J. 1892) 24 Atl. Rep. 365.

By Deed. — The interest of the beneficiaries in the land converted may be transferred by deed. Matter of Ledrich, 68 Hun (N. Y.) 396.

Mortgage. — The interest of the legatee in the proceeds of the land directed by the executor to be sold, being a mere chose in action, is not the subject of mortgage. Gray *v.* Smith, 3 Watts (Pa.) 289.

3. Lechmere *v.* Carlisle, 3 P. Wms. 211; Edwards *v.* Warwick, 2 P. Wms. 171; Guidot *v.* Guidot, 3 Atk. 254; Matter of DeLancey, L. R. 4 Exch. 345.

4. Guidot *v.* Guidot, 3 Atk. 254; Greenhill *v.* Greenhill, 2 Vern. 679; Biddulph *v.* Biddulph, 12 Ves. Jr. 161; Green *v.* Stephens, 17 Ves. Jr. 64; Rashley *v.* Masters, 1 Ves. Jr. 201.

An infant cannot by will dispose of money to be laid out in land. Carr *v.* Ellison, 2 Bro. C. C. 56; Earlom *v.* Saunders, Ambl. 241.

5. **Judgment Lien — Land Converted into Personalty.** — Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Sayles *v.* Best, 66 Hun (N. Y.) 628, 49 N. Y. St. Rep. 460; Allison *v.* Wilson, 13 S. & R. (Pa.) 330; Brolasky *v.* Gally, 51 Pa. St. 509; Evans's Appeal, 63 Pa. St. 185; Jones *v.* Caldwell, 97 Pa. St. 43; Roland *v.* Miller, 100 Pa. St. 47; Hunter *v.* Anderson, 152 Pa. St. 386; Stallman's Estate, 2 Pa. Dist. Rep. 265.

Execution. — The interest of a legatee of the proceeds of land is not subject to sale on execution. Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Paisley *v.* Holzshu, 83 Md. 325; Morrow *v.* Brenizer, 2 Rawle (Pa.) 185; Hess *v.* Shorb, 7 Pa. St. 231; Brolasky *v.* Gally, 51 Pa. St. 509; Stuck *v.* Mackey, 4 W. & S. (Pa.) 196.

6. *Re* Lesnion, 1 Hog. 177; Frederick *v.* Aynscombe, 1 Atk. 392.

7. **Curtesy.** — Ramsden *v.* Langley, 2 Vern. 536; Dodson *v.* Hay, 3 Bro. C. C. 404; Otway *v.* Hudson, 2 Vern. 583; Cunningham *v.* Moody, 1 Ves. 174; Sweetapple *v.* Bindon, 2 Vern. 536; Follett *v.* Tyrer, 14 Sim. 125. See also the title CURTESY.

8. **Dower.** — Crabtree *v.* Bramble, 3 Atk. 680; Cunningham *v.* Moody, 1 Ves. 174.

9. Haggard *v.* Rout, 6 B. Mon. (Ky.) 247; Konvalinka *v.* Schlegel, 104 N. Y. 131.

Land Converted into Money. — Of course the widow of the beneficiary is not entitled to dower in land converted into money. Willing *v.* Peters, 7 Pa. St. 287; Hunter *v.* Anderson, 152 Pa. St. 386. See also the title DOWER.

10. Jennings *v.* Smith, 29 Ill. 122, wherein it was held that a gift of the proceeds of land was not a gift of land so as to bar dower.

11. Tobias *v.* Ketchum, 32 N. Y. 319; Asche *v.* Asche, 113 N. Y. 232; Brink *v.* Layton, 2 Redf. (N. Y.) 79.

A gift to the widow of the proceeds of land is a gift of an "interest in land" so as to require her to elect. *In re* Thomas, 34 Ch. Div. 166.

12. **Validity of Provisions of Will.** — Lorillard *v.* Coster, 5 Paige (N. Y.) 172; Bowditch *v.* Ayrault, 138 N. Y. 222.

5. Legacy Tax. — A legacy from the proceeds of land converted into personalty is subject to the legacy tax.[1]

6. Escheat and Forfeiture. — Equity will not enforce a conversion to enable the sovereign to take land by escheat or forfeiture.[2]

7. Suits Affecting the Converted Property — Parties. — Where the will works a conversion, the heir of the decedent is not a necessary party to a bill to foreclose a mortgage on the land converted, nor are the persons entitled to the proceeds of the interest of the decedent in the land necessary parties to a suit for partition of the land.[3]

8. Lien Creditors. — Where land is converted into money by order of court and under sanction of the law, the money becomes the representative of the property, and is held as a fund to respond to all the charges and liens which existed against the property in the order of their priority.[4]

IV. Resulting Trust on Failure of Gift — 1. In General. — As a general rule, where the objects of the conversion fail either wholly or in part, there will be a resulting use or trust in the property or in so much thereof as is not disposed of, in favor of those who would have been entitled to such property if the conversion thereof had not been directed by the will. It is immaterial whether such failure be occasioned by the incapacity of the devisee or legatee to take, or by the illegality of the disposition attempted to be made of the converted property, or by any other cause.[5]

Aliens. — A gift of the proceeds of land to an alien will be upheld as a gift of personalty, though the alien was incapacitated to take the land. Du Hourmelin *v.* Sheldon, 1 Beav. 79, *affirmed* 4 Myl. & C. 525; De Barante *v.* Gott, 6 Barb. (N. Y.) 497; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Craig *v.* Leslie, 3 Wheat. (U. S.) 563; Taylor *v.* Benham, 5 How. (U. S.) 234; Com. *v.* Martin, 5 Munf. (Va.) 117.

However, in Radcliffe *v.* Roper, 10 Mod. 89, it was held that Roman Catholics who were incapacitated to take land could not take a gift of the surplus of the proceeds of land directed to be sold for payment of the testator's debts. And see Fourdrin *v.* Gowdey, 3 Myl. & K. 383.

Religious Societies, though incapacitated to take land, may take a legacy of the proceeds of land. Marsh *v.* Atty.-Gen., 7 Jur. N. S. 184; Lucas *v.* Jones, L. R. 4 Eq. 73; Church Extension *v.* Smith, 56 Md. 362; Hope *v.* Brewer, 136 N. Y. 126; Fraser *v.* United Presb. Church, 124 N. Y. 479; Dodge *v.* Williams, 46 Wis. 70.

Perpetuities. — In determining the validity of a provision in a will disposing of the proceeds of land as affected by the statute against perpetuities, the gift is to be regarded as a gift of personalty. Kane *v.* Gott, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; Wells *v.* Wells, 88 N. Y. 323; Flanagan *v.* Flanagan, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 413; Gott *v.* Cook, 7 Paige (N. Y.) 521; Vail *v.* Vail, 7 Barb. (N. Y.) 226.

Statute of Uses. — Kane *v.* Gott, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46.

Conflict of Laws. — Where land situated in another state is directed to be sold, the conversion does not render the validity of the disposition of the proceeds subject to the *lex domicilii*. Guarantee Trust, etc., Co. *v.* Maxwell, (N. J. 1894) 30 Atl. Rep. 339.

1. Legacy Tax. — In Goods of Gunn, 9 Prob. Div. 242; Atty.-Gen. *v.* Mangles, 5 M & W. 120; Williamson *v.* Advocate-Gen., 10 Cl. & F. 1; Atty.-Gen. *v.* Ailesbury, L. R. 12 App. 672; Atty.-Gen. *v.* Dodd, 10 Reports 177, (1894) 2 Q. B. 150. And this is so though the land is situated in another state. Miller *v.* Com., 111 Pa. St. 321. But see Matter of De Lancey, L. R. 5 Exch. 102. This case, however, was *disapproved and treated as overruled* in Atty.-Gen. *v.* Dodd, 10 Reports 177, (1894) 2 Q. B. 150.

2. Escheat — Forfeiture. — Walker *v.* Denne, 2 Ves. Jr. 170; *In re* Thompson's Trusts, 22 Beav. 506; Harrop's Estate, 3 Jur. N. S. 380; Taylor *v.* Haygarth, 14 Sim. 8.

3. Mortgage Foreclosure. — Mutual L. Ins. Co. *v.* Woods, (Supreme Ct.) 4 N. Y. Supp. 133.

Partition Suit. — Delafield *v.* Barlow, 107 N. Y. 535.

4. Cahn *v.* Person, 56 Miss. 360; McCombs *v.* Howard, 18 Ohio St. 436.

5. Land and Money — Resulting Trust in Favor of Heir — *England.* — Ackroyd *v.* Smithson, 1 Bro. C. C. 503; Hatfield *v.* Pryme, 2 Colly. 204; Tregonwell *v.* Sydenham, 3 Dow. 196; Bective *v.* Hodgson, 10 H. L. Cas. 656; Clarke *v.* Franklin, 4 Kay & J. 257; Spencer *v.* Wilson, L. R. 16 Eq. 501; Jessopp *v.* Watson, 1 Myl. & K. 665; Scudamore *v.* Scudamore, Pre. Ch. 543; Sharpe *v.* Rhoade, 2 Rose 192; Ripley *v.* Waterworth, 7 Ves. Jr. 425; Nash *v.* Smith, 17 Ves. Jr. 29; Chambers *v.* Brailsford, 18 Ves. Jr. 368; Hill *v.* Cock, 1 Ves. & B. 174; Cruse *v.* Barley, 3 P. Wms. 20; Eyre *v.* Marsden, 2 Keen 564.

United States. — Craig *v.* Leslie, 3 Wheat. (U. S.) 563.

New Jersey. — Lerch *v.* Oberly, 18 N. J. Eq. 575; Hand *v.* Marcy, 28 N. J. Eq. 59; Roy *v.* Monroe, 47 N. J. Eq. 356.

New York. — Jackson *v.* Jansen, 6 Johns. (N. Y.) 73; Bogert *v.* Hertell, 4 Hill (N. Y.) 492; McCarty *v.* Terry, 7 Lans. (N. Y.) 236; Hawley *v.* James, 5 Paige (N. Y.) 444; Gott *v.* Cook, 7 Paige (N. Y.) 542; De Peyster *v.* Clendining, 8 Paige (N. Y.) 295; Wood *v.* Keyes, 8 Paige (N. Y.) 365; Giraud *v.* Giraud, 58 How. Pr. (N. Y. Supreme Ct.) 175; Read

2. Instruments Inter Vivos. — The doctrine of resulting trusts is applicable

v. Williams, 125 N. Y. 560, 21 Am. St. Rep. 748.

North Carolina. — Lindsay *v.* Pleasants, 4 Ired. Eq. (39 N. Car.) 320.

Pennsylvania. — Nagle's Appeal, 13 Pa. St. 260.

Personalty into Land — Resulting Trust in Favor of Next of Kin, as Against Heir. — Curteis *v.* Wormald, 10 Ch. Div. 172; Hereford *v.* Ravenhill, 5 Beav. 51; Cogan *v.* Stephens, 5 L. J. N. S. Ch. 17; Bective *v.* Hodgson, 10 H. L. Cas. 656; Eyre *v.* Marsden, 2 Keen 564; Hawley *v.* James, 5 Paige (N. Y.) 318; Gott *v.* Cook, 7 Paige (N. Y.) 542.

The resulting trust in personalty directed to be converted into land arises notwithstanding an actual conversion, and goes to the executor as personalty subject to the payment of testator's debts, and not to the next of kin as land. Head *v.* Godlee, 6 Jur. N. S. 499.

Contrary to Intention of Testator. — A trust may result in favor of the heir though the testator expressly states that no part shall result for the benefit of his heir. Fitch *v.* Weber, 12 Jur. 645.

Application in Particular Cases — Partial Disposition. — There is a resulting trust in favor of the heir in the undisposed portion of the proceeds of land directed to be converted for the purposes of the will.

England. — Sheldon *v.* Barnes, 2 Ves. Jr. 447; Robinson *v.* Taylor, 1 Ves. Jr. 44; Fletcher *v.* Chapman, 1 Bro. P. C. 43; Stanley *v.* Stanley, 16 Ves. Jr. 491; Hill *v.* Cock, 1 Ves. & B. 173; Berry *v.* Usher, 11 Ves. Jr. 87; Culpepper *v.* Aston, 2 Ch. Ca. 115; Starkey *v.* Brooks, 1 P. Wms. 390; Randall *v.* Bookey, 2 Vern. 425; London *v.* Garway, 2 Vern. 571; Wright *v.* Wright, 16 Ves. Jr. 188; Watson *v.* Hayes, 5 Myl. & C. 125; Robinson *v.* Taylor, 2 Bro. C. C. 589; Chitty *v.* Parker, 2 Ves. Jr. 271; Halliday *v.* Hudson, 3 Ves. Jr. 210; Levet *v.* Needham, 2 Vern. 138; Buggins *v.* Yates, 9 Mod. 122; Collins *v.* Wakeman, 2 Ves. Jr. 683; Maugham *v.* Mason, 1 Ves. & B. 410; Jessopp *v.* Watson, 1 Myl. & K. 665; Emblyn *v.* Freeman, Pre. Ch. 541; Fitch *v.* Weber, 12 Jur. 645.

District of Columbia. — Hilton *v.* Hilton, 2 MacArthur (D. C.) 70.

New Jersey. — Moore *v.* Robbins, 53 N. J. Eq. 137.

Pennsylvania. — Wilson *v.* Hamilton, 9 S. & R. (Pa.) 424.

See, however, Collier *v.* Collier, 3 Ohio St. 369.

In Flint *v.* Warren, 16 Sim. 124, where the testator directed a sale of his lands and provided that the proceeds should form part of his "real and personal" estate, and that any surplus should be disposed of as directed by codicil, and no codicil was made, it was held that the surplus resulted in favor of the heir as against the next of kin. See, however, Cunningham *v.* Mellish, 2 Vern. 247.

Charitable Gifts — Failure of Gift for Illegality — Land into Money. — On the failure of a gift of the proceeds of land for a charitable purpose there is a resulting trust in favor of the heir.

England. — Gravenor *v.* Hallum, Ambl. 643; Mogg *v.* Hodges, 2 Ves. 52; Gibbs *v.* Rumsey, 2 Ves. & B. 294; Jones *v.* Mitchell, 1 Sim. & S. 290; Cooke *v.* Stationers' Co., 3 Myl. & K. 262; Williams *v.* Williams, 5 L. J. N. S. Ch. 84; Johnson *v.* Woods, 2 Beav. 409.

New York. — Wright *v.* M. E. Church, Hoffm. Ch. (N. Y.) 202.

Pennsylvania. — Luffberry's Appeal, 125 Pa. St. 513.

Money into Land — Resulting Trust in Favor of Next of Kin. — Mogg *v.* Hodges, 2 Ves. 52; Cogan *v.* Stephens, 5 L. J. N. S. Ch. 17.

In Favor of Residuary Legatees. — Phillips *v.* Ferguson, 85 Va. 509, 17 Am. St. Rep. 78.

Failure of Legacy of Proceeds of Land — Invalid Legacy. — A trust results in favor of the heir.

England. — Hatfield *v.* Pryme, 2 Colly. 204; Jessopp *v.* Watson, 1 Myl. & K. 665; Pickering *v.* Stamford, 2 Ves. Jr. 272; Fairbairn *v.* Rothwell, 9 Jur. 787; Burley *v.* Evelyn, 16 Sim. 290; Jones *v.* Mitchell, 1 Sim. & S. 290.

Maryland. — Orrick *v.* Boehm, 49 Md. 72; Rizer *v.* Perry, 58 Md. 112; Trippe *v.* Frazier, 4 Har. & J. (Md.) 446; Dashiell *v.* Atty.-Gen., 5 Har. & J. (Md.) 392, 9 Am. Dec. 572, 6 Har. & J. (Md.) 1.

New York. — Wood *v.* Cone, 7 Paige (N. Y.) 471; Hawley *v.* James, 5 Paige (N. Y.) 444; Giraud *v.* Giraud, 58 How. Pr. (N. Y. Supreme Ct.) 175.

Lapsed Legacies. — And also in case the legacy lapses.

England. — Ackroyd *v.* Smithson, 1 Bro. C. C. 503; Barker *v.* Gyles, 3 Bro. P. C. 297; Cruse *v.* Barley, 3 P. Wms. 20; Digby *v.* Legard, Dick. 500; Gibbs *v.* Ougier, 12 Ves. Jr. 416; Roberts *v.* Walker, 1 Russ. & M. 752; Williams *v.* Coade, 10 Ves. Jr. 500.

Delaware. — Harker *v.* Reilly, 4 Del. Ch. 92.

Maryland. — Trippe *v.* Frazier, 4 Har. & J. (Md.) 446.

New Jersey. — Hand *v.* Marcy, 28 N. J. Eq. 59.

New York. — *In re* Vandervoort, 1 Redf. (N. Y.) 270; Wood *v.* Keyes, 8 Paige (N. Y.) 365; Wood *v.* Cone, 7 Paige (N. Y.) 471.

Pennsylvania. — Worsley's Estate, 4 Pa. Dist. Rep. 179.

In Amphlett *v.* Parke, 2 Russ. & M. 221, where the testatrix directed the sale of her land and that the proceeds should be taken as part of her personal estate, and after certain legacies bequeathed the residue of her personalty, it was held that as to legacies lapsing during the testatrix's life there was a resulting trust in favor of the heir.

In case of a lapsed legacy, the resulting trust in favor of the heir cannot be affected by an unattested codicil bequeathing the lapsed legacy. Hooper *v.* Goodwin, 18 Ves. Jr. 156.

Incapacity of Legatee. — The trust results irrespective of whether the legacy lapsed on account of the death of the legatee or on account of his incapacity to receive the legacy. Betts *v.* Betts, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317.

Legacy a Charge on Land. — Where, however, such a legacy is merely made a charge on land which is subsequently devised, there is no resulting trust for the heir, but the failure of the legacy inures to the benefit of the devisee. Wright *v.* Row, 1 Bro. C. C. 61; Carter *v.* Haswell, 3 Jur. N. S. 788; Matter of Cooper's Trusts, 4 De G. M. & G. 757.

not only to wills, but also to instruments *inter vivos*, such as marriage settlements, etc.[1]

3. Legacy to Heir — Effect. — A legacy to the heir will not defeat his right to claim a resulting trust in his own favor.[2]

4. Residuary Legacy — Effect. — A trust in the undisposed proceeds of land converted merely for the purpose of the will, or to the extent of a legacy therefrom, which has lapsed, will result in favor of the heir even as against the residuary legatee.[3]

5. Conversion Out and Out — Effect. — Where the will shows that the testator intended that the proceeds of his real estate should be treated as personal estate for all intents and purposes, and not merely for the purposes of the will, there is no resulting trust in favor of the heir.[4]

6. Character of Trust Fund. — Where the purposes of the conversion of land into money wholly fail, the land results to the heir as realty.[5] But where the purposes of the conversion fail only partially, and a conversion is necessary for the purposes of the will, the heir takes the resulting trust as personalty.[6] However, in case of a conversion of personalty into land, it has been held that a resulting trust arising from the partial failure of the purposes of the conversion passes to the next of kin as personalty subject to the payment of the testator's debts, even though an actual conversion has taken place.[7]

See, however, M'Cleland *v.* Shaw, 2 Sch. & Lef. 538, wherein it is said that the rule expressed as to legacies made a charge on land is exploded, and does not prevent a resulting trust in favor of the heir.

1. **Contracts Inter Vivos.** — Hewitt *v.* Wright, 1 Bro. C. C. 86; Anonymous, 1 Comyns' Rep. 345; Knights *v.* Atkyns, 2 Vern. 20.

2. **Legacy to Heir.** — Kellett *v.* Kellett, 1 B. & B. 533.

3. **Residuary Legacy — Undisposed Surplus.** — Berry *v.* Usher, 11 Ves. Jr. 87; Maugham *v.* Mason, 1 Ves. & B. 416; Kellett *v.* Kellett, 1 B. & B. 533; Cooke *v.* Stationers' Co., 3 Myl. & K. 262; Colls *v.* Robins, 1 De G. & Sm. 131.

Lapsed and Invalid Legacies. — Amphlett *v.* Parke, 2 Russ. & M. 221; Collins *v.* Wakeman, 2 Ves. Jr. 683; Hutcheson *v.* Hammond, 3 Bro. C. C. 128; Spencer *v.* Wilson, L. R. 16 Eq. 501; Hamilton *v.* Foot, 6 Ir. R. Eq. 572.

4. **Conversion Out and Out — Wills** — *England.* — Ashby *v.* Palmer, 1 Meriv. 296; Barber *v.* Barber, 3 Myl. & C. 688; Brown *v.* Bigg, 7 Ves. Jr. 279; Court *v.* Buckland, 1 Ch. Div. 605; Durour *v.* Motteux, 1 Ves. 321; Green *v.* Jackson, 2 Russ. & M. 238; Johnson *v.* Woods, 2 Beav. 409; Kennell *v.* Abbott, 4 Ves. Jr. 802; Mallabar *v.* Mallabar, Forrest 78; Singleton *v.* Tomlinson, L. R. 3 App. 404; Wilson *v.* Coles, 6 Jur. N. S. 1003; Simmons *v.* Pitt, 28 L. T. N. S. 327.

United States. — Craig *v.* Leslie, 3 Wheat. (U. S.) 563.

Michigan. — Shaw *v.* Chambers, 48 Mich. 355.

New York. — Kearney *v.* Missionary Soc., 10 Abb. N. Cas. (N. Y. Supreme Ct.) 274.

North Carolina. — Proctor *v.* Ferebee, 1 Ired. Eq. (36 N. Car.) 143, 36 Am. Dec. 34.

Pennsylvania. — Burr *v.* Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48.

A mere direction, however, that the proceeds of the land directed to be sold shall be considered as part of the testator's personalty and be taken to be personalty to all intents and purposes, will not necessarily work an out-and-out conversion. Robinson *v.* London Hospital, 10 Hare 19. See also Bedford *v.* Bedford, 35 Beav. 584; Taylor *v.* Taylor, 3 De G. M. & G. 190; Edwards *v.* Tuck, 23 Beav. 268.

In Proctor *v.* Ferebee, 1 Ired. Eq. (36 N. Car.) 143, 36 Am. Dec. 34, however, a direction for the sale of the testator's land and the division of the residue of the testator's estate after the payment of his debts and certain legacies was held to work an out-and-out conversion.

Creditor's Deeds. — Van *v.* Barnett, 19 Ves. Jr. 102; Biggs *v.* Andrews, 5 Sim. 424; Griffith *v.* Rickets, 7 Hare 299.

5. **Land into Personalty — Total Failure.** — Bagster *v.* Fackerell, 26 Beav. 469; Davenport *v.* Coltman, 6 Jur. 404, 12 Sim. 610; *In re* Richerson, (1892) 1 Ch. 379; Read *v.* Williams, 125 N. Y. 560, 21 Am. St. Rep. 748.

6. **Partial Failure** — *England.* — Bagster *v.* Fackerell, 26 Beav. 469; Burley *v.* Evelyn, 16 Sim. 290, 12 Jur. 712; Hatfield *v.* Pryme, 2 Colly. 204, 9 Jur. 838; Jessopp *v.* Watson, 1 Myl. & K. 665; Levet *v.* Needham, 2 Vern. 138; Smith *v.* Claxton, 4 Madd. 484; Taylor *v.* Taylor, 3 De G. M. & G. 190; Wilson *v.* Coles, 28 Beav. 215; Wright *v.* Wright, 16 Ves. Jr. 188.

Ireland. — Hamilton *v.* Foot, 6 Ir. R. Eq. 572.

New Jersey. — Hand *v.* Marcy, 28 N. J. Eq. 59.

But see Hawley *v.* James, 5 Paige (N. Y.) 444; Wilson *v.* Hamilton, 9 S. & R. (Pa.) 424.

7. **Personalty into Land — Partial Failure.** — Head *v.* Godlee, 6 Jur. N. S. 507. See, however, Curteis *v.* Wormald, 10 Ch. Div. 172.

Total Failure. — In Curteis *v.* Wormald, 10 Ch. Div. 172, it was held that where personal estate is bequeathed in trust for conversion into land and the trusts wholly fail, land purchased before such failure goes to the next of kin as real estate.

Instrument Inter Vivos. — The same rule applies in case of a resulting trust arising out of instruments *inter vivos*. Clarke *v.* Franklin, 4 Kay & J. 257.

7. Reason of Doctrine of Resulting Trust. — The ground upon which the title of the heir rests, through the doctrine of resulting trust, is that whatever is not disposed of remains to the testator or trustor and partakes of the old use, as if it had not been directed to be sold,[1] and therefore a resulting trust can only arise in case of wills when something is left undisposed of, either by some defect in the will or by some subsequent lapse which prevents the disposition intended by the testator from taking effect. And the question can also only arise between the real and personal representatives of the testator, and not between the representatives of a party taking under the will.[2]

V. RECONVERSION — 1. Definition and Reasons of Doctrine. — Reconversion is that imaginary process by which a prior constructive conversion is annulled, and the converted property restored, in contemplation of equity, to its original state.[3] The doctrine of reconversion arises from the principle that equity will not compel the execution of a trust against the wishes of the persons beneficially interested,[4] and from the presumption, in case of a conversion by will, that the direction for the conversion was given for the benefit and convenience of the devisees and legatees, and that unless made imperative in terms, it was not intended to prevent the beneficiaries from taking the bounty of the testator except in the precise form in which the property would exist after the conversion.[5]

Conversion Out and Out — Effect. — It has been held that a conversion out and out deprives the beneficiary of the right to elect.[6]

2. Election — *a.* DEFINITION. — Election is the expression of the intention on the part of the beneficiary to take the constructively converted property in its actual quality.[7]

b. CAPACITY TO ELECT — (1) *In General.* — As a general rule, all persons *sui juris*, or under no disability inhibiting them from contracting in regard to their property, and who have the exclusive beneficial interest in the property constructively converted, may elect to take the property in its actual condition.[8]

(2) *Persons Non Sui Juris* — (a) **Infants.** — Infants themselves cannot elect,[9]

1. Reasons of Doctrine. — Craig *v.* Leslie, 3 Wheat. (U. S.) 563.

2. Ashby *v.* Palmer, 1 Meriv. 296.

3. Definition. — Rapalje & Lawrence Law Dict., title Reconversion; Black's Law Dict., title Reconversion.

Conversion is that "notional or imaginary process by which a prior constructive conversion is annulled and taken away, and the converted property restored, in contemplation of equity, to its original actual quality." Snell's Principles of Equity 160.

"Where the trust is countermanded by the subsequent owners, their act is denominated a reconversion." Adams's Equity (5th Am. ed.), p. 137.

4. Reasons of Doctrine. — Craig *v.* Leslie, 3 Wheat. (U. S.) 563; Fluke *v.* Fluke, 16 N. J. Eq. 478.

5. Mellen *v.* Mellen, 139 N. Y. 210.

6. Conversion Out and Out — Effect. — Trelawney *v.* Booth, 2 Atk. 307; Com. *v.* Martin, 5 Munf. (Va.) 117.

7. Election — Definition. — Shallenberger *v.* Ashworth, 25 Pa. St. 152; Beal *v.* Stehley, 21 Pa. St. 376.

8. Capacity to Elect — Persons Sui Juris — *England.* — Pulteney *v.* Darlington, 7 Bro. P. C. 530; Benson *v.* Benson, 1 P. Wms. 130; Seeley *v.* Jago, 1 P. Wms. 389; Pearson *v.* Lane, 17 Ves. Jr. 104; Walker *v.* Shore, 19 Ves. Jr. 392.

United States. — Craig *v.* Leslie, 3 Wheat. (U. S.) 563; Beadle *v.* Beadle, 3 McCrary (U. S.) 586.

Illinois. — Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600.

New Jersey. — Gest *v.* Flock, 2 N. J. Eq. 115; Scudder *v.* Stout, 10 N. J. Eq. 377; Fluke *v.* Fluke, 16 N. J. Eq. 478.

New York. — Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 21, 7 Am. Dec. 513; Prentice *v.* Janssen, 79 N. Y. 478; Murray *v.* Murray, 2 Chan. Sent. (N. Y.) 23.

Ohio. — Holt *v.* Lamb, 17 Ohio St. 374.

Pennsylvania. — Smith *v.* Starr, 3 Whart. (Pa.) 62.

Virginia. — Effinger *v.* Hall, 81 Va. 94.

Election defeats mandatory power of sale given to executors. McDonald *v.* O'Hara, 13 Misc. Rep. (N. Y. Super. Ct.) 527.

Defeasible Title.—Persons having a defeasible title cannot elect. Sisson *v.* Giles, 3 De G. J. & S. 614.

Ownership Dependent on Contingency. — A person, however, contingently entitled to the proceeds of land may, before the contingency, elect to take the land, so as to give effect to his election on the happening of the contingency. Meek *v.* Devenish, 6 Ch. Div. 566.

9. Infants. — Earlom *v.* Saunders, Ambl. 241; Carr *v.* Ellison, 2 Bro. C. C. 56; Seeley *v.* Jago, 1 P. Wms. 389; Chaplin *v.* Horner, 1 P. Wms. 483; Van *v.* Barnett, 19 Ves. Jr. 102; Hetzel *v.* Barber, 69 N. Y. 1; Carr *v.* Branch, 85 Va. 597.

nor can the trustee or guardian elect for them, without the sanction of the court.[1] The court, however, may elect for the infant if it is for his benefit, such power being similar to the power to direct a conversion if for the benefit of the infant.[2]

(b) **Lunatics.** — Nor have lunatics the power to elect for themselves.[3]

(c) **Married Women.** — In the absence of statutory provisions, a married woman cannot elect to take the money instead of the land into which it is directed to be converted,[4] though living apart from her husband,[5] but may do so with the consent of her husband,[6] or on examination in court.[7] And though the husband may elect for his wife, yet equity will require a settlement for the benefit of the wife.[8]

(3) *Undivided Interests.* — Where the proceeds of the land converted are to be divided among several persons, all interested in the distribution must join in the election.[9] But where the direction is for a conversion of money into land, one only of the beneficiaries may elect to reconvert as to his share.[10]

(4) *Distributee of Beneficiary.* — The distributee of the beneficiary to whom the proceeds of the constructively converted land were to be paid cannot elect without showing that administration on the estate of the beneficiary is unnecessary.[11]

(5) *Remainderman.* — A remainderman may make an election so as to bind his heirs and personal representatives, but of course cannot so elect as to affect the prior estates.[12]

(6) *Tenant in Tail.* — A tenant in tail not having the sole interest in money directed to be laid out in land cannot elect to take the money instead of the

1. Earlom *v.* Saunders, Ambl. 241.

2. **Election by Court for Infant.** — Robinson *v.* Robinson, 19 Beav. 494; Turner *v.* Street, 2 Rand. (Va.) 404, 14 Am. Dec. 792; McDonald *v.* O'Hara, 13 Misc. Rep. (N. Y. Super. Ct.) 527.

3. **Lunatics.** — *In re* Barker, 17 Ch. Div. 241; Ashby *v.* Palmer, 1 Meriv. 296; *In re* Wharton, 18 Jur. 299.

4. **Married Women.** — Oldham *v.* Hughes, 2 Atk. 452; Cunningham *v.* Moody, 1 Ves. 174; Proctor *v.* Ferebee, 1 Ired. Eq. (36 N. Car.) 143, 36 Am. Dec. 34. See, however, Walker *v.* Denne, 2 Ves. Jr. 170. And Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600, wherein the right of the wife to elect to take the land is recognized, provided the election is made under the same formalities required for a conveyance.

Land Converted into Money. — Hobby *v.* Allen, 15 Jur. 835.

5. High *v.* Worley, 33 Ala. 196.

6. Hannah *v.* Swarner, 3 W. & S. (Pa.) 223, 38 Am. Dec. 754.

7. Standering *v.* Hall, 11 Ch. Div. 652; Pratt *v.* Taliaferro, 3 Leigh (Va.) 419; McClanachan *v.* Siter, 2 Gratt. (Va.) 280; Turner *v.* Dawson, 80 Va. 841.

8. Samuel *v.* Samuel, 4 B. Mon. (Ky.) 245.

In Shallenberger *v.* Ashworth, 25 Pa. St. 152, it was held that when the husband elects for his wife to take the land, the wife becomes the owner in fee.

9. **Undivided Interests — Land into Money** — *England.* — Holloway *v.* Radcliffe, 23 Beav. 163; Brown *v.* Brown, 33 Beav. 399; Fletcher *v.* Ashburner, 1 Bro. C. C. 497; Biggs *v.* Peacock, 22 Ch. Div. 284.

United States. — Rinehart *v.* Harrison, 1 Baldw. (U. S.) 177.

Alabama. — High *v.* Worley, 33 Ala. 196.

Georgia. — De Vaughn *v.* McLeroy, 82 Ga. 687.

Illinois. — Heslet *v.* Heslet, 8 Ill. App. 22; Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600.

New Jersey. — Fluke *v.* Fluke, 16 N. J. Eq. 478.

New York. — Emens *v.* St. John, 79 Hun (N. Y.) 99; McDonald *v.* O'Hara, 144 N. Y. 566.

Pennsylvania. — Allison *v.* Wilson, 13 S. & R. (Pa.) 330; Willing *v.* Peters, 7 Pa. St. 287; Beatty *v.* Byers, 18 Pa. St. 105; Shallenberger *v.* Ashworth, 25 Pa. St. 152; Evans's Appeal, 63 Pa. St. 183.

Virginia. — Harcum *v.* Hudnall, 14 Gratt. (Va.) 369; Com. *v.* Martin, 5 Munf. (Va.) 117.

However, in Reed *v.* Underhill, 12 Barb. (N. Y.) 113, it was held that one only of the beneficiaries in the proceeds of the land might elect so as to pass his interest in the land by conveyance.

10. **Personalty into Land.**— Seeley *v.* Jago, 1 P. Wms. 389.

11. **Distributee.**— High *v.* Worley, 33 Ala. 196.

12. **Remaindermen.** — Meredith *v.* Vick, 23 Beav. 559; *In re* Skeggs's Settlement, 2 De G. J. & S. 533; *In re* Stewart, 16 Jur. 1063; Harcourt *v.* Seymour, 15 Jur. 740; Dornford *v.* Dornford, 10 L. J. N. S. Ch. 341; Roberts *v.* Gordon, 37 L. T. N. S. 627; Meek *v.* Devenish, 6 Ch. Div. 566; Short *v.* Wood, 1 P. Wms. 470; De Vaughn *v.* McLeroy, 82 Ga. 687.

Time of Election. — Remaindermen may elect before the termination of the precedent estate. Harper *v.* Chatham Nat. Bank, 17 Misc. Rep. (N. Y. Supreme Ct.) 221.

land;[1] but where he has the sole interest he may elect, as he can bar the entail and reversion.[2]

c. TIME OF ELECTION. — Of course the election must be made before actual conversion.[3] And where the right of the beneficiary to the proceeds of the converted land is dependent on a contingency, the election may be made before the happening of the contingency, so as to take effect when it happens.[4]

d. EFFECT OF ELECTION. — The effect of the election when properly made is to give to the property its actual character, and in case of land will render it subject to judgment liens on judgments recovered against the beneficiary, and to liability to sale on execution,[5] and may also serve to prevent the failure of the bequest of the proceeds, which, regarded as a legacy of personalty, was in violation of the statute against perpetuities.[6]

e. WHAT CONSTITUTES ELECTION — (1) *By Act of Parties.* — Whether or not an election has been made depends upon whether the person entitled to the beneficial interest in the converted property has manifested an intention to give to the property its original character. This intention may be shown by acts or declaration of the parties.[7] It is the expression of this intention, and not the mere right to make it, which changes the equitable character of the estate so as to give it its legal character at the will of the person entitled to the beneficial interest.[8] And though courts have said that such intention must be clearly and unequivocally manifested,[9] yet no distinct or positive act is necessary; a slight expression of intent may be sufficient.[10]

1. **Tenant in Tail.** — Hardcastle *v.* Shafto, 1 Anstr. 67; Anonymous, 2 Anstr. 453; Collet *v.* Collet, 1 Atk. 11; Trafford *v.* Boehm, 3 Atk. 447; Warwick *v.* Edwards, 1 Bro. P. C. 207.

2. Trafford *v.* Boehm, 3 Atk. 447; Dornford *v.* Dornford, 10 L. J. N. S. Ch. 341; Benson *v.* Benson, 1 P. Wms. 130; Short *v.* Wood, 1 P. Wms. 470; Amler *v.* Amler, 3 Ves. Jr. 583. See, however, Eyre's Case, 3 P. Wms. 13.

3. **Time of Election.** — Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Allison *v.* Wilson, 13 S. & R. (Pa.) 330; Reed *v.* Mellor, 122 Pa. St. 635.

4. **Election Before Happening of Contingency.** — Meek *v.* Devenish, 6 Ch. Div. 566.

5. **Effect of Election.** — Stuck *v.* Mackey, 4 W. & S. (Pa.) 196; Brownfield *v.* Mackey, 27 Pa. St. 320.

6. Greenland *v.* Waddell, 116 N. Y. 234, 15 Am. St. Rep. 400.

7. **What Constitutes Election — Intention Controlling.** — Crabtree *v.* Bramble, 3 Atk. 680; Cookson *v.* Reay, 5 Beav. 22; Cookson *v.* Cookson, 12 Cl. & F. 121; Craig *v.* Leslie, 3 Wheat. (U. S.) 563; Cropley *v.* Cooper, 7 D. C. 226.

Parol Declaration Is Sufficient. — Chaloner *v.* Butcher, *cited* in Crabtree *v.* Bramble, 3 Atk. 685; Edwards *v.* Warwick, 2 P. Wms. 171.

In Bradish *v.* Gee, Ambl. 229, however, there are dicta to the contrary.

8. Craig *v.* Leslie, 3 Wheat. (U. S.) 563; Yonkers Sav. Bank *v.* Kinsley, 78 Hun (N. Y.) 186.

9. **How Evidenced.** — Beatty *v.* Byers, 18 Pa. St. 105; Evans's Appeal, 63 Pa. St. 183; Harcum *v.* Hudnall, 14 Gratt. (Va.) 369.

10. **Slight Expression of Intention Sufficient.** — Bradish *v.* Gee, Ambl. 229; Prentice *v.* Janssen, 79 N. Y. 478.

Having money directed to be laid out in land paid to the beneficiary shows an election. Chandler *v.* Pocock, 16 Ch. Div. 648.

Preservation by the beneficiary of the property in its actual state shows an election. Dixon *v.* Gayfere, 17 Beav. 433.

Laying out only a portion of the fund to be laid out in land and the retention of the balance sufficiently show an election. Pulteney *v.* Darlington, 1 Bro. C. C. 223.

Bill to Enjoin Sale of Land. — However, filing a bill by beneficiary to enjoin the sale of the land does not necessarily show an election. Carr *v.* Branch, 85 Va. 597.

Action to Recover Land. — An action, however, by the beneficiary to recover possession of the land shows an election, so as to render the subject-matter of the action realty. De Vaughn *v.* McLeroy, 82 Ga. 687.

Ignorance as to the Effect of a Failure to Elect will not prevent an election where it clearly appears that it was the intention of the beneficiary to treat the property as having its legal character. Harcourt *v.* Seymour, 15 Jur. 740.

Retention for a Short Time of the Possession of the Land directed to be converted is insufficient to show an election. Harcum *v.* Hudnall, 14 Gratt. (Va.) 369; Kirkman *v.* Miles, 13 Ves. Jr. 338. But see Davies *v.* Ashford, 15 Sim. 42, where it was held that where the surviving husband, who was entitled to the exclusive beneficial interest in land articled to be sold, secured possession of the title deeds and of the land until his death, there was an election. And Griesbach *v.* Fremantle, 17 Beav. 314, wherein it was held that retention of the land for sixteen years showed an election.

Possession by one only of the persons beneficially interested does not show an election. Beatty *v.* Byers, 18 Pa. St. 105.

Leasing Land is sufficient to show an election to take it as land. Crabtree *v.* Bramble, 3 Atk. 680; Mutlow *v.* Bigg, 1 Ch. Div. 385; *In re* Gordon, 6 Ch. Div. 531; *In re* Davidson, 11 Ch. Div. 341. See, however, Harcum *v.* Hudnall, 14 Gratt. (Va.) 369.

Conveyance of the Land is an election. Ridge-

(2) *By Act of Law* — **Property "At Home."** — As a general rule, where the possession of the equitably converted property and the right to it meet in the same person — that is, where there is no other person than the one who has the actual possession who has any interest in retaining the fictitious character of the estate — the property is reconverted to its legal character.[1]

(3) *Burden of Proof.* — The burden of showing an election is on the party alleging it.[2]

CONVERT. — To "convert" means to change to something else.[3]

way *v.* Underwood, 67 Ill. 419; Swan *v.* Goodwin, 2 Duv. (Ky.) 299; Reed *v.* Underhill, 12 Barb. (N. Y.) 113. And also a conveyance between the beneficiaries. Beal *v.* Stehley, 21 Pa. St. 376; Twaddell's Estate, 9 Phila. (Pa.) 316.

Mortgage. — Giving a mortgage on the land is an election. Gest *v.* Flock, 2 N. J. Eq. 108.

Devise. — And also a devise by the legatee. Burr *v.* Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48.

Rescission of a Contract of Sale after the death of the vendor is a reconversion. Leiper *v.* Irvine, 26 Pa. St. 54.

Changing Investment of money directed to be laid out in land is an election. Bradish *v.* Gee, Ambl. 229; Harcourt *v.* Seymour, 15 Jur. 740; Lingen *v.* Sowray, 1 P. Wms. 172. See, however, *In re* Stewart, 16 Jur. 1063; Matter of Pedder's Trusts, 5 De G. M. & G. 890.

1. Property "At Home." — Trafford *v.* Boehm, 3 Atk. 440; Pulteney *v.* Darlington, 7 Bro. P. C. 530, *affirming* 1 Bro. C. C. 223; Wheldale *v.* Partridge, 8 Ves. Jr. 235; Oliver *v.* Brown, 80 Me. 542; Forman *v.* Marsh, 11 N. Y. 544.

In Foreman *v.* Foreman, 7 Barb. (N. Y.) 215, Mason, J., said: "When the law has impressed real properties and uses upon moneys, it is necessary, in order to put an end to that impression, that it be shown either that the party entitled to the property and having a right to elect in what shape he will take it has declared that election, or done some act denoting his intention in relation thereto, or the property must, according to the expression used in some of the cases, *be at home;* that is, the person being the absolute owner must have in himself the entire qualification of heir and executor. He must not only have the *jus in re*, but no other person must have an outstanding *jus ad rem*. In that case, if he makes no declaration of his intention in relation to it, it shall go according to the quality in which it was left at his death."

In Chichester *v.* Bickerstaff, 2 Vern. 295, money by marriage settlement was articled to be laid out by the husband in land for the benefit of the husband and wife for life, with remainder to the husband. The wife died without investment, and the husband also within a few days after her death. It was held that the money was reconverted. See, however, Lechmere *v.* Carlisle, 3 P. Wms. 221.

2. Burden of Proof. — Griffith *v.* Lunell, 14 Jur. 166.

3. Merriwether *v.* Saline County, 5 Dill. (U. S.) 273.

Covenant. — It is stated that a "covenant not to ***convert*** a dwelling-house into a shop, means a structural ***conversion***, and not merely exposing goods for sale." Woodf. L. & T. 667, *citing* Wilkinson *v.* Rogers, 2 De G. J. & S. 62, 12 W. R. 119, 284. But it would seem that that case supports the reverse of the proposition stated in Woodfall. It is only reported on an application for an interim injunction; and in dissolving an injunction which had been granted by the Master of the Rolls, the lord justices expressly reserved an actual decision till the hearing; but they also intimated their opinion that the ***conversion*** into a shop might be effected without any structural change. Turner, L. J., said: "I think the premises may be ***converted*** either by user or by an alteration of structure." Stroud's Jud. Dict. See generally the title BUILDING RESTRICTIONS, vol. 5, p. 2; LEASES.

Embezzlement. — A statute inflicted a penalty upon an officer who should convert to his own use, or make way with, or secrete, public moneys. It was held that an indictment charging that an officer did unlawfully and feloniously make way with, secrete, and ***convert*** to his own use, etc., charged but a single offense. The court says: "Here the charge is, 'did make way with, secrete, and ***convert*** to his own use.' Is there any repugnancy here? The statute covers conversion 'in any manner whatever.' We are not aware of any technical significance the words 'make way with,' 'secrete,' and ***convert*** have, that would render them repugnant or inconsistent; and either of them might characterize an embezzlement, or all of them can properly unite in designating a particular embezzlement. One can 'make way with' another's property by secreting it, and at the same time make a secret investment of it for his own benefit, thus fully meeting the legal view of a conversion to his own use. This court, in State *v.* Flint, 62 Mo. 393, did not deem the words 'make way with' and 'secrete' repugnant. If they are not repugnant to each other, they certainly are not to the expression ***convert***. Indeed, we think the statute in this case makes the word ***convert*** generic, and includes within it the other two expressions as modifiers." State *v.* Manley, 107 Mo. 364.

Convert and Embezzle. (See the title EMBEZZLEMENT.) — In Hamilton *v.* State, 46 Neb. 284, it is said: "The terms 'shall embezzle,' '***convert*** to his own use' (found in section 121 of the Nebraska Criminal Code), are synonymous; for an agent to ***convert*** to his own use is made embezzlement by this statute; but embezzlement is the 'fraudulent' appropriation by an agent or bailee of the property of another. Leonard *v.* State, 7 Tex. App. 417."

CONVEY — CONVEYANCE. (See the titles ABSTRACT OF TITLE, vol. 1, p. 210; ACKNOWLEDGMENTS, vol. 1, p. 483; ADVERSE POSSESSION, vol. 1, p. 787; BOUNDARIES, vol. 4, p. 756; CHARITIES, vol. 5, p. 893; CLOUD ON TITLE, vol. 6, p. 149; COMMON ASSURANCES, vol. 6, p. 234; COMMUNITY PROPERTY, vol. 6, p. 293; CONDITIONS, vol. 6, p. 499; CONFIRMATION, vol. 6, p. 588; CORPORATIONS, *post*; COVENANTS; DEEDS; ESCROW; ESTATES; EXCHANGE; FRAUDS, STATUTE OF; FRAUDULENT SALES AND CONVEYANCES; HUSBAND AND WIFE; IMPLIED TRUSTS; LIMITATION OF ACTIONS; MARRIAGE SETTLEMENTS; MORTGAGES; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PUBLIC LANDS; PURCHASE-MONEY MORTGAGES; REAL PROPERTY; RECORDING ACTS; RELEASE; SALES; SEALS; SEPARATE PROPERTY OF MARRIED WOMEN; SHERIFFS' SALES; STATE LANDS; TAX SALES; TAX TITLES; TRUST DEEDS AND POWER-OF-SALE MORTGAGES; USES; VENDOR AND PURCHASER; WILLS.) — 1. A "conveyance" is the act or instrument by which property in real estate is transferred.[1] The word "convey" means to transfer the title or property from one person to another.[2]

1. Alexander *v.* State, 28 Tex. App. 186, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 182; Dudley *v.* Sumner, 5 Mass. 472.

A ***conveyance*** is an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another. Webster's Dict., *quoted* in Kelly *v.* Fleming, 113 N. Car. 138.

Conveyance is the transfer of the title to land from one person to another, and the instrument itself is called a ***conveyance***. Pickett *v.* Buckner, 45 Miss. 245.

A ***conveyance*** is a deed which passes or "conveys" land from one man to another. Jacob's Law Dict., *quoted* in Brown *v.* Fitz, 13 N. H. 285.

Conveyance is a general word, comprehending the several modes of passing title to real estate. Klein *v.* McNamara, 54 Miss. 90.

In Fairfax *v.* Lewis, 11 Leigh (Va.) 248, Stanard, J., said: "The term ***conveyance*** is sometimes used to signify the instrument or act by which a title is professed or attempted to be passed; sometimes as the effect produced, by the operation of such act or instrument, on the thing and the title to it. Land is ***conveyed*** only when the title to it passes."

2. Burrell's Law Dict.; Edelman *v.* Yeakel, 27 Pa. St. 27; Lambert *v.* Smith, 9 Oregon 193; Nickell *v.* Tomlinson, 27 W. Va. 720.

Convey means a transfer of title from one person to another. Cross *v.* Weare Commission Co., 153 Ill. 510.

To ***convey*** real estate is by an appropriate instrument to transfer the legal title to it from the present owner to another. Abendroth *v.* Greenwich, 29 Conn. 365.

Title. (See the title VENDOR AND PURCHASER.) — Where a party has agreed to ***convey*** certain real estate, it is not enough for him to show that he has tendered a deed of it, but he must show that he had a title to it at the time, so his deed would have ***conveyed*** the property. Abendroth *v.* Greenwich, 29 Conn. 365.

So where a contract read, "to ***convey*** the land by a deed of ***conveyance***," it was held that this was not fulfilled by executing a deed of ***conveyance*** merely, for the party must be able to ***convey*** such a title as the other party had a right to expect, which is to be determined from the fair import of the terms used, with reference to the subject-matter; for, said the court, by Redfield, J.: "It has been argued in the present case that the extent of plaintiff's obligation was fulfilled by the execution of a deed, and that it was at the risk of defendant whether it conveyed title. The agreement now in suit specifies the land sold, but is silent in regard to the title. The price was six hundred and fifty dollars, and the covenant to ***convey*** was in these words: 'to ***convey*** to said Samuel, by a deed of ***conveyance***, a certain tract of land,' etc. Can it be with propriety said that this covenant is satisfied by the 'execution of a deed of ***conveyance***'? Nothing could be more absurd. The contract is not to execute a deed merely, but to ***convey*** by a deed, etc., a certain tract of land. Could language be more explicit? What is implied in ***conveying*** land? Surely, that the title shall be ***conveyed***. I admit that when the contract is in terms, for the execution of a deed of ***conveyance***, merely, the obligee must take the risk of the title, provided the party do not divest himself of the title which he had at the time of the contract. Stow *v.* Stevens, 7 Vt. 27." Lawrence *v.* Dole, 11 Vt. 549.

Same — Lawful Deed of Conveyance. — Where one covenanted to give a "lawful deed of ***conveyance***," he may be fairly understood to mean a deed ***conveying*** a lawful or good title; and he is bound to produce his title to the defendant, and offer himself ready to execute a deed before he can recover the consideration money. Dearth *v.* Williamson, 2 S. & R. (Pa.) 498.

Same — Executed. — The language of the statute under which an indictment was found was, that if any person having ***conveyed*** any article of personal property by mortgage, etc.; it was contended that the indictment should have alleged that the defendant owned the property; for, if he did not, then the property was not ***conveyed***. The court said: "This is hypercritical and untenable. It is not uncommon to find statutes declaring it a crime for a person to sell or ***convey*** land, without having title thereto, with intent to defraud. According to counsel's mode of reasoning, if the party had no title, he had never ***conveyed*** the land and hence had committed no offense under the statute. The statute must be construed as it it read: 'If any person having executed a mort-

Writing. — In their more technical sense it would seem that the terms "convey" and "conveyance" imply an instrument in writing; but when construed in reference to the context or subject matter they may have a broader significance embracing any transmission of possession.[1]

gage on any article of personal property,' etc." State *v.* Williams, 32 Minn. 539.

Power to Convey Implies Power to Sell. — Where a testator, by his will, gave his executors "full power and authority to ***convey*** in fee simple absolute, or otherwise, in their discretion, all or any portion of my real estate, and to execute and deliver all proper deeds and instruments in writing therefor," it was held that the power to ***convey*** by all proper deeds, etc., implied a power to sell. Hamilton *v.* Hamilton, 98 Ill. 254.

Does Not Import a Consideration. — In construing the following instrument, "I have this day ***conveyed*** a note to J. E. S. against D. G. for $117.39, dated, etc., which note I hold myself accountable for the payment thereof, on condition the said J. E. S. uses proper exertion to collect the same;" and holding that the word ***conveyed*** did not import a consideration, the court, by Parker, J., said: "It was argued before us that the word ***conveyed*** in this guaranty imported a consideration, and it was claimed to be equivalent to the word 'sold.' But I do not so understand its meaning. Webster defines it as signifying, 'to carry, to bear, to pass, to transfer; to pass a title to anything from one person to another, as by deed, assignment, or otherwise.' I may ***convey*** a farm without any consideration. The word is used in this instrument as synonymous with 'transfer,' and certainly a promissory note may be ***conveyed*** or transferred without consideration. It passes by delivery, and may be by gift. In Newcomb *v.* Clark, 1 Den. (N. Y.) 226, it was held that the word 'agree' in a contract did not import a consideration. In that case, as in this, the question was whether there was a consideration expressed so as to take a promise to pay the debt of a third person out of the statute of frauds. I think the word ***convey*** neither expresses, nor even implies, that anything was paid, or promised to be paid, for the conveyance." Spicer *v.* Norton, 13 Barb. (N. Y.) 542.

Sold and Conveyed. — In Grant *v.* Levan, 4 Pa. St. 425, a distinction is made between an admission that one has sold and received the purchase money, and an admission that he has ***conveyed*** the land. See also M'Donald *v.* Campbell, 2 S. & R. (Pa.) 473. And see *supra*, Spicer *v.* Norton, 13 Barb. (N. Y.) 542.

The word "sold," when applied to real estate, cannot, as a matter of law, be held always to be equivalent to the word ***conveyed***. While a sale of realty cannot be complete and effectual to pass the title without a ***conveyance***, yet the word "sold" and the word "sale" are frequently used with reference to a transaction wherein no deed has been executed. It will always depend upon the circumstances of the particular case whether or not the word "sold" or "sale" imports an actual ***conveyance***. Bradish *v.* Yocum, 130 Ill. 386.

Same — Disposed of. — In Cook *v.* Burnham, 3 Kan. App. 27, it is said that while the words "sold," ***conveyed***, and "disposed of" are not necessarily synonymous, they may be often used to describe the same transaction.

Sell and Convey Used Synonymously. — For an instance of the use of these terms synonymously, see Patapsco Guano Co. *v.* Morrison, 2 Woods (U. S.) 404.

Distinguished from Payment. — In Sands *v.* Hill, 55 N. Y. 22, the court said: "The associates of the word 'transfers' are the words 'sales,' 'assignments,' 'mortgages,' and ***conveyances***. Each of them has the meaning of a passing from one to another, in whole or in part, absolutely or upon conditions, of an existing right which shall survive the act of passing over. There is no meaning in them of an extinguishment or satisfaction of the thing sold, assigned, mortgaged, or ***conveyed***, which is the sole result of payment."

Convey Synonymous with Grant. — The word ***convey*** in a deed is equivalent in signification and effect to "grant." Lambert *v.* Smith, 9 Oregon 193; Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 140; Cross *v.* Weare Commission Co., 153 Ill. 510.

So where a deed was substantially as follows: "For and in consideration, etc., I do hereby assign and ***convey*** to James Coleman my right and title in said decree, and to the mortgage and mortgaged property therein specified, etc. Wm. May," the court, by Mills, J., said: "The expressions used in this instrument, however informal and summary, certainly include the mortgaged estate; * * * and the words used, especially the term ***convey***, we conceive are in meaning and effect sufficient to answer the requisites of a grant at common law, and under our statute concerning conveyances, and to carry with it the legal estate, and vest it in the grantee." Patterson *v.* Carneal, 3 A. K. Marsh. (Ky.) 618, 4 Wheel. Am. Com. Law, 249.

Give, Grant, and Convey. — These words are as comprehensive as any that can be used to ***convey*** the legal title. Young *v.* Ringo, 1 T. B. Mon. (Ky.) 30.

Grant, Bargain, Sell, and Convey. — As to whether these words imply any covenants in a deed of ***conveyance*** of land in fee simple, see the title COVENANTS.

Voluntary Conveyance. — See VOLUNTARY.

Absolute Conveyance. — See ABSOLUTE, vol. 1, pp. 207, 208.

Convey and Warrant. — See the title COVENANTS.

Covenant to Convey. — See the title VENDOR AND PURCHASER.

1. Writing Not Implied. — Where a plaintiff in replevin, in order to prove property in himself, offered in evidence a deposition in which it was stated that the plaintiff's wife's father "sold and ***conveyed***" to her the articles replevied, before her marriage, it was objected that the testimony was incompetent, because the language used by the witness proved that the contract of sale and ***conveyance*** was in writing. But the court held otherwise; Gilchrist, J., saying: "If, from the testimony of

Seal. — Ordinarily the term "conveyance" signifies a deed or instrument, under seal; but the term is also used in a broader sense as denoting any instrument which conveys an interest in land from one person to another.[1]

the witness, it must be inferred that a bill of sale of the goods, or some written contract, was made by the father of Mrs. Brown, at the time to which the witness refers, the instrument should be produced, or its absence accounted for; and, unless that be done, there will be no evidence of property in the plaintiff. The first inquiry, then, is, whether the words 'sold and *conveyed*' be susceptible of the construction put upon them by the counsel for the defendant. According to the most approved modern lexicographer, the word 'sell' is used 'where something is given or delivered in exchange for money, or security for money.' The word *convey* means 'to carry,' 'to transport,' 'to take to or from,' 'to import.' (Richardson's New Eng. Dict., *in verb.*) According to Jacob, a sale is the transferring the property of goods from one to another, upon a valuable consideration; and such is substantially the meaning given it by Chitty, and Comyn on Contracts. A *conveyance* is a deed which passes or conveys land from one man to another. (Jacob's Law Dict., *in verb.*) But whether the definitions given by Jacob be technically correct or not, the meaning of the words is to be ascertained by the context. The witness was speaking of property a sale of which need not be proved by an instrument in writing. The defendant's argument is, substantially, that by using the words 'sold and *conveyed*' the same idea is communicated as if she had said, 'sold and *conveyed* by an instrument in writing.' Now, the word 'sale' does not imply a written contract. The word *convey*, if it imply a written instrument, refers to a deed of land. Had she been speaking of land, as it can be *conveyed* only by deed, the word would have implied a deed; but she was speaking only of personal chattels; and as we are called upon to criticise the language she used, and ascertain the ideas it might properly convey, our opinion is, that, considering the subject to which the words referred, they do not mean that anything more was done than was necessary to transfer the property in the articles from the owner to Mrs. Brown, and that from them it cannot be inferred that there was an instrument in writing, that being unnecessary." Brown *v.* Fitz, 13 N. H. 283.

Writing Implied. — A statute provided for a privy examination of a wife where household or kitchen furniture is *conveyed* by chattel mortgage, or otherwise. In construing this statute the court said: "The word *convey*, in its broadest significance, might embrace any transmission of possession, but we are restrained to its legal meaning which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities. Rapalje & Lawrence Law Dict., Convey, Conveyance. According to Webster, a conveyance is 'an instrument in writing by which property or the title to property is *conveyed* or transmitted from one person to another.'" Kelly *v.* Fleming, 113 N. Car. 138.

1. **Seal Implied.** — In holding that a freehold estate can only be conveyed by a deed or writing under seal, the court, by Scott, J., said: "It has been argued that there is nothing in our statute concerning *conveyances* which requires an instrument *conveying* lands to be sealed. The statute uses the word *conveyance* to designate all instruments *conveying* lands from one to another. Blackstone says, deeds which serve to *convey* the property of lands and tenements from man to man are commonly denominated *conveyances*. 2 Blackstone 309. We have seen that, in England, the word *conveyance* carries with it the idea of a sealed instrument. This word is used by our legislature in the sense in which it is understood in England. This seems apparent from the twenty-sixth section of the act relative to *conveyances*, which declares that no covenant expressed or implied, in any *conveyance*, shall bind a married woman, etc. A covenant cannot be created but by deed. The legislature, then, must have had in mind the idea of a sealed instrument, when the word *conveyance* is used." McCabe *v.* Hunter, 7 Mo. 355.

So in holding that a colorable sale and transfer of personal property, although void as against the creditors of the vendor, do not amount to an act of bankruptcy within the bankrupt law of the United States, unless executed by a fraudulent deed or *conveyance*, the court, by Sewall, J., said: "The transfer in this case was by a bill of parcels, a writing without seal, with a receipt for the amount, and a delivery of the articles sold by this memorandum. This *conveyance* was not, in the opinion of the court, a *conveyance* of chattels in the technical sense, or according to the legal construction of the clause cited from the statute. Whatever may be the loose and popular sense, or possible applications, of the term *conveyance*, the legislature are not understood to speak in an indeterminate maner, especially if that construction would violate any general principle of jurisprudence. For in making a statute the legislature are understood to refer themselves to existing customs and rules; or, in other words, when using technical terms, to employ them in a precise and technical sense. The same term *conveyance* is used in speaking of the transfer of lands and of chattels, and different meanings must be given to the same word to apply it to the transaction in question." Livermore *v.* Bagley, 3 Mass. 487, 510.

Seal Not Implied. — In Ingoldsby *v.* Juan, 12 Cal. 577, it was held that an instrument without a seal might come within the term *conveyance*.

In holding that a further charge in favor of the first mortgagee of land requires registration, the court, by Lord Cairns, L. C., said: "The question, then, is, whether the further charge of Potter & Brown was a 'deed or *conveyance*' within the meaning of the West Riding Registry Act. The wording of the Act is not very clear, but we cannot read the first section without seeing that the documents intended to be registered were all deeds and *conveyances* of or affecting lands within the West

Personal Property. — While the terms "convey" and "conveyance" are usually applied and sometimes confined to real property,[1] yet there are many instances in which they have been held applicable to personalty.[2]

Kinds of Conveyance. — The common-law conveyances may be divided into two classes, original or primary, and derivative or secondary. The original or primary conveyances are those by means whereof a benefit or estate is first created or first arises; they are as follows: feoffment, gift, lease, grant, exchange, partition. Derivative or secondary conveyances are those by which the benefit or estate originally created by another conveyance is enlarged, restrained, transferred, or extinguished; they are release, confirmation, surrender, assignment, and defeasance. Besides these common-law conveyances there are others owing their force to the statute of uses and the statute of grants; these are covenant to stand seized to uses, bargain and sale, lease and release, deed to lead or declare uses, and deed of revocation of uses.[3]

Lease. — Blackstone[4] enumerates leases as among the primary "conveyances" at common law, and in several cases the term "conveyance" has been held to include a lease;[5] but the weight of authority is to the effect that in its ordinary significance the term does not embrace a chattel interest in realty.[6]

Riding. Is, then, an instrument not under seal, giving a charge on the equity of redemption in an estate, a ***conveyance*** within the meaning of the Act? There is no magical meaning in the word ***conveyance***: it denotes an instrument which carries from one person to another an interest in land. Now, an instrument giving to a person a charge upon land, gives him an interest in the land — if he has a mortgage already, it gives him a further interest; and so, whether made in favor of a person who has already a charge, or of another person, it is a ***conveyance*** of an interest in the land." Credland *v.* Potter, L. R. 10 Ch. 8.

1. See the dissenting opinion of Wright, J., in Dickerman *v.* Abrahams, 21 Barb. (N. Y.) 551, 561.

Forgery. — In a statute against forgery it was held that the term ***conveyance*** did not apply to an instrument purporting to transfer personal property. Alexander *v.* State, 28 Tex. App. 186. See the title FORGERY.

2. Smith *v.* Zurcher, 9 Ala. 208.

In Leaycraft *v.* Hedden, 4 N. J. Eq. 512, 552, it was held, where a trustee for a married woman covenanted to ***convey*** the property as she should direct, that the term ***convey*** was used in reference to the personal as well as to the real estate. The court said: "The term ***convey***, although usually applied to real estate, is very comprehensive in its meaning, and implies a transfer and assignment of personal property also."

See *infra*, *Lease*; and see instances under black-letter line *Other Transactions*.

Charities — Note. — Where a statute invalidated ***conveyances*** to charities, except where made within a month of the death of the donor, it was held that the word ***conveyance*** applied to personal as well as real estate, and therefore included a note. *In re* Luebbe, 179 Pa. St. 447. See the titles CHARITIES, vol. 5, p. 919; MORTMAIN; WILLS.

In Singluff *v.* Tindal, 40 S. Car. 504, *infra*, *Other Transactions*, it was held that ***conveyance*** did not include a note.

3. See 2 Blackst. Com., pp. 309, 324, 327, 338; and see the titles DEEDS; GIFT; LEASE; EXCHANGE; SURRENDER; ASSIGNMENTS, vol. 3, p. 156; ESTATES; PARTITION; RELEASE; REAL PROPERTY; USES, STATUTE OF. And see FEOFFMENT; GRANT; CONFIRMATION, vol. 6, p. 588; DEFEASANCE.

4. See *supra*, *Kinds of Conveyance*.

5. Including Leases. (See the title LEASE.) — A statute provided that no power of attorney from a wife to her husband to ***convey*** real estate or any interest therein, should be of any force. It was held that the term ***convey*** comprehended the word "lease," and therefore a husband could not make a valid lease. Sanford *v.* Johnson, 24 Minn. 172. See generally the titles HUSBAND AND WIFE; SEPARATE PROPERTY OF MARRIED WOMEN.

But in *California* a lease for a term exceeding one year was held a ***conveyance*** within the definition of that word as used in the Recording Act of 1850. That Act defined ***conveyance*** as including every instrument in writing by which an interest in land is created. Jones *v.* Marks, 47 Cal. 242. See the title RECORDING ACTS.

6. Lease Not Included. — That ***convey*** does not include "lease," see Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 140; Perkins *v.* Morse, 78 Me. 17; New York *v.* Mabie, 13 N. Y. 151.

In Sullivan *v.* Barry, 46 N. J. L. 5, the court said: "But neither the word ***convey*** nor 'encumber,' according to its ordinary signification, is expressive of the act of creating a tenancy for years in lands. The former of the terms is appropriate to the transfer of a title to a freehold; the latter, to putting the property in pledge for the payment of money. That the word ***conveyance*** does not, when standing without assistance in a statute, signify its applicability to the passing of a chattel interest in realty, is clearly indicated in the cases of Kinney *v.* Watts, 14 Wend. (N. Y.) 38, and Tone *v.* Brace, 8 Paige (N. Y.) 598." In Kinney *v.* Watts, 14 Wend. (N. Y.) 38, however, a lease was held a ***conveyance***, where the statute expressly defined ***conveyance*** as embodying all chattels real.

Same — Recording Act. — That the term ***con-***

Mortgages. — At common law there can be no doubt that a mortgage is a conveyance. This is clearly shown by the definitions of a mortgage which invariably describe it as a "conveyance," etc.[1] The term "conveyance" has therefore been generally held to include a mortgage.[2] But in some states

veyance usually refers to a conveyance of the fee, see Hutchinson *v.* Bramhall, 42 N. J. Eq. 385, in which case it was held that a lease for years need not be recorded. See the title RECORDING ACTS.

Same — Married Women. — In Perkins *v.* Morse, 78 Me. 17, 57 Am. Rep. 780, it was held that a statute providing that a wife might not without the joinder of her husband ***convey*** certain real estate did not prohibit her leasing the premises. The court said: "An appeal to the authorities sustains the view advocated by the complainant. Jacob's Law Dictionary gives this as the old common-law definition of the word which is the key to the dispute: '***Conveyance*** is a deed which passes land from one man to another.' In Abendroth *v.* Greenwich, 29 Conn. 356, a party was to ***convey*** a bridge to a town. The court said: 'To ***convey*** real estate is by an appropriate instrument to transfer the legal title to it from the present owner to another.' In New York *v.* Mabie, 13 N. Y. 151, a question arose as to the meaning of the word ***conveyance*** in a statute which provides that 'no covenants shall be implied in any ***conveyance*** of real estate;' and it was held that a grant of wharfage for one year was not a ***conveyance*** of real estate. In Tone *v.* Brace, 11 Paige (N. Y.) 566, it was decided that a lease for a term of years was not, in the ordinary sense of the term, a ***conveyance*** of land. In the case of Matter of Hunter, 1 Edw. Ch. (N. Y.) 1, it was decided that where a person was to ***convey*** an estate he must transfer 'the whole title.' Mott *v.* Ruckman, 3 Blatchf. (U. S.) 71, decides that a charter party is not a ***conveyance*** of a vessel, that it goes to the use and not the title. In Livermore *v.* Bagley, 3 Mass. 487, it was determined, upon a very learned discussion of the question by both bar and court, that the word ***conveyance*** in the bankrupt law of 1800 referred to a deed of land, and not to a bill of sale of personal property."

1. See the title MORTGAGES. And see cases and illustrations in the next note.

2. **Conveyance Includes a Mortgage.** — Beals *v.* Hale, 4 How. (U. S.) 52; Rowell *v.* Williams, 54 Wis. 639; Pickett *v.* Buckner, 45 Miss. 245; Sessions *v.* Bacon, 23 Miss. 273; Decker *v.* Boice, 83 N. Y. 220.

In Den *v.* Wade, 20 N. J. L. 292, it is said: "At common law and in legal parlance the words 'deed or ***conveyance***' embrace a mortgage of lands as well as a deed in fee simple or absolute."

Same — Recording Acts. — In Odd Fellows' Sav. Bank *v.* Banton, 46 Cal. 604, it was held that the term ***conveyance*** included mortgages. This, however, was under the *California* Recording Act, which expressly provides that the term ***conveyance*** shall include every instrument in writing by which an estate or interest in real property is created, aliened, mortgaged, etc. See the title RECORDING ACTS.

So, in Tolman *v.* Smith, 74 Cal. 345, a mortgage was held a ***conveyance***. See also Hassey *v.* Wilke, 55 Cal. 528. But *compare* Stewart *v.* Powers, 98 Cal. 518, *infra*, next note.

So under a similar statute in *Wisconsin*, a mortgage has been held a ***conveyance***. Rowell *v.* Williams, 54 Wis. 636.

Same — Personal Property. — A mortgage of personal property for the purpose of securing a debt has been held a ***conveyance*** within a recording act. Smith *v.* Zurcher, 9 Ala. 208.

Same — Dower. (See the title DOWER.) — In *Mississippi*, in deciding that a mortgage in fee, made by the husband during coverture, bars his widow of dower, the court, by Simrall, J., said: "A mortgage in fee serves a complex purpose; it is a security for a debt, and at the same time a ***conveyance*** of the estate. In strictness it creates a conditional estate, or an estate upon defeasance. * * * We are unable to discover the reason why the husband may, for a valuable consideration, ***convey*** absolutely, so as to deprive the widow of dower, and yet a less ***conveyance*** by way of mortgage not be within the act. Both are within its letter. * * * In employing the term in the dower act (art. 162, Code 467), ***conveyance***, ***conveyed***, we suppose that the legislature meant the sense in which the word is ordinarily used in our jurisprudence. It is a technical or *quasi*-technical word of precise and definite import. As defined by Bouvier (1 Law Dict. 346), '***Conveyance*** is the transfer of the title to land, by one person to another.' 'The instrument itself is called a ***conveyance***.' It is a general term indicating the several modes of passing title. Such was the import given it in Sessions *v.* Bacon, 23 Miss. 273. The wife had power, with the concurrence of her husband, to ***convey*** her separate property. The objection was, that this did not authorize her to mortgage it. But, argued the court, as the major includes the minor, if she may ***convey*** absolutely, it is clear that she could exercise the less power of making a 'conditional ***conveyance***.' * * * We are conducted to these conclusions, that a mortgage in fee, executed by the husband during the coverture, in good faith to secure a debt, is a '***conveyance*** for a valuable consideration' within the statute, and imposes an incumbrance upon the estate, to which the dower of the widow is subordinate." Pickett *v.* Buckner, 45 Miss. 226.

Same — Bankrupt Act. — The word ***conveyance*** as used in the Bankrupt Act of March 2, 1867, has been held to include mortgages. The court said: "But the word ***conveyance***, in the bankrupt act, is a generic term, including all proceedings to dispose of or encumber property in derogation of the equality of creditors, with intent by such disposition either to give a preference or to defeat or delay the operation of the act. Its elementary definition, therefore, is to be ascertained. Bouvier defines a legal mortgage of lands to be a ***conveyance*** of lands by a debtor to his creditor as a pledge or security, etc., with a proviso. See also 1 Rev. Stat., marg. p. 762, § 38. 4 Kent

where a mortgage is considered a mere lien, the legal title remaining in the

Com. 136 says: 'A mortgage is the ***conveyance*** of an estate by way of pledge for the security of a debt, and to become void on payment of it.' 1 Washb. Real Prop. 475 defines a mortgage to be an estate created by a ***conveyance*** absolute in its form, but intended to secure, etc. Books of forms have a heading of '***Conveyances*** by Deed or Mortgages.' See Clerk's Assistant. The form of a mortgage is a grant, etc., and this ***conveyance*** is intended as a security. Such also is the definition in the United States courts. Marshall, C. J., in U. S. *v.* Hooe, 3 Cranch (U. S.) 73, says: 'The difference is a marked one between a ***conveyance*** which purports to be absolute, and a ***conveyance*** which from its terms is to leave the possession in the vendor. If, in the latter case the retaining possession was evidence of fraud, no mortgage would be valid.' In Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 441, it is said that 'a mortgage is a ***conveyance*** of property and passes it conditionally,' which is stated as a very plain proposition; and Story, J., adds: 'A mortgage is a lien for a debt, and something more. It is a transfer of the property itself as a security for the debt.' In Wilkins *v.* Wright, 29 Fed. Cas. No. 17666, the court says that the distinction between a trust deed and a mortgage is somewhat technical. I cannot divest myself of the idea that the word ***conveyance***, as used in sections 14 and 39 of the act, includes mortgages and therefore these mortgages to the defendants." Bingham *v.* Frost, 3 Fed. Cas. No. 1413. See the title INSOLVENCY AND BANKRUPTCY.

Mortgagee — Homestead. — An *Iowa* statute provides that a ***conveyance*** of a homestead should be of no validity unless husband and wife concurred in the ***conveyance***. A mortgage was held a ***conveyance*** within the statute. The court said: "Did the legislature, in the adoption of this section, intend to embrace mortgages within the meaning of the term ***conveyance***? Giving to the word ***conveyance*** a construction according to the approved usage of language, or the peculiar and appropriate meaning it has received in law, would it not apply to or include mortgages, as well as absolute transfers of titles? 'A mortgage is the ***conveyance*** of an estate, by way of pledge for the security of a debt, and to become void upon the payment of it: 4 Kent Com. 138. 'A mortgage may be described to be a ***conveyance*** of lands by a debtor to his creditor,' etc.: Bouv. Law Dict. '*Mortuum vadium*, dead pledge, or mortgage, is where a debtor actually ***conveys*** lands to his creditor' etc.: Walker's Am. Law 293. 'A mortgage is a ***conveyance*** of property, and passes it conditionally to the mortgagee:' U. S. *v.* Fisher, 2 Cranch (U. S.) 358. 'A mortgage is not only a lien for a debt, but it is something more; it is a transfer of the property itself as a security for the debt:' Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 441. 'A mortgage is the ***conveyance*** of an estate:' 1 Hilliard on Mortgages 2. 'A mortgage not only creates a lien, but operates to transfer to the mortgagee a qualified or conditional estate, etc.; and a mortgagee is a purchaser within the meaning of our registry law:' Porter *v.* Greene, 4 Iowa 571. The authorities, without exception, speak of a mortgage as a ***conveyance***. We are inclined to think that our legislature regarded a ***conveyance*** within the meaning of this section, not only from the general signification of the word as applicable to mortgages, but by the use of the word in other sections of the code, adopted at the same time this section was." Babcock *v.* Hoey, 11 Iowa 375. See generally the title HOMESTEAD.

Mortgage — Pre-emption. (See also the title PUBLIC LANDS.) — So in the territory of *Montana*, it was held, in January, 1887, that a mortgage is included within the words "grant or ***conveyance***" as used in U. S. Rev. Stat., § 2262, providing that any grant or ***conveyance*** made by a settler of lands pre-empted before final receipt, "shall be null and void, except in the hands of a *bona fide* purchaser for value." In this case the court, by Bach, J., said: "It is claimed by the appellants that the words 'grant or ***conveyance***' do not include a mortgage; that a mortgage by our laws does not pass the title to the land, but is a mere security or lien for the note. The authorities are at variance upon this question. The Supreme Court of California has held that such a mortgage was absolutely void, as against the mortgagor and his assigns, excepting a *bona fide* purchaser. See Bull *v.* Shaw, 48 Cal. 455. The Supreme Court of Minnesota held mortgages to be within the terms 'grant and ***conveyance***,' and that they were therefore void, except as provided in the statute, in several cases, among others in McCue *v.* Smith, 9 Minn. 252; Woodbury *v.* Dorman, 15 Minn. 338. But the same court, in a later case, reversed that doctrine, and held that a mortgage was not included within the terms of the statute; and the court bases its decision upon the ground that a mortgage is a mere security, and does not act as a ***conveyance***. See Jones *v.* Tainter, 15 Minn. 512. The Supreme Court of Kansas holds, with the California Supreme Court, that a mortgage does not come within the terms of the statute. Brewster *v.* Madden, 15 Kan. 249. In the case of Owings *v.* Lichtenberger, 9 Copp, Landowner, 197, in a letter dated Nov. 17, 1882, the Hon. Henry M. Teller, then Secretary of the Interior, writes upon this question as follows: 'It is claimed by plaintiff's counsel, that the mortgage given by plaintiff before his removal was a disposition of his homestead. * * * I do not think this view of the case can be maintained. At common law, the title passed to the mortgagee; but the rule of the common law has been changed by statute in most of the states, and in such states the legal title remains in the mortgagor. In Nebraska, a mortgage of real estate is a mere pledge or collateral security.' We think the honorable secretary of the interior and the Supreme Court of Minnesota apply the wrong rule of interpretation to the section 2262, by first ascertaining what the nature of a mortgage is in Nebraska and Minnesota. They, in effect, declare that a United States statute is to be interpreted through the medium of a statute of a state. Whatever may be the meaning of the words 'grant or ***conveyance***' in section 2262, it is certain that there

mortgagor, it has been held not to be a conveyance.[1] So an absolute deed intended for a mortgage,[2] a transfer or charge upon the equity of redemption,[3]

cannot be two proper interpretations of the same statute. It is equally certain that the section contains one rule of law, and no more, on this subject, and that such rule applies to mortgages upon pre-emption lands, wherever situated, with the same force and effect. * * * But there is still a further reason for such an interpretation. Section 2262 became a law in the year 1841. At that time, the courts of the state of New York were the only courts that held that a mortgage was a security only. Even at this late date, the following states: Alabama, Arkansas, Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia, hold the old common-law doctrine that the mortgagee has the legal title. In New York alone the courts, without the aid of a statute, hold a contrary doctrine. In the other states which hold a mortgage not to be a ***conveyance*** the rule depends upon express statutes, passed long after 1841, when section 2262 was made law by Act of Congress. Then we must consider what a mortgage was considered to be in the year 1841. And, so considering, we are forced to the conclusion that a mortgage is included within the words 'grant and ***conveyance***,' in section 2262, and that the mortgage sought to be foreclosed in this action was absolutely void. The Supreme Court of the United States, as far as we can ascertain, has never ruled upon this question; but in the case of Warren *v.* Van Brunt, 19 Wall. (U. S.) 646, that court, speaking of the Minnesota cases which held such mortgages void, said (page 655), 'All contracts in violation of this important provision of the act are void, and are never enforced. It has been so decided many times by the Supreme Court of Minnesota. We are satisfied with these decisions.'" Bass *v.* Buker, 6 Mont. 442.

In Stewart *v.* Powers, 98 Cal. 518, a mortgage was held not within this provision; the court comments upon Bull *v.* Shaw, 48 Cal. 455, and Bass *v.* Buker, 6 Mont. 442, *supra*.

Same — Powers. — A power to sell and ***convey*** has been held not to include a power to mortgage. Patapsco Guano Co. *v.* Morrison, 2 Woods (U. S.) 404. See the titles AGENCY, vol. 1, pp. 1011, 1018; POWERS.

1. See Brewster *v.* Madden, 15 Kan. 251, and Bass *v.* Buker, 6 Mont. 442, *supra*, preceding note, where it is intimated that a mortgage is not generally to be considered a ***conveyance***.

In Stewart *v.* Powers, 98 Cal. 518, it was held that a mortgage was not a ***conveyance***, apart from the definition of the word ***conveyance*** in the recording act. The court said: "This section defines the term ***conveyance*** only 'as used' in the recording act, and does not imply that a mortgage is in fact a ***conveyance*** of real property, but rather the contrary; for if it were a ***conveyance***, and so regarded and understood, it need not have been included in the definition."

In Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608, a mortgage was held not to be a ***conveyance*** within the statute against selling pretended titles. To the same effect see Leonard *v.* Bosworth, 4 Conn. 421. In Bates *v.* Coe, 10 Conn. 280, the question was whether a mortgage was within the statute of 1828 making void ***conveyances*** with a view to insolvency. It was held that a mortgage was not a ***conveyance***.

2. **Deed Absolute Intended as a Mortgage.** — In construing the *Mississippi* Code, which provides that "no ***conveyance*** or incumbrance for the separate debts of the husband shall be binding on the wife beyond the amount of her income," the court, by Simrall, C. J., said: "The plain policy of the statute is, that she may sell her property, and ***convey***, transfer, or mortgage it. But if she pledges it as a security for the separate debt of her husband, whether that pledge is by a ***conveyance*** absolute, by mortgage, or by deed of trust, it shall only have a limited effect. The legislative intention is that she shall not, beyond the income, make her property a security for her husband's debt, either by '***conveyance*** or incumbrance,' that is, by any form of instrument by which, under the law, a lien or hypothecation can be created. It will be observed that the word ***conveyance*** is separated by the disjunction 'or' from 'incumbrance.' Those words are not used to convey the same idea. ***Conveyance***, being a general word, comprehends the several modes of passing title to real estate. It is defined to be 'the transfer of the title of land from one person, or class of persons, to another.' 1 Bouv. Law Dict. (12th ed.) 361. * * * We think that it is used in this statute in its general sense." Klein *v.* McNamara, 54 Miss. 90. Accordingly, it was held that a deed absolute was void where it was shown by parol that it was given as security for the debts of the husband. See the titles HUSBAND AND WIFE; SEPARATE PROPERTY OF MARRIED WOMEN.

3. **As Applied to an Equity of Redemption.** — In Webster *v.* Tibbits, 19 Wis. 446, it is said: "It may be that the words '***conveyance*** of land,' taken by themselves, or standing in some other connection, would be construed to signify the transfer of an absolute title; but such was clearly not the sense in which they were employed in this contract. It was proper to speak of the transfer of the equity of redemption as a ***conveyance*** of land; and that was the manner in which the parties did speak in the contract before us."

Equitable Charge — Equity of Redemption. — An equitable charge on the equity of redemption has been held a ***conveyance*** within an English Registry Act. Moore *v.* Culverhouse, 27 Beav. 639. To the same effect, see Credland *v.* Potter, L. R. 10 Ch. 12, in which case, Cairns, L. C., said: "Is, then, an instrument not under seal, giving a charge on the equity of redemption in an estate, a ***conveyance*** within the meaning of the Act? There is no magical meaning in the word ***conveyance***: it denotes an instrument which carries from one person to another an interest in land. Now, an instrument giving to a person

a satisfaction piece of a mortgage,[1] an assignment of a mortgage,[2] a release by a mortgagee,[3] and an agreement to execute a mortgage,[4] have been held "conveyances."

Will or Devise. (See the title WILLS.) — Although the common-law authorities speak of a devise as a conveyance, and a will has been held to come within the meaning of that term,[5] yet there is authority to the contrary.[6]

a charge upon land gives him an interest in the land; if he has a mortgage already it gives him a further interest; and so, whether made in favor of a person who has already a charge, or of another person, it is a ***conveyance*** of an interest in the land. I come the more readily to this conclusion, because at the time when the Act was passed interests in land were frequently, though not so frequently as now, given by mere charges; and the case therefore comes within the mischief intended to be guarded against by the Act. This memorandum was, then, in my opinion, a ***conveyance*** affecting land within the meaning of the Act."

1. Satisfaction Piece of a Mortgage. — In Bacon *v.* Van Schoonhoven, 87 N. Y. 446, a satisfaction piece of a mortgage was held a ***conveyance*** within the meaning of a *New York* Recording Act.

2. Assignment of a Mortgage Held a Conveyance Within the Recording Acts. — Fairfax *v.* Lewis, 11 Leigh (Va.) 248; Donaldson *v.* Grant (Utah 1897) 49 Pac. Rep. 781; Vanderkemp *v.* Shelton, 11 Paige (N. Y.) 38; Decker *v.* Boice, 83 N. Y. 215; Westbrook *v.* Gleason, 79 N. Y. 23; Bacon *v.* Van Schoonhoven, 87 N. Y. 446; Savings Bank *v.* Frank, 45 N. Y. Super. Ct. 404.

3. Release by a Mortgagee. — Within the *Minnesota* Recording Act a release by a mortgagee of his interest and estate in the mortgaged premises, whether made by an entry in the margin of the record, by a certificate of discharge, or by a decree of court, has been held a ***conveyance***. Palmer *v.* Bates, 22 Minn. 532. See also Merchant *v.* Woods, 27 Minn. 398.

4. Mortgages — Agreement to Execute a Mortgage. — An agreement to execute a mortgage has been held a ***conveyance*** within an English Registry Act. *In re* Wight's Mortg. Trust, 43 L. J. Ch. 66, L. R. 16 Eq. 41; Neve *v.* Pennell, 33 L. J. Ch. 19, 2 H. & M. 170, *overruling* Wright *v.* Stanfield, 28 L. J. Ch. 183, 27 Beav. 8.

5. Will Held a Conveyance. — An English statute provided for the grant of lands by deed or ***conveyance*** to the Church of England. It was held that the word ***conveyance*** includes a will. Robinson, C. J., said: "Does a will, then, according to proper legal construction, come within the meaning of the word ***conveyance*** — or, in plain words, is a will a ***conveyance***? In Sheppard's Touchstone, pp. 1, 2, we are told 'that the common or general assurances or ***conveyances*** of the kingdom that are made between subject and subject, and are of ordinary and daily use for the transferring of lands, tenements and hereditaments from one to another, are of ten kinds; two of which are by matter of record, namely, fine and recovery; and the rest are by matter of deed. Mr. Preston corrects this passage by inserting in a parenthesis, '(or *in pais* or by will, and commonly termed matters *in fait*),' and he enumerates the eight kinds of ***conveyance*** intended by Sheppard, namely, (1) by feoffment; (2) grant; (3) bargain and sale; (4) lease; (5) exchange; (6) surrender; (7) release or ***conveyance***; (8) by devise, or by last will and testament. * * * Mr. Justice Blackstone, in his Commentaries, vol. 2, p. 378, says: 'The last method of ***conveying*** real property is by devise.' * * * In Harwood *v.* Goodright, 1 Cowp. 90, Lord Mansfield observed: 'But a devise in England is an appointment of particular lands to a particular devisee, and is considered in the nature of a ***conveyance*** by way of appointment, and upon that principle it is that no man can devise lands which he has not at the date of such ***conveyance***.' Thus it appears that a devise is treated in law not merely as a ***conveyance***, but as being emphatically a ***conveyance***, so that, on the principles of the common law, nothing can pass under it but what the devisor at the time of making his will was in a condition to ***convey***. We cannot therefore hold, in the face of these authorities, that the word ***conveyance*** cannot include a devise." Baker *v.* Clark, 7 U. C. Q. B. 49. See the titles CHARITIES, vol. 5, p. 919; MORTMAIN; RELIGIOUS SOCIETIES; WILLS.

6. Will Held Not to Be a Conveyance. — And that the term ***conveyance*** does not include a will. May *v.* Slaughter, 3 A. K. Marsh. (Ky.) 509.

It has been held that a statute which provided that all contracts, bargains, and ***conveyances*** made by any person under guardianship should be void, did not apply to wills or devises, they not being within the meaning of the term ***conveyances***. Jenckes *v.* Probate Court, 2 R. I. 256. The court in that case said: "In the first place, the term ***convey*** is a technical term, long known and used in deeds ***conveying*** real estate, and never known or used in a will or devise, any more than the terms 'bequeath' or 'devise' are used in a deed. The term 'give' is used in devises and deeds, because a gift may be by deed as well as by devise. To call a devise, therefore, a ***conveyance***, violates all propriety of legal language."

Same — Charities. — A *Virginia* statute provided that "every ***conveyance***, devise, or dedication shall be valid, which since the first day of January, 1777, has been made, and every ***conveyance*** shall be valid which hereafter shall be made, of land for the use or benefit of any religious congregation." It was contended that this proposition did not authorize future devises. The court said: "There can be no doubt but that the word ***conveyance***, in its comprehensive and perhaps in its technical sense, embraces a devise; and if it had been the only word used by the legislature in the provision in question to express the mode of transfer, it might reasonably have been con-

Other Transactions. — In the note will be found many instances in which the courts have determined whether or not various transfers were "conveyances."[1]

strued in that sense; especially as it is used in that sense in other parts of the Code, as in chapter 116, §§ 1, 11. But we know that in common parlance the word is often used in a more restricted sense, as contradistinguished from 'devise;' and that it has often been so used in our most important acts of legislation; as, for example, in the act concerning *conveyances*, 1 Rev. Code 1819, c. 99. It is like the word 'purchase,' which technically embraces a devise but is generally used in a more restricted sense, and as meaning an acquisition of property by contract only. In the provision in question, *conveyance* is not the only word used to designate the mode of transfer therein mentioned. The section begins: 'Every *conveyance*, devise, or dedication shall be valid, which since the first day of January, 1777, has been made;' thus tending to show that the word *conveyance* was not used here as comprehending 'devise or dedication;' otherwise, it is presumable that these latter words would not have been used. But the section immediately proceeds: 'and every *conveyance* shall be valid which hereafter shall be made,' etc.; thus dropping the words 'devise or dedication,' used in the first line of the section. We cannot suppose that the legislature, in three consecutive lines, in which the only stop is a comma, would have used the words '*conveyance*, devise, or dedication,' as to the past, and the word *conveyance* only as to the future, without meaning something by the change of phraseology; without meaning more by the three words first used, than by one of them repeated in the same sentence." Seaburn *v.* Seaburn, 15 Gratt. (Va.) 427. See the titles CHARITIES, vol. 5, p. 919; MORTMAIN; RELIGIOUS SOCIETIES, WILLS.

1. Assignment by Heir of His Interest. — Where an heir agreed that a portion of his interest in real estate, which was about to be sold under proceedings in the Orphans' Court, should be applied to the payment of a debt for which another was his surety, but before the return of sale he assigned to two others, to whom he was indebted, a portion of the proceeds of sale, after the payment of the former transfer, and in case the sale should be set aside, then he transferred to them his right, title, and interest in the land, or money made by its sale, to the said amount; it was held that the second instrument was not a *conveyance* of the land, but a mere transfer of the land or money to the amount of the indebtedness; and that though the first sale was set aside, still the second transferees took subject to the first agreement. Dimond's Estate, 14 Pa. St. 323.

Assignment for the Benefit of Creditors. (See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 6.) — An assignment of a vessel for the benefit of creditors has been held a *conveyance* within the United States statute requiring the registration of *conveyances* of vessels. Haug *v.* Detroit Third Nat. Bank, 77 Mich. 480. See generally the title SHIPS AND SHIPPING.

Same — Vendor's Lien. (See also the title VENDOR'S LIEN.) — An *Iowa* statute provided that no vendor's lien for unpaid purchase money should be recognized after a *conveyance* by the vendee unless such lien was reserved by *conveyance*, mortgage, or other instrument duly acknowledged. It was held that an assignment for the benefit of creditors was a *conveyance*. The court said: "The rights of the parties in this case depend upon the question whether an assignment by an insolvent for the benefit of creditors is a *conveyance*, within the meaning of the statute. If it is a *conveyance*, the plaintiff can have no lien, because he did not reserve the same by a written instrument, as required by the statute. A conveyance is defined to be 'an instrument in writing by which property, or the title to property, is conveyed or transmitted from one person to another.' An assignment for the benefit of creditors is required to be in writing, duly acknowledged, in the same manner as *conveyances* of real estate, and recorded (Code, § 2117). And the assent of the creditors of the insolvent shall be presumed (Code, § 2116). Any assignee, as aforesaid, shall have as full power and authority to dispose of all the estate, real and personal, assigned, as the debtor had at the time of the *conveyance* (Code, § 2127). It is apparent, therefore, that an assignment for the benefit of creditors is a *conveyance* of the legal title of the real estate of the insolvent to the assignee in trust for the benefit of the creditors. It is an absolute, unconditional, and irrevocable *conveyance* of the legal title." Prouty *v.* Clark, 73 Iowa 56.

Certificate of Sale of School Lands. (See the titles PUBLIC LANDS; RESULTING TRUSTS; STATE LANDS.) — In Haaven *v.* Hoaas, 60 Minn. 313, it was held that a certificate of the sale of school lands, made by the commissioner of the state land office, pursuant to the Minnesota statute, was a *conveyance* within the meaning of the Minnesota statute prohibiting resulting trusts. The court said: "The only question necessary to be decided, in this case, is whether or not a certificate of sale, executed by the commissioner of the state land office, upon a sale of school land, pursuant to G. S. 1894, § 3967, is a *conveyance* within the meaning of the statute prohibiting uses and trusts. If it is, the plaintiff is not entitled to any relief in this action. It is claimed by respondent that it is not, for the reason that the word *conveyance* in this statute must be strictly construed, and that it is only where the complete legal title is *conveyed* to one person, and the consideration is paid by another, that a resulting trust in favor of the latter is abolished. The argument in support of this proposition is technical, and, if pushed to its logical conclusion, would defeat his claim; for technically a resulting trust in real estate, if not prohibited by the statute, can only arise, in favor of the party paying the consideration, upon an actual *conveyance* of the land to a third party, and not upon an executory contract for such *conveyance*. Johnson *v.* Krassin, 25 Minn. 117. This, however, is too narrow a view of the case at bar, and we base our decision upon the broad ground that the

certificate of sale is a ***conveyance*** within the meaning of the word as used in the statute abolishing trusts."

Charter Party. — The Act of Congress entitled "An Act to provide for recording the ***conveyances*** of vessels, and for other purposes," does not extend to charter parties. Hill *v.* The Steamer Golden Gate, 1 Newb. Adm. 308; Mott *v.* Ruckman, 3 Blatchf. (U. S.) 71. See the titles CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES; SHIPS AND SHIPPING.

Declaration of Trust. — In *Wisconsin* a written instrument in the form of a memorandum equivalent to a declaration of trust as to certain land, though not under seal, and without witnesses or acknowledgment, was held to be a ***conveyance*** under the statutes. White *v.* Fitzgerald, 19 Wis. 480. See also Corse *v.* Leggett, 25 Barb. (N. Y.) 394; and the title TRUSTS AND TRUSTEES.

Deed of Trust. — A deed of trust has been held a ***conveyance***. Corse *v.* Leggett, 25 Barb. (N. Y.) 394; Smith *v.* Zurcher, 9 Ala. 208. See generally the title TRUST DEEDS.

Deposit of Title Deeds as Security. — Within an English registry statute it was held that a deposit by a debtor of the title deeds of his house, with his creditor as security, was not a ***conveyance***. Sumpter *v.* Cooper, 9 L. J. O. S. K. B. 226; 2 B. & Ad. 223, 22 E. C. L. 61; Neve *v.* Pennell, 33 L. J. Ch. 23.

Dissolution of Partnership. — Where, upon dissolution of a partnership, one partner ***conveyed*** to the other his interest in the firm, the transaction was held a ***conveyance*** within the meaning of an English statute exacting a stamp duty on ***conveyances***. Christie *v.* Inland Revenue Com'rs, L. R. 2 Exch. 46.

Easement — Agreement Creating an Easement. — As an easement is an interest in real estate, under the *Minnesota* statutes, such an instrument is held to be a ***conveyance***. Warner *v.* Rogers, 23 Minn. 34. See generally the title EASEMENTS.

English Stamp Act. — By an instrument not under seal the Conservators of the Thames agreed to grant permission during their pleasure to the appellants to construct and retain a jetty in consideration of an annual payment. This instrument was held not to be a ***conveyance*** so as to be chargeable with stamp duty. Thames Conservators *v.* Inland Revenue Com'rs, 18 Q. B. Div. 279.

English Stamp Act — Good Will. — In Inland Revenue Com'rs *v.* Angus, 23 Q. B. Div. 579, it was held that an agreement for the sale of the good will of a business was not a ***conveyance*** within the English Stamp Act, which defines ***conveyance*** and sale as including every instrument whereby any property, upon the sale thereof, is legally and equitably transferred to or vested in the purchaser. See the title GOOD WILL.

Convey Distinguished from Exchange. — In Leach *v.* Dennis, 24 U. C. Q. B. 131, the court said: "The only averment of operative words is that these parties each ***conveyed*** to the other, and the word ***convey*** has not the legal technical meaning assigned to the word 'exchange.'"

Exchange — Fraudulent Sale of Property Mortgaged. (See the titles FALSE PRETENSES; FRAUD.) — An *Alabama* statute provided that it should be a misdemeanor for any person to sell or ***convey*** personal property upon which he had given a written mortgage, lien, or deed of trust. It was held that the word ***convey*** included a transfer of property by exchange. The court said: "The word ***convey***, when applied to a disposition of property, has the signification of 'transfer;' and means the passing of title and dominion from one person to another. It is in this, its largest sense, it is employed in this statute, intended to prohibit the mortgagor, or maker of a lien, or grantor in a deed of trust, from disposing of the property, so that the security of the mortgage or lien, or deed of trust, would be endangered or embarrassed. The danger or embarrassment would result not only from a sale, but from an exchange, a gift, or any other transfer, by which a title, not in subordination to the mortgage, lien, or deed of trust, was created, or by which the possession was changed. A word of large meaning was employed by the law-maker, to prevent evasion of the statute, by the adoption of other instrumentalities than such as would have been designated by a word of more limited significance. An exchange is a transfer of the property, violative of the statute." Johnson *v.* State, 69 Ala. 597. So in Lippman *v.* State, 104 Ala. 61, it was held where defendant consigned mortgaged property to a third person "to do what he pleased with it," taking a receipt from the railroad company, that he was guilty of ***conveying*** property within the statute.

Execution — Recording Acts. — In Foster *v.* Briggs, 3 Mass. 313, an execution on land was held not a ***conveyance*** of land within a statute providing that a register shall be appointed to record all ***conveyances***. The court said: "That an extent of an execution on land is a ***conveyance*** of land, there can be no doubt; but is it such a ***conveyance*** as is manifestly within the intent of this statute? Certainly, it is not. The ***conveyances*** here intended are ***conveyances*** by deed; the statute speaks of the grantors and their heirs, and provides that they only shall be bound by the ***conveyance***, unless the deed be recorded."

Gift — Charity. — A gift of personalty is not a ***conveyance***; and therefore, where an act (April 26, 1855, § 11) declared: "No estate, real or personal, shall hereafter be bequeathed, devised, or ***conveyed*** to any body politic, or to any person in trust for religious and charitable uses, except the same be done by deed or will, etc., at least one calendar month before the decease of the testator or alienor;" and A, having made a will whereby she bequeathed legacies to charities, on finding her death imminent, executed a power of attorney to B, with instructions to sell her loans, and pay the amounts of her charitable legacies from the proceeds, all of which was done in her lifetime, but A died within a calendar month of the date of her will, and while the proceeds of the sale of the loans were still in B's hands; it was held that such a gift of personalty, not being a ***conveyance*** of property, was valid. McGlade's Appeal, 11 W. N. C. (Pa.) 257. See the titles CHARITIES, vol. 5, p. 893; MORTMAIN; WILLS.

Same — Advancement. — In *In re* Player, 54 L. J. Q. B. 556, Cave, J., said: "The case of *Ex p.* Shorland, 7 Ves. Jr. 88, decided that a mere gift by way of advancement to a son was not void by 1 Jac. 1, c. 15, § 5, where the words

2. The word "convey" means to carry, to transport, to take to or from, to import.[1]

used are '*convey*, or procure or cause to be *conveyed*.'"

Inchoate Dower. (See also the title DOWER.) — In Nickell *v.* Tomlinson, 27 W. Va. 720, a statute provided that a writing signed by husband and wife purporting to *convey* real estate, when admitted to record as to the husband as well as to the wife, should operate to *convey* from the wife her right of dower in the real estate embraced therein. It was held that the effect of a wife uniting with her husband in a deed *conveying* land, under this statute, is not to vest in the grantee any estate separate and distinct from her husband, but simply to relinquish a contingent right of dower. The court said: "The language now used is: 'shall operate to *convey* from the wife her right of dower in the real estate embraced in the deed.' Now *convey* means transfer the title of land from one person or class of persons to another. (See Bouvier's Law Dictionary, vol. 1, p. 399.) Clearly, an inchoate dower-interest is no title to land. It is no estate present or future, vested or contingent, and the term *convey* can be properly used only when the transfer of some 'estate in land' is spoken of. * * * It would then, it seems to me, be entirely improper to seize hold of this word *convey* in this statute so inappropriately used, as we are asked to do by the counsel for the appellees, to give meaning to the statute, and from it draw the inference, that a wife in this mode could sell her contingent dower-interest. * * * The language used in the statute, 'such writing shall operate to *convey* to the grantee the wife's right of dower,' seems to me to clearly indicate that no change was intended to be made in the power of the wife over her inchoate dower-interest. For by levying with her husband a fine she could release her inchoate right of dower, but could not sell or *convey* it to a grantee separately. It could pass from her, but not to the grantee separated from her husband's estate. All that he got goes from the husband, but he got the land free from the incumbrance of the wife's inchoate dower-interest."

Indenture to Lead to the Uses of a Common Recovery. — In Dudley *v.* Sumner, 5 Mass. 438, 472, it was held that an indenture to lead to the uses of a common recovery was a *conveyance* within the meaning of the recording acts, and that where that part of such an indenture which was executed by the recoverer was acknowledged and recorded, it was not necessary that the part signed and sealed by the recoveree should be acknowledged and recorded, Sedgwick, J., said: "As 'grantor' is the most comprehensive word to signify one who conveys lands, so *conveyance* is the common statute word to intend the deed, the act or instrument, by which property in real estate is transferred."

Lien of Judgment. — In Wilcoxson *v.* Miller, 49 Cal. 193, it was held that a lien of a judgment was not a *conveyance* within the meaning of the *California* Registry Act.

Married Women — Contract for Sale of Land. — In Gregg *v.* Owens, 37 Minn. 61, a contract for the sale of real estate was held a *conveyance* within a statute providing that no *conveyance* by a married woman should be valid unless the husband joined with her. *Compare* Kingsley *v.* Gilman, 15 Minn. 59.

Note — Married Women. — A statute provided that all *conveyances*, mortgages, and like formal instruments in writing, executed by a married woman, should be effectual to *convey* or charge her separate estate. It was held that a promissory note was not a *conveyance* within this statute. Singluff *v.* Tindal, 40 S. Car. 504. In *In re* Luebbe, 179 Pa. St. 447, *supra*, *Personal Property*, a note was held to be a *conveyance*.

Quit-Claim Deed. — Within the *Wisconsin* Recording Act a quit-claim deed has been held a *conveyance*. Cutler *v.* James, 64 Wis. 178.

1. Brown *v.* Fitz, 13 N. H. 285.

Water Conveyed. — Where an agreement reserved the privilege of using all the water of a spring as formerly *conveyed*, it was held that the word *conveyed* meant the manner of conducting the water, and did not refer to the *conveyance* of the right; the court, by Black, J., saying: "The judge of the common pleas thought that the agreement of 1836 established a privilege to use the water as it had been used previously. The plaintiff contends that it created a right limited and defined by the terms of the old grant. We are of opinion that the court below was right. The main argument of the plaintiff in error is, that the word *convey* must be taken in its technical sense. It is true that a term of art in the law, when used in a written contract, is always understood by the courts according to the meaning which they have agreed to impress upon it, unless very strong reasons can be adduced to show that the parties meant something else by it; for instance, 'heirs' and 'heirs of his body' have a certain legal meaning, which will adhere to them until the contrary intent be clearly established, though it is well known that many, perhaps most unprofessional persons, use them as synonymous with 'children.' But it often happens that we have one and the same word for two ideas totally different. Of such a word we can never know the meaning, except by reference to the context. There is no better example of this than the word *convey*, which may mean to conduct water from place to place, or to transfer title from one person to another. Assuming that in the latter sense it is a term of art (which it is not), we are still bound to receive it in its other meaning, if water was the subject-matter spoken of, since it would be absurd to speak of '*conveying* water,' in a technical sense, from a spring to a paper-mill. Now, it was water that the agreement said should be *conveyed* 'as it has formerly been *conveyed*.' The grammatical structure of the sentence leaves this in no doubt. The right or title is not referred to. The pronoun 'it' can have no antecedent except water." Edelman *v.* Yeakel, 27 Pa. St. 26.

Furnish Distinguished from Convey — Escape. (See also the title ESCAPE.) — A statute made it a criminal offense to *convey* into a jail any instruments or other things useful to aid a prisoner in escaping. An indictment charged that the accused did furnish a person confined

CONVEYANCING. (See the titles ABSTRACT OF TITLE, vol. 1, p. 210; DEEDS; VENDOR AND PURCHASER; and see CONVEY, *ante*, and references there given.) — "Conveyancing" is that part of the lawyer's business which relates to the alienation and transmission of property and other rights from one person to another, and to the framing of legal documents intended to create, define, transfer, and distinguish rights. It therefore includes the

in a jail with certain instruments. This was held a fatal variance. The court said: "The words are to be understood according to their usual meaning in ordinary language. Code Crim. Pro., art. 397. 'Furnish' and ***convey*** are words of widely different meaning. To furnish a thing and to ***convey*** it signify very different acts. To furnish is to provide or supply anything wanted by another; to ***convey*** is to bear, carry, or transport the thing to another person or place. A person at a distance may furnish the article desired, upon request by letter or otherwise, and another may ***convey*** it to the person for whom it is intended. One may furnish, provide, or supply a person confined in jail with food, which another may '***convey*** into any jail' to the person therein confined. Therefore, to furnish a person who is confined in jail with anything, may and ordinarily does mean quite a different act from what we understand by the words 'shall ***convey*** into any jail' anything." Francis *v.* State, 21 Tex. 285.

Send Distinguished from Convey. — A statute provided that it should be a criminal offense to send or ***convey*** an insulting or obscene letter to a female. It was held that an indictment charging that the accused did send and ***convey*** was technically defective, as "send" and ***convey*** import a different kind of transmission. Larison *v.* State, 49 N. J. L. 259.

Accident Insurance — Public or Private Conveyance. (See also the title ACCIDENT INSURANCE, vol. 1, p. 305. And see PRIVATE; PUBLIC.) — Where an insurance company issued insurance tickets against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers," in two forms or classes, one known as the "travelers' risk," the other as the "general accident," the latter being sold for the highest price, and an engineer holding the ticket "general accident" was killed while on a railroad locomotive, it was held that the deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death, and that the insurance company was liable. Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221.

Under a similar policy, a passenger injured while walking a short distance between a connecting steamboat and railway line, even though cabs were standing for hire, which might have been used, was held entitled to recover on the policy. Northrup *v.* Railway Pass. Assur. Co., 43 N. Y. 516.

On the other hand, where one took out an accident policy of insurance on his life, while "traveling by public or private ***conveyance***," and having performed a part of his journey by steamer, which brought him to a certain village, he walked thence home, about eight miles, it was held that while thus walking he was not traveling by either public or private ***conveyance***. It was argued by counsel that "In Northrup *v.* Railway Pass. Assur. Co., 43 N. Y. 516, the contract was against accident while traveling by public or private ***conveyance*** provided for the transportation of its passengers. Yet the company was held liable though the death was caused while the party was walking from a steamboat landing to a railway station, a distance of seventy rods. The case regards the walking as part of the original journey in the public or private ***conveyance***, and wisely; for few persons on a long journey are all the time in the rail carriages. The case does but carry out the injunction given by Cockburn, C. J., in Trew *v.* Railway Pass. Ins. Co., 30 L. J. Exch. 317: 'We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases.' But independently of this, the words 'private ***conveyance***' reasonably, and *ex vi termini*, include the case of a person pursuing a journey, or traveling, by means of his own personal powers of locomotion; his limbs with their muscles and tendons, bones and joints — the primitive, universal 'private ***conveyance***' of man. ***Conveyance*** is the instrument or means of carrying or transferring anything from place to place. It is derived from *con* (with, by, along) and *via* (the way). It is used in this sense in the Scriptures, where it is said that the Saviour had ***conveyed*** himself away. * * * And so in ordinary language, and in every-day life. Should a court direct its officer to '***convey*** the prisoner to jail,' no one will doubt that the prisoner's walking to the place designated would be a literal and exact compliance with the order. If one were to say to an intruder, '***Convey*** yourself away,' the speaker would have no idea but that the party should walk off; nor would the party himself expect that anything else was meant." But the court, by Chase, C. J., said: "That the deceased was traveling is clear enough; but was traveling on foot, traveling by public or private ***conveyance***? The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private ***conveyance***. 'Public ***conveyance***' naturally suggests a vessel or vehicle employed in the general ***conveyance*** of passengers. 'Private ***conveyance***' suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, traveling, within the terms of the policy. There is nothing to show that it was not.' Ripley *v.* Railway Pass. Assur. Co., 16 Wall. (U. S.) 336.

investigation of the title to lands, and the preparation of agreements, wills, articles of association, private statutes operating as conveyances, and many other instruments in addition to conveyances properly so called.[1]

CONVICT. (See the titles CIVIL DEATH, vol. 6, p. 65; CRIMINAL LAW; FALSE IMPRISONMENT; FINES; HABEAS CORPUS; HOUSES OF CORRECTION; PARDON; SENTENCE; WITNESSES. And see CONVICTION, *infra*, and 5 ENCYC. OF PL. AND PR. 15. As to the competency of witnesses, see the title WITNESSES. As to the employment and convict-labor system of the different states, see the title PRISONS. As to escape, see the title ESCAPE. As to extradition of fugitives, see the title EXTRADITION. As to support of convicts, see the title PRISONS. As to ill-treatment of convicts, see the title PRISONS. As to discharge of convicts, see the title PRISONS. As to commutation of sentence for good behavior, see the title PARDON.) — A "convict" is one who has been found guilty of a crime by the verdict of a jury or by the sentence of a competent court. In a more confined sense the term signifies one who is serving a sentence for the commission of a crime.[2]

1. Rap. & Law. Law Dict. *sub verb.* See generally Sugden on Vendors; Preston on Conveyancing; Washburn on Real Property.

2. See *infra*, CONVICTION; and see 5 ENCYC. OF PLEADING AND PRACTICE, p. 15.

State-prison Convict. — A *Massachusetts* statute providing for payment by the commonwealth for the support of a "state-prison ***convict***" committed to a state lunatic hospital until the end of his sentence to the "state prison," was held not to apply to a female ***convict*** transferred to such a hospital from the reformatory prison for women; but the town or city in which such ***convict*** has her settlement is liable, under Pub. Stat., c. 87, § 33, for her support. Beard *v.* Boston, 151 Mass. 96. See the titles INSANITY; PRISONS.

Appointment of Committee. — In Matter of Stephani, 75 Hun (N. Y.) 188, it was held that a petition for the appointment of a committee for a life ***convict*** must show who are his heirs at law and next of kin, and that a statement that certain persons are his next of kin is insufficient in the absence of facts showing how the alleged relationship arises.

Service of Process. — Service of notice of an application for the appointment of a committee for a life ***convict*** is not proved by an admission signed by the ***convict*** in the presence of another, where there is no proof of the genuineness of the signatures. Matter of Stephani, 75 Hun (N. Y.) 188.

Mandamus — Insanity. — An application disclosed that the relator had been ***convicted*** of murder and sentenced to the extreme penalty of the law, and that the respondent had subsequently appointed, at his instance, a commission of medical experts to examine into, determine, and report his mental condition; that the majority of the commission had reported the relator to be of sound mind, though of a low grade, and thereafter the relator had made an application to the respondent for a trial by jury of the issue of insanity *vel non*, and the same had been refused. It was held that there is no law which imposes upon the respondent the ministerial duty of directing a trial of such an issue by a jury. In such case the allowance of trial by jury must be governed and controlled by the circumstances surrounding, and the situation of the case. State *v.* Judge, 48 La. Ann. 503.

Convicts — Statute Regulating Immigration. (See also the title IMMIGRATION.) — In *In re* Aliano, 43 Fed. Rep. 517, the court said: "The relators, by their own admission, were found guilty in the country from which they came, of an assault with a deadly weapon. They were sentenced to two and four months' imprisonment, respectively, and have served their terms. They are clearly ***convicts***, within the meaning of the act regulating immigration."

Suits. (See the title CIVIL DEATH, vol. 6, p. 365; and see ENCYC. OF PLEADING AND PRACTICE, title CONVICTS, vol. 5, p. 15). — That a ***convict*** is entitled to sue for personal injuries and to enforce his property rights, see Kenyon *v.* Saunders, 18 R. I. 590; Dalheim *v.* Lemon, 45 Fed. Rep. 225; Willingham *v.* King, 23 Fla. 478; Dade Coal Co. *v.* Haslett, 83 Ga. 550.

Alienation. (See the title CIVIL DEATH, vol. 6, p. 65). — Under the *Missouri* statute of 1879 it was held that a ***convict*** could not mortgage or alienate his property. Williams *v.* Shackleford, 97 Mo. 322.

Master and Servant. (See generally the titles MASTER AND SERVANT; PRISONS.) — A statute of *Minnesota* forbade the farming out of ***convict*** labor. The defendants, engaged in erecting a state prison, by an agreement with the prison authorities availed themselves of a ***convict's*** labor. It was held that the relationship of master and servant existed and the defendants were liable for injury sustained by the plaintiff, caused by their negligence. Dalheim *v.* Lemon, 45 Fed. Rep. 225.

Same — Damages. — Where the plaintiff, a ***convict***, was injured through the negligence of persons for whom he was working, it was held that he could not recover damages for the loss of ability to labor during the period of his imprisonment. Dalheim *v.* Lemon, 45 Fed. Rep. 225.

Same — Breach of Contract. — A statute provided that where, upon ***conviction***, a defendant in open court signed a written contract approved by the judge, whereby, in consideration of another becoming his surety, he agreed to do any act or perform any service

Prosecution for Other Crimes. — At common law it would seem that a person convicted of a felony, and thereby attainted, might plead the same in bar to a subsequent prosecution for any other felony, whether committed before or after the first conviction; for the reason that by his becoming attainted his possessions were forfeited, his blood corrupted, and he became dead in law, and therefore further conviction or attaint would be fruitless.[1] This doctrine, however, has received little recognition in the United States, and it is generally held that a convict may be indicted for another crime than that for which he was convicted, whether committed before or after the first conviction, or while the criminal is serving out his sentence thereon.[2]

CONVICTED FELON. — See the title LIBEL AND SLANDER; and see FELON.

CONVICTION. (See ACQUITTAL, vol. 1, pp, 572, 573. And see the titles CRIMINAL LAW; JURY AND JURY TRIAL; SENTENCE; VERDICT.) — 1. The word "conviction" ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a "conviction," or one is "convict," the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned.[3] Thus it has been held, where a

for such person, and upon his release failed to perform such act or services, he should be guilty of an offense. It was held that an agreement to farm on shares did not create the relation of employer and employee, and a breach of such contract was not a criminal offense. The court said: "The language of the statute is: 'Any defendant * * * who agrees to do any act, or perform any service, for such person.' It is thus manifest that the creation of the relation of employer and employee between the surety and defendant is contemplated, whereby the latter undertakes to do the act or perform the service for the former, the compensation for which shall be applied to the payment and discharge of the fine and costs adjudged against him, for which the former has confessed judgment. * * * It is clear this contract creates no relation of employer and employee between the parties. It does not, in any sense, stipulate for the performance of any act or service by defendant for the surety. The parties enter upon a joint business venture, to wit, farming. The one party agrees to contribute to this venture the land, stock, feed for the stock, and the farming implements; the other party, the necessary labor. They are to divide the crops produced equally between them. Each has the same interest in and control over the business and its products as the other. Neither is in the service of the other, nor does any act for the other. What is done by each in performance of the contract is done to promote the success of the joint adventure, and for the common benefit of both." Winslow *v.* State, 97 Ala. 68.

Interstate Commerce. (See also the titles INTERSTATE COMMERCE: PRISONS.) — The Act of May 19, 1894 (91 *Ohio* Laws 346), entitled "An act to regulate the sale of *convict*-made goods, wares, and merchandise, manufactured by *convicts* in other states," is in conflict with section 8 of article 1 of the Constitution of the United States, and is therefore void. Arnold *v.* Yanders, 56 Ohio St. 417.

1. 4 Black. Com. 336; 2 Hale's P. C. 250; Crenshaw *v.* State, 1 Mart. & Y. (Tenn.) 122; People *v.* Flynn, 7 Utah 382.

2. State *v.* Fayetteville, 2 Murph. (6 N. Car.) 371; State *v.* M'Carty, 1 Bay (S. Car.) 334; Henderson *v.* James, 52 Ohio St. 242; State *v.* Johnson, 91 Mo. 439; State *v.* Connell, 49 Mo. 282; Simpson *v.* State, 56 Ark. 8. See the title JEOPARDY.

In Hawkins *v.* State, 1 Port. (Ala.) 475, the court held that neither ***conviction*** nor pardon for any particular offense could operate as a bar or discharge for another distinct offense.

One under ***conviction*** of, and sentenced for, a felony cannot be tried for another felony in the same court until he has served his sentence or the judgment has been set aside or reversed. State *v.* Buck, 120 Mo. 479.

Cumulative Sentences. — See the title SENTENCE.

Escape — Theft. — In People *v.* Flynn, 7 Utah 378, it was held that a ***convict*** might be tried and sentenced for the theft of a horse and an attempt to escape from the penitentiary, even though the trial and sentence were had before his term of imprisonment had expired.

Murder. — In Coleman *v.* State, 35 Tex. Crim. Rep. 404, it was held that a ***convict***, under a life sentence for murder, was liable to prosecution for the murder of another person.

In Singleton *v.* State, 71 Miss. 782, it was held no defense to an indictment for murder, that when the crime was committed the accused was undergoing sentence of imprisonment for life on a former ***conviction***.

Sentence Before Expiration of First Term. — In Thomas *v.* People, 67 N. Y. 218, it was held that the fact that at the time of his ***conviction*** for murder the prisoner was under sentence for a term of which several years were unexpired, did not prevent his being sentenced to be hanged before the expiration of his term.

3. *In re* Friedrich, 51 Fed. Rep. 749; People *v.* Adams, 95 Mich. 543; U. S. *v.* Watkinds, 6 Fed. Rep. 158; Blair *v.* Com., 25 Gratt. (Va.) 850, *quoting* Bish. Cr. Law 36; State *v.* Moise, 48 La. Ann. 109; State *v.* Wilson, 14 La. Ann. 450.

Attainder Distinguished from Conviction. — In Shepherd *v.* People, 25 N. Y. 419, it is said: "In 1 Inst. 391*a*, it is said: 'The difference between a man attainted and ***convicted*** is,

constitution conferred the pardoning power upon the executive after conviction, that a pardon granted a defendant after verdict, but before sentence, was valid.[1] When, indeed, the word "conviction" is used to describe the

that a man is said ***convict*** before he hath judgment, as if a man be a ***convict*** by confession, verdict, or recreancie. And when he hath his judgment upon the verdict, confession, etc., then he is said to be attaint.' It is further said: 'By a ***conviction*** of a felon his goods and chattels are forfeited; but by attainder, that is by judgment given, his lands and tenements are forfeited and his blood corrupted, and not before.' So in Jacob's Law Dictionary (Attainted) it is said: 'Attainder of a criminal is larger than ***conviction;*** a man is ***convicted*** when he is found guilty or confesses the crime before judgment had, but not attainted till judgment is passed upon him.' This shows the technical, common-law definition of the word ***convict*** or ***convicted;*** a felon was ***convicted*** by the verdict of a jury; he was attainted by the judgment rendered on the verdict." See also U. S. *v.* Watkinds, 6 Fed. Rep. 158; Green *v.* Shumway, 39 N. Y. 430; Cozens *v.* Long, 3 N. J. L. 331.

Equivalent to Verdict of Guilty. — In *Ex p.* Brown, 68 Cal. 180, 7 Crim. L. Mag. 328, it was held that the ordinary meaning of the word ***conviction*** is a finding by the jury of a verdict that the accused is guilty; and accordingly it was held that the defendant was not admissible to bail as of right after verdict. See the title BAIL AND RECOGNIZANCES, vol. 3, p. 673. See, on the same point, People *v.* McGarigle, 19 Chicago Leg. N. 347.

Same — Suit on Bond. (See also the title INTOXICATING LIQUORS.) — In Quintard *v.* Knoedler, 53 Conn. 485, a verdict of guilty was held a ***conviction***, although no sentence or judgment had been pronounced, under a statute providing for suit on a liquor dealer's bond whenever he should be ***convicted***, etc.

Same — Costs. (See also the title COSTS, 5 ENCYC. OF PLEADING AND PRACTICE, p. 100.) — In York County *v.* Dalhousen, 45 Pa. St. 372, it was held, when a statute provided that in all cases of ***conviction*** where the party had been discharged according to law, without payment of costs, the county should pay them, that the term ***conviction*** applied to the verdict of the jury; and therefore, where the defendant had been ***convicted*** by the jury, and before sentence pleaded pardon, the county was held liable for the costs. See also Agnew *v.* Cumberland County, 12 S. & R. (Pa.) 94.

Former Conviction. (See the title JEOPARDY; and see ENCYC. OF PLEADING AND PRACTICE, vol. 9, p. 630.) — In U. S. *v.* Gibert, 2 Sumn. (U. S.) 40, Mr. Justice Story said that ***conviction*** does not mean the judgment passed upon the verdict; and in that case it was held that a plea of *autrefois convict* may be sustained by a confession or verdict, even where there has been no judgment. See, to the same effect, People *v.* Goldstein, 32 Cal. 432; Shepherd *v.* People, 25 N. Y. 406.

In Stevens *v.* People, 1 Hill (N. Y.) 261, it was held sufficient, in an indictment for a second larceny, to allege a prior ***conviction*** of the defendant, without averring that there was any judgment or sentence pronounced against him; but the contrary appears to have been held in Smith *v.* Com., 14 S. & R. (Pa.) 69.

Same — Reward. — In a United States case, in which certain claims were made for a reward offered for information which should lead to the forfeiture of any distillery, and to the ***conviction*** of the person engaged in operating it, it appeared that the persons said to have been ***convicted*** were found guilty by the jury, but that judgment on the verdict was suspended at the instance of the district attorney. It was held that the conditions of the offer were complied with; the court, by Nott, J., saying: "The counsel for the defendants has also argued that the term ***conviction*** in the offer of reward is to be construed * * * as meaning * * * 'trial and punishment.' We are of the same opinion, but draw from it a different inference, which is, that the statute enlarges rather than restricts the intent of the word ***conviction***. The informer's information led to an indictment, to a trial, and to a verdict of guilty. It also led to punishment — not to a punishment by fine or imprisonment on the judgment of the court, but to a lesser, modified punishment, inflicted at the instance of the prosecuting officer, who deemed it best to hold the judgment in suspense over the heads of offenders as security for their future good behavior." Williams's Case, 12 Ct. of Cl. 192.

A reward offered for the prosecution and ***conviction*** of a person is earned by procuring the prosecution followed by a plea of guilty. Wilmoth *v.* Hensel, 151 Pa. St. 209. See, generally, the title REWARDS.

Same — Appeal. — A statute provided that an appeal might be claimed in a convenient time before the rising of the court before which ***conviction*** should be had. It was held that the appeal must be claimed before the end of the term at which the verdict was returned. Shaw, C. J., said: "In general, the legal meaning of ***conviction*** is, that legal proceeding of record, which ascertains the guilt of the party, and upon which the sentence or judgment is founded, as a verdict, a plea of guilty, an outlawry, and the like. The law implies that there must be a ***conviction*** before punishment. 1 Hawk. P. C., c. 10, § 9. Judgment amounts to ***conviction***, though it doth not follow that every one who is ***convict*** is adjudged. 1 Hawk. P. C., c. 10; Jacob's Law Dict., *verb.* ***Conviction***. ***Conviction*** may accrue two ways, either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country. 4 Blackst. Com. 362. After trial and ***conviction*** the judgment of the court regularly follows, unless suspended or arrested, etc. Ibid, 365." Com. *v.* Richards, 17 Pick. (Mass.) 296.

1. Pardon. (See also the title PARDON.) — In State *v.* Alexander, 76 N. Car. 231, it was held that the term ***conviction***, as used in the Constitution of *North Carolina*, conferring the pardoning power upon the governor after ***conviction***, denoted a verdict of guilty rendered by a jury. Therefore, when the defendant, after verdict and judgment in the court below,

effect of the guilt of the accused, as judicially proved in one case when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the effect of guilt judicially ascertained as a disqualification of the "convict." [1] Thus, where a statute provides that

appealed to the Supreme Court, and pending such appeal was pardoned by the governor, it was held that such pardon was authorized by the constitution and was valid. See State *v.* McIntire, 1 Jones L. (46 N. Car.) 1, where it was held that the governor could not pardon after the judgment had been annulled by the Supreme Court. The court said: "The judgment is referred to in the pardon as subsisting, whereas in fact it was annulled by an appeal to the Supreme Court; and if that court should decide there was error, and direct a *venire de novo*, the ***conviction*** also would be annulled and the defendants stand as if there had been no trial." See also State *v.* Mooney, 74 N. Car. 98.

In *Massachusetts*, where the constitution placed in the hands of the governor the power of pardoning offenses, but provided that no pardon before ***conviction*** should avail the party pleading the same, it was held that a pardon granted after verdict of guilty, and before sentence, was valid. Judge Gray says: "The ordinary legal meaning of ***conviction***, when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the facts thus ascertained." Com. *v.* Lockwood, 109 Mass. 323.

Under the governor's power to grant a pardon conferred by the Constitution of *Virginia*, art. 4, § 5, which declares that "he shall have power to remit fines and penalties in such cases, and under such rules and regulations, as may be prescribed by law; and, except when the prosecution has been carried on by the house of delegates, to grant reprieves and pardons after ***conviction***," it was held that the governor has authority to pardon a person ***convicted*** of a felony by a verdict of the jury, before sentence is passed upon him by the court; Judge Moncure saying: "It thus appears that the word ***conviction***, as used in our laws, ordinarily signifies the finding of the jury by verdict that the prisoner is guilty, or something equivalent thereto; but the word sometimes denotes the final judgment." Blair *v.* Com., 25 Gratt. (Va.) 850. See also Smith *v.* State, 6 Lea (Tenn.) 637, in which it was held that, as the governor can only pardon after ***conviction***, and it is intimated that a ***conviction*** implies not simply a verdict, but also a judgment, the governor's pardon cannot release the defendant from the costs in favor of third persons imposed on him by the ***conviction***.

1. **Final Sentence.** — Com. *v.* Lockwood, 109 Mass. 325; Smith *v.* Com., 14 S. & R. (Pa.) 69; People *v.* Board of Police, 20 Hun (N. Y.) 337; Kingsbury *v.* State, (Tex. Crim. App. 1897) 39 S. W. Rep. 365; Burgess *v.* Boetefeur Co., 7 M. & G. 481, 49 E. C. L. 481.

Where a statute provides that a person ***convicted*** of crime shall be incapacitated from holding office, the verdict must be followed by judgment to amount to a ***conviction*** within the statute. Faunce *v.* People, 51 Ill. 311.

Same — Disqualification of Electors. (See also the title ELECTIONS.) — In State *v.* Houston, 103 N. Car. 383, Smith, C. J., concurring in the judgment of the court, that an elector prosecuted for perjury for taking the oath that he was a duly qualified voter, when, as alleged, he had been ***convicted*** of larceny, could not be found guilty of the perjury unless sentence had been passed on him for the larceny, said, quoting from the opinion of Judge Gray in Com. *v.* Lockwood, 109 Mass. 325: "'When, indeed, the word ***conviction*** is used to describe the effect of the guilt of the accused, as judicially proved in one case when pleaded, or given in evidence in another, it is sometimes in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the plea *autrefois convict*, or of the effect of guilt judicially ascertained as a disqualification for office.' He proceeds to give this meaning to the word, where, in the constitution, it is provided that no person ***convicted*** of bribery or corruption in obtaining an election or appointment 'shall hold a seat in the legislature, or any office of trust or importance in the state government.' I see no just reason for distinguishing in principle the consequences flowing from the criminal act, in the conditions under which, and the proof by which, they are to be extended to the disability to give evidence and the disability to vote. In my opinion, the same rule must govern in each."

Where one was charged with voting, not being a qualified voter, for that he had been "***convicted*** of the crime of burglary," on a motion to quash because the indictment failed to show and allege the defendant's disqualification in this, that it failed to allege any final judgment of a court of competent jurisdiction, the court overruled the motion, White, P. J., saying: "The word ***convicted*** used by the pleader has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused. Penal Code, art. 27; 1 Bouv. Law Dict., word ***Conviction***. To say that a party had been ***convicted***, and then add that he stood his final trial, and that judgment final was rendered against him, would be tautology. Moreover, the word ***convicted*** is the proper statutory word to convey the idea that a party is disqualified from voting because he has been tried and condemned for a felony." Gallagher *v.* State, 10 Tex. App. 469.

But in U. S. *v.* Watkinds, 6 Fed. Rep. 152, it was held that the word ***conviction***, as used

upon conviction of an offense the convict shall be disqualified thereafter as a

in the constitution of *Oregon*, which declares that the privilege of an elector shall be forfeited by ***conviction***, must be taken in its ordinary and primary sense as not including sentence. The court said: "In the argument for the defendant it has been assumed that ***conviction*** of a crime includes and is the result of the judgment or sentence of the court imposing the punishment prescribed therefor. But this is altogether a mistake. The term ***conviction***, as its composition (*convinco*, *convictio*) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are, (1) by the plea of guilty, and (2) by the verdict of a jury."

Same — Bribery. (See the titles ELECTIONS; PUBLIC OFFICERS.) — The constitution of *Nevada* provides that any person who may be convicted of having given a bribe to secure his election shall be disqualified. In contesting an election the complainant failed to allege that the contestee had been ***convicted*** of the crime of bribery. This was held fatally defective. The court said: "The ***conviction*** is the foundation upon which the cause of action must be based on a charge of bribery, and without such a ***conviction*** no ouster can be adjudged. The word ***convicted*** has a well-defined meaning, and he who reads ought not to be misled thereby. Webster's Dictionary defines the word as 'the past participle of the verb to ***convict***. To prove or find guilty of an offense or crime charged; to pronounce guilty, as by legal decision.' Black's Law Dictionary: '***Convicted***. This term has a definite signification in law, and means that a judgment of final condemnation has been pronounced against the accused.' Anderson's Law Dictionary: '***Convicted***. Found guilty of the crime whereof one stands indicted.' Rapalje & Lawrence's Law Dictionary: 'The finding of a person guilty of an offense.' Bouvier: '***Conviction***. A condemnation. In its most extensive sense this word signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense it means the judgment given against the criminal.' See also Blaufus *v.* People, 69 N. Y. 109; Faunce *v.* People, 51 Ill. 312; Ritter *v.* Democratic Press Co., 68 Mo. 460. Under our system of government and the statute of this state, and the constitutional provision referred to, ***convicted*** means when a person has been indicted by a grand jury, tried by a court and jury, and found guilty of the offense charged in the indictment; and it was the intention of the framers of the constitution that no person should be ousted from an office, when charged with the crime of bribery, until after such trial and ***conviction*** upon a verdict of guilty." Egan *v.* Jones, 21 Nev. 433.

The case of Sutton *v.* Bishop, 4 Burr. 2283, is a singular one. Bishop, the defendant, had received a bribe of five guineas from one Earle. In order to indemnify himself, he determined to discover Earle, so as to avail himself of the eighth section of the Bribery Act (2 Geo. II., c. 24), which enacts "that if any person offending against this act [shall] within the space of twelve months next after such election, etc., discover any other person or persons offending against this act, so that such person or persons so discovered be thereupon ***convicted***, such person so discovering, etc., shall be indemnified," etc. Accordingly, upon Bishop's statement, an action was brought under that act, by one Bingley against Earle. Two months afterwards an action was brought by Sutton against Bishop under the same section, for taking the bribe. Both these causes were set down for trial on the same day, and were actually tried within half an hour of each other; but the cause of Sutton *v.* Bishop standing first, the judge would not invert the order in which they stood upon his paper by trying the other cause of Bingley *v.* Earle first, though that action was first commenced; the consequence was, that Sutton got a verdict against Bishop, for Bishop could not show that he had made a discovery of another person so as to be thereupon ***convicted***. Bingley, on the other hand, got a verdict against Earle upon the evidence of Bishop. But this verdict came too late to avail Bishop in his own cause at the suit of Sutton; for a verdict had already been given against him, which, as his counsel insisted, could not have happened if his cause had been tried first. On a motion by Bishop, the defendant, to set this verdict aside, it was made a question "what shall amount to a ***conviction*** within the sense of this clause?" And the court said "that a verdict alone was not a ***conviction***; that in civil actions a verdict is nothing without a judgment. This is a civil action, an action of debt for a penalty; *nil debet* is pleaded. The defendant is not ***convicted*** of the debt till judgment." They were, therefore, of opinion that it ought to be completed by a judgment. But they were also of opinion that after it should be so completed it would relate back to the time of the original discovery. And they thought that Bingley ought to be at liberty to enter up his judgment, in order to entitle Bishop to his indemnity, or, at least, not to strip him of it. They thought also that Sutton should complete his judgment, but that his proceeding upon it should be stayed.

Same — Dower. — A statute provided that a wife ***convicted*** of adultery in an action brought against her by her husband for divorce should not be entitled to dower in his real estate. It was held that by ***conviction*** as here used was meant a verdict followed by final judgment. Schiffer *v.* Pruden, 64 N. Y. 52. See also Pitts *v.* Pitts, 52 N. Y. 593. And see generally the title DOWER.

Same — Appeal. — A statute provided for an appeal to the Supreme Court by any person ***convicted*** in the Circuit Court of any offense. It was held that this did not authorize an appeal before sentence or judgment, although there had been a verdict of guilty. Lemly *v.* State, 69 Miss. 628. See generally ENCYC. OF PLEADING AND PRACTICE, title APPEAL, vol. 2, p. 1.

Same — Conviction Fees. — In State *v.* Barnes, 24 Fla. 153, it was held that a state attorney was not entitled to a ***conviction*** fee until after

witness, the term "conviction" is held to include final judgment, and a sentence of the court. The court said: "It is very plain that this statute contemplates a sentence of the court as necessary to entitle the state attorney to a ***conviction*** fee. The costs are not taxed till the sentence is given, and the defendant is not required to pay till they are taxed. Then if he fails to pay, the sheriff must make return that the fee cannot be made out of his goods and chattels before the state can be called on to pay, and such return could only be made on an execution, which never issues unless specially authorized by statute, before final judgment. It follows that ***conviction***, as used in this statute, includes a sentence of the court, and the same meaning must be given to it in the statute allowing the fee to the county solicitor." See also Buckingham *v.* People, 26 Ill. App. 269. See generally the title PROSECUTING ATTORNEY.

Same — Intoxicating Liquors. — A statute provided that a ***conviction*** of a liquor dealer, by a competent court, of violations of the liquor law, should of itself make the license of such dealer void. The court held that the term ***conviction***, as here used, could mean nothing less than a final judgment, quoting from the opinion of Com. *v.* Gorham, 99 Mass. 420, to the effect that the term ***conviction*** was used in the statutes of *Massachusetts* in two different senses. Com. *v.* Kiley, 150 Mass. 325. See generally the title INTOXICATING LIQUORS.

Same — Disorderly House. — Where an action was brought upon the Stat. 25 Geo. II., c. 36, § 5, against the defendants as overseers of the parish of Paddington, for the sum of ten pounds, under the provisions of that statute, to wit, in case a person keeping a disorderly house in any parish, and being prosecuted on the information of two inhabitants of such parish, be ***convicted***, the overseers are forthwith to pay ten pounds to each of such inhabitants; and it appeared that E was prosecuted, and pleaded guilty to keeping a disorderly house, while F and G were overseers of the parish; and that after C and D succeeded them in that office, E was called up for judgment and sentence; it was held that E was not to be considered as ***convicted*** until the judgment of the court upon the indictment against him was pronounced, and therefore that the action was rightly brought against C and D, and that their predecessors F and G were not liable; the court, by Tindal, C. J., saying: "The first question, then, is, Who were the overseers of the said parish at the time the ***conviction*** took place? The information was laid in the year 1842, when the parties prosecuted pleaded guilty. The defendants contend that the ***conviction*** took place at that time. The plaintiff, on the other hand, says that there was no ***conviction*** then, nor till the parties were subsequently brought up and received the sentence of the court. The word ***conviction*** is undoubtedly *verbum æquivocum*. It is sometimes used as meaning the verdict of a jury, and at other times in its more strictly legal sense, for the sentence of the court. In the passages cited from Blackstone's Commentaries, the term seems to be used in both senses. The question is, in which sense is it used in the statute now under consideration. And I cannot but think that the case of Sutton *v.* Bishop, 4 Burr. 2283 [set out *supra*, this note], is decisive of the point. The court there said: 'Though there is a distinction in criminal cases between the ***conviction*** and the attainder, yet there is no such distinction in civil cases between verdict and judgment so as that any effect can follow from a naked verdict. In a civil action no penalty takes place till judgment be given on the verdict. The penalty is demanded as a debt, and is not due till judgment is given. Any other construction would open the door to frauds. An offender would prosecute another to verdict, and therefore secure his own indemnity, and then proceed no further.' Why does not the same reasoning apply to this case? If a verdict of a jury or a confession by the party were sufficient to satisfy the statute, a door would be equally open to fraud. So, again, the word 'acquittal' is *verbum æquivocum*. It is generally said that a party is acquitted by the jury, but, in fact, the acquittal is by the judgment of the court. A plea of *autrefois convict* or *antrefois acquit* can only be supported by proof of a judgment. Then, as these defendants were the overseers at the time that the judgment of the court was pronounced, I think they are properly made defendants in this action." Burgess *v.* Boetefeur, 7 M. & G. 481, 504, 49 E. C. L. 481, 504.

Same — Second Offense. (See the title CRIMINAL LAW.) — In White *v.* Com., 79 Va. 616, it is said: "Probably, in a prosecution alleging, as in this case, a former ***conviction***, and where the statute imposes an increased penalty for each succeeding offense, and when the alleged prior ***conviction*** and judgment thereon is held for review on writ of error in the court of last resort, it would be safer and more in consonance with a liberal and just view of the rights of the citizen to hold, as intimated by Dwarris, that pending the alleged former ***conviction*** in the appellate tribunal there is wanting that final judicial sentence essential to constitute ***conviction***. In such case it is apparent that if the judgment of the appellate court should be one of reversal nothing would be left as the basis of a second prosecution alleging a former ***conviction***."

See 1 Hale P. C. 686, where Lord Hale, commenting upon the Stat. 5 Eliz., c. 14, against the forging or making of false deeds, etc., by which a person committing a second offense after his ***conviction*** or condemnation of a former one, shall be deemed guilty of felony without benefit of clergy, has these words: "By ***conviction*** I conceive is intended, not barely a ***conviction*** by verdict where no judgment is given, but it must be a ***conviction*** by judgment."

Same — Arrest of Judgment. — In *England* it has been held that the Stat. 5 W. & M., c. 11, directing that no certiorari shall be granted on the part of a defendant to remove an indictment for a misdemeanor from the sessions before he shall enter into a recognizance, etc., to try at the next assizes, and that "if the defendant prosecuting such certiorari be ***convicted*** the Court of King's Bench shall give

verdict alone is not sufficient to disqualify the defendant.[1]

Necessity of Verdict. — In several cases a verdict by a jury has been held necessary to constitute a conviction,[2] but in others a finding of the court has been

reasonable costs to the prosecutor," and that the recognizance shall not be discharged till the costs taxed shall be paid, attaches only upon a defendant *convicted* by judgment; and therefore, if, after a verdict of guilty, the judgment is arrested, no costs can be taxed for the prosecutor. Rex *v.* Turner, 15 East 570.

Same — Execution of Slave. — In Hamilton *v.* Auditor, 14 B. Mon. (Ky.) 185, where a statute provided that when the court should sentence to death a slave, the value of such slave shall be fixed by the court, and if the slave be executed, or die in jail after *conviction* before the day of execution, the value so fixed shall be paid, etc., it was held that the legislature used the word *conviction* in the first clause as synonymous with the word "sentence" in the second clause; and therefore, where a slave died after a verdict of guilty but before sentence, it was held that his owner could recover nothing.

1. Witnesses — Infamy. (See also the titles INFAMY; WITNESSES.) — Fitz *v.* Smalbrook, 1 Keb. 134, T. Raym. 32; Lee *v.* Gansel, 1 Cowp. 3; Faunce *v.* People, 51 Ill. 311; Dawley *v.* State, 4 Ind. 128; Com. *v.* Gorham, 99 Mass. 420; Keithler *v.* State, 10 Smed. & M. (Miss.) 192, 236; Marion *v.* State, 16 Neb. 362; Blaufus *v.* People, 69 N. Y. 107; Sacia *v.* Decker, 1 Civ. Pro. Rep. (N. Y. C. Pl.) 47; People *v.* Whipple, 9 Cow. (N. Y.) 707; Arcia *v.* State, 26 Tex. App. 193; Woods *v.* State, 26 Tex. App. 490.

In Com. *v.* Gorham, 99 Mass. 422, it was held that the word *conviction* as used in the *Massachusetts* statute providing that the *conviction* of any crime may be shown to affect the credibility of a witness, implies a judgment of court. The court said: "Under the Gen. Stat., c. 131, § 13, no person can now be excluded by reason of crime from giving evidence as a witness, but the *conviction* of any crime may be shown to affect the credibility of the witness. The term *conviction* is used in at least two different senses in our statutes. In its most common use it signifies the finding of the jury that the prisoner is guilty; but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt. Gen. Stat., c. 160, § 8; c. 173, § 1. In c. 174, the several sections relating to judgment and execution in criminal cases plainly describe the situation of the prisoner when nothing remains but the sentence. And in the several chapters which define and punish offenses against persons, property, public morality and health, the words *conviction* and *convicted* describe the same condition of the offender. We think the obvious purpose of the legislature was to restore the competency of a witness against whom the record of a judgment for crime was produced, but to permit the same evidence to be used as affecting his credibility (in all cases requiring the same complete record of the whole case), and that the word *conviction* is here used in the broader and less technical sense, and implies the judgment of the court."

2. Necessity of Jury Trial. — A *New York* statute provided that the board of police of the city of New York might remove members of the force upon their *conviction* of certain offenses. It was held that *conviction* in this connection meant a *conviction* in the ordinary courts of justice, and that the statute conferred no authority upon the board to try members of the force for such offenses. The court said: "The idea that the board of police may try and *convict* persons charged with perjury or murder, arson, or other legal offense, is simply preposterous. Those offenses can only be tried by a jury, and in the mode provided by law. Neither an act of the legislature, nor the consent of the accused, will justify a trial for these offenses in any different manner. The word *conviction*, as used in this section, has the same meaning as when used in similar statutes. It means a judgment of guilty pronounced against the accused, by the tribunal and in the mode prescribed by law. Blaufus *v.* People, 69 N. Y. 107; Schiffer *v.* Pruden, 64 N. Y. 47." People *v.* Board of Police, 20 Hun (N. Y.) 337.

Same — Demurrer. — A statute (11 and 12 Vict., c. 78), created a court of criminal appeal, and provided that, when any person should have been *convicted*, etc., the judge, etc., before whom the case was tried, might, in his discretion, reserve a case stated, with any questions of law, for the consideration of said court. On an indictment to which the defendants demurred, upon judgment for the crown on the demurrer, the judge reserved the question as to the validity of the indictment; but it was held that the court had no jurisdiction, Lord Campbell, C. J., saying: "I find no such power conferred upon us; the statute refers to questions which shall arise upon the trial, and which, after the prisoner shall have been *convicted*, may be reserved for this court. Looking at the language employed, the word *convicted* must be taken to mean '*convicted* upon verdict,' and that really is the trial that takes place before the jury. There is no power here given us to investigate what is done upon demurrer before the trial begins." Reg. *v.* Faderman, T. & M. 286; 1 Den. C. C. 565. But see Foster's Case, 11 Coke 59, where a judgment on demurrer was held a *conviction*.

Same — Disbarment of Attorney. — Where a statute provided that no attorney should be disbarred unless *convicted* of a criminal offense, it was held that by *convicted* is meant *convicted* by a jury and not by the court. Kane *v.* Haywood, 66 N. Car. 29. See generally ATTORNEY AND CLIENT, vol. 3, p. 304.

Where a statute provided that an attorney might be disbarred upon *conviction* of a crime, it was held that an indictment followed by his escape from jail did not warrant his being struck off the roll. State *v.* Foreman, 3 Mo. 602.

Same — Appeal. — Where an attorney has been convicted of crime it has been held a sufficient cause for disbarment although an appeal is

deemed sufficient for this purpose.[1]

Civil Actions. — The terms "convicted" and "conviction" are usually applied to express the result in criminal cases only.[2] But in their most extensive sense they are applicable to a judgment in a civil action.[3]

Other Constructions. — For cases in which other questions of construction have arisen, see note 4.

pending. *In re* Kirby, (S. Dak. 1898) 73 N. W. Rep. 907.

Same — Conviction Fees. — In Buckingham *v.* People, 26 Ill. App. 269, it was held that neither a fine for contempt nor a judgment in proceedings by scire facias on a forfeited recognizance, was a ***conviction*** within the meaning of the statutory provision allowing the state's attorney ***conviction*** fees. See also State *v.* Barnes, 24 Fla. 153. See the title PROSECUTING ATTORNEY.

Same — Distinguished from Detection. — The libel sued upon was the publication by the defendant that the plaintiff was "the only insurance agent in Vermont who had been ***convicted*** in open court of wilful perjury." The defendant contended that the word ***convicted*** was not used in its legal sense, but in its popular meaning of being detected in guilt. The court said: "The meaning of this libel depends upon the construction to be given to the word ***convicted***, as used therein. The defendant claims that it is capable of being understood to mean, not only that the plaintiff had been ***convicted*** in the sense of having been tried and found guilty by legal decision, but also that he had ***convicted*** himself by his own testimony in open court, and stood self-***convicted*** in the minds and estimation of those who heard him testify; or, in other words, that his testimony in open court had detected him in wilful perjury, or proved him guilty of it. The meaning of that word is to be gathered from the whole publication, which we must read as people in general would read it, and understand as they would understand it; and, reading and understanding it thus, what is there to suggest the meaning claimed by the defendant? The words are direct and positive: 'has been ***convicted*** in open court of wilful perjury.' Language could scarcely be more opposite, not only to impute perjury, but to charge a ***conviction*** of it by legal decision. It is the ***conviction*** that is charged to have been in open court, not the perjury, which, as the defendant claims, constituted the ***conviction***, that the libel means. The perjury may have been committed out of court as well as in court, for aught that is said." Norton *v.* Livingston, 64 Vt. 473.

1. Finding of Court. — The finding of a court that a married man had abandoned his wife was held a ***conviction*** within a *Wisconsin* statute providing for the report of such ***convictions*** to the Appellate Court. The court said: "The attorney-general suggests there may be a doubt as to whether the case is properly before us, because there has been no ***conviction***. The court, however, has found the facts which show that defendant is liable for the penalty of the statute, and this finding may be treated as equivalent to the verdict of a jury. At all events, we have deemed it best to give our decision upon the questions certified by the municipal court." State *v.* Witham, 70 Wis. 476.

Where a person accused of crime was ordered by a court of preliminary jurisdiction to enter recognizance for his appearance, and he neglected to do so, a mittimus was issued for him to be committed to await his trial, stating that he had been ***convicted*** and ordered to recognize. Upon a writ of personal replevin (*de homine replegiando*) the mittimus was held sufficient; the court, by Davis, J., saying: "It is alleged that the accused, upon his hearing, had been ***convicted*** of the offense. Though the magistrate had no authority to sentence, he had authority to try the case. He required the accused to plead to the charge, and upon that plea, after the hearing, he ***convicted*** him. ***Conviction*** is an adjudication that the accused is guilty. It imports all that the statute requires before holding one to bail, and more. It involves not only the *corpus delicti* and the probable guilt of the accused, but his actual guilt. I think the mittimus sufficient." Nason *v.* Staples, 48 Me. 123.

2. Swan *v.* State, 29 Ga. 626.

Judgment in Civil Action. — It has been held that a judgment in a civil action does not fall within the term ***conviction***. The court said: "The term ***conviction*** implies a judicial sentence of condemnation for a public *delictum*." Perrit *v.* Crouch, 5 Bush (Ky.) 204.

3. On the question as to whether a town court, constituted to try all civil actions, and given all the powers in civil matters conferred upon justices, had jurisdiction over violation of the license laws, the court, by Young, C. J., said: "The difficulty, as it appears to me, has arisen out of a misapprehension of the scope and meaning of the words ***convicted*** and ***conviction***, in the license law, chapter 75. It was argued that a ***conviction*** necessarily and exclusively applies to a criminal offense, punishable as a misdemeanor, and the proper subject of an indictment to be enforced by a warrant. Now, it may be conceded that this is the sense in which it is often understood, but not always so. Bouvier, in his Law Dictionary (2d ed.), says: 'This word means a condemnation. In its most extensive sense it signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense it means a judgment given against a criminal.' It is obvious that the legislature meant a ***conviction*** for penalties under chapter 75, in its extensive sense, otherwise they would never have perpetrated the absurdity of making them recoverable in the same manner and with the like costs as if they were private debts, and giving the form, not of a warrant, but of an execution." *In re* Fraser, 13 Nova Scotia 354.

4. Every Person Convicted of Felony. — An act (33 and 34 Vict., c. 29, § 14), providing that "every person ***convicted*** of felony shall forever be disqualified from selling spirits by retail," was held to be retrospective, and to apply to a person "***convicted*** of felony" either before or after the act passed; Cockburn, C. J., saying:

Record of Summary Proceedings. — A conviction is defined to be the record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced.[1]

2. "Conviction" is the state of being convinced or fully persuaded; strong belief on the ground of satisfactory reasons or evidence; the conscious assent of the mind; settled persuasion; a fixed or firm belief; as, an opinion amounting to "conviction."[2]

CONVICT-LABOR SYSTEM. — See the title PRISONS.

CONVINCE. — To "convince" is primarily to overcome and subdue, and in logic to satisfy the mind by proof.[3]

"On looking at the act, the words used seem to import the intention to protect the public against persons *convicted* in the past as well as in future; the words are in effect equivalent to 'every *convicted* felon.'" Reg. *v.* Vine, L. R. 10 Q. B. 195.

Joinder — Two Convictions. — Under an indictment joining a count for burglary with one for larceny, a verdict of guilty on both counts, followed by judgment sentencing the defendant for both offenses, was held to constitute two *convictions* within a statute allowing a prosecuting attorney a fee for each *conviction*. The court said: "In construing it in this way, it seems to me that the word *conviction*, as used in the statute fixing fees, means the legal ascertainment of the guilt of the defendant of an offense, and that the prosecuting attorney in this case is entitled to two fees, as there were two *convictions*." Hempstead County *v.* McCollum, 58 Ark. 167. See generally the title PROSECUTING ATTORNEY.

1. Record of Summary Proceedings. — Preusser *v.* Cass, 54 N. J. L. 534. The court in that case said: "Such a *conviction* should contain the substance of the complaint or information, so as to show jurisdiction in the magistrate; the process whereby the alleged offender is brought before the magistrate; his appearance and defense or confession; and, if no confession is made, the evidence presented, so that a reviewing court may discover the grounds on which the adjudication of the magistrate was made; and, lastly, the judgment. Bosc. Pen. Stat. 17." See also Hankinson *v.* Trenton, 51 N. J. L. 495.

The *conviction* must contain sufficient of the evidence to show the legal propriety of the judgment. Dougherty *v.* Conover, 42 N. J. L. 193; Lyons *v.* Spratford, 43 N. J. L. 376; Hoeberg *v.* Newton, 49 N. J. L. 617.

2. Century Dictionary.

Abiding Conviction. See the titles EVIDENCE; REASONABLE DOUBT.) — In holding that a charge to the jury on the subject of "reasonable doubt" as follows: "If you can truthfully say that you have an 'abiding *conviction*' of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt," was not erroneous, the court, by Field, J., said: "The word 'abiding' here has the signification of settled and fixed, a *conviction* which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of *conviction* would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs." Hopt *v.* People, 24 Rep. 129.

In a civil case the jury are authorized to find that a controverted fact has been established if a preponderance of the evidence reasonably satisfies them of its truth; and it is error to instruct them that they should not find that such fact has been established unless they have an "abiding *conviction*" from the evidence that it has been established, or if they are left "in doubt and uncertainty" as to its existence. Battles *v.* Tallman, 96 Ala. 403.

Jury and Jury Trial. (See also the title JURY AND JURY TRIAL.) — A deliberate *conviction* formed by a juror of the prisoner's guilt was *prima facie* a disqualification, the term "deliberate *conviction*" being the equivalent of "a fixed opinion." Allison *v.* Com., 99 Pa. St. 30. In that case, however, it was held that although the examination in chief apparently showed that the juror had formed a fixed opinion, the cross-examination showed that such was not actually the case.

3. Instructions. (See the titles EVIDENCE; FRAUDULENT SALES AND CONVEYANCES; REASONABLE DOUBT.) — Evans *v.* Rugee, 57 Wis. 623, in which case it was held that the jury should not be instructed that more *convincing* testimony is required to establish the validity of conveyance between husband and wife than if the parties were strangers.

An instruction that the jury must be *convinced* was held not error where the judge also instructed that the plaintiff need only prove his case by a fair preponderance of evidence. Davidson *v.* Kolb, 95 Mich. 469.

Same — Convincing Proof. — In trespass *de bonis*, where the defendants justify the asportation, an instruction "that it is incumbent upon the defendants to show, by a clear preponderance of the evidence and by *convincing* proof, their right to do so," is erroneous. The court said: "Assuming that [the property] had been carried away by them, and assuming it incumbent upon them to justify their acts, still they were only required to do so by a preponderance of the evidence, not by a 'clear preponderance and by convincing proof.' Perhaps the adjectives were intended for emphasis only, but the testimony upon the issues tried was so evenly balanced that the instruction may have misled the jury, and very likely did so. Preponderance means to outweigh; to weigh more. A clear preponderance may

CONVOY. — In a warranty in a policy of insurance that a ship will sail with convoy, by the term "convoy" is to be understood "a naval force under the command of a person appointed by the government of the country to which the vessel insured belongs." [1]

COOKING STOVE. — See STOVE.

COOLING TIME. (See the title HOMICIDE.) — "Cooling time" in the law of homicide means time for the mind after provocation to become so calm and sedate as that it is supposed to contemplate, comprehend, and coolly act with reference to the consequences likely to ensue.[2] But no precise time in hours or minutes can be laid down by the court as a rule of law within which the passions must be held to have subsided, and reason to have resumed its control.[3]

COOPER. — See note 4.

mean that which may be seen, is discernible, and may be appreciated and understood. In this sense the expression might be unobjectionable; but it may convey the idea, under emphasis, of certainty beyond doubt, and very likely would do so to the common mind. At any rate, the expression is equivocal and mischievous. ***Convincing*** proof may be said to mean that degree of certainty required to sustain a given postulate. But that view assumes that the hearer knows the rule that governs isuch case, which jurors are not supposed to know, but of which they should be informed. The two expressions, coupled, must have conveyed to the jury an erroneous basis for their verdict." French *v.* Day, 89 Me. 441.

1. Convoy. (See the titles INTERNATIONAL LAW; MARINE INSURANCE.) — Peake Add. Cas. 143, note; D'Eguino *v.* Bewicke, 2 H. Bl. 551.

In The Atalanta, 3 Wheat. (U. S.) 423, the court says: "A ***convoy*** is an association for a hostile object. In undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a ***convoy*** every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy. If, then, the association be voluntary, the neutral in suffering the fate of the whole has only to regret his own folly in wedding his fortune to theirs; or, if involved n the aggression or opposition of the ***convoying*** vessel, he shares the fate which the leader of his own choice either was or would have been made liable to, in case of capture."

Wait for Convoy. — Where a ship was to sail with ***convoy***, and demurrage was to be paid for every day beyond a certain number of days that she should wait for ***convoy***, this was construed to mean that it was to be paid until the ***convoy*** was ready to sail, and not that the freighter was to be discharged on the arrival of the ***convoy*** at the port where the ship lay. Lannoy *v.* Werry, 4 Bro. P. C. 630.

Depart with Convoy. — "Depart with ***convoy***" means to sail with ***convoy*** throughout the whole voyage. Jeffery *v.* Legender, 3 Lev. 321. See also Warwick *v.* Scott, 4 Campb. 62.

Sails with Convoy and Arrives. — "Sails with ***convoy*** and arrives" means that the ship is bound to sail with ***convoy***, but not to arrive with ***convoy***; and it is sufficient if the goods arrive, although they do not arrive safely, there being no warranty as to their condition. "Arrived" means at the ultimate port of destination. Kellner *v.* Le Mesurier, 4 East 396. See also Dalgleish *v.* Brooke, 15 East 295; Leevin *v.* Cormac, 4 Taunt. 483.

2. Eames *v.* State, 10 Tex. App. 447.

3. Maher *v.* People, 10 Mich. 223.

Other Definitions. — In Keiser *v.* Smith, 71 Ala. 486, it is said: "It is manifest that no absolute rule for all possible cases can be declared. The time in which a man of ordinary prudence would ***cool***, under a similar state of circumstances, is usually designated as a reasonable time for such purpose. The law cannot preserve its own integrity, and at the same time admit the proposition, sometimes sanctioned by a sentiment originating in too tender regard for human frailty, that calm reflection on legal wrongs may justly increase one's rage in proportion to the length of time spent in their contemplation. The recognition of such a principle would speedily undermine and ultimately destroy that peace of society which is absolutely essential to the very existence of good government."

In May *v.* People, 8 Colo. 220, it is said: "Our statute declares that if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder. This is our statutory definition of what may be termed ***cooling time***."

In Kilpatrick *v.* Com., 31 Pa. St. 198, ***cooling time*** is defined as a reasonable time in which an ordinary man under or in like circumstances would have ***cooled***.

In Fields *v.* State, 52 Ala. 348, ***cooling time*** is defined as time in which passion would have subsided unless wrath had been nursed.

For Examples in which the court has defined what constitutes a sufficiency of ***cooling time*** after provocation, see Rex *v.* Legg, Kel. 27; State *v.* Andrew, 76 Mo. 104; Fields *v.* State, 52 Ala. 348; Robinson *v.* State, 108 Ala. 14; State *v.* Yarborough, 39 Kan. 582; Judge *v.* State, 58 Ala. 413; Abernethy *v.* Com., 101 Pa. St. 322; Com. *v.* Webster, 5 Cush. (Mass.) 308.

4. A ***cooper*** of a ship has been held a seaman within the provisions of the United States Crimes Act of 1790. U. S. *v.* Thompson, 1 Sumn. (U. S.) 168. See generally the title SEAMEN.

CO-OPERATIVE SOCIETY. — A "co-operative society" is defined as a union of individuals, commonly laborers or small capitalists, formed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member.[1]

CO-ORDINATE JURISDICTION. — See the titles JURISDICTION; UNITED STATES COURTS.

COPARCENARY. — See the title PARCENARY.

CO-PARTIES. — See note 2.

COPARTNERSHIP. — See the title PARTNERSHIP.

COPY. (See also the titles COPYRIGHT, *post*; DOCUMENTARY EVIDENCE: EXEMPLIFICATION; SECONDARY EVIDENCE.) — A copy is a true transcript of an original writing.[3] The word "copy" imports an entire transcript or copy

1. Finnegan *v.* Noerenberg, 52 Minn. 244, *quoting* Cent. Dict. That case arose under the construction of an act entitled "An Act in relation to the formation of *co-operative* associations." The court said further: "Taking the distinctive feature of a *co-operative society* to be that it is made up of laborers or small capitalists, it is manifest that the chapter intends to deal with just that sort of associations. Not only does it contemplate that the operations of the corporations shall be local, but the capital stock is limited to fifty thousand dollars, the stock which one member may hold to one thousand dollars. No one can become a shareholder without the consent of the managers, and no one is entitled to more than one vote." See also the titles CORPORATIONS; SOCIETIES AND CLUBS.

Co-operative Plan. — A statute was entitled "An Act to require of butter and cheese factories on the *co-operative* plan to give bonds, and to prescribe penalties for the violation thereof." The act was held not open to the objection that the subject was not embraced in the title. The court said: "It is claimed that the *co-operative* plan is different from the dividend plan. * * * It is claimed that the title does not express the subject of the body of the act. The term *co-operative* is defined to be, 'promoting the same end; helping; acting together to accomplish the same end.' This being the meaning of the word, it seems to describe the business transacted by appellants and those who furnished the milk to be manufactured. They all promoted the same end, and hence *co-operated* — the farmers by furnishing the milk, and appellants by manufacturing and selling the product. * * * It is, however, urged that the body of the act embraces two distinct kinds of factories, conducted on essentially different plans, and one of them is not named in the title. We think a fair construction is, that the terms in the body of the act, '*co-operative* or dividend plan,' are used as convertible terms. But if they are not, and they imply two plans, then both are embraced in the body of the act, and as the *co-operative* plan is named in both the title and the enacting clause, the *co-operative* plan is embraced in both, and we have seen that appellants were conducting their business on the *co-operative* plan." Hawthorn *v.* People, 109 Ill. 313.

2. **Co-Parties.** — "The word *co-parties*, as used in section 551 of the *Indiana* Code, means parties to the judgment appealed from, not co-plaintiffs or co-defendants to the action. The appellant's co-defendants to the action were adverse to him, and not *co-parties* with him, or to the judgment rendered against him, within the meaning of the law." Hadley *v.* Hill, 73 Ind. 448, 449.

3. **Distinguished from Abstract.** (See also ABSTRACT, vol. 1, p. 209.) — Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 413. The court said further in that case: "An abstract of a judgment or title is not the same as a *copy* of a judgment or title. An abstract of a title is a brief account of all the deeds upon which the title rests; a synopsis of the distinctive portions of the various instruments which constitute the muniments of title. See Preston on Abstracts of Title; Wharton's Dict. (2d Lond. ed.); Bouvier's Law Dict. 47. An abstract, ordinarily, means a mere brief and not a *copy* of that from which it is taken. This paper, then, being only an abstract of an alleged judgment, and attested only as an abstract, and not as a *copy*, and the existence of the judgment being denied, and the abstract excepted to as not being legal evidence of the judgment, it cannot be read as proof of the judgment against the railroad company. It would be extremely dangerous to accept mere abstracts of judgments as proof of the original."

Abstract in the Sense of Copy. — A statute provided that *copies* of any entry made in the office of any register of any United States land office, certified by said register, should be received in evidence. A register certified that a certain plat was a correct abstract of the records of his office. It was held that it was evident that the register used the word "abstract" in the sense of *copy*, and that while the register's certificate might have been more formal, it was not to be regarded as insufficient. Wilhite *v.* Barr, 7 Cent. L. J. 119.

Translation — Copyright. (See also the title COPYRIGHT, *post.*) — In Stowe *v.* Thomas, 2 Wall. Jr. (C. C.) 547, it was held that a prose translation of a copyrighted prose romance was not a *copy* of the original within the copyright law. The court said: "A *copy* of a book must therefore be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or *copy* of the same book. I have seen a literal translation of Burns's poems into French prose; but to call it a *copy* of the original would be as ridiculous as the translation itself."

of the original to which it is applied.[1]

Office Copy — Examined Copy — Certified Copy — Exemplified Copy. (See ATTESTATION, vol. 3, p. 273; AUTHENTICATION, vol. 3, p. 516; and see the titles DOCUMENTARY EVIDENCE; EXEMPLIFICATION; NOTARY PUBLIC. As to the authentication of public documents or records, see the title RECORDS. As to the authentication of foreign laws, see the title FOREIGN LAWS. As to the authentication of judgments of another state, see the titles JUDGMENTS AND DECREES; RECORD. As to the authentication of statutes of another state, see the title STATUTES. As to the authentication of deeds, see the titles ACKNOWLEDGMENTS, vol. 1, p. 155; DEEDS.) — Copies under seal are called exemplified copies. A sworn or examined copy is a copy sworn to have been examined with the original record or paper. An office copy is a copy made out by the officer in whose hands the original is, without being examined. A certified copy is a copy certified to be such by the officer having the custody of the original.

"Copy" Was Also Used in the Sense of "Copyright," signifying "an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters."[2]

COPYHOLD. — A base tenure founded upon immemorial custom and usage. A copyhold estate is a parcel of the demesnes of a manor, held at the lord's will, and according to the customs of such manor, as evidenced by the rolls of the courts-baron in which they were entered. Such estates do not exist in the United States.

1. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 412; Rogers *v.* Jewett, 12 Month. L. Rep. (N. S.) 340.

Entire Copy — Account. — A statute permitting a party to file a ***copy*** of his account is satisfied only by a ***copy***, not by the substance, amount, or balance of the account claimed. M'Cormick *v.* Brookfield, 4 N. J. L. 77.

Same — Service of Process. (See ENCYC. OF PL. AND PR., title SERVICE OF PROCESS.) — Where a writ of capias described the defendant by the addition of "gentleman," which word was omitted in the ***copy*** served, it was held that this was not a ***copy*** of the writ, in compliance with the statute regulating the mode of service. Cooke *v.* Vaughan, 4 M. & W. 69. But it is also held that if the defendant cannot be misled or prejudiced by a mistake in the ***copy***, the service is good. Union Furnace Co. *v.* Shepherd, 2 Hill (N. Y.) 414.

Same — Indictment. (See ENCYC. OF PL. AND PR., vol. 10, p. 470.) — A "***copy*** of the indictment," directed under Act of Congress to be furnished to persons accused of treason, must contain "a ***copy*** of the caption." U. S. *v.* Insurgents, 2 Dall. (U. S.) 342.

Same — Articles of Association. — Whether it is necessary that a "***copy*** of articles of association" should contain the names of members as subscribed to the original article, *quære*. West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282.

Same — Copy of the Record. — A "***copy*** of the record" means an entire copy, and not a mere extract. Edmiston *v.* Schwartz, 13 S. & R. (Pa.) 135.

Same — True Copy. (See also TRUE.) — A true ***copy*** imports an entire ***copy***. Updergraff *v.* Perry, 4 Pa. St. 294.

Same — Application for Insurance. — A ***copy*** of an application for insurance without the ***copy*** of the applicant's signature thereto is not a ***copy*** within the meaning of a statute requiring fire-insurance companies, upon the issue or renewal of a policy, to attach to such policy a true ***copy*** of any application or representations of the assured. Dunbar *v.* Phenix Ins. Co., 72 Wis. 497. See the title FIRE INSURANCE.

Copy of Any Paper on File. — In Muirhead's Case, 13 Ct. of Cl. 251, it was held that a statute which allowed a supervisor of elections fifteen cents per folio for a ***copy*** of any paper on file in his office did not extend to a pamphlet of instructions printed by him, and sent to his subordinates. The court said: "The words '***copy*** of any paper on file' mean a copy certified and issued by the supervisor as a ***copy***; not a duplicate printed ***copy*** of an original paper issued as an original document."

2. Millar *v.* Taylor, 4 Burr. 2396; Jefferys *v.* Boosey, 4 H. L. Cas. 884, 888.

Copy in the Sense of Copyright. — In Millar *v.* Taylor, 4 Burr. 2346, Lord Mansfield says: "Further: That this idea of an author's property has been so long entertained, that the ***copy*** of a book seems to have been not familiarly only, but legally, used as a technical expression of the author's sole right of printing and publishing that work. And that these expressions, in a variety of instruments, are not to be considered as the creators or origin of that right or property; but as speaking the language of a known and acknowledged right; and, as far as they are active, operating in its protection."

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By Theodor Megaarden.

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CROSS-REFERENCES.

For matters of PROCEDURE, *see* THE ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *titles* *COPYRIGHT*, vol. 5, p. 116; *DISCOVERY, PRODUCTION, AND INSPECTION*, vol. 6, p. 728.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles in this work:* *CONFUSION OF GOODS*, vol. 6, p. 592; *DAMAGES; EXECUTIONS; FINES AND PENALTIES; INJUNCTIONS; LETTERS; MASTER IN EQUITY; PATENTS; TRADE-MARKS.*

I. **DEFINITION.** — Copyright is the exclusive right of printing or otherwise multiplying copies of a published intellectual production, and publishing and vending the same; the right of preventing all others from doing so.[1]

II. **DISTINGUISHED FROM THE COMMON-LAW RIGHT.** — The word "copyright" is sometimes used indifferently to denote the statutory and the common-law property in intellectual productions. But there are essential differences between the two rights. Copyright, strictly speaking, signifies the exclusive right of an owner of an intellectual production to multiply copies of and publish the same.[2] It is also called copyright after publication, or statutory copyright. But the common-law property in an intellectual production does not include the exclusive right of continued publication, but only the right to make the first publication. It is sometimes referred to as common-law copyright or copyright before publication. While this may be permissible, the use of the word "copyright" to designate the right which the owner of an unpublished intellectual production has therein at common law, does not seem to be an accurate use of the term, nor is it common.[3]

III. **DISTINGUISHED FROM LITERARY PROPERTY.** — The term is also used as an equivalent of literary property. But the word "copyright" and the phrase "literary property" are not generally considered to be synonymous. The latter phrase has a more general signification than copyright, and includes both the right which the producer of an intellectual production has therein by the common law, and the right which he may obtain therein under the copyright statute; it is a general term which describes the interest of an author, or those

1. **Definition** — *England.* — Chappell *v.* Purday, 14 M. & W. 316; Millar *v.* Taylor, 4 Burr. 2311; Jefferys *v.* Boosey, 4 H. L. Cas. 867.

United States. — Stephens *v.* Cady, 14 How. (U. S.) 530; Stowe *v.* Thomas, 2 Wall. Jr. (C. C.) 547; Baker *v.* Selden, 101 U. S. 99; "Mark Twain" Case, 14 Fed. Rep. 728; Henry Bill Pub. Co. *v.* Smythe, 27 Fed. Rep. 914; Kennedy *v.* McTammany, 33 Fed. Rep. 584; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Ager *v.* Murray, 21 Am. L. Reg. N. S. 469.

Missouri. — Davis *v.* Vories, (Mo. 1897) 42 S. W. Rep. 707, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 147.

In the United States Statute, copyright in a book, as secured by the statute, is defined to be "the sole liberty of printing, reprinting, publishing, * * * and vending the same." U. S. Rev. Stat., § 4952.

By English Statute. — The second section of the 5 & 6 Vict., c. 45, defined "copyright" to mean "the sole right and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied."

2. "Copyright, in the proper sense of the term, means the right which, after publication, the producer retains to multiply copies." Clerk and Lindsley on the Law of Torts 534.

3. "Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute." Lord Watson, in Caird *v.* Sime, L. R. 12 App. 326, 36 Alb. L. J. 291.

"Copyright" So Used as to Include Common-law Right. — In the case of Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410, construing a partial assignment of the author's interest in a poem, it was held that a reservation by the author "subject to the concession herein made," of her "copyright" in the poem, imported a reservation of the common law as well as of the statutory copyright.

who claim under him, in his works, whether before or after publication, or before or after a copyright has been secured.[1]

IV. Literary Property — 1. Definition. — Literary property is the exclusive right of the owner to possess, use, and dispose of intellectual productions.[2]

2. At Common Law — *a.* In General. — The right of property in intellectual productions is recognized and protected independently of and notwithstanding copyright statutes.[3] The existence of the common-law right is, however, dependent upon whether or not there has been a publication of the work.

b. Before Publication — (1) *In General.* — An author has, at common law, a property in his intellectual production before it has been published, and may obtain redress against any one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication.[4]

(2) *In What Productions.* — And this protection is given to intellectual productions generally, whether they be literary compositions,[5] artistic productions, — including not only paintings,[6] etchings,[7] and works of sculpture,

1. Drone on Copyright 101; 2 Bouv. L. Dict. 121; Keene *v.* Wheatley, 9 Am. L. Reg. 44.

2. Literary Property Defined. — Drone on Copyright 97; 2 Bouv. L. Dict. 121; Goldmark *v.* Kreling, 25 Fed. Rep. 349; Woolsey *v.* Judd, 11 How. Pr. (N. Y. Super. Ct.) 49.

"Literary property" may be described as the right which entitles an author and his assigns to all the use and profit of his composition, to which no independent right is, through any act or omission on his or their part, vested in another person. Keene *v.* Wheatley, 9 Am. L. Reg. 44.

Literary Property Limited to the Common-law Right. — It has been said that literary property is the common-law ownership of the original work; copyright is the statutory right to make all the copies of it that shall be made for a term of years. 1 Abb. L. Dict. 288. But it would be difficult to find, in the authorities, an example of the employment of the phrase in this restricted sense.

3. White *v.* Geroch, 2 B. & Ald. 298; Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408; Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196.

4. Before Publication — At Common Law. — Maughon on Lit. Property 74, 137; 2 Story Eq. 943.

England. — Macklin *v.* Richardson, Ambl. 694; Millar *v.* Taylor, 4 Burr. 2303; Webb *v.* Rose, *cited* in 4 Burr. 2330; Pope *v.* Curl, 2 Atk. 342; Manley *v.* Owen, *cited* in 4 Burr. 2329; Southey *v.* Sherwood, 2 Meriv. 435; Jefferys *v.* Boosey, 4 H. L. Cas. 961; Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, on appeal 10 Ir. Ch. Rep. 510; Donaldsons *v.* Becket, *cited* in 4 Burr. 2408; Prince Albert *v.* Strange, 2 De G. & Sm. 652; Fisher *v.* Fold, 1 Jones Exch. 12; White *v.* Geroch, 2 B. & Ald. 298; Exchange Tel. Co. *v.* Gregory, (1896) 1 Q. B. 147.

United States. — Boucicault *v.* Wood, 2 Biss. (U. S.) 34; Stowe *v.* Thomas, 2 Wall. Jr. (C. C.) 547; Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87; "Mark Twain" Case, 14 Fed. Rep. 728; Crowe *v.* Aiken, 2 Biss. (U. S.) 208; Roberts *v.* Myers, 23 Law Rep. 396; Little *v.* Hall, 18 How. (U. S.) 165; Keene *v.* Wheatley, 4 Phila. (Pa.) 159, 5 Clarke (Pa.) 501, 9 Am. L. Reg. 33; Myers *v.* Callaghan, 5 Fed. Rep. 726; Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410.

Illinois. — Rees *v.* Peltzer, 75 Ill. 475.

Minnesota. — Banker *v.* Caldwell, 3 Minn. 94.

New York. — French *v.* Maguire, 55 How. Pr. (N. Y. Supreme Ct.) 471; Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. (N. Y. Supreme Ct.) 194; Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480.

Recognition of Common-law Right by United States Copyright Act. — This common-law right of property in unpublished literary productions has long been recognized by statute in the United States. Section 4967 of the United States Revised Statutes, re-enacting, with some modifications, § 9 of the Copyright Act of 1831, provides that "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, * * * shall be liable to the author or proprietor for all damages occasioned by such injury."

5. Dramatic Productions. — Thus the owner of an opera which has not been copyrighted has been granted an injunction restraining an unauthorized presentation by the defendant. Goldmark *v.* Kreling, 25 Fed. Rep. 349.

Operetta Adapted from an Old Play. — Even though an operetta is based upon an old drama, if the title, dialogue, minor characteristics, scenery, and dramatic situations, which, with the orchestration, orchestra parts, songs and music, make up the operetta, are so far different as to entitle the piece, on the whole, to the claim of originality, it is entitled to the common-law protection given to intellectual productions. Aronson *v.* Fleckenstein, 28 Fed. Rep. 75.

6. Pictures. — It has been held that this common-law property unquestionably exists in pictures as well as any other work of art. Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, on appeal 10 Ir. Ch. Rep. 510; Oertel *v.* Wood, 40 How. Pr. (N. Y. Supreme Ct.) 10; Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808. See also Parton *v.* Prang, 3 Cliff. (U. S.) 537.

7. Etchings. — Prince Albert *v.* Strange, 2 De G. & Sm. 652.

but engravings and photographs,— or musical compositions.[1] It has also been extended to statements and compilations of information which is accessible to every one who chooses to collect it,[2] but not to the plan adopted for imparting the information.[3]

Name of Unpublished Works. — Even the name of an unpublished work will, it seems, be protected as a part of the work; so that when the title which an author or composer has conferred upon his production, if the name selected is such as may properly be appropriated for that purpose, is adopted as the title for another and different work, this unauthorized use of the name may be enjoined.[4]

(3) *Nature and Extent of the Property* — **Analogous to Other Personal Property.** — The nature of the rights of an owner in unpublished intellectual productions is analogous to that of the rights of ownership in other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable.[5]

Control of Publication. — The right which an originator of an intellectual production has therein at common law, before publication, is absolute. If, after composition, the author chooses to keep his productions private, he may do so, and has his remedies to prevent publication.[6] If, on the other hand, he

1. Musical Compositions. — Thomas *v.* Lennon, 14 Fed. Rep. 849; Iolanthe Case, 15 Fed. Rep. 444; Mikado, etc., Case, 25 Fed. Rep. 183.

2. Compilations. — " It is clear that, before it is forfeited by publication, there is a common-law property in valuable facts and information which have been collected and utilized by skill, diligence, and expense." Drone on Copyright 123.

"A man may impress upon materials, which are open to all the world, a right of property when he has, as the result of his own efforts and expenditure, collected and reduced to a form serviceable to the public such material. This right of property, however, does not preclude another person, as the result of his own efforts and diligence, from collecting independently, and utilizing as he may see fit, the same materials." Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. (N. Y. Supreme Ct.) 198.

Charts. — This common-law property may exist in charts. Though the author has not obtained the statutory copyright, yet by the common law, so long as the charts are unpublished, he has the same right of exclusive enjoyment of them as of any other species of personal property, for by his possession they have proprietary marks, and are distinguishable property. Rees *v.* Peltzer, 75 Ill. 475.

News Items. — It has been held that a corporation, which has for its business the collection of news in all parts of the world by its agents, has a common-law right of property in news, such as " foreign financial news," consisting of quotations of consols, rentes, U. S. bonds, the rates of interest, and increase and decrease of the specie in the banks of England and France, which is collected and telegraphed to it by its agents, and which is not abandoned by publication. And a rival news agency was restrained by injunction from transmitting such news over its wires to its customers. Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. (N. Y. Supreme Ct.) 194. See Drone on Copyright 210.

Stock Quotations. — And a compilation of quotations in stocks and bonds on the floor of the London Stock Exchange was, in Exchange Tel. Co. *v.* Gregory, [1896] 1 Q. B. 147, held to be entitled to this common-law protection.

Abstract Books and Indexes. — It has been held that this common-law property exists in abstract books compiled from the public records, containing complete abstracts of title to all the lands in a country, and showing the incumbrances and liens on such lands. Dart *v.* Woodhouse, 40 Mich. 399; Perry *v.* Big Rapids, 67 Mich. 146, 11 Am. St. Rep. 570, Banker *v.* Caldwell, 3 Minn. 94. See Leon Loan, etc., Co. *v.* Equalization Board, 86 Iowa 127, 41 Am. St. Rep. 486.

3. Plan of Imparting Information. — Burnell *v.* Chown, 69 Fed. Rep. 993.

4. Aronson *v.* Fleckenstein, 28 Fed. Rep. 75; Thomas *v.* Lennon, 14 Fed. Rep. 849. See also Iolanthe Case, 15 Fed. Rep. 439. See the title TRADE-MARKS.

5. Palmer *v.* DeWitt, 47 N. Y. 532, 7 Am. Rep. 480. See Jefferys *v.* Boosey, 4 H. L. Cas. 867.

6. Right to Withhold from Publication. — See Jefferys *v.* Boosey, 4 H. L. Cas. 961; Parton *v.* Prang, 3 Cliff. (U. S.) 537.

" Every new and innocent product of mental labor which has been embodied in writing, or some other material form, being the exclusive property of its author, the law securing it to him as such, and restraining every other person from infringing his right. Whether the ideas thus unpublished take the shape of written manuscripts of literary, dramatic, or musical compositions, or whether they are the designs for works of ornament or utility planned by the mind of an artist, they are equally inviolable while they remain unpublished, and the author possesses an absolute right to publish them or not as he thinks fit, and if he does not desire to publish them, to hinder their publication, either in whole or in part, by any one else." Shortt on the Law of Literature 48.

communicates them, he may prescribe limitations and impose restrictions as to the extent of their use.[1]

Not Subject to Execution. — And since the law will not permit this right of the owner of a manuscript to publish it and keep it back from publication to be interfered with, except as he chooses to make it public, it has been held that an unpublished manuscript cannot be seized and sold on execution.[2]

Whether Taxable. — It has even been said that unpublished manuscripts are not taxable.[3]

Descriptive Catalogue of Unpublished Drawings and Etchings. — In Prince Albert *v.* Strange, 1 Macn. & G. 25, 1 H. & T. 1, 13 Jur. 109, 18 L. J. Ch. 120, 2 De G. & Sm. 652, it was held that the court of chancery will interfere to prevent the invasion of the common-law right of the drawer or designer of etchings and drawings which had never been published and were kept for his private use and pleasure, by the publication of a catalogue containing a description of such work. See 2 Dan. Ch. Pr. (4th Am. ed.) 1647; 2 Kent (11th ed.) 380, note 1, in which the editor, referring to this point in the decision of this case of Prince Albert *v.* Strange, says: "A writer in the London Jurist (February, 1849), intimates doubts, and with apparent justice, of the correctness of this position. It is certainly carrying the right of authors to a great extent to restrain by injunction the communication, not only of the works themselves, but the fact of their existence, and the designation of the mode of their existence." See Thomson *v.* London University, 12 W. R. 733.

1. Right to Restrict Use. — Jefferys *v.* Boosey, 4 H. L. Cas. 961; Prince Albert *v.* Strange, 1 Macn. & G. 25, 1 H. & T. 1, 13 Jur. 109, 2 De G. *v.* Sm. 652, 18 L. J. Ch. 120; Parton *v.* Prang, 3 Cliff. (U. S.) 537; Bartlette *v.* Crittenden, 4 McLean (U. S.) 300, 5 McLean (U. S.) 32; Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410. See *infra*, this division, subdivision *Publication*.

In Jefferys *v.* Boosey, 4 H. L. Cas. 815, Mr. Justice Erle says: "He [the author] may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee."

2. Whether Leviable. — It was so held in Dart *v.* Woodhouse, 40 Mich. 399, in which the controversy grew out of an execution levied on a set of manuscript abstract books which were at the time in the possession of the execution debtor. The court said that the right in unpublished manuscripts is neither goods nor chattels subject to execution. "The right of the proprietor of such a manuscript to publish it or to keep it back from publication is not only a property right, but one which is purely incorporeal and attended with considerations of a nature entirely different from any involved in other rights. The law will not permit it to be interfered with except as he chooses to make it public, and the right is one which is entirely independent of locality and belongs essentially to the owner wherever he may be, and in whatever locality one or more copies of the writings may be found. The value when it is considered at all in a pecuniary sense depends on the information or interest of the composition or document, and not on the particular bundle of paper which records it." But see Freeman on Executions, § 110, where the decision in this case, so far as it holds that abstract books are not leviable, is doubted.

In Bartlett *v.* Crittenden, 5 McLean (U. S.) 32, the court says: "A man may write without any intention to publish. He may treat of principles and characters without restraint — with a view to his mental improvement, or from some other motive. * * * And there is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property."

3. Whether Taxable. — In Perry *v.* Big Rapids, 67 Mich. 146, 11 Am. St. Rep. 570, it was held that the manuscript abstract books have no intrinsic value and are not taxable. Campbell, C. J., said: "The constitution requires assessments to be made on property at its cash value. This means not only what may be put to valuable uses, but what has a recognizable pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it. The court below found expressly, and could not have found otherwise, that these abstract books have no intrinsic value. They are only valuable for the information they contain, and that information is conveyed by consultations or extracts. Their value is only kept up by their completeness and continued correction. The sale of a complete copy would practically destroy the value of the books in the hands of the plaintiff. So a similar compilation by any one else would have a like result. The value of the books, except as used, is nothing. They resemble in nature, if not precisely, the books which are consulted by any person who makes an income from his acquired knowledge, whether scientific or otherwise; as a surveyor's notes, an author's memoranda, a druggist's recipes, and many analogous things. They may be and are very serviceable, but they are not things that the law has made subject to seizure or assessment. If these books were taxable as personalty, they could be made liable to satisfy it, and this, in our opinion, cannot be done. As the whole subject was discussed and disposed of in Dart *v.* Woodhouse, 40 Mich. 399, it does not seem necessary to rehearse or review what was there held. All civilized governments respect private manuscripts, and treat them as not partaking of the nature of property open to ordinary sale and disposal. The possession of them gives no right in the

(4) *Transfer* — (a) **Assignability of the Property.** — This common-law right of an author in his intellectual productions is, like any other personal property right, assignable, and he may sell and transfer his entire property to another.[1]

possessor to use them, or publish them, unless by the acquiescence of the originator. While it often has happened that trade secrets, and other information which has been noted down in writing, may furnish means of acquiring profit, it was never imagined or held that the writings themselves were subject to seizure and sale without consent. Any attempt to make value out of such a sale would be really a sale of knowledge, and not of property." But in a dissenting opinion by Morse, J., it is said: "The main issue to be determined is the liability to taxation of these abstract books. I think they are subject to taxation the same as other personal property. They cannot be considered as scientific discoveries, nor is there any particular genius exercised in their creation. They are not like the manuscripts of an author, the recipes of a druggist, or a copyright. The work of compiling these abstracts is a mere mechanical one, involving no independent creation of the mind of the transcriber. It is not in any sense the work of genius, or the development of new thoughts or ideas. They are no more the creation or creature of the mind than is the iron or wood work of the skilled mechanic, nor are they so much so. * * * These abstracts have also a cash value, and pass from hand to hand, and are bartered and sold like other property. * * * They brought $2,900 in this very case when sold by the maker to the plaintiff. Can it be said that these books in the hands of the plaintiff are purely incorporeal, with no tangibility that the tax gatherer can reach? * * * If these books are property, they ought to be subject to taxation. It cannot be disputed from this record but that they have been both used and sold as property, and have a large money value."

And in the case of Leon Loan, etc., Co. *v.* Equalization Board, 86 Iowa 127, 41 Am. St. Rep. 486, though it is said that the court must not be understood as committing itself to any view of the law relative to the liability of authors' manuscripts being taxable, it was held that a set of abstract books was taxable as personal property, and the majority opinion in the above cited case of Perry *v.* Big Rapids, 67 Mich. 146, 11 Am. St. Rep. 570, was *criticised.* In delivering the opinion of the court, Granger, J., said: "The Michigan cases attach great importance to the fact that the proprietor of a manuscript may control or determine whether or not it shall be published, and that, without publication, there is no value as a basis for an assessment or levy. We are unable to understand the application of the thought to the case at bar. In cases of manuscript designed for publication, their value, in a general property sense, may be said to be in the published work or the right of publication, for it is then only that it becomes of interest to others than the author. It is when the manuscript is, by the author, put in condition for use, that it takes to itself value in a commercial sense. Before publication, or a transfer of the right of publication by the author, the manuscript is but a private memorandum or writing, without significance, except to the author, like other private memoranda. When the author places it upon the marts of the world for use or profit, a commercial value attaches, and it becomes 'property' in the general sense. Before the publication, or the granting of a right to publish, the author's work is incomplete. In the light of a design to publish a work, nothing has been produced. These abstract books answer the original design, are complete, and placed before the public for use and profit. They were not made for publication, in the general sense. Such a publication would defeat the very purpose of their production. Their value consists, chiefly, in their contents being kept from the public. They are the means, in a sense the instruments, for carrying on a business; as much so as are the tool or machinery by which the artisan plies his calling. * * * The rule as to patents and copyrights, as claimed by the appellant, from the cases of Stephens *v.* Cady, 14 How. (U. S.) 531, and Stevens *v.* Gladding, 17 How. (U. S.) 451, whereby they are not subject to seizure on execution because incorporeal in their nature and without existence in any particular place, is not applicable here, for the reason that these books are tangible, have a particular location, and are capable of seizure and delivery."

1. Assignability. — Parton *v.* Prang, 3 Cliff. (U. S.) 537; Mackaye *v.* Mallory, 12 Fed. Rep. 328; Palmer *v.* DeWitt, 47 N. Y. 532, 7 Am. Rep. 480; Widmer *v.* Greene, 56 How. Pr. (N. Y. Supreme Ct.) 91. See Bartlett *v.* Crittenden, 5 McLean (U. S.) 32; Oertel *v.* Wood, 40 How. Pr. (N. Y. Supreme Ct.) 10.

In Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, on appeal 10 Ir. Ch. Rep. 510, it is held that not only the painter has, at common law, a right to prevent any person from copying his picture, but the owner of the picture who has purchased it from the painter has the same right.

"An author," said Hoar, J., in Keene *v.* Kimball, 16 Gray (Mass.) 549, "has at common law a property in his unpublished works which he may assign, and in the enjoyment of which equity will protect his assignee as well as himself."

Assignment of Common-law Property Recognized by the United States Copyright Act. — The Copyright Act of the United States recognizes the assignability of literary work before publication, by that provision of the statute which authorizes copyright to be taken out by the legal assigns of the author. U. S. Rev. Stat., § 4952.

And an assignment may be made before the entry for copyright. 1 Bouv. L. Dict. 401; Callaghan *v.* Myers, 128 U. S. 617.

Transference in Fraud of Creditors. — In the case of Dart *v.* Woodhouse, 40 Mich. 399, where the controversy grew out of an execution levy made by the judgment creditor on a set of manuscript abstract books which were

(b) **Partial or Conditional Assignments.** — Sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions.[1]

Of Paintings. — Thus there may be a sale of a painting itself without the common-law right of publishing or restricting publication; the artist may reserve that right, and transfer it and the right to obtain a statutory copyright to another person.[2]

Of Dramatic Compositions. — And the author of a dramatic composition may give another person the right to perform the work within a prescribed territory.[3]

(c) **Construction of Assignments.** — The rules of law applicable in the case of the assignment of other personal property must be applied in determining the real character of this property.[4] To pass this common-law right of property in an intellectual production, *i. e.*, the right to publish or restrict publication, the assignment must be absolute and unconditional, without any qualification, limitation, or restriction, expressed or implied.[5]

at the time in the possession of the execution debtor, who had transferred them to a third party under a transfer which was claimed to be invalid against creditors, it was held that since an unpublished manuscript cannot, by reason of the nature of the property therein, be subject to execution, the creditors could not complain of its disposal.

1. Parton *v.* Prang, 3 Cliff. (U. S.) 537, 18 Fed. Cas. No. 10784; Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410; Oertel *v.* Wood, 40 How. Pr. (N. Y. Supreme Ct.) 10.

2. **Sale of Painting to One Person, and Right to Obtain Copyright to Another.** — Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808.

3. **Assignment of Right to Produce a Drama Within a Particular Territory.** — One Robertson, of London, produced a drama called "Play," and assigned to the plaintiff the exclusive right and privilege of printing and publishing, acting and performing, representing and producing the play on the stage, licensing and permitting it to be printed, published, and acted, performed and represented and produced on the stage, within and throughout the United States. The plaintiff, as such assignee, was protected in the enjoyment of the right so assigned. Palmer *v.* DeWitt, 47 N. Y. 532, 7 Am. Rep. 480.

For additional cases where the assignment of the right to publicly present a dramatic production was limited to specific territory, see Goldmark *v.* Kreling, 35 Fed. Rep. 661; Keene *v.* Wheatley, 9 Am. L. Reg. 47; Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480.

Nature of Partial Assignment. — It has been said, in a suit in equity, where the foreign proprietor of a drama had assigned to the plaintiff the right to produce the play on the stage within the United States, that the transfer could not be regarded as otherwise than only a partial assignment, upon which a suit could not be maintained at law in the plaintiff's own name. But it was held that in a proceeding in equity, a limited local or other partial assignment, if made for a valuable consideration by a person whose transfer of the whole interest would have passed proprietorship, is carried into effect whether it would have been otherwise or not at law. Keene *v.* Wheatley, 9 Am. L. Reg. 47.

But in a *New York* case, that of Palmer *v.* DeWitt, 47 N. Y. 541, 7 Am. Rep. 480, Allen, J., said: "It is said in Jefferys *v.* Boosey, 4 H. L. Cas. 978, that copyright was indivisible, and that the owner could not assign a part of the right, as to print in a particular place or country, or do anything less than assign the whole right given by the English law." Continuing, the learned judge said: "But whether the instrument is called a transfer or a license is not material. The plaintiff has, for a valuable consideration, acquired the right to the first publication of this drama, as well as the right to represent the same upon the stage in the United States, and it is a right of pecuniary value. * * * But the plaintiff under his transfer might restrain the author, as well as every other person, from publishing the work within the United States to his prejudice."

4. See Parton *v.* Prang, 3 Cliff. (U. S.) 537, 18 Fed. Cas. No. 10784; Oertel *v.* Wood, 40 How. Pr. (N. Y. Supreme Ct.) 10.

5. Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808; Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410.

Assignment of Painting Construed. — If the sale of a painting is an absolute and unconditional one, and the painting is absolutely and unconditionally delivered to the purchaser, the whole property passes to the purchaser, including the right of reproduction and publication, unless the same is protected by copyright. Hence, in a case where it appeared that the complainant, an artist, for a valuable consideration sold a picture, which he had painted, to the vendor of the respondent, and that the same was delivered by the complainant to the purchaser unconditionally and without any reservation, and that the purchaser from the complainant in like manner sold the picture for a valuable consideration to the respondent, and he delivered the same to the respondent unconditionally and without any reservation, it was held that the defendant acquired the right to reproduce copies of the painting. Parton *v.* Prang, 3 Cliff. (U. S.) 537.

Sale or Gift of Manuscript Construed. — A sale of a manuscript or plate, or both of these, will not, it has been said, necessarily carry with it any right on the part of the purchaser thereof to make copies of the original work. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273, *citing* Stephens *v.* Cady, 14 How. (U. S.) 530; Stev-

(d) **Necessity of Writing.** — There is no distinction between the mode of assigning this and any other personal property. Hence, if no legislative enactment provides otherwise, it may be transferred by oral contract.[1] There is nothing in the present copyright law of the United States to prevent the parol transfer of whatever right a person has in a work before the taking out of the technical copyright.[2]

(5) *Rights of Employer and Employee.* — The person who employs another to prepare a work may, from the circumstances of the employment, become entitled to whatever literary property exists in the production, without a formal assignment.[3] But the employer will acquire title to only such works of his employee as are contemplated by the contract of employment.[4]

ens *v.* Gladding, 17 How. (U. S.) 447. See also Drone on Copyright 105.

Thus an injunction was granted to restrain the printing of Lord Clarendon's unpublished History of the Reign of Charles II., which had been given by his son, the second Lord Clarendon, to Mr. Gwinn, under whom the defendant claimed, but not with the intention that he should publish it. Queensberry *v.* Shebbeare, 2 Eden 329.

And, again, Southey did not lose his rights in his manuscript by letting it remain twenty-three years in the possession of a bookseller. Southey *v.* Sherwood, 2 Meriv. 435. "To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work." McLean, J., in Bartlett *v.* Crittenden, 5 McLean (U. S.) 41.

Assignment of Right to Produce Play Construed. — An unqualified assignment, made in England, of the right to produce a play, in consideration of a royalty for each time it should be produced in London or elsewhere, was held to carry the right of performance in the United States, although the assignors did not intend such effect. Ward *v.* Moss, N. Y. Daily Reg., March 23, 1881.

1. Oral Assignment Sufficient. — Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, 510; Little *v.* Gould, 2 Blatchf. (U. S.) 165; Parton *v.* Prang, 3 Cliff. (U. S.) 537.

2. Under Provisions of United States Copyright Act. — The United States Copyright Act of 1831, § 9 (4 U. S. Stat. at L. 438), made a written instrument, signed by the author or legal proprietor in the presence of two credible witnesses, necessary to a lawful authority in another to print or publish any manuscript whatever. And it was said by eminent authority that there could only be a valid assignment or license of the right which exists in a manuscript before copyright is obtained when so executed. 1 Bouv. L. Dict.

But it was held that a painting did not come within this requirement, and that the common-law property of the painter in his work passed without a written assignment. Parton *v.* Prang, 3 Cliff. (U. S.) 537.

The provision referred to was not retained in the corresponding section (§ 4967) of the Revised Statutes, and there can be little doubt but that, under the present law, an inchoate right to a copyright may, prior to the taking out of the copyright, be transferred by parol. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618; Callaghan *v.* Myers, 128 U. S. 617.

3. Title to Work of Employee Acquired by Employer. — Lawrence *v.* Dana, 4 Cliff. (U. S.) 65; Carte *v.* Evans, 27 Fed. Rep. 861; Callaghan *v.* Myers, 128 U. S. 658.

It has been held that the publication of a map made from material collected while in the service of the commonwealth, as draughtsman of a party working at her cost, would be restrained by injunction; all the results of such labor are the property of the commonwealth. Com. *v.* Desilver, 3 Phila. (Pa.) 31. For a somewhat similar case, see Heine *v.* Appleton, 4 Blatchf. (U. S.) 125, where, however, there was an express agreement that the work done should belong to the government.

Where the defendant had performed labor, under the direction of the plaintiff, on the preparation of an astronomical work showing the star positions, which work had been conceived by the latter, who had for thirty years collected material for that purpose, it was held that, in the absence of a definite contract, the plaintiff was entitled to all the manuscript which was prepared under his supervision and in accordance with his directions, and to the material furnished by him. Peters *v.* Borst, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 1.

4. Title Not Acquired by Employer. — In the case of Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87, it was said that "a man's intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer unless a valid agreement to that effect is adduced." And it was accordingly held that the plaintiff, an actor and dramatic author, who agreed to write a play to be acted at the theatre of the defendant and to act it himself as long as it would run, and to receive a share of the profits as a compensation, did not thereby confer upon the defendant the legal or equitable title to the play.

And it has been held that where a professor at a college, while in the discharge of his duties as such professor, produced a literary work in the production of which he was largely aided by the facilities afforded him by the college, the property in the production was not in the college but in the author. Peters *v.* Borst, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 1.

Right of Employer to Statutory Copyright. — For a further discussion of this question from the standpoint of the right to obtain statutory

(6) *Alien Ownership.* — Since an author's property in his unpublished works stands upon precisely the same basis as property of any other description, the protection afforded by the common law to intellectual productions is accorded to alien friend and citizen alike.[1]

c. AFTER PUBLICATION — (1) *In General.* — While the decisions have always been uniform in their recognition of the common-law property of the producer in his intellectual productions prior to and until their publication, there was at one time some divergence of judicial opinion as to his rights in such works after their publication.

(2) *Prior to Copyright Legislation.* — It seems to be established that by the early law of England an author's right of property in his literary productions was not limited to his unpublished works; but that prior to 1710, when the statute of 8 Anne, c. 19, became a law, an author of a literary composition, and his assigns, had by the common law the sole right of printing and publishing the same in perpetuity.[2]

(3) *Effect of Copyright Legislation* — **Early English Doctrine.** — And at one time it was held in England that not only did an author have an original perpetual common-law right of property in his work, but that the statute of 8 Anne, which declared that an author should have the sole right of publishing his intellectual productions for a specified period and gave a remedy against piracy, was only cumulative, merely giving additional remedies for the violation of the right.[3]

copyright in works produced by one person while in the employment of another, see *infra*, this title, the division *Who May Copyright*, subdivision *Employer's Right to Copyright Work of Employee*.

1. Aliens. — In Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480, it is said: "The alienage of the author is no obstacle to him or his assignee in proceeding in our courts for a violation, or to prevent a violation, of his rights of property in his unpublished works." And the rights of assignees, domiciled here, of alien authors resident abroad, have frequently been sustained by the courts of this country. Crowe *v.* Aiken, 2 Biss. (U. S.) 208, 4 Am. L. Rev. 450; Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480; French *v.* Maguire, 55 How. Pr. (N. Y. Supreme Ct.) 471; Shook *v.* Daly, 49 How. Pr. (N. Y. Super. Ct.) 366; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Keene *v.* Wheatley, 4 Phila. (Pa.) 157, 9 Am. L. Reg. 33. See also Thomas *v.* Lennon, 14 Fed. Rep. 849; Jefferys *v.* Boosey, 4 H. L. Cas. 867. And see the title PRIVATE INTERNATIONAL LAW.

2. Prior to the Statute of Anne. — Between the years 1735 and 1752, the Court of Chancery granted at least five injunctions restraining the piracy of printed books which were not under the protection of the statute. Eyre *v.* Walker, Motte *v.* Falkner, Walthoe *v.* Walker, Tonson *v.* Walker, *cited* in 4 Burr. 2325; Tonson *v.* Walker, 3 Swanst. 672. These decisions were based on the view that the ownership of literary property was perpetual by the common law, and had not been taken away or abridged by the statute.

In the case of Millar *v.* Taylor, 4 Burr. 2303, decided in 1769, the question of what property an author had in his literary work at common law came squarely before the court of King's Bench. The copyright secured by the statute of Anne had expired. Three of the four judges were of the opinion that not only did an author have an original perpetual common-law right of property in his literary work, which property was not lost by publication, but that this common-law right was not taken away by the statute.

In the case of Donaldsons *v.* Becket, *cited* in 4 Burr. 2408, on an appeal to the House of Lords, the judges were called upon for their opinions on five questions, the fourth of which was as follows: "Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity, by the common law?" This question was answered in the affirmative by seven of the eleven judges. See comments on this case in Boosey *v.* Jefferys, 6 Exch. 592, 4 H. L. Cas. 961, and Drone on Copyright 37–42.

3. After the Statute of Anne. — In several cases arising in the Court of Chancery between the years 1735 and 1752, which was after the enactment of the statute of Anne, that court, acting on the theory that the ownership of literary property was not only perpetual at common law, but that the right had not been taken away or abridged by the statute, granted injunctions restraining the piracy of printed books not protected by the statute. Eyre *v.* Walker, Motte *v.* Falkner, Walthoe *v.* Walker, Tonson *v.* Walker, *cited* in 4 Burr. 2325; Tonson *v.* Walker, 3 Swanst. 672.

And the court of King's Bench came to the same conclusion in the case of Millar *v.* Taylor, 4 Burr. 2303.

Author's View. — The doctrine that an author has a perpetual right of property in his productions, independently of and notwithstanding the copyright legislation, which is sometimes called the author's view, has frequently been contended for by law writers as well as the *literati*. See Drone on Copyright 8 *et seq.*; article "Is Copyright Perpetual?" 10 Am. L. Rev. 16; article entitled "Anomalies in the Law of

Modern Doctrine — In England. — But later English decisions establish the doctrine that, whatever may have been the rights of an author prior to the enactment of the statute of 8 Anne, the rights of an author to his published works could not, after the passage of that act, be asserted upon his common-law right, but only by virtue of and for the time limited by the statute.[1]

In the United States. — And in the United States, although there was some conflict of judicial opinion in the case where the question first arose,[2] it is now settled that while at common law the author of any book or literary composition has the sole right of first printing and publishing the same for sale, and even may have had a perpetual right thereto prior to the copyright legislation, yet, since the enactment of the copyright laws, an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public, and any person may thereafter reprint and sell it for his own benefit, except so far as it is protected by the copyright statutes.[3]

3. Under Copyright Statutes — *a.* IN GENERAL. — The statute law of England [4] and the United States [5] at the present time gives more or less complete

Copyright," by Judge James O. Pierce, 5 South. L. Rev. (N. S.) 420. And see references in 2 Abb. Nat'l Dig. 2.

1. Modern English Doctrine. — Donaldsons *v.* Becket, *cited* in 4 Burr. 2408. Although there was a difference of opinion between the judges who were in this case called upon for their opinion by the House of Lords, the later cases recognize it as settled in England that, since the statute of 8 Anne, the only property which an author has in his published works is that which he has under the statute. Jefferys *v.* Boosey, 4 H. L. Cas. 815; Caird *v.* Sime, L. R. 12 App. 326, 36 Alb. L. J. 291; Beckford *v.* Hood, 7 T. R. 620.

In Jefferys *v.* Boosey, 4 H. L. Cas. 877, there is a dictum by Mr. Justice Erle, to the effect that authors have a property in their works by the common law, as well since the statute of Anne as before it; that such property includes copyright after publication, which has continued since the statute of Anne not otherwise affected thereby than limited in duration. But in Reade *v.* Conquest, 9 C. B. N. S. 755, 99 E. C. L. 755, it was contended that, even though the statute of Anne put an end to the common-law perpetual copyright (which, it was asserted, existed in intellectual productions prior to the enactment of that statute) after the period which it prescribes, it nevertheless preserved it during the currency of such period. The court, in its decision of this case, did not deem it necessary to consider the question whether anterior to the statute of Anne there existed a copyright at common law in published books more extensive in its nature and duration than the right conferred or expressed by that statute, and applied the doctrine that, since the enactment of that statute, the author of a published work has no other than the statutable copyright therein.

In Scotland it was held, as early as 1748, that copyright in a published book did not exist by the common law independently of the statute of Anne. Midwinter *v.* Hamilton, 10 Mor. Dict. of Dec. 8295, on appeal Midwinter *v.* Kincaid, 1 Pat. App. Cas. 488. To the same effect are Hinton *v.* Donaldson, 10 Mor. Dict. of Dec. 8307; Cadell *v.* Robertson, 10 Mor. Dict. of Dec. 8307, Lit. Prop. App. 5, 5 Pat. App. Cas. 493.

2. Early Conflict of Opinion in the United States. — In an elaborate dissenting opinion by Mr. Justice Thompson, in Wheaton *v.* Peters, 8 Pet. (U. S.) 591, the claim was made that the common law in this country recognizes the perpetual right of authors to their literary productions, and that the copyright statutes which had been enacted in the *United States* were merely cumulative, and intended only to secure the common-law right.

3. Established Doctrine in the United States. — In Wheaton *v.* Peters, 8 Pet. (U. S.) 591, it was decided, though by a divided court, that an author cannot assert any right to his published work that is not conferred upon him by the statutes relating to copyright. This view has been affirmed by later decisions. "Mark Twain" Case, 14 Fed. Rep. 728; Parton *v.* Prang, 3 Cliff. (U. S.) 537; Mikado, etc., Case, 25 Fed. Rep. 183; Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. Rep. 54, 33 U. S. App. 399; Rees *v.* Peltzer, 75 Ill. 475; Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 349; Potter *v.* McPherson, 21 Hun (N. Y.) 559; Putnam *v.* Pollard, 10 Cent. L. J. 318; Keene *v.* Wheatley, 4 Phila. (Pa.) 157.

And it is supported by numerous dicta. See Crowe *v.* Aiken, 2 Biss. (U. S.) 208; Clayton *v.* Stone, 2 Paine (U. S.) 382; Pulte *v.* Derby, 5 McLean (U. S.) 328; Bartlett *v.* Crittenden, 5 McLean (U. S.) 32; Boucicault *v.* Wood, 2 Biss. (U. S.) 34; Banks *v.* Manchester, 128 U. S. 244; Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. Rep. 445; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360; Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480; Banker *v.* Caldwell, 3 Minn. 94.

4. English Statutes. — Domestic Copyright in intellectual productions is in England secured by the following statutes: 8 Geo. II., c. 13; 7 Geo. III., c. 38; 15 Geo. III., c. 53; 17 Geo. III., c. 57; 54 Geo. III., c. 56; 3 Wm. IV., c. 15; 5 & 6 Wm. IV., c. 64; 6 & 7 Wm. IV., c. 59; 5 & 6 Vict., c. 45; 25 & 26 Vict., c. 68; 38 & 39 Vict., c. 53.

Same — International Copyright. — And the following statutes provide for international copyright: 7 & 8 Vict., c. 12; 15 & 16 Vict., c. 12; 38 Vict., c. 12.

5. Statutes of the United States. — The following are the copyright laws now in force

protection to intellectual productions.[1]

b. LIMITATION OF STATUTORY PROTECTION TO UNPUBLISHED WORKS.— The copyright statutes of the United States, and the English law as to some works,[2] protect only such works as have not been published before compliance with certain formalities prescribed for securing their protection.[3]

4. Publication — *a.* EFFECT OF PUBLICATION ON LITERARY PROPERTY. — It appears, then, that the question of publication is, in the United States and to a lesser extent in England, of importance with reference both to the common-law right in intellectual property and the statutory copyright. Both may be defeated by publication. The common-law property in such works does not cease until there is a dedication to the public by publication. But if there is a publication the common-law right is lost, and no statutory copyright can thereafter attach, unless there has first been a compliance with the requirements of the statute. If, however, the requirements of the copyright laws, with reference to the steps which shall be taken before publication in order to secure a copyright, have been observed, so that there is a publication which is within the protection of the statute, such publication amounts only to a dedication of the work subject to the protection afforded by the laws of copyright, the author or originator accepting the statutory rights thereby given in place of his common-law rights; in such case the literary property of the common law ends where the statutory copyright begins. The former exists only in works which have not been published, but the latter may exist in works which have been published after there has been a compliance with certain of the formal requirements of the statutes.[4]

Restricted Publication. — But while an unqualified publication of an intellectual production, such as is made by printing and offering copies for sale, dedicates the contents to the public unless the sole right to reproduce is secured to the originator thereof, or his assignee, under the copyright statutes, there may be a limited publication by communicating the contents by reading, representation, or restricted private circulation, which will not abridge the rights of the owner any further than necessarily results from the nature and extent of such limited use as he has made or allowed others to make of his work.[5] And such restricted use of a work, which does not amount to a dedication thereof to the public, will not interfere with the right subsequently to obtain a copyright therefor.[6] Neither will it curtail the right to prevent the unauthorized use thereof by another.[7] It becomes important, therefore, to determine what constitutes publication such as will work an abandonment.

in the United States: U. S. Rev. Stat., tit. 60, c. 3, §§ 4948–4971; Act of June 18, 1874, 18 U. S. Stat. at L. 78; Act of Aug. 1, 1882, 22 U. S. Stat. at L. 181; Act of March 3, 1891, 26 U. S. Stat. at L. 1106; Act of March 2, 1895, 28 U. S. Stat. at L. 965; Act of January 6, 1897, 29 U.S. Stat. at L. 481; Act of March 3, 1897, 29 U. S. Stat. at L. 694.

1. Constitutional Authorization of Copyright Legislation. — The power of granting and protecting copyright is vested, by the Constitution of the United States, in Congress. Art. I., § 8, U. S. Rev. Stat. 20.

2. Provisions of English Statutes as to Publication. — By the English law the exclusive right of representing and performing a dramatic piece or musical composition cannot be gained if such dramatic piece or musical composition has been printed and published as a book before the first presentation thereof. See the digest of the copyright laws of Great Britain prepared by Sir James Stephen, Q. C., and presented in the report of the Royal Copyright Commission in 1878, art. 14. And see *infra*, this title, the division *Formalities for Securing Copyright*.

3. Provisions of United States Law as to Publication. — By the copyright law of the United States it is provided in effect that no person shall be entitled to a copyright in a work unless he shall register the title "on or before the day of publication;" nor unless he shall deposit copies of the work with the Librarian of Congress "not later than the day of the publication thereof." U. S. Rev. Stat., § 4956, as amended by the Act of March 3, 1891, 26 U. S. Stat. at L. 1107. See *infra*, this title, the division *Formalities for Securing Copyright*.

4. Drone on Copyright 100; Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480. See *infra*, this title, division *Formalities for Securing Copyright*, subdivision *Publication*.

5. Parton *v.* Prang, 3 Cliff. (U. S.) 549.

6. Keene *v.* Kimball, 16 Gray (Mass.) 545.

7. Macklin *v.* Richardson, Ambl. 694.

b. WHAT CONSTITUTES PUBLICATION — **Gift of Copy of Manuscript.** — To permit a copy of manuscript to be made, or to make a gift of a copy thereof, is not such publication as will amount to an abandonment, and the person receiving the copy cannot multiply copies published, or make any other use of the work, except with the consent of the owner.[1]

Printing Copies Without Distribution. — Printing itself cannot amount to a publication, for the obvious reason that a book may be withheld from the public long after it has been printed.[2]

Accompanied by Distribution — In General. — To constitute a publication, there must, in addition to printing, be some distribution of the copies.

Restricted Distribution. — But there may be such a qualified distribution of the printed copies, as in the case of their being delivered to a few ascertained persons only, who receive them under conditions expressly or impliedly precluding any ulterior diffusion of the knowledge of their contents, as will not constitute such publication as amounts to a dedication of the work to the public.[3]

1. **Gift of Copy of Manuscript.** — Jefferys *v.* Boosey, 4 H. L. Cas. 919, Short 48; Prince Albert *v.* Strange, 1 Macn. & G. 25, 1 H. & T. 1, 13 Jur. 109, 2 De G. & Sm. 652; Forrester *v.* Waller, *cited* in 4 Burr. 2331; Queensberry *v.* Shebbeare, 2 Eden 329; Thompson *v.* Stanhope, Ambl. 737; Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87.

2. **Printing Alone Not Publication.** — Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12.

Delivery of Printed Copies of a Law Report to the State. — The delivery, by the official reporter, of printed copies of a law report to the state, without distribution by the state, is not a publication. Myers *v.* Callaghan, 5 Fed. Rep. 726.

3. See Wheaton *v.* Peters, 8 Pet. (U. S.) 591.

Limited Gift of Copies. — In the case of Keene *v.* Wheatley, 4 Phila. (Pa.) 157, 5 Clark (Pa.) 501, 9 Am. L. Reg. 33, it was said, by Cadwalader, J., in delivering the opinion of the court, that "such a case occurs where a small first edition of a book, printed with a notice on the title page that it is for private circulation, is gratuitously distributed by the author among particular persons." The learned judge instances the issuing by Mr. Justice Talfourd, when at the bar, of the first impressions of his tragedy of "Ion" in this manner.

And it has been held that printing alone, even though accompanied by a limited gift of copies, is not publishing. Prince Albert *v.* Strange, 1 Macn. & G. 25.

Sending Copies of Directory to Subscribers. — Where a directory containing information regarding the place of business, street address, particular kinds and extent of business, commercial standing, and mercantile credit of individuals, firms, and corporations engaged in the jewelry trade throughout the United States and Canada was issued twice a year by the plaintiff, a mercantile agency, and printed copies of the directory were leased to the plaintiff's subscribers upon a contract printed in each copy, which restricted the use of the book and required its return to the plaintiff, no copy of the book ever being sold, it was held that the distribution of the book under these restrictions did not constitute such a publication as would destroy the plaintiff's property rights in the book. Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12. But see the case of Ladd *v.* Oxnard, 75 Fed. Rep. 703, where there is a dictum to the effect that after such publication of a credit-ratings book it will not be protected against infringement unless it has been copyrighted.

Transmission of News by News-collecting Agency to Its Subscribers. — Where a corporation, which has for its business the collection of news in all parts of the world by its agents, transmitted such news to its subscribers by wire, it was held that such transmission did not constitute a general publication which would amount to an abandonment. Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. (N. Y. Supreme Ct.) 194.

Deposit of Copies of Book with Librarian of Congress. — The deposit of copies of a book with the Librarian of Congress for the purpose of obtaining a copyright, which, however, is not obtained for the reason that the necessary publication is omitted, is not a publication which deprives the author of his common-law right of property. Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12.

Deposit of Chart in Navy Department. — In Blunt *v.* Patten, 2 Paine (U. S.) 397, a deposit by the author of his work in a public office, such as a chart in the navy department, was held not to make it a public document which any one might copy. The deposit was made upon the express understanding that the chart was not to be published except by the plaintiff.

Printing Operetta for Use of Performers. — The printing of copies of an operetta for the use of the artists producing it, and to be used by them only for the purpose of learning their respective parts, and having the words "Right of representation and reproduction reserved" printed upon its title page, has been held not to constitute such publication as will amount to a dedication of the work to the public. French *v.* Kreling, 63 Fed. Rep. 621.

Consignment of Books to Dealers with Request Not to Sell Till a Specified Time. — The consignment of copies of a book in quires to publishers, accompanied with the request not to expose for sale until bound copies should be sent,

Distribution Unrestricted as to Persons and Purpose. — Unless, however, the circulation of copies is restricted, both as to persons and purpose, it will amount to a publication.[1] A book is, of course, published when printed copies are sold unconditionally to the public.[2] The delivery of a printed copy of a work to one of several subscribers for even a limited edition of the work is sufficient.[3]

Publication of Book in Serial Form. — And the publication of a book in serial form in a magazine before the statutory formalities for obtaining a copyright have been complied with is, without doubt, such a publication as will dedicate the work to the public and deprive the author of his right to a statutory copyright.[4]

Publication of Novel Based on Drama. — The publication of a novel based upon a drama has been held not to constitute a publication of the drama.[5]

Public Performance of Play. — Unless so provided by statute, the public presentation of a play on the stage does not constitute such publication as will amount to an abandonment of the owner's common-law right and prevent his obtaining the statutory copyright.[6]

has been held not to constitute a publication. Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

But it has been held that while it seems that a conditional consignment of printed books to a bookseller, with order not to sell before a specified day, is not a publication, a sale after that period operates as a complete dedication of the work to the public. Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 349.

1. See opinion of Cadwalader, J., in Keene *v.* Wheatley, 4 Phila. (Pa.) 157, 5 Clark (Pa.) 501, 9 Am. L. Reg. 33.

Illustration. — Where a person compiled maps of the city of Chicago, of a particular design, from the public records, into an atlas, and without taking out any copyright made several copies of the original in a form suitable for comprising atlases, sold several, and placed one copy in the hands of the city for public use, where any part or the whole of it could be copied and used by any citizen, placing no restrictions on their use, it was held that the author thereby dedicated the maps to public use, and consequently lost his common-law proprietorship in them, and they became public property. Rees *v.* Peltzer, 75 Ill. 475.

2. Unconditional Sale of Printed Copies to the Public. — Gottsberger *v.* Aldine Book Pub. Co., 33 Fed. Rep. 381; Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep 480; Osgood *v.* A. S. Aloe Instrument Co., 83 Fed. Rep. 470.

A sale of a book naturally implies a publication. Baker *v.* Taylor, 2 Blatchf. (U. S.) 82.

3. See Keene *v.* Clarke, 5 Robt. (N. Y.) 38.

4. Publication of Book in Serial Form. — Holmes *v.* Hurst, 76 Fed. Rep. 757, on appeal Holmes *v.* Hurst, 80 Fed. Rep. 514; Holmes *v.* Donohue, 77 Fed. Rep. 179.

5. In the case of Shook *v.* Rankin, 3 Cent. L. J. 210, it was held that the publication of a novel which is founded upon a drama, though made with the consent of the owner of the drama, is not such a dedication to the public as will authorize the novel to be dramatized and put upon the stage without the consent of the owner of the play from which it was indirectly derived. See also Reade *v.* Conquest, 11 C. B. N. S. 479, 103 E. C. L. 479.

6. Stage Presentation Not Publication — *England.* — Macklin *v.* Richardson, Ambl. 694; Morris *v.* Kelly, 1 Jac. & W. 461.

United States. — Crowe *v.* Aiken, 2 Biss. (U. S.) 208; Boucicault *v.* Wood, 2 Biss. (U. S.) 34; Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87; Roberts *v.* Myers, 23 Law Rep. 396; Boucicault *v.* Hart, 13 Blatchf. (U. S.) 47; Keene *v.* Wheatley, 4 Phila. (Pa.) 157, 5 Clark (Pa.) 501, 9 Am. L. Reg. 33. See also Thomas *v.* Lennon, 14 Fed. Rep. 849.

New York. — Palmer *v.* De Witt, 2 Sweeny (N. Y.) 530, *affirmed* 47 N. Y. 532, 7 Am. Rep. 480; French *v.* Maguire, 55 How. Pr. (N. Y. Supreme Ct.) 471; Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408.

Where the author of a play permits and procures it to be presented on the stage for his own benefit and through his selected channels, but does not print it, he has not abandoned it or given it to the public, nor has he published it within the meaning of the provisions of the Revised Statutes of 1870 in regard to copyrights. Boucicault *v.* Hart, 13 Blatchf. (U. S.) 47.

Performance of Opera. — The public performance of an uncopyrighted opera gives no right to print the music. Gilbert *v.* Bacher, 9 W. N. C. (Pa.) 14.

Changes and Additions by Actor Employed by Owner of Play. — Where an actor who is employed by the owner of an unpublished play makes written alterations in the manuscript and also incorporates unwritten additions in the play, the use of such alterations and additions by the owner of another theatre, when such actor has communicated them, will be enjoined. Keene *v.* Wheatley, 4 Phila. (Pa.) 157, 9 Am. L. Reg. 33, 5 Clark (Pa.) 501. But see Keene *v.* Clarke, 5 Robt. (N. Y.) 38.

Continued Performance of Play. — In Keene *v.* Clarke, 5 Robt. (N. Y.) 38, it was held that upon the evidence it should have been submitted to the jury by the court below whether the play had not been dedicated to the public by means of its public presentation, in various places, at various times, in theatres not under the management of the plaintiff, whereby she had lost her literary property in the play. Mr. Justice Monell dissented from this view. In the prevailing opinion, by Chief Justice Robertson, it is said: "There was also

Right to Reproduce from Memory of Spectator. — But while it is undoubtedly settled that the public presentation of a dramatic production by the owner, or by third persons with his sanction, does not constitute such absolute publication as will work an abandonment of all the literary property therein, it has sometimes been questioned whether such presentation is not a qualified publication or a publication *pro tanto*, so that the owner cannot object to any such public dramatic presentation by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience.[1] There are some authority and a number of dicta favoring the view that it does have this effect.[2] But in the later cases, and in perhaps the larger

enough evidence in this case to have gone to the jury upon the question whether the plaintiff had not so frequently performed the play in question, for such a period, and at so many places, as to warrant the conclusion of every one of ordinary intelligence that she intended to surrender the knowledge and use of it to the public, and confine her expectations to the superiority of her mode of performing it. Or if she did not, then that by her frequent performances she had enabled it to be so universally represented from recollections originating in such performances as to destroy her right."

In Boucicault *v.* Wood, 2 Biss. (U. S.) 34, there is a dictum by Judge Drummond to the following effect: "By allowing them [the plays in question] to be represented throughout the community for a long period of time without license or objection, he [the plaintiff] may be considered as having abandoned the use of them to the public, otherwise he has the right to call upon any person using them without his consent to respond in damages."

But, in the case of Palmer *v.* De Witt, 2 Sweeny (N. Y.) 553, Monell, J., in delivering the opinion of the court, takes the view that an abandonment of the common-law property cannot be argued from the mere frequency of the performance of a manuscript play or the reading of a manuscript lecture before the public.

1. **Whether Public Performance of Play Authorizes Reproduction from Memory.** — Crowe *v.* Aiken, 2 Biss. (U. S.) 208.

2. **View that Stage Presentation Authorizes Reproduction from Memory.** — This was decided to be the law in the case of Keene *v.* Kimball, 16 Gray (Mass.) 545. But this case was *overruled* in the more recent case of Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480.

In an elaborate opinion in the case of Keene *v.* Wheatley, 4 Phila. (Pa.) 157, 5 Clark (Pa.) 501, 9 Am. L. Reg. 33, decided in the Circuit Court of the United States for the Eastern District of Pennsylvania, Judge Cadwalader said: "The literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make, from its having been retained in the memory of any of the audience." But this is a mere dictum; as is said of Judge Cadwalader's opinion, by Judge Devens, in the case of Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480, "a decision on this question was not necessary in order to dispose of the case before him."

In Keene *v.* Clarke, 5 Robt. (N. Y.) 38, Robertson, C. J., says: "Where the audience is not limited, as in the case of a public theatrical performance, the public are held entitled to make use of that faculty which is necessarily addressed by such representation, to wit, the memory, for the purpose of repeating the contents of the play, even in performing it elsewhere, when the owner has laid no restraint upon such use of the knowledge so obtained and retained by memory only." But a dissenting opinion is delivered in this case by Mr. Justice Monell. It is said that the principle enunciated by Chief Justice Robertson in the above-cited case was applied in the unreported New York case of Wallack *v.* Williams, 14 Am. L. Reg. N. S. 213.

But in a later case in the same state it was held that a play, even though it has been given a public stage performance, cannot be published in print, no matter how obtained, whether by the memory of spectators or otherwise. Palmer *v.* DeWitt, 2 Sweeny (N. Y.) 530, *affirmed* 47 N. Y. 532, 7 Am. Rep. 480. In delivering the opinion of the Superior Court, Mr. Justice Monell again dissents from the opinions of the judges in the cases where it is held or intimated that a spectator may, upon witnessing a public performance of a play, rightfully commit it to memory and then publish it to the world. "It seems to me that any surreptitious procuring of the literary property of another, no matter how obtained, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights if the property so obtained is made use of to his injury. Each of the learned justices admits that a play cannot lawfully be taken down by a shorthand writer from the lips of the actors during a public performance. If taken thus by a stenographer, is it different, in its legal effect and resulting consequences, from committing to memory and afterwards writing it out? In principle it is not. They are only different modes of doing the same thing, and, if without the author's consent, are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterwards as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement of the author's common-law right of property as if his manuscript has been feloniously taken from his possession. I can see no difference."

The case of Coleman *v.* Wathen, 5 T. R. 245, which is sometimes cited in support of

number of cases in which this question actually arose for determination, the refinements upon which this view is based are rejected, and it is held that it is immaterial whether the copy of a play which has only been published by public presentation on the stage is obtained by notes, stenography, or similar means by the persons attending the representation, or solely by the memory of such persons; that it is a violation of the property rights of the owner of a play when a spectator who has obtained possession of a copy of the drama, even though it was obtained solely by the aid of the memory, undertakes to use it either for publication in print or for any other public representation.[1]

By the English Statute. — In England, this whole question as to the effect of a stage production of a drama has been put at rest by the copyright statute, which declares in effect that one public representation or performance of any dramatic piece is sufficient in the construction of the law to constitute a publication.[2]

Delivery of Lectures. — The delivery of lectures to a limited audience, as where lectures are delivered by an instructor to his pupils, does not constitute publication.[3] And in analogy with the rule which obtains in the case of the public presentation of a dramatic production on the stage,[4] probably the same rule would prevail in the case of a lecture delivered publicly before a promiscuous assembly.[5]

Public Recital of Poem. — It has been held that the public recital of a poem does not constitute a publication.[6]

Public Exhibition of Paintings. — In *England* it has been held that the public exhibition of paintings does not necessarily constitute such a publication as will dedicate them to the public.[7] But in the *United States*, if a recent decision is to

this view, is hardly in point. That was an action brought by the owner of the copyright of O'Keeffe's farce called "The Agreeable Surprise," against the manager of a theatre in Richmond, on account of the performance, for the penalty imposed by the Statute of 8 Anne, c. 19, as for an unauthorized publication. The verdict having been in his favor, it was set aside upon the ground that the only publication by which the statutory penalty could be incurred was by a publication in print. See Tompkins *v.* Halleck, 133 Mass. 37, 43 Am. Rep. 480.

Memorization of Play by Actor in Employ of Owner. — A memorization of a play by actors while in the employ of the owner of a play, and with a view of producing the play for the benefit of such owner, is not such a memorization as will allow them to produce the play in another theatre, for the benefit of one not the owner of the play. Shook *v.* Rankin, 3 Cent. L. J. 210.

1. View that Stage Presentation Does Not Authorize Reproduction from Memory. — Macklin *v.* Richardson, Ambl. 694; Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480, *overruling* Keene *v.* Kimball, 16 Gray (Mass.) 545; French *v.* Connolly, 1 N. Y. Wkly. Dig. 197.

Circulation of Printed Copies Obtained by Memorization. — The public performance of a play does not authorize the circulation of printed copies, no matter whether obtained by the process of memorization or otherwise. Palmer *v.* De Witt, 2 Sweeny (N. Y.) 530, *affirmed* 47 N. Y. 532, 7 Am. Rep. 480.

2. English Statute. — 5 & 6 Vict., c. 45, § 20. See D'Almaine *v.* Boosey, 1 Y. & Coll. 289, *per* Lord Lyndhurst; Boucicault *v.* Chatterton, 5 Ch. Div. 275.

Stage Production in Foreign Country. — In Boucicault *v.* Delafield, 1 Hem. & M. 597, 33 L. J. Ch. 38, 9 Jur. N. S. 1282, 9 L. T. N. S. 709, 12 W. R. 101, an action to recover a penalty under a statute, it was accordingly held that a public performance of a drama in the United States, before taking out a copyright in England, was a publication within the statute.

3. Limited Audience — Delivery of Lecture to. — Abernethy *v.* Hutchinson, 3 L. J. Ch. 209; Caird *v.* Sime, L. R. 12 App. 326, 36 Alb. L. J. 291; Nicols *v.* Pitman, 26 Ch. Div. 374. See Drummond *v.* Altemus, 60 Fed. Rep. 338.

Permitting Pupils to Take Copies. — The manuscript of a work on bookkeeping was used by the author in a school taught by himself, and also in a school of which he was part owner, and in both these schools the manuscript was studied by the pupils, who were required to copy certain parts of it, and were at liberty to copy the whole. It was held that this did not operate as an abandonment of the work. Bartlett *v.* Crittenden, 5 McLean (U. S.) 32.

4. See *supra*, this title and division, the paragraph *Public Performance of Play*.

5. Public Lecture. — See Palmer *v.* DeWitt, 2 Sweeny (N. Y.) 553, 40 How. Pr. (N. Y.) 293, 3 Alb. L. J. 34, on appeal 47 N. Y. 532, 7 Am. Rep. 480. But see Caird *v.* Sime, L. R. 12 App. 326, 36 Alb. L. J. 291.

English Statutory Provision. — In England it was provided by the statute 5 & 6 Wm. IV., c. 65, that no person allowed for a certain fee to be present at any lecture, delivered at any place, should be deemed to be licensed to publish such lecture on account of having been permitted to attend the lecture, etc.

6. Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410.

7. Rule in England. — Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, on appeal 10 Ir. Ch. Rep. 510.

be regarded as sound, the common-law right which the artist has in his painting will be forfeited by its public exhibition, and it will become public property unless protected by a statutory copyright.[1]

Publishing Copies of Painting. — It has been held, and it seems to be the law, that the reproduction and sale of chromo-lithographic copies of a painting constitute a publication.[2]

Cataloguing Paintings and Photographs. — The cataloguing of paintings or photographs for distribution to a more or less general public does not necessarily constitute such publication as will work a forfeiture of the common-law property and prevent the acquisition of the statutory copyright, even though the catalogue may contain pictorial descriptions.[3]

Reproduction of Painting from Memory. — In Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, on appeal 10 Ir. Ch. Rep. 510, a painting on public exhibition for private emolument was seen by spectators, some of whom from recollection arranged themselves in a tableau representing the figures in the painting and were photographed. The sale of the engravings made from such photographs was restrained by injunction. See *supra*, this title and division, the paragraph *Public Performance of Play*.

1. Rule in the United States. — In the case of Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808, Townsend, J., in delivering the opinion of the court, said of a public exhibition of a painting that "it would seem that such an exhibition would not be a publication unless the general public was permitted to make copies at pleasure," and that "in the absence of direct evidence, such permission will not be assumed."

And in Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. Rep. 445, Putnam, J., in delivering the opinion, said: "Moreover, a mere exhibition of a picture in a public gallery, like that at Berlin, does not, at common law, forfeit the control of it by the artist or the owner, unless the rules of the gallery provide for copying, of which there is no evidence in this case." But upon an appeal of this case to the United States Circuit Court of Appeals, it was held (Colt, Circuit Judge, and Nelson, District Judge, concurring, and Webb, District Judge, dissenting), that the public exhibition of a painting constitutes an abandonment of the artist's property therein, unless it is protected by a statutory copyright. Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. Rep. 54, 33 U. S. App. 399.

2. Publishing Lithographic and Photographic Copies of Painting. — Oertel *v.* Jacoby, 44 How. Pr. (N. Y. Supreme Ct.) 179. But *compare* the earlier case of Oertel *v.* Wood, 40 How. Pr. (N. Y. Supreme Ct.) 10. This was a suit by A and B against C for an injunction restraining the latter from publishing photographic reproductions of a painting by A. The facts were that A, an artist, had assigned to B the exclusive right to reproduce the picture by chromo-lithograph, lithograph, or in any other manner, except that of a facsimile oil painting. B subsequently published and sold a chromo-lithograph and photograph of the picture. The injunction was granted, apparently on the ground that there had been no publication of the painting which dedicated it to the public.

Printing Engraving of Painting in Periodical. — In Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, on appeal 10 Ir. Ch. Rep. 510, the facts were as follows: One Wallis painted a picture which he called "The Death of Chatterton." It was exhibited at the Royal Academy, and by his permission a wood engraving of it was published in the National Magazine. Wallis afterwards sold the picture to one Egg, for one hundred guineas, and Egg exhibited it for two years in the galleries of London and Manchester. Two years after such exhibition, Egg, by an agreement in writing, sold to one Turner the right to make and publish an engraving of the picture, for the sum of £150, and Egg agreed to lend the picture to Turner for the purpose of engraving it, and for the further purpose of exhibiting the original picture, so as to procure subscriptions for the engraving thereof. Turner exhibited the picture and published advertisements of his intended engraving. On an application for an injunction restraining one Robinson from publishing and vending reproductions of the picture, which was granted, it was held that the use which had been made of the painting was not such publication as dedicated it to the public.

Sale of Replica of Painting. — In the case of Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808, it was held that the sale of the replica of a painting was not such a publication by the author as would destroy the right to copyright. Townsend, D. J., said: "The replica was not a copy of the painting, but was made before the painting, for assistance to the author in producing the painting. It differed from the painting in size and style, and was itself an original painting, of which the author had the common-law right to prevent a reproduction. It was sold by him, reserving any right of reduplication, and such a sale was not a publication even of the replica, and certainly not of the painting."

3. Sketch of Painting in Salon Catalogue. — In the case of Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808, which was an action for the infringement of the copyright in a painting, it was contended by the defendant that there had been a publication of a copy of the painting in a salon catalogue and that the right of the artist to a copyright was thereby destroyed, but the court held that there was no such publication as would work a forfeiture of the right of copyright. In delivering the opinion of the court, Townsend, D. J., said: "This was an illustration not taken from the painting, but from a very superficial crayon

Partial Publication. — It has been said that as to so much of a work as has been published before filing the title, the author cannot obtain a copyright under the statutes; but if he has published part of the work only, he may no doubt copyright the remainder.[1]

Partial Publication of Opera or Oratorio. — As to whether the publication of the words or vocal parts of an oratorio or the libretto and vocal score of an opera, omitting the orchestration and substituting a piano accompaniment, constitutes such publication as will authorize the reproduction of the work, with a new orchestration, without the consent of the owner, there is some conflict of judicial opinion. It has been held that it does not,[2] but the contrary view is favored in the later and what seem to be the better-considered cases.[3]

sketch printed in a catalogue of the salon where the painting was exhibited prior to the assignment to the complainant. It was not intended to be a copy of the painting. The purpose of the catalogue was merely to furnish to the holder of the catalogue information regarding the paintings, or to enable him to find the paintings desired, and perhaps to recall the paintings to the memory afterwards. It was not intended to serve in any way as a copy of the painting. No one would think of considering it as a work of art. Such a printing would at most be a qualified or limited publication which would not work a forfeiture of the right of copyright. Such use of catalogue is under the implied qualification that the privilege shall not be extended beyond the purpose for which it was granted."

Miniature Cuts of Photographs in Catalogue for Dealers. — In Falk *v.* Gast Lithograph, etc., Co., 54 Fed. Rep. 890, a publisher sent to retail dealers an exhibition card containing copies in very reduced sizes of photographs, from which the dealers were requested to make their orders. The card did not contain a copyright notice in the language prescribed by statute. Shipman, J., said: "This card or sheet of miniature copies of photographs for the inspection of dealers is not one of the published editions of the photographs which it contained, within the meaning of the section. The statutes refer to a published edition, which is an edition offered to the public for sale or circulation."

1. Holmes *v.* Hurst, 80 Fed. Rep. 514.

2. Publication of Opera or Oratorio, Omitting Orchestration. — Gounod, the composer, permitted the words and vocal parts of his oratorio "The Redemption," set to an accompaniment for the piano, to be published in book form, and this book contained all the harmonies and melodies of the original oratorio. The defendant did not copy Gounod's score, but procured the band parts to be made by some unnamed composer or arranger of music, and undertook to give a public performance of the published parts of the oratorio with this new orchestration, and advertised the proposed production to be "Gounod's Redemption, with new orchestration arranged from indications in the published pianoforte score." In Thomas *v.* Lennon, 14 Fed. Rep. 849, where the plaintiff, the owner for the United States of whatever exclusive rights Gounod retained after the publication of the book, sought an injunction restraining the defendant's production, the court, by Lowell, C. J., said: "Such a work is a single creation, of which the orchestration is an essential part; every reproduction of it from something else is necessarily an imperfect imitation, which, nevertheless, occupies the same field, and may ruin the original. In this respect an opera is more like a patented invention than like a common book; he who shall obtain similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer. * * * Another practical point of some importance is that it would be very difficult to prove, in many cases, whether memory had not had some part in the reproduction. If necessary to the logic of the argument, we might, perhaps, hold that the publication of the piano score is a restricted dedication of that and nothing more." The injunction was granted. The learned judge *cites* Boosey *v.* Farlie, 7 Ch. Div. 301, *affirmed* L. R. 4 App. 711, and Goldmark *v.* Collmer, decided in November, 1882, by Chancellor Tuley, in the Circuit Court of Cook county, Illinois, in support of this view.

3. In the Iolanthe Case, 15 Fed. Rep. 439, the court refused to concur in the doctrine of restricted dedication enunciated in Thomas *v.* Lennon, 14 Fed. Rep. 849. And in this case and also in Carte *v.* Duff, 23 Blatchf. (U. S.) 347, 25 Fed. Rep. 183, it was held that where a libretto and vocal score of a comic opera with piano accompaniment was published, the orchestration being omitted from the publication and retained in manuscript, a person who arranged a new orchestration, embodying therein only the published vocal and pianoforte score, cannot be enjoined from publicly presenting the opera with his new orchestration. Of the opinion by Judge Lowell, in Thomas *v.* Lennon, 14 Fed. Rep. 849, above quoted, the court, in the Iolanthe Case, 15 Fed. Rep. 439, by Morris, J., said: "So far as the decision of the learned circuit judge in that case goes upon the ground of deceptive advertisements calculated to mislead the public and injure the licensed performance, we do not doubt its correctness; but so far as it may be used as an authority for the doctrine of a restricted dedication, we are unable, for the reasons already expressed, to concur in it." In the same opinion the cases cited in Thomas *v.* Lennon, 14 Fed. Rep. 849, in support of the doctrine therein applied, are declared not to be in point. Of Boosey *v.* Fairlie, 7 Ch. Div. 301, which was cited by the complainants' counsel as a case directly in point, in which the right to the full orchestral score of an opera was protected against an independent orchestration

Publication Abroad. — The publication of an intellectual production abroad constitutes such publication as will operate as a dedication of the work to the public.[1]

Publication Without Consent of Author or Owner. — To constitute an abandonment of the common-law property the publication must be a voluntary one, made by the owner himself or by his authority.[2]

made from a published score for the piano and voices, the learned judge said: "We think, however, that the report of that case discloses that the Court of Appeal and House of Lords of England so held because the Acts of Parliament and the convention with France gave to Offenbach, the author of the opera then in question, the sole liberty of publicly performing his opera for a limited period, without regard to whether it had been published or not. The principal question in the case very obviously was whether the requirements of the statute with reference to registration had been complied with. If Offenbach had properly registered his composition, as required by the British statute, then the statute gave him the monopoly of its public performance, although he had already published every note of it. * * * Therefore, when the court decided that Offenbach's opera had been properly registered, and that he was entitled to the monopoly given by the statute, there was no question as to the infringement."

And of Goldmark *v.* Collmer, decided by Chancellor Tuley, in 1882, in the Circuit Court of Cook County, Illinois, it is said: "The facts of that case, however, were quite different from this. There, although the songs and music, as arranged for the piano, had been published, the libretto had been kept in manuscript. The respondents were, therefore, properly restrained from using the unpublished libretto of the complainants, of which, in some manner, they had obtained possession. The learned chancellor hesitated to say that the defendant should be enjoined from making from the published piano score an independent arrangement for an orchestra, and was inclined to think that was one of the uses any one might make of the published score; but he was clear that the defendant should be restrained from using such an orchestration in the production on the stage of that opera of which he had no right to the libretto. In the opinion filed by the learned chancellor he goes much further, and insists that by the common law a composer has the right to have his opera represented on the stage with just that orchestration or combination of musical instruments which he has arranged for it, notwithstanding he has published a partial score; but we think that to the extent stated in the opinion this doctrine will be found in direct conflict with authoritative decisions."

Title or Name Not Abandoned by Partial Publication. — Where an intellectual production, such as an operetta or oratorio, is published in part, as to the extent of publishing the songs and vocal score of the operetta, or the words and vocal parts of the oratorio, set to an accompaniment for the piano, together with the name of the operetta or oratorio, leaving a considerable portion, as the orchestration and orchestra parts of the libretto of the operetta or the orchestration of the oratorio, unpublished, such publication of the name does not make it public property. Aronson *v.* Fleckenstein, 28 Fed. Rep. 75; Thomas *v.* Lennon, 14 Fed. Rep. 849. See also the Iolanthe Case, 15 Fed. Rep. 439.

1. Foreign Publication. — In the case of Boucicault *v.* Wood, 2 Biss. (U. S.) 34, it was held that the publication of a play abroad with the consent of the author would work an abandonment of his rights under our laws, and place him simply in the position of a foreign dramatist who has published his plays in his own country.

In *England*, while it has been said that it seems that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statutes, it has been held that if the author first publishes abroad, he cannot afterwards have the benefit of the statute by publishing in England. Chappel *v.* Purday, 14 M. & W. 303. See Clementi *v.* Walker, 2 B. & C. 861, 9 E. C. L. 258; Jefferys *v.* Boosey, 4 H. L. Cas. 847; Guichard *v.* Mori, 9 L. J. Ch. 227.

2. Consent of Owner — Publication Without. — The publication in a foreign country of a play never published in the United States is not a dedication to the public, unless such publication was made with the consent of the author. Boucicault *v.* Wood, 2 Biss. (U. S.) 34.

The operetta "Nanon" was completed in September, 1884, and a manuscript copy immediately transmitted by the authors to the plaintiffs, who, before it was written, had purchased the exclusive right to use it in America, so that they were the exclusive owners for America and in possession of the manuscript before there was any publication of any part in Europe or America. The defendants were enjoined from performing the play as a whole, or the piano score, or any part of it except the orchestration, which was the defendants' work. Goldmark *v.* Kreling, 35 Fed. Rep. 661. It appeared in this case that the piano score had been published in Europe, but it did not appear very clearly, if at all, that it was with the author's consent. But the court, in its opinion, did not deem this important, since it clearly appeared that neither the score nor any part of the operetta was published with the plaintiff's consent either in Europe or America. The court, by Sawyer, J., said: "The authors certainly could not have sold and conveyed any right to a third party to perform their operetta in America, so as to cut off the prior exclusive right conveyed to Goldmark and Conried. If they could not cut them off by subsequent sale, we do not perceive how they could do it by a subsequent dedication to the public by publication. In our judgment defendants had no right to use the piano score, even if it had been published by the authors in Europe after the right of complain-

V. Subjects of Copyright — 1. Provisions of the Statute. — The original copyright act of 1790 provided for the copyrighting of maps, charts, and books.[1] Copyright protection was, however, gradually extended by subsequent legislation,[2] and by the terms of the present law, statutory copyright may be obtained for a book, map, chart, dramatic or musical composition, engraving, cut, print, photograph or negative thereof, painting, drawing, chromo, statue, and a model or design intended to be perfected as a work of the fine arts.[3]

2. Construction of Particular Terms — *a.* "Book" — (1) *In General.* — That a printed volume, whether containing many or few pages, is a book, within the meaning of the copyright law, cannot be questioned.[4] But in determining what constitutes a "book" within the meaning of that term as used in the copyright statutes, the form of the publication is not material. Thus it has been held that the term does not imply the requirement that the work shall be printed.[5] Neither does it mean a book within the common and ordinary acceptation of the word, viz., a volume written or printed, made up of several sheets and bound together; the work may be printed on only one sheet.[6] It has been held to include blanks for legal instruments.[7]

(2) *Newspapers and Magazines.* — There is no provision in the copyright law of the United States whereby copyright protection is expressly extended to periodicals, such as newspapers and magazines. These publications are, however, mentioned in the law in such a manner as would seem to imply that they come within its protection.[8] And there can be little doubt that a publi-

ants had attached. We are not certain that it was published with the consent of the authors. * * * But concede it to be so, there was no consent of complainants, in whom the exclusive right for America had already vested."

1. **Original Copyright Act.** — 1 U. S. Stat. at Large 124.

2. **Subsequent Legislation Extending Copyright.** — Historical or other prints were added by the Act of 1802 (2 U. S. Stat. at Large 171); musical compositions, cuts, and engravings, by the Act of 1831 (4 U. S. Stat. at Large 436); photographs, by the Act of 1865 (13 U. S. Stat. at Large 540); and paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts, by the Act of 1870 (16 U. S. Stat. at Large 198).

3. **Present Law.** — U. S. Rev. Stat., § 4952.

4. See Scoville *v.* Toland, 6 West. L. J. 84, Cox Manual of Trade-Mark Cas. 51, 21 Fed. Cas. No. 12553.

Article Published in Foreign Encyclopædia. — It has been held that a single article may be copyrighted, though bound in a volume of the Encyclopædia Britannica, the bulk of which was public property. Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

Article Published in Newspaper. — And in like manner it seems that a copyright may be obtained for any article published in an uncopyrighted newspaper by a compliance, in the case of such article, with the statutory provisions. Drone on Copyright 170.

5. **Printing Not Necessary.** — In Roberts *v.* Myers, Brunner Col. Cas. 698, 23 Law Rep. 396, 17 Leg. Int. (Pa.) 405, 20 Fed. Cas. No. 11906, it was held that there might be a copyright in Boucicault's drama called "The Octoroon," although it had never been printed.

6. **Single Sheet Sufficient.** — The English statute of 8 Anne on the subject of copyright, enumerating in section 1 the works intended to be protected by it, contains the words "book or books." In the case of Clementi *v.* Golding, 2 Campb. 25, the court held that the form of the publication was not material in determining whether it was or was not a book within the meaning of the statute, and it was held that a song published on a single sheet came within the meaning of the word "book" as used in the statute, and was a proper subject of copyright.

This case was *cited with approval* in the American case of Drury *v.* Ewing, 1 Bond. (U. S.) 540, 7 Fed. Cas. No. 4095, where it was held that a single sheet containing diagrams representing a system of taking measures for and cutting women's dresses, with instructions for its practical use, was a "book" within the meaning of the first section of the Act of 1831, and was a proper subject of copyright. See remarks on this case in Baker *v.* Selden, 101 U. S. 99.

As to "book" in the copyright act embracing one sheet or more containing original matter, see Scoville *v.* Toland, 6 West. L. J. 84, Cox Manual of Trade-Mark Cas. 51, 21 Fed. Cas. 12553; Clayton *v.* Stone, 2 Paine (U. S.) 382, 5 Fed. Cas. 2872. See also Littleton *v.* Oliver Ditson Co., 62 Fed. Rep. 597; Oliver Ditson Co. *v.* Littleton, 67 Fed. Rep. 905.

7. **Blanks for Legal Forms.** — Brightley *v.* Littleton, 37 Fed. Rep. 103.

Indexed Letter File. — An indexed letter file has been held not to be copyrightable as a book, within the meaning of that term as used in the statutes. Amberg File, etc., Co. *v.* Shea, 78 Fed. Rep. 479, 79 Pat. Office Gaz. 514, 29 Chicago Leg. N. 152.

8. See U. S. Rev. Stat., § 4956, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1107.

cation of this description is copyrightable as a book.[1]

b. "PRINT." — It has been said that the word "print" used in the statute in connection with "engraving," "cut," and "photograph," means, apparently, a picture, something complete in itself, similar in kind to an engraving, cut, or photograph.[2] Thus it may include a chromo-lithograph,[3] but not a mere pattern print.[4]

c. "CHART." — Though a sheet of paper exhibiting tabulated or methodically arranged information may properly be called a "chart," the word as used in the copyright law does not have that meaning.[5] As there used, the word "chart" refers to a form of map.[6]

1. Newspapers and Magazines Copyrightable as Books. — Drone on Copyright 168; 1 Spelling on Extr. Rel. 866.

In Harper *v.* Shoppell, 26 Fed. Rep. 519, a case involving the infringement of a cut published in the plaintiffs' newspaper, the court, by Wallace, J., said: "The copyright of the plaintiffs' newspaper was a copyright of a book, within the meaning of the copyright laws."

In *England* a newspaper may be protected by statutory copyright. Exchange Tel. Co. *v.* Gregory, [1896] 1 Q. B. 147.

Daily Price Current. — Perhaps the nearest approach to a decision of this question is to be found in the case of Clayton *v.* Stone, 2 Paine (U. S.) 382, where it was held that a daily price current was not a proper subject of copyright. It seems that the decision in this case was based upon two grounds: first, the ephemeral character of the publication in question; second, the impracticability in the case of such publication of complying with the statutory requirements. So far as the decision in this case was based upon the ephemeral character of the publication, it is of course applicable to a large part of any newspaper. But, on the other hand, the ordinary newspaper usually contains a quantity of matter of great value, which possesses permanent literary merit, and which should, it has been said (Drone on Copyright 169), be entitled to copyright protection. And so far as the judgment rests upon the impracticability of complying with the then statutory requirements, one of which was that a copy of the record of entry should be published for four weeks in one or more newspapers, it may be said that this requirement has been done away with and the objection is now without the force which it once possessed. It would, of course, be inconvenient to comply with even the present requirement, which makes it necessary to obtain a separate copyright for each issue of the publication, but it might be done, and the authorities favor the view that if the necessary formalities are complied with, a valid copyright may be obtained in the newspaper. Drone on Copyright, pp. 169, 170.

2. See Rosenbach *v.* Dreyfuss, 2 Fed. Rep. 217.

3. Chromo-lithographs. — It seems that before chromo-lithographs were specifically referred to as copyrightable matter in the Act of 1870 and in section 4952 of the Revised Statutes by the use of the word "chromo," they were copyrightable as "prints" under the Act of 1831. Yuengling *v.* Schile, 12 Fed. Rep. 97.

Photographs. — But a photograph was held not to be a print within that statute. Wood *v.* Abbott, 5 Blatchf. (U. S.) 325.

4. Pattern Prints. — It has been said that the word "print" in the statute clearly does not mean something printed on paper that is not intended for use as a picture, but is itself to be cut up and embroidered and thus made up into an entirely different article. Rosenbach *v.* Dreyfuss, 2 Fed. Rep. 217. And it was accordingly held in this case that a printing upon paper of balloons and hanging baskets, with lines to mark out the different parts and show how the paper was to be cut to make the different parts fit together so as to form the balloon or basket, and with other lines indicating where and how they might be embroidered, was not copyrightable.

5. Tabulated Election Statistics. — A tabulation of election statistics was printed upon a single sheet, doubled up so as to make two leaves with four pages. On the first page were the title and contents, the name of the author, and notice of the copyright. On the second was the popular and electoral vote for Presidents from 1789 to 1880, inclusive, by political parties, with the names of candidates and explanatory notes. On the third was the popular vote for the leading candidates for President in 1880 by states, with a note giving the scattering vote and electoral vote for President and Vice-President, by states. On the fourth was the electoral college for 1884, by states, with blanks for the number of each for each leading political party, the total electoral vote, the number necessary for a choice, the day of election, and the day of the meeting of the electoral colleges. It was held that this publication did not constitute a "chart" within the meaning of that word as used in the copyright law, and that it was not a proper subject of copyright. Taylor *v.* Gilman, 23 Blatchf. (U. S.) 325, 24 Fed. Rep. 632.

Advertising Card Showing Various Colors of Paint. — So an advertising card devised for the purpose of showing paints of various colors, consisting of a sheet of paper to which were attached square pieces of paper of the various colors, and some lithographic work advertising the sale of the paint, surrounding the squares, was held to be neither a chart, engraving, nor a book, and could not be the subject of a copyright. Ehret *v.* Pierce, 10 Fed. Rep. 553, 18 Blatchf. (U. S.) 302.

6. Ehret *v.* Pierce, 10 Fed. Rep. 553; 18 Blatchf. (U. S.) 302; Taylor *v.* Gilman, 24 Fed. Rep. 632, 23 Blatchf. (U. S.) 325.

Dressmaker's Pattern Chart. — In the case of Drury *v.* Ewing, 1 Bond (U. S.) 540, the court inclined to the view that a chart representing a series of diagrams, interspersed with printed instructions as to the mode of using them in taking measurements for and cutting certain

d. "PHOTOGRAPH." — It was held that a photograph was not a "print, cut, or engraving" within the meaning of the earlier copyright law, and was not, therefore, a proper subject of copyright under that statute.[1] Congress, however, in 1865, extended copyright protection to photographs by expressly including them among the articles for which copyright was provided.[2] Though it has been questioned whether a photographer is an author, and a photograph a writing within the constitutional provision under which copyright laws may be passed, the constitutionality of such legislation has been sustained.[3] And photographers have frequently been protected in the enjoyment of a copyright in their photographic productions.[4]

e. "PAINTING." — The size of a painting is not material on the question whether it is a proper subject of copyright.[5]

f. "DRAMATIC COMPOSITION." — It has been said that in order that a composition may constitute a "dramatic composition" within the meaning of that term as used in the copyright law, it is necessary that it should tell some story.[6] And it has been held that there can be no copyright in a mere stage dance,[7] or in a purely spectacular piece,[8] although there may be in a descriptive or dramatic song.[9]

parts of women's dresses, which was printed upon one large sheet of paper, from which the diagrams were to be cut out and pasted on thick paper or pasteboard corresponding with and showing precisely the forms of the diagrams, was copyrightable either as a chart or print. See comments on this case in Baker *v.* Selden, 101 U. S. 99.

But in *England* it has been held that the phrase "map, chart, or plan" in the English Copyright Act of 1842, § 2 (5 & 6 Vict., c. 45), does not include a cardboard sleeve pattern having upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions. Hollinrake *v.* Truswell, [1894] 3 Ch. 420.

1. Under Act of 1831. — In the case of Wood *v.* Abbott, 5 Blatchf. (U. S.) 325, it was held that photographs were not copyrightable under the first section of the Act of 1831, which extended copyright protection to any "print, cut, or engraving."

2. Statutes Making Photographs Copyrightable. — Act of March 3, 1865, 13 U. S. Stat. at Large 540, U. S. Rev. Stat. 4952.

3. Same — Constitutionality. — Sarony *v.* Burrow-Giels Lithographic Co., 17 Fed. Rep. 591, *affirmed* in Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53; Schreiber *v.* Thornton, 17 Fed. Rep. 603.

4. Falk *v.* Gast Lithographic, etc., Co., 48 Fed. Rep. 262; Falk *v.* Brett Lithographing Co., 48 Fed. Rep. 678; Falk *v.* Donaldson, 57 Fed. Rep. 32; Falk *v.* Howell, 37 Fed. Rep. 202; Bolles *v.* Outing Co., 45 U. S. App. 449, 77 Fed. Rep. 966.

Under the English Statute (25 & 26 Vict., c. 68, § 1), providing that "the author of every original painting, drawing, and photograph, and his assigns," shall have the sole and exclusive right for a certain period of copyrighting such painting or drawing and the design thereof, or such photographs and the negative thereof, it has been held that a copyright might be had in a photograph of an engraving from a picture. Matter of Copyright Acts, L. R. 4 Q. B. 715.

5. Size of Painting Immaterial. — Schumacher *v.* Schwenke, 23 Blatchf. (U. S.) 373, 25 Fed. Rep. 466.

6. Narrative Character an Essential Element. — Fuller *v.* Bemis, 50 Fed. Rep. 926.

7. Dance Known as the "Serpentine Dance." — In the case of Fuller *v.* Bemis, 50 Fed. Rep. 926, it was held that a stage dance known as the serpentine dance was not copyrightable, it not being a dramatic composition within the meaning of the copyright act. In arriving at this conclusion Lacombe, J., said: "It is essential to such a composition that it should tell some story. * * * An examination of the description of complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion."

8. "Black Crook" Case. — In the case of Martinetti *v.* Maguire, 1 Abb. (U. S.) 356, in deciding that the spectacular piece known as "Black Crook" was not a proper subject of copyright, the court expressed a doubt whether the spectacle, in view of its questionable morality, was entitled to the benefit of copyright, even if it could pretend to be a dramatic composition, but seemed to place its decision upon the ground that a mere spectacle or spectacular piece, such as the one in question, could not properly be called a dramatic composition. "The dialogue is very scant and appears in the light of a mere accessory — a piece of word machinery tacked on to the ballet and tableaux." For an adverse criticism of this decision, see the article entitled "The Law for Playrights," 8 So. L. Rev. N. S. 13.

9. Descriptive or Dramatic Song. — A song which related to the burning of a ship at sea and the escape of those on board, describing their feelings in vehement language and sometimes in the supposed words of the suffering passengers, has been held to be a "dramatic piece" within the meaning of the English statute, although it was sung by only one person sitting at a piano, giving effect to the verses by his delivery, but not assisted by scenery or appropriate dress. Russell *v.* Smith, 12 Q. B. 217, 64 E. C. L. 217.

In Clark *v.* Bishop, 25 L. T. N. S. 908, a

Dialogue Unimportant. — But if the composition tells a story intelligible to the spectator, it is immaterial whether it is done by means of dialogue or otherwise. Hence it has been held that a series of incidents grouped in a certain sequence and realistically presented may constitute a "dramatic composition" within the statute, although they are accompanied by very little dialogue.[1]

Mechanical Contrivances. — But while the term "dramatic composition" may include dramatic situations or action, it does not cover the merely mechanical instrumentalities by which the situations or scenic effects are produced.[2]

g. "MUSICAL COMPOSITION." — In *England*, where copyright in "dramatic" and "musical" compositions respectively is provided for by different statutes, and it sometimes becomes important to determine whether a particular composition belongs to the one class or the other, it seems that a song which is a dramatic piece may also be a musical composition.[3]

3. Requirements as to Quality of Publications — *a.* IN GENERAL. — Though coming within one of the classes of publications mentioned by the statutes as entitled to be copyrighted, a work may still be of such a character as not to be the subject of a valid copyright. The courts have construed the copyright

song was held to be a dramatic piece when its only value was derived from the singing and acting of it in character.

And in the case of Roberts *v.* Bignell, 3 Times L. R. 552, a song, "Oh, Jenny dear," was held by Day and Wills, JJ., to be a dramatic piece, "presented as it was in the particular instance."

But in a later English case, that of Fuller *v.* Blackpool Winter Gardens, etc., Co., (1895) 2 Q. B. 429, 64 L. J. Q. B. 699, 73 L. T. 242, it was held that to bring a musical composition within the Dramatic Copyright Act of 1833 it must have the characteristics of a dramatic piece, and whether it has such characteristics must be determined in each case by the nature of the composition itself, and that a song which does not require for its representation either dramatic effect or scenery is not a dramatic piece, although it is intended to be sung in appropriate costume on the stage of music halls.

1. Series of Dramatic Events — "Railroad Scene." — A play contained the following scene: One of the characters was put in peril of his life by being placed by another of the characters upon a track over which a railroad train was momentarily expected to arrive, and so fastened that he could not move from his dangerous position. From this perilous situation he was rescued by a third person who, surmounting obstacles, succeeded at the last moment in releasing him. Though the scene contained but very little dialogue, it was held in two well-considered cases that it constituted a "dramatic composition" within the meaning of that term as used in the copyright law. Daly *v.* Palmer, 6 Blatchf. (U. S.) 256, 8 Am. L. Reg. N. S. 286, 36 How. Pr. (N. Y.) 206 [*distinguished* in Serrana *v.* Jefferson, 33 Fed. Rep. 347]; Daly *v.* Webster, 56 Fed. Rep. 483, 1 U. S. App. 573.

Pantomime. — A pantomime has been held to be a "dramatic piece" within the meaning of 3 & 4 Wm. IV., c. 15, which extended the protection of copyright to "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment." Lee *v.* Simpson, 3 C. B. 871, 54 E. C. L. 871.

2. River Scene in Play. — A play entitled "Donna Bianca, or Brought to Light," contained in the fourth act a scene in which, after an angry dialogue and struggle between the hero and villain of the play, the hero falls through a bridge into the water below. In the production of this scene a real tank, three feet square and seven feet deep, and filled with water, was set in the stage. This water flowed through a trough from behind a battlement wall at the rear of the stage, falling into the tank and running off underneath the stage. The water in this tank and trough represented a river which was crossed by a bridge upon which the scene took place. The owners of the play brought an action to restrain the presentation of a similar scene in a play entitled "A Dark Secret," basing the claim to exclusive right of using the scene upon the circumstance that in their play the river in which the fall took place was mimicked by a tank filled with real water, instead of by an apparatus constructed of cloth, canvas, or painted pasteboard. But it was held that such a mechanical contrivance is not protected by a copyright of the play in which it is introduced. Serrana *v.* Jefferson, 33 Fed. Rep. 347.

3. Dramatic Song Copyrightable as a Musical Composition. — Fuller *v.* Blackpool Winter Gardens, etc., Co., (1895) 2 Q. B. 429, 64 L. J. Q. B. 699, 73 L. T. 242.

In Roberts *v.* Bignell, 3 Times L. R. 552 decided in 1887, it was held that a song called "Oh, Jenny dear," set to music not of the proprietor's own authorship, was not a musical composition but a dramatic piece, and that a mere verbal permission to sing it was an ineffectual gift, so that the proprietor, notwithstanding such permission, could recover the forty shillings penalty.

But in the opinion delivered by Kay, L. J., in the case of Fuller *v.* Blackpool Winter Gardens, etc., Co., (1895) 2 Q. B. 429, 64 L. J. Q. B. 699, 73 L. T. 242, this case was commented upon as follows: "I have not found any other report of this case. I can scarcely believe that this report is accurate. If it was decided that because the words of the song were dramatic the music was not a musical composition, I respectfully differ from that decision."

laws with regard to their object and purpose, and in doing so have imposed certain requirements not expressed in the statutes themselves. It has been said that "in the case of statutory copyright the theory of the law is that a work, to be entitled to protection, must be original and innocent, and have some literary, art, or other value, which will contribute to the information, instruction, or enjoyment of others than the owner." [1]

b. ORIGINALITY — (1) *In General.* — The purpose of copyright legislation being to protect authors in the enjoyment of their intellectual productions, there can, of course, be no copyright in any work unless it possesses some degree of originality.[2] But while some degree of originality is necessary to sustain a copyright, the courts do not show any disposition to be very exacting in the enforcement of this requirement.[3] The mere fact that a work bears evidence that it was derived from a former publication does not necessarily prevent its being considered an original work; the author may nevertheless, by selection and modification, arrangement and combination, produce a new work.[4]

(2) *Dramatization of Novel.* — Thus the mere fact that a play is based upon and somewhat resembles a novel previously published does not necessarily prevent its being copyrightable as an original production.[5]

(3) *Adaptation of Play.* — And a dramatic composition, though founded upon another play, may yet be so far different from the latter as to entitle

1. Drone on Copyright 110.

2. **Requirement of Originality.** — In the case of Martinetti *v.* Maguire, 1 Abb. (U. S.) 356, the court questioned whether the spectacular piece called "Black Crook" possessed such originality as entitled it to the protection of the copyright law.

In the case of Serrana *v.* Jefferson, 33 Fed. Rep. 347, it was held that a scene which consisted of an angry dialogue between the hero and villain of the play, and then a struggle between them terminating in the villain being thrown into the river, did not possess such originality as entitled it to come under the protection of the copyright in the play. In delivering the opinion, Lacombe, J., said: "There is nothing original in the incident thus represented on the stage. Heroes and heroines, as well as villains of both sexes, have for a time whereof the memory of the theatre-goer runneth not to the contrary been precipitated into conventional ponds, lakes, rivers, and seas. So frequent a catastrophe may fairly be regarded as the common property of all playwrights."

Sketch Appropriated from Foreign Publication. — No copyright can be acquired in a sketch appropriated from a foreign publication. Johnson *v.* Donaldson, 3 Fed. Rep. 22.

Title of Book. — In order that the title of a work may be protected by a copyright secured in the work itself, there must be some originality in such title. No exclusive right to the use of common English words can ordinarily be obtained by appropriating them as the title of a copyrighted work. Thus where the owner of a copyright in a play called "Charity" brought suit to restrain the defendant from presenting a different play under the same name, the injunction was refused. Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511.

In Dicks *v.* Yates, 50 L. J. Ch. 809, 18 Ch. Div. 76, Sir George Jessel, M. R., in discussing whether there could be copyright in the words "Splendid Misery" used as the title for a novel, said: "I am of opinion that there cannot. The words 'Splendid Misery' are common English words. I should say that the combination of them was a hackneyed and common combination, and it is proved that it was used as the actual title of a novel so far back as 1801. It does not appear to me that there was any invention in the combination of 'Splendid Misery,' any more than there would be in the words 'Miserable Sinner,' or anything of that kind."

Where a person who had dramatized Collins's novel entitled "The New Magdalen" entered his version for copyright by sending in the title "The New Magdalen," it was held that this did not give him a right to the exclusive use of that title, but that another person might use it as the title for an independent dramatization of the novel. Benn *v.* Leclercq, 18 Int. Rev. Rec. 94, 30 Leg. Int. (Pa.) 185, 5 Leg. Op. 145, 3 Fed. Cas. No. 1308.

3. See Henderson *v.* Tompkins, 60 Fed. Rep. 758; Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87; Brightley *v.* Littleton, 37 Fed. Rep. 103.

4. Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87.

5. **Play Based on Novel Copyrightable.** — In the case of Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87, after comparing the drama by Boucicault entitled "The Octoroon" with Captain Mayne Reid's novel called "The Quadroon," the novel having been published before the play was written, the court, without formulating any definite rule to be applied in such case, held that the play was an original work and copyrightable. See also the case of Daly *v.* Byrne, 43 N. Y. Super. Ct. 261, an action of libel against the defendant for publishing an article charging the plaintiff with claiming the authorship of a play, when in fact it was written by another person. In the course of the opinion delivered in this case the court gave expression to the following dicta: "The plaintiff had a right to dramatize the novel, and such dramatization became his property, though there appeared in it substantial similarity in plot, situations, and incidents to the novel."

the adaptation as a whole to the claim of originality.[1]

(4) *New Arrangement or Adaptation of Musical Composition.* — So, in music, copyright protection is not confined to absolutely new productions; any substantially new arrangement or adaptation of an old piece may be copyrighted.[2] But, in order to be copyrightable, the new arrangement must be something more than a mere copy of the older piece, with additions and variations such as a writer of music with skill and experience might readily make.[3]

(5) *Compilations.* — To come within the protection of the copyright statutes, a work need not consist of new or original matter. There may be a valid copyright for the plan of a book as connected with the arrangement and combination of the matter, though all the materials used and its subject are common to all writers.[4] But, to entitle an author to a copyright in the plan, arrange-

1. Play Based on Another Drama. — Tree *v.* Bowkett, 74 L. T. 77; Aronson *v.* Fleckenstein, 28 Fed. Rep. 75; French *v.* Maguire, 55 How. Pr. (N. Y. Supreme Ct.) 471.

2. Substantially New Composition Copyrightable. — Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 39, 2 Fed. Cas. No. 640.

The complainants in the case of Schuberth *v.* Shaw, 19 Am. L. Reg. N. S. 248, 21 Fed. Cas. No. 12,482, were the publishers of a certain musical composition called "Manola Waltz, arranged by J. M. Lauder," which had been prepared for them by a musical composer in their employ who made a new arrangement of the piece by a French composer, Waldteufel, called "Manola Suite de Valses pour Piano." In making this new arrangement Mr. Lauder altered and simplified the harmony and in some cases altered the melody. He abridged the length of the introduction of the waltz, and also the coda. The defendant employed Mr. A Becket, a musician, to make an arrangement of the Waldteufel music. The defendant's arrangement was very similar to that of the complainants, and was published by him as "Manola Waltz, as performed by J. M. Lauder." Upon a bill being filed by the complainants asking for an injunction restraining the defendant's publication, the court, after taking testimony, made a preliminary order appointing two musicians as experts to report "whether the Manola Waltz published by complainants was musically different from the Waldteufel composition, in what the difference consisted, and whether complainants' publication is an original musical composition representing any musical authorship." These experts reported as follows: "While we do not consider the publication an original composition, with the exception of the harmony in the last three bars of the introduction, we regard it as an original arrangement and the work of a practical harmonist and musician." The court held that the complainants' publication was a substantially new adaptation of an old piece, which might be copyrighted, and the injunction was granted.

In the case of Reed *v.* Carusi, Taney's Dec. (U. S.) 72, 20 Fed. Cas. No. 11,642, an action of debt for the infringement of copyright obtained by the plaintiff's assignor in the music of the well-known ballad called "The Old Arm Chair," the court said: "If the said musical composition was borrowed altogether from a former one, or was made up of different parts copied from older musical compositions without any material change, and put together into one tune with only slight and unimportant alterations or additions, then Russell [the plaintiff's assignor] was not the author within the meaning of the law; but the circumstance of its corresponding with older musical compositions, and belonging to the same style of music, does not constitute it a plagiarism, provided the air in question was, in the main design and in its material and important parts, the effort of his own mind."

Arrangement of Opera Score for Pianoforte. — Under the English law it has been held that if an opera score is arranged for the pianoforte, the arrangement is an independent composition, of which the arranger, and not the original composer, is the author. Wood *v.* Boosey, L. R. 3 Q. B. 223. And in the United States it has been held that an arrangement for the pianoforte of the orchestral score of an opera is an original musical composition within the meaning of the copyright law. Carte *v.* Evans, 27 Fed. Rep. 861.

3. Jollie *v.* Jaques, 1 Blatchf. (U. S.) 618; Reed *v.* Carusi, Taney's Dec. (U. S.) 72; Carte *v.* Duff, 23 Blatchf. (U. S.) 347, 25 Fed. Rep. 183.

4. Compilations Copyrightable. — Lewis *v.* Fullarton, 2 Beav. 6; Gray *v.* Russell, 1 Story (U. S.) 11; Emerson *v.* Davies, 3 Story (U. S.) 768; Greene *v.* Bishop, 1 Cliff. (U. S.) 186; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1.

Illustrations. — The following have been held proper subjects of copyright: itineraries, road and guide books, Cary *v.* Longman, 1 East 358; Cary *v.* Faden, 5 Ves. Jr. 24; Murray *v.* Bogue, 1 Drew 353; abridged information of train service in connection with circular tours of a particular locality, Leslie *v.* Young (1894) App. 335; a book of chronology, Trusler *v.* Murray, 1 East 363, note; dictionaries, Barfield *v.* Nicholson, 2 Sim. & S. 1; Spiers *v.* Brown, 6 W. R. 352; a book of words for use in telegraphy, Ager *v.* Peninsular, etc., Steam Nav. Co., 26 Ch. Div. 637; a directory, Kelly *v.* Morris, L. R. 1 Eq. 697; Morris *v.* Ashbee, L. R. 7 Eq. 40; Mathieson *v.* Harrod, L. R. 7 Eq. 270; Kelly *v.* Hooper, 4 Jur. 21; Morris *v.* Wright, L. R. 5 Ch. 279; Kelly *v.* Hodge, 29 L. T. N. S. 387; trades directory headings, Lamb *v.* Evans, (1892) 3 Ch. 462, 67 L. T. 523, 47 Alb. L. J. 93; Lamb *v.* Evans, 68 L. T. 131, 47 Alb. L. J. 323; an East India calendar, Matthewson *v.* Stockdale, 12 Ves. Jr. 270; a court calendar, Longman *v.* Winchester, 16 Ves. Jr. 269; a topographical dictionary, Lewis *v.* Ful-

ment, and combination of his materials, the work, in these respects, must be new and original.[1]

larton, 2 Beav. 6; Kelly *v.* Morris, L. R. 1 Eq. 697; a trade (Cornish *v.* Upton, 4 L. T. N. S. 862) or shipping list, Maclean *v.* Moody, 20 Sc. Sess. Cas., 2d ser. 1154; a book of credit ratings, Ladd *v.* Oxnard, 75 Fed. Rep. 703; maps and charts, Stannard *v.* Lee, L. R. 6 Ch. 346; Blunt *v.* Patten, 2 Paine (U. S.) 393; Stephens *v.* Cady, 14 How. (U. S.) 528; Stevens *v.* Gladding, 17 How. (U. S.) 447; Farmer *v.* Calvert Lithographing, etc., Co., 5 Am. L. T. 168; Rees *v.* Peltzer, 75 Ill. 475; catalogues, Wilkins *v.* Aiken, 17 Ves. Jr. 422; Hotten *v.* Arthur, 1 Hem. & M. 603; Hogg *v.* Scott, L. R. 18 Eq. 444; Grace *v.* Newman, L. R. 19 Eq. 624; Maple *v.* Junior Army, etc., Stores, 21 Ch. Div. 369; *compare* Cable *v.* Marks, 52 L. J. Ch. 107, W. N. (1882) 164; mathematical tables, M'Neill *v.* Williams, 11 Jur. 344; King *v.* Reed, 8 Ves. Jr. 223, note *a*; Baily *v.* Taylor, 3 L. J, Ch. 66, 1 Russ. & M. 73; a book of statistics, Scott *v.* Stanford, L. R. 3 Eq. 718; Maclean *v.* Moody, 20 Sc. Sess. Cas., 2d ser. 1154; Walford *v.* Johnston, 9 Sc. Sess. Cas., 2d ser. 1160, note; a compilation of stock exchange quotations, Exchange Tel. Co. *v.* Gregory, 73 L. T. 120, *affirmed on appeal*, 74 L. T. 83, (1896) 1 Q. B. 147, 65 L. J. Q. B. 262; abstracts of titles to lands, Banker *v.* Caldwell, 3 Minn. 94; a list of hounds, Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324; a list of race horses, American Trotting Register Assoc. *v.* Gocher, 70 Fed. Rep. 237; statutory forms, Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. 2d ser. 748; Brightley *v.* Littleton, 37 Fed. Rep. 103, 28 Am. L. Reg. 313; but see Carlisle *v.* Colusa County, 57 Fed. Rep. 979; a compilation of the statutes of a state, Davidson *v.* Wheelock, 27 Fed. Rep. 61; an analysis of Acts of Parliament with appendices, Alexander *v.* Mackenzie, 9 Sc. Sess. Cas., 2d ser. 748; a digest, Banks *v.* McDivitt, 13 Blatchf. (U. S.) 163; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360; Davidson *v.* Wheelock, 27 Fed. Rep. 61; a spelling book, Lennie *v.* Pillans, 5 Dec. of Ct. Sess., 2d ser. 417; a book of elementary lessons in arithmetic (Emerson *v.* Davies, 3 Story (U. S.) 768) or science, Jarrold *v.* Houlston, 3 Kay & J. 708; Jarrold *v.* Heywood, 18 W. R. 279, W. N. (1869) 265; or English grammar, Greene *v.* Bishop, 1 Cliff. (U. S.) 186; additions, corrections or original notes to an old work, Tonson *v.* Walker, 3 Swanst. 672, *citing* 4 Burr. 2325; Cary *v.* Longman, 1 East 358; Hotten *v.* Newsagents' Co., 1 Set. 245; Hutchins *v.* Sheard, W. N. (1881) 20; a collection of notes to a book, Black *v.* Murray, 9 Sc. Sess. Cas., 3d ser. 341; Hotten *v.* Newsagents' Co., 1 Set. 245; alterations and additions in the shape of notes and otherwise, in a new addition of a well-known Latin grammar, Gray *v.* Russell, 1 Story (U. S.) 11; a compilation made from voluminous public documents and so arranged as to show readily the date and order of historic events, Hanson *v.* Jaccard Jewelry Co., 32 Fed. Rep. 202.

Collection of Receipts for Cooking. — A mere collection of receipts for cooking cannot, it has been said, be the subject of copyright, as it requires no mental labor. Rundell *v.* Murray, 1 Jac. 314. But Mr. Kerr, in his treatise on Injunctions, says that the authorities do not support this dictum. Kerr Inj. 361.

1. Originality in Plan and Arrangement Necessary. — "A mere copy or reprint of common materials without novelty or value in their arrangement or combination is not entitled to copyright as a compilation; for in such case there is nothing to represent authorship on the part of the compiler." Drone on Copyright 156, *citing* Hedderwick *v.* Griffin, 3 Sc. Sess. Cas., 2d ser. 383. See also Rundell *v.* Murray, 1 Jac. 311; Jollie *v.* Jaques, 1 Blatchf. (U. S.) 618; Mutual Advertising Co. *v.* Refo, 76 Fed. Rep. 961.

In the case of Lawrence *v.* Cupples, 9 Pat. Office Gaz. 254, the plaintiff issued a monthly chart, containing information in regard to a certain class of debtors, which information was conveyed by means of a list of the debtors arranged alphabetically, with the address of the debtor, the address of the creditor, the amount of the claim, and, in some instances, the discount at which the claim would be sold for cash, arranged in tabular form. The charge was that the defendant, in a work of similar character, had adopted the plaintiff's plan in arranging the names and residences of debtors and creditors, and in stating the amounts, and in the object and purposes of said arrangement. But the court held that, although the plan or arrangement of a book may be secured to the author, if it be the product of his own genius, there did not seem to be anything in the plaintiff's work which possessed any such novelty of plan or arrangement as would preclude any other person from making and publishing, from his own independent sources of information, similar lists.

This case was *cited with approval* and a similar conclusion reached in the case of Bullinger *v.* Mackey, 15 Blatchf. (U. S.) 550, in which the plaintiff sued for damages and an injunction by reason of an alleged infringement by the defendant of the copyright claimed by the plaintiff in a compilation of information that was useful in counting rooms. Benedict, J., in delivering the opinion of the court, said: "The plan, arrangement, and method adopted by the plaintiff, as well as by the defendant, is such as would naturally, if not necessarily, occur to any intelligent person intending to impart information of this character. These methods spring from the necessities of the case and the character of the information intended to be conveyed. * * * But it is said that the plaintiff was the first to combine the methods employed by him to convey his information, and is therefore the author of a new combination of methods to which he has the exclusive right. It is true that in no single prior publication is there to be found in use all the methods of conveying information employed by the plaintiff in his work, but each of those methods has been used before, and none are original with him. What he has done is to aggregate various methods, which, when aggregated, stand now collected for the first time on a single page.

(6) *Legal Form Blanks.* — It has been held that form blanks for legal instruments required by statute may possess sufficient originality to entitle them to be copyrighted.[1]

(7) *Translations.* — Although the question was for a long time involved in considerable doubt, it is now well settled, both in *England* and the *United States*, that a translation may be copyrighted.[2]

(8) *Pirated Matter.* — When it is said that a mere new disposition of existing materials may be original, this must be taken with the limitation that the materials are such as may be lawfully used; there can be no protection for that which is itself a piracy.[3]

c. LITERARY OR ARTISTIC MERIT — (1) *General Principles.* — It has sometimes been contended that in order that a work may properly be a subject of copyright it must be possessed of literary or artistic merit.[4] While this view seems not to be wholly without judicial support,[5] the trend of the later decisions

* * * Here there is no new combination of material constituting a new and original work. There is a use, perhaps, a combination, of old methods, but it can scarcely be said that a new method of illustrating the subject has been produced."

And in *England* it has been held that the mere publication in any particular order of the time-tables issued by railway companies cannot be claimed as a subject of copyright, if no more has been done than to copy them in their order, leaving out such stations as the author thinks fit. Leslie *v.* Young, (1894) App. 335.

1. Forms for Legal Instruments. — Alexander *v.* Mackenzie, 9 Sc. Sess. Cas., 2d ser. 748.

A series of blank forms for the instruments required by a liquor-tax law to be filed by every applicant for a license to sell liquor at retail has been held to be entitled to the protection of the copyright statute. The plaintiff's forms were declared to be sufficiently original. "They are founded upon and are adapted to the requirements of the Pennsylvania statute of 1887, relating to the sale of liquors. While minor parts of each form are old, they are so combined with the parts drawn in pursuance of the statute as to make a complete form. To prepare such instruments requires some learning and involves some literary labor; quite as much as the compilation of facts or figures, or extracts from books. Such compilations are entitled to a copyright, under the construction given to the statute." Brightley *v.* Littleton, 37 Fed. Rep. 103, 28 Am. L. Reg. 313.

But in the case of Carlisle *v.* Colusa County, 57 Fed. Rep. 979, it was held that a blank form for a certain instrument required by statute was not copyrighted. The decision, however, did not turn on the question of originality. The plaintiff had put the requirements of the California Code into a convenient form for the blank statement which the code required the assessor to exact of each person. Section 3630 of the Political Code required the board of supervisors to furnish the assessor with blank forms for the statements of property which another section required him to exact from each person. The court held that the plaintiff should have no copyright in the form prepared by him. "The law requires the board of supervisors to furnish the blank form, and if one convenient form can be copyrighted and monopolized by the complainant, other convenient forms can be copyrighted and monopolized by others, and the board of supervisors of the counties of the state will be in the anomalous position of being unable to perform their legal duties legally."

2. Translations Copyrightable. — Wyatt *v.* Barnard, 3 Ves. & B. 77; Shook *v.* Rankin, 6 Biss. (U. S.) 480. See also Emerson *v.* Davies, 3 Story (U. S.) 780.

3. Arrangement of Copyrighted Opera Score for Piano. — Thus, it seems that an arrangement of an opera score for the piano may be an original work if at the time there is no copyright in the opera itself, but otherwise not. *Per* Kelly, C. B., in Wood *v.* Boosey, L. R. 3 Q. B. 230. See D'Almaine *v.* Boosey, 1 Y. & Coll. 288.

4. Grounds for the Contention. — This contention is based upon the fact that the constitutional provision under which copyright as well as patent legislation is enacted empowers Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is argued that copyright legislation being passed in execution of the power given by the Constitution, its object must be the promotion of science, and it cannot be to protect productions possessing no literary or artistic merit.

5. Apparent Recognition of the Requirement as to Literary Merit. — In the case of Clayton *v.* Stone, 2 Paine (U. S.) 382, in holding that a daily price current was not within the purview of the copyright statutes, Mr. Justice Thompson used the following language: "In determining the true construction to be given to the Act of Congress, it is proper to look at the Constitution of the United States to aid us in ascertaining the nature of the property intended to be protected. Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries. The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term science cannot, with any propriety, be applied to a work

is to regard a very slight degree of literary or artistic merit as sufficient for the requirement.[1] Indeed, there may be some question as to whether there is any such requirement at all.[2]

(2) *Descriptive Advertisements.* — Nevertheless, to entitle a work to copyright protection, it must have by itself some value as a composition, at least to the extent of serving some purpose other than a mere advertisement. It has therefore been held that a production which has no value except as a mere advertising medium cannot be copyrighted.[3] If, however, the value of

of so fluctuating and fugitive a form as that of a newspaper or price current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public, and not as a work of science. The title of the Act of Congress is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."

In the case of Lamb *v.* Grand Rapids School Furniture Co., 39 Fed. Rep. 474, the plaintiffs, who were manufacturers of church furniture, had prepared and published a book of engravings, illustrating their goods, and containing also a price list thereof. This book they had procured to be copyrighted. On a motion for a preliminary injunction to restrain the defendants from publishing a similar work, alleged to be an infringement of the plaintiff's engravings, the court refused the motion on the ground that it was a matter of much doubt whether the engravings were intrinsically valuable as works of art. See also Kenrick *v.* Lawrence, 25 Q. B. Div. 99.

Mode of Ruling a Book. — In the case of Page *v.* Wisden, 20 L. T. N. S. 435, copyright was claimed in a cricket scoring sheet. Vice-Chancellor Malins held that it was not a fit subject of copyright, partly because it was not new, but also because "to say that a particular mode of ruling a book constitutes an object for a copyright is absurd."

Indexed Letter File. — It has been held that an indexed letter file is not copyrightable. The decision was placed on the grounds that the contrivance was not a book. Amberg File, etc., Co. *v.* Shea, 78 Fed. Rep. 479, 79 Pat. Office Gaz. 514, 29 Chicago Leg. N. 152.

Railway Ticket. — Under the Copyright Act of the Dominion of *Canada* it has been held that a railway ticket is not a proper subject of copyright. In the course of delivering the opinion the court inquires: "What is the literary property to be protected in this ticket?" Griffin *v.* Kingston, etc., R. Co., 17 Ont. Rep. 660. But in the later case of Church *v.* Linton, 25 Ont. Rep. 131, Chancellor Boyd says: "I do not go with the limitation suggested in Griffin *v.* Kingston, etc., R. Co., 17 Ont. Rep. 665, that the legislation is to be applied having regard to literary merit as an ingredient."

1. Degree of Literary Merit Required. — For examples of the moderate degree of literary merit sufficient to entitle a work to protection under the copyright statutes, see the following cases: Daly *v.* Palmer, 6 Blatchf. (U. S.) 256, 6 Fed. Cas. No. 3552; Daly *v.* Webster, 1 U. S. App. 573, 56 Fed. Rep. 483.

Topical Song. — In the case of Henderson *v.* Tompkins, 60 Fed. Rep. 758, a topical song was held to possess sufficient literary merit and originality to be the subject of copyright.

Pamphlet Descriptive of Mode of Advertising. — In Mutual Advertising Co. *v.* Refo, 76 Fed. Rep. 961, a pamphlet describing a new method of using coupons for the purpose of advertising was held to be a proper subject of copyright.

2. In Drury *v.* Ewing, 1 Bond (U. S.) 540, the court, in expressing its opinion that a dressmaker's chart was the proper subject of copyright, said: "It is clearly no objection to the validity of her [the plaintiff's] copyright that her production does not claim a standing as a work of great literary merit. The statute does not make this necessary element of a legal copyright, and it is well known there are works of great practical utility, having no pretension to literary merit, which are yet within not only the words but the scope and design of the statute."

England. — The English text writers, it seems, do not regard the protection of the copyright statutes as limited to works of literary merit. Kerr Inj. 360; Clark & Lin. L. of T. 537. See also Hollinrake *v.* Truswell, (1894) 3 Ch. 420. But *compare* Kenrick *v.* Lawrence, 25 Q. B. Div. 99.

Scotland. — In the Scotch case of Maclean *v.* Moody, 20 Sc. Sess. Cas., 2d ser. 1154, Lord Deas said: "The act does not confine the privilege to works of literary merit."

3. Advertisements Possessing No Literary or Artistic Qualities. — Lamb *v.* Evans, 67 L. T. N. S. 523, 47 Alb. L. J. 93. *Compare* Lamb *v.* Evans, 68 L. T. 131. 47 Alb. L. J. 323. In the case of Collender *v.* Griffith, 11 Blatchf. (U. S.) 212, it was held that certain engravings of billiard tables offered for sale were not works of art and did not have any value or use as such, but were only valuable for the purpose of advertising the tables for sale, and could not therefore be the subjects of a valid copyright.

So also a mere advertising card, possessing none of the characteristics of a work of art or of a literary production — having no value aside from its function as an advertisement — was in Ehret *v.* Pierce, 10 Fed. Rep. 553, 18 Blatchf. (U. S.) 302, held not to be a proper subject of copyright.

In the case of J. L. Mott Iron Works *v.* Clow, 72 Fed. Rep. 168, it was held that under the Act of 1874, limiting the right of copyright to such cuts and prints as are connected with the fine arts, there can be no copyright on cuts contained in a trade catalogue, when it is not

a work is not confined to its character as an advertisement, but it has also an appreciable literary or artistic value, the mere fact that it is designed and used for advertising purposes does not prevent it from being the subject of a valid copyright.[1]

(3) *Labels.* — As in the case of the publications referred to in the preceding section, mere labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles, have never been within the protection of the copyright law.[2] Here, however, the analogy between these two classes of publications would seem to end. Since the enactment of June 18, 1874, "to amend the law relating to patents, trade-marks, and copyrights,"[3] it seems that no labels, even though possessed of artistic merit, can be copyrighted, if they are intended to designate any article of manufacture.[4] But it is held that the mere fact that copies of a painting may be used as labels does not preclude the painting from being the subject of a valid copyright.[5]

d. Immoral or Otherwise Illegal Publications. — On the ground that the law will not lend its aid to protect the author or owner of an unlawful production,[6] no copyright can be acquired in a work which is of an indecent or immoral character.[7] And in the analogous case of an author being guilty

shown that the author or designer intended or contemplated the cuts and prints as works of fine art, and when they were offered to the public merely as an adjunct to a publication connected with a useful art.

Under the Canadian Copyright Law the chancery division of the High Court of Justice for Ontario, in a recent case, whether necessary to the decision of the cause or not, took occasion expressly to deny the necessity of "literary merit as an ingredient," and sustained the validity of a copyright claimed in a business circular. Church *v.* Linton, 25 Ont. Rep. 131, *dissenting* from Griffin *v.* Kingston, etc., R. Co., 17 Ont. Rep. 665.

1. Advertisements Possessing Literary or Artistic Merit. — In the case of Yuengling *v.* Schile, 20 Blatchf. (U. S.) 452, 12 Fed. Rep. 97, a chromo-lithograph which, though used by the plaintiff as an advertisement, possessed evident artistic merit, was said to be the subject of copyright.

Advertising Catalogues. — In Hotten *v.* Arthur, 9 L. T. N. S. 199, 1 Hem. & M. 603, 32 L. J. Ch. 771, 11 W. R. 934, it was held that there can be a copyright in the original letter-press of a bookseller's catalogue, if it is not merely a dry list of names.

But in the case of Cobbett *v.* Woodward, L. R. 14 Eq. 407, 27 L. T. N. S. 27, it was held that the catalogue of an upholsterer containing engravings of the articles offered by him for sale could not be copyrighted, for the reason that the catalogue was circulated gratuitously as an advertisement.

This case was, however, substantially *overruled* in the subsequent case of Grace *v.* Newman, L. R. 19 Eq. 623, where it was held that a book of pictures of sepulchral monuments, collected and made for a cemetery man, to be shown to customers ordering a monument, was the proper subject of copyright.

And again, in the case of Maple *v.* Junior Army, etc., Stores, 21 Ch. Div. 369, it was held that the pictures in an illustrated catalogue of furniture are the subject of copyright, though there happened to be no letter-press in the catalogue for which copyright could be obtained.

2. Mere Labels Not Copyrightable. — It was substantially so held under the copyright law of 1831, in the case of Scoville *v.* Toland, 6 West. L. J. 84, Cox Manual of Trade-Mark Cas. 51, 21 Fed. Cas. No. 12553. See also Coffeen *v.* Brunton, 4 McLean (U. S.) 516. And again in the case of Higgins *v.* Keuffel, 140 U. S. 428, which, however, was decided after the Act of June 18, 1874, to which reference is hereafter made.

3. Act of June 18, 1874. — Section 3 of this Act declares in substance that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizes them to be registered and protected as trade-marks in proper cases. 18 U. S. Stat. at Large, c. 301, p. 78.

4. Decisions Under the Act. — Where the plaintiffs, who were manufacturers of prints and labels for cigar boxes and other articles, designed a label for cigar boxes which contained a picture representing a young woman holding a bouquet of flowers, and took proceedings to copyright the picture, it was held, in a suit by the plaintiffs for its infringement, that the facts showed an attempt to evade the provisions of section 3 of the Act of June 18, 1874. In delivering the opinion, Wallace, J., said: "If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on the labels. The case of Schumacher *v.* Schwencke, 25 Fed. Rep. 466, 23 Blatchf. (U. S.) 373" (see next succeeding note) "is distinguishable from the present, because in that case the court found that the picture copyrighted was not made to be used for labels." Schumacher *v.* Wogram, 35 Fed. Rep. 210.

5. Schumacher *v.* Schwencke, 23 Blatchf. (U. S.) 373, 25 Fed. Rep. 466.

6. See Du Bost *v.* Beresford, 2 Campb. 511; Hime *v.* Dale, 2 Campb. 27, note *b*; Fores *v.* Johnes, 4 Esp. N. P. 97; Gale *v.* Lechie, 2 Stark. 107, 3 E. C. L. 337.

7. Immoral Publications Not Copyrightable. — See Lawrence *v.* Smith, 1 Jac. 471; Walcot *v.*

of a fraud upon the public and seeking to acquire a circulation by passing his work off under false colors, it has been held that there can be no valid copyright in the publication.[1]

4. Requirement as to Domestic Manufacture. — While the statutes of the United States no longer restrict copyright protection to works of native and resident authors only,[2] they contain provisions intended to secure the domestic manufacture of copyrighted articles.[3]

5. Law Reports — Opinions and Other Matter Prepared by the Judges. — Since every person is presumed and required to know the law, it is a question whether considerations of public policy, which make it desirable that the fullest and earliest opportunity of access to the expositions of judicial tribunals be afforded to all, do not demand that the judicial decisions and opinions of the courts shall not be the subject of copyright but shall be regarded as public property to be freely published by anybody. Though perhaps never actually passed upon in any reported case, this question has frequently been the subject of judicial discussion. And, except in one case,[4] the American courts

Walker, 7 Ves. Jr. 1; Martinetti *v.* Maguire, 1 Abb. (U. S.) 356.

Libelously Immoral Book. — In 1826 it was held in *England* that no action could be maintained to recover damages for loss sustained by the publication of a copy of a book, which had been first published by the plaintiff, it appearing that the work, which professed to be a history of the amours of a courtesan, contained in some parts matter highly indecent, and in others matter of a slanderous nature upon persons named in the work. Stockdale *v.* Onwhyn, 2 C. & P. 163, 12 E. C. L. 73, 5 B. & C. 173, 11 E. C. L. 191.

Playing Card's Design. — The fact that playing cards may be used to violate the laws against gambling does not prevent prints or designs for such cards from being copyrightable. Richardson *v.* Miller, 20 Fed. Cas. No. 11791, 12 Pat. Office Gaz. 3, 15 Alb. L. J. 340, 3 L. & Eq. Rep. 614.

Blasphemous Publications. — It has been held that blasphemous publications cannot be copyrighted. In Murray *v.* Benbow, 6 Petersd. Abr. 558, an application for an injunction restraining the publication of a pirated edition of Lord Byron's "Cain" was refused, for the reason that the chancellor doubted whether the poem was not "intended to vilify and bring into discredit that portion of Scripture history to which it relates."

1. Fraudulent Publication. — Where the plaintiff published a religious work, and on the title page and in a preface represented that the work was a translation from the German by one Sturm, a German writer whose works had been translated into the English language and were highly valued and esteemed by the British public, and the work published by the plaintiff was not one of Sturm's writings, but was an original work written in English by a person who had been employed by the plaintiff for that purpose, it was held that the plaintiff could not have any copyright in the publication, and consequently could not maintain an action against the defendants for piracy. Tindal, C. J., in delivering the opinion of the court, said: "The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion did not indeed bear directly on the case before us; but they have this analogy with the present inquiry — that they prove that the rule which denies the existence of copyright in those cases is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea is to make the practice of it unprofitable to its author." Wright *v.* Tallis, 1 C. B. 893, 50 E. C. L. 893. See also Stannard *v.* Harrison, 24 L. T. N. S. 570.

2. See *infra*, this title, the division *Who May Copyright*.

3. U. S. Rev. Stat., § 4956, as amended by the Act of March 3, 1891, 26 U. S. Stat. at L. 1107.

Musical Composition Not Within Requirement. — It has been held that a musical composition is not a book or lithograph within the meaning of the proviso in section 3 of the Act of March 3, 1891 (26 U. S. Stat. at L. 1106), which declares that in the case of a "book, photograph, chromo, or lithograph," the two copies required to be deposited with the librarian of Congress shall be manufactured in this country. Littleton *v.* Oliver Ditson Co., 62 Fed. Rep. 597, *affirmed* in Oliver Ditson Co. *v.* Littleton, 67 Fed. Rep. 905.

Under the Canadian Copyright Act (Rev. Stat. Can., c. 62), it has been held that printing and publishing a book from stereotype plates imported into Canada is a sufficient "printing," though no typographical work is done in the preparation of the copies. Frowde *v.* Parrish, 27 Ont. Rep. 526, 23 Ont. App. 728.

4. Connecticut Doctrine. — It appearing in the case of Gould *v.* Banks, 53 Conn. 415, 55 Am. Rep. 143, that the state of Connecticut had made a contract with a publishing house to publish the reports of the decisions of the Supreme Court, an application for an order directing the state reporter to furnish copies of all opinions of the court to another publishing house was denied. In delivering the opinion of the court, Pardee, J., said: "For the information of the public the state of Connecticut publishes reports of cases argued and determined in the Supreme Court of Errors. The volume is prepared for publication by the official reporter, and contains the opinions written by the judges, together with head-

have inclined to the view that there can be no copyright in the results of labor done by judicial officers in the discharge of their duties.[1]

Original Work of Reporter. — There can, however, be no question but that a copyright may be secured in law reports, by the proper person, which will protect those parts, such as syllabi, statements of cases, abridgments of the arguments of counsel, foot-notes, etc., which are prepared by the reporter.[2]

Construction of Statutes Providing for Copyright in Official Reports. — The reluctance of the courts to recognize judicial opinions as proper subjects of copyright has, in a number of cases, been exemplified in connection with the official law reports of our state courts. These reports are commonly prepared by an official reporter who is paid a salary by the state, and a copyright is taken out, generally by either the reporter or the secretary of state, for the benefit of the state. The courts have shown a tendency to regard the copyright thus secured by or for the benefit of the state as extending not to those portions of the work which are prepared by the judges, but only to the original work of the reporter.[3]

notes to all cases, footnotes to some of them, statements of facts, a table of cases, and an index to subjects, the work of the reporter. The judges and the reporter are paid by the state, and the product of their mental labor is the property of the state, and the state, as it might lawfully do, has taken to itself the copyright. The statute requires the comptroller to supervise the publication of the volumes, taking a copyright for the benefit of the state. Under this statute that officer, for a valuable consideration, granted to Banks & Brothers, who agree to print and sell the reports at a fixed price, the protection of the copyright for a limited period. During three or four years the state, with knowledge, has acquiesced in the terms of this contract and accepted the resulting benefits. If, therefore, we should now direct the reporter to furnish copies of opinions to the petitioners, that they may sell them to the public in advance for their own profit, we should in effect advise the state to a breach of contract."

In the case of State *v.* Gould, 34 Fed. Rep. 319, Wallace, J., in delivering the opinion, says of the next above cited case, that while the opinion delivered therein undoubtedly asserts the right of the state to copyright the opinions, and interprets the statute as designed to effectuate that right, " the observations upon this point, however, were unnecessary to the decision of the case before the court, which was whether a mandamus should be granted to compel the reporter to furnish copies of the opinions which he was preparing for publication, when the writ would operate to deprive the authorized publishers for the state of the benefit of their contract with the state. This sufficiently appears from the following language of the opinion: ' If, therefore, we should now direct the reporter to furnish copies of the opinions to the petitioners, that they may sell them to the public in advance for their own profit, we should, in effect, advise the state to a breach of contract.' "

1. Opinions of Judges Not Subjects of Copyright. — For dicta favoring this view see the following cases: Banks *v.* Manchester, 23 Fed. Rep. 143; State *v.* Gould, 34 Fed. Rep. 319; Banks *v.* West Pub. Co., 27 Fed. Rep. 50; Nash *v.* Lathrop, 142 Mass. 29.

Constitutional Provision Making Judicial Decisions Public Property. — In the case of Little *v.* Gould, 2 Blatchf. (U. S.) 165, it was held that the provision of the 22d section of the 6th article of the Constitution of New York, adopted in 1846, that all " judicial decisions shall be free for publication by any person," was not repugnant to the Constitution of the United States. For a construction of this provision, see Little *v.* Gould, 2 Blatchf. (U. S.) 362.

2. Reporter's Original Work May Be Copyrighted. — Sweet *v.* Benning, 16 C. B. 459, 81 E. C. L. 459; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360; Gray *v.* Russell, 1 Story (U. S.) 21; Little *v.* Hall, 18 How. (U. S.) 165; Paige *v.* Banks, 13 Wall. (U. S.) 608; Chase *v.* Sanborn, 6 Pat. Office Gaz. 932, 4 Cliff. (U. S.) 306; Farmer *v.* Calvert Lithographing, etc., Co., 5 Chicago Leg. N. 1.

3. Opinions of the Court. — It was held in the case of Banks *v.* West Pub. Co., 27 Fed. Rep. 50, where the complainants sought to restrain the defendant from publishing the opinions of the Supreme Court of Iowa, claiming that the exclusive right to such publication was vested in them under a contract made with the state under the *Iowa* Laws of 1880, c. 60. In delivering the opinion of the court, Brewer, J., said: " The contract must be interpreted by the legislation of the state. Nothing passed to complainants save as authorized by statute; and to determine the scope of the act under which this contract was made we must construe it in connection with other legislation *in pari materia*. The Laws of 1873 prescribed the duties of the clerk of the Supreme Court, and also provided for the publication of the reports. They directed the clerk to record all opinions as soon as filed, required him to permit any one to take a copy, and to himself make and certify a copy when requested. No larger liberty of access could well be given — no clearer expression of the intent of the legislature to make the opinions free to all. At the same time those laws provided for the publication of the reports and vested the copyright thereof in the state. The publication was given to the reporter, and the contents of each volume were prescribed. In addition to the

6. Statutes. — In *England*, the crown has, by virtue of its prerogative, the exclusive right to the publication, among other things, of Acts of Parliament.[1] But in the *United States*, while a compilation of the laws of the state may, on account of the judgment and skill displayed in the combination and analysis, be so original as to entitle the author to a copyright therein, no one, not even the state or its assigns, can obtain the exclusive right to the publication of the statutes themselves.[2]

7. Title of a Work. — Where the title of a copyrighted production is the original[3] production of the author's mind, probably the courts, in protecting the production itself, would also protect the title.[4] And perhaps it is only as a part of a copyrighted work and as the title to that particular work that any title can receive protection under the copyright law.[5] True, it has been inti-

opinions he was to prepare and include syllabi, abstracts of the facts and law questions in each case, table of cases, and index. It was this completed volume which was to be copyrighted, a part of its contents being the official interpretations of law by the judges, and the balance mere matters of convenience to the public, prepared by the reporter. Construing these different portions of the same statute together, could it be seriously contended that the copyright of the reports nullified or limited the general and unrestricted access to the opinions? Is not the only fair construction that the opinions were to be free to all, and the security of the copyright only cast upon the completed volume? Such would be the construction under any circumstances; and especially when, as in this case, the matter declared free is the official interpretation of laws — matter the most general knowledge of which is of vital importance. Now, the Act of 1880 makes no change in the duties of the clerk, repeals no section giving freedom of access to the opinions, and only changes the manner of publishing the reports. Instead of leaving it with the reporter, it is done by contract. If the opinions were free before, they still are. There is nothing in the act which either directly or by implication asserts on the part of the state a broader or more extensive copyright, or purports to give to the contractor any other rights than were claimed for the state by the Statutes of 1873. How, then, can complainants claim the exclusive right to the publication of the opinions separately? I think the state has made them the common property of all." The application for an injunction restraining the publication of the opinions in question was denied.

And in the case of Nash *v.* Lathrop, 142 Mass. 29, where a publishing company, by virtue of a contract entered into with the commonwealth in pursuance of the statute, had the right of publishing and the copyright in the volumes of the official reports of the Supreme Judicial Court of Massachusetts, it was held that such copyright did not extend to the opinions of the court, but that any one, although not a citizen of the state, had a right to require the reporter to allow copies of such opinions to be made for the purpose of publication.

In case of State *v.* Gould, 34 Fed. Rep. 319, it was held that the Act of the General Assembly of the state of Connecticut (approved March 22, 1888), creating the office of reporter of the judicial decisions of the Supreme Court of Errors, fixing his salary, and directing those decisions to be published in volumes under the supervision of the comptroller, and the several volumes copyrighted for the benefit of the people of the state, does not forbid, expressly or by implication, the publication of the opinions of the court separately or collectively, by any person who chooses to use them, but by reasonable construction restricts the exclusive right of publication to the reports compiled and edited by the officer who is to receive a salary for the work.

The case of Banks *v.* Manchester, 23 Fed. Rep. 143, is a case turning upon the same principle as was applied in the foregoing cases. See also Davidson *v.* Wheelock, 27 Fed. Rep. 61.

But in the *Connecticut* case of Gould *v.* Banks, 53 Conn. 415, 55 Am. Rep. 143, a statute of that state is, in the opinion, interpreted as designed to effectuate the right of the state to copyright the opinions of its judges. It has, however, been said that the observations upon this point were unnecessary to the decision of the case before the court. Wallace, J., in State *v.* Gould, 34 Fed. Rep. 319.

Syllabi Prepared by the Judges. — In the case of Chase *v.* Sanborn, 4 Cliff. (U. S.) 306, it was held that since the judges of the Superior Court of New Hampshire prepared the headnotes to the opinions which they respectively delivered, the official reporter could not, therefore, have any copyright therein, and could not convey the exclusive right to publish such headnotes to any one else.

1. Crown Copyright. — Kerr on Inj. 372; Basket *v.* Cambridge University, 1 W. Bl. 105; Baskett *v.* Cunningham, 2 Eden 137; Eyre *v.* Carnan, Bac. Abr. Prerog. (F) 5. And see, as to copyright in government publications, 84 L. T. 30.

2. Statutes Not Copyrightable. — Davidson *v.* Wheelock, 27 Fed. Rep. 61. See also Banks *v.* West Pub. Co., 27 Fed. Rep. 50.

3. Originality Necessary. — To be entitled to copyright protection in any case, a title must possess some originality. Dicks *v.* Yates, 18 Ch. Div. 76, 50 L. J. Ch 809; Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511. See *supra*, this title and division, the subdivision *Originality*.

4. Whether Title Protected by the Copyright in the Work Itself. — See Osgood *v.* Allen, 1 Holmes (U. S.) 185; Jollie *v.* Jaques, 1 Blatchf. (U. S.) 627. See *infra*, this title, the division *Extent and Limitations of Copyright Protection*.

5. Title Alone Not Copyrightable. — Jollie *v.* Jaques, 1 Blatchf. (U. S.) 627; Osgood *v.* Allen,

mated that possibly there could "be copyright in a title, as, for instance, in a whole page of title or something of that kind requiring invention." [1] But no case can be found, either in England or in the United States, in which, under the law of copyright, courts have protected the title alone separate from the book or other production which it is used to designate.[2]

VI. Who May Copyright — 1. Author, Inventor, Designer — *a.* Provisions of the Statute. — With regard to its designation of the persons who may copyright the productions which have been shown to come within the purview of the law, the United States Copyright Law, after having undergone a process of gradual growth,[3] and as it now stands,[4] names the "author," "inventor," and "designer."

b. What Constitutes an Author, Inventor, or Designer. — While one person by employing another to produce a work may become the proprietor of the production,[5] it seems that he is not the "inventor" or "designer" within the meaning of those terms as used in the statute.[6] To constitute one

1 Holmes (U. S.) 185, 18 Fed. Cas. No. 10603, 6 Am. L. T. 20, 7 Am. L. Rev. 568, 3 Pat. Office Gaz. 124, 4 Cent. L. J. 282, Cox Manual of Trade-Mark Cas. 231; Benn *v.* Leclercq, 30 Leg. Int. (Pa.) 185, 18 Int. Rev. Rec. 94, 5 Leg. Op. 145, 3 Fed. Cas. No. 1308; Donelley *v.* Ivers, 18 Fed. Rep. 595; Harper *v.* Ranous, 67 Fed. Rep. 904; Corbett *v.* Purdy, 80 Fed. Rep. 901.

In the case of Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, Lord Cairns said: "I apprehend indeed that if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. The copyright contemplated by the act must be not in a single word, but in some words in the shape of a volume, or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work."

1. Sir George Jessel, M. R., in Dicks *v.* Yates, 18 Ch. Div. 76, 50 L. J. Ch. 809.

2. See Osgood *v.* Allen, 1 Holmes (U. S.) 185, 18 Fed. Cas. No. 10,603, 6 Am. L. T. 20, 7 Am. L. Rev. 568, 3 Pat. Office Gaz. 124, 4 Cent. L. J. 282, Cox Manual of Trade-Mark Cas. 231; Corbett *v.* Purdy, 80 Fed. Rep. 901.

But because a title may not be within the protection of the copyright law, it does not follow that a title cannot be protected from piracy under the trade-mark law. See the title Trade-Marks.

3. **Provisions of the Successive Acts.** — The first copyright act of the United States, that of 1790, in providing for copyright in any map, chart, or book gave the right to the "author and authors, * * * his or their executors, administrators, or assigns." 1 U. S. Stat. at L. 124. The Act of 1802 (2 U. S. Stat. at L. 171) and the Act of 1831 (4 U. S. Stat. at L. 436) are substantially the same except that they are made to include any person who shall invent or design any print or engraving. The Act of 1870 (16 U. S. Stat. at L. 198), which includes paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of fine arts, in the list of copyrightable productions, names the "author," "inventor," and "designer" among the persons who may have copyright protection.

4. 26 U. S. Stat. at L. 1106.

5. See *infra*, this title and division, the subdivision *Proprietor*.

6. See Pierpont *v.* Fowle, 2 Woodb. & M. (U. S.) 46.

Author. — It has been held that a person who hires another to write a book and gives him the description and subject of the work is not the author. The literary man who writes the book and prepares it for publication is the author, and the copyright is intended to protect him and not the person who employed him. Hence, in a case where it appeared that a book was written by a person in the employment of another, who furnished him with the facts and incidents of a person's life, and a copyright in the book was taken out in the name of the person so furnishing the facts, it was held that he was not the author, and that a party claiming as his assignee could not maintain an action for infringement. DeWitt *v.* Brooks, 7 Fed. Cas. No. 3851. And it has been held that one who procures another to arrange a piece of music is not entitled to copyright as author. Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 39. See also Pierpont *v.* Fowle, 2 Woodb. & M. (U. S.) 23. But while it may be true that the complainants in these cases were not the "authors" of the works in question, it would seem that their copyright therein might have been sustained on the ground that they were entitled to the copyright by reason of their character as employers. See *infra*, this title and section, the subdivision *Proprietor*.

Adapter of Play an Author. — The adapter of a play who introduces into his version material alterations is an "author of a dramatic piece" within the English Dramatic Copyright Act (3 & 4 Wm. IV., c. 15). Tree *v.* Bowkett, 74 L. T. 77.

Under the English Act of 25 & 26 Vict., c. 68, the first section of which authorizes the author of a photograph upon making registration of it under the Copyright Act of 1882 to have a monopoly of its reproduction and multiplication during the life of the author, a man who employs another to take the negative is not the author of a photograph, and if he registers himself as the author the registration is bad. Wooderson *v.* Tuck, W. N. (1887) 209. Thus, the plaintiffs in the case of Nottage *v.* Jackson, 11 Q. B. Div. 627, in the registration of

an "author," "inventor," or "designer," he must by his own intellectual labor, applied to the materials of his composition, produce an original work.[1]

c. REQUIREMENTS AS TO CITIZENSHIP AND RESIDENCE — (1) *In England* — (a) **Under the General Copyright Statutes.** — The general copyright statutes of England grant protection to "authors," without declaring whether native or foreign authors are meant.

British Author Resident Abroad. — Unquestionably, the term "author" in these statutes includes natural-born subjects wherever resident, for they carry their allegiance with them wherever they go.[2]

Aliens. — And the object of the English copyright statutes being to encourage literature and art among British subjects, the term includes all persons who,

the photograph in question, had described themselves as the authors. It appeared that they had arranged with the captain of the Australian cricketers to take a photograph of the whole team in a group; and they sent one of the artists in their employ from London to some country town to do it. The question in the case was whether the plaintiffs, who owned the establishment in London where the photographs were made from the negative and sold, and who had the negative taken by one of their men, were the authors, or the man who, for their benefit, took the negative. It was held that the latter was the author under the first section of the Copyright Act of 1862 (25 & 26 Vict., c. 68), and that the action failed because plaintiffs had described themselves as authors. See also Shepherd *v.* Conquest, 17 C. B. 427, 84 E. C. L. 427.

In the case of Melville *v.* Mirror of Life Co., (1895) 2 Ch. 531, an action for the infringement of the copyright in a photograph, it appeared that the plaintiff, who was a photographer, had taken a photograph of a certain runner under an agreement, not in writing, whereby no charge was made, but the athlete received a certain number of copies, and bought some additional ones. When the photograph was taken the plaintiff and his son were both present. The son did the posing and performed all the manual acts, while the father stood by and looked on and at the proper moment held up his hand so as to indicate to the subject the direction in which he was to look. It was contended by the defendant that the son, and not the father, was the "author" of the photograph and entitled to the copyright. But the court held that the plaintiff was entitled to a copyright in the photograph on the ground that the "author" of a photograph, within the meaning of section 1 of the Fine Arts Copyright Act, 1862, is the person who generally controls the operation of taking the photograph; and the person who performs the manual operations under his control and direction is not the author. This case was *distinguished* from that of Nottage *v.* Jackson, 11 Q. B. Div. 627, on the ground that in that case the principal who claimed the copyright was not present at the taking of the photograph. Kekewich, J., said: "In that case, no doubt, the principal was the gentleman who sent some one to Kennington Oval to take the photographs of the Australian cricketers playing there, and the court did not see its way to saying that a gentleman sitting in his room in Regent Street could be the author of a photograph which was being taken at Kennington Oval."

Biographer Not Appointed by Subject of Work. — The fact that the person who writes a biography and has it copyrighted was not designated by the subject of the biography as his special biographer cannot, of course, have any effect on the validity of the copyright. Gilmore *v.* Anderson, 38 Fed. Rep. 846.

Inventor and Designer — Under Act of 1802. — Where the plaintiff had employed and paid artists to prepare a historical print, and the print was composed and executed by them, it was held that the plaintiff, who, it appeared, neither designed nor invented the general arrangements of the print, was not entitled to a copyright under the provisions of the Act of Congress which gave copyright to "any person being a citizen of the United States, or a resident within the same, who shall invent and design, engrave, etch or work, or from his own works and inventions shall cause to be designed and engraved, etched, or worked, any historical or other print." Binns *v.* Woodruff, 4 Wash. (U. S.) 48.

Under the English Act of 7 Geo. III. — But under the English statute of 7 Geo. III., c. 38, the inventor of an artistic design, though himself unable to draw, may nevertheless have a copyright in the design in question, although he has employed another person to make the drawing for him and communicates his ideas to that person. Stannard *v.* Harrison, 24 L. T. N. S. 570, 19 W. R. 811.

1. Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 46; Reed *v.* Carusi, Taney's Dec. (U. S.) 72, 8 Law Rep. 410, 20 Fed. Cas. No. 11,642. See also Nottage *v.* Jackson, 11 Q. B. Div. 627; Banks *v.* Manchester, 128 U. S. 244.

Appropriation of Sketch from Foreign Publication. — One who appropriates a sketch from a foreign publication, and records the description and complies with the other formal requisites of the act for obtaining copyright, obtains no exclusive right to it, because he is not the author, designer, or proprietor of the sketch. Johnson *v.* Donaldson, 18 Blatchf. (U. S.) 289.

2. Nonresident Citizen. — A British author need not be within the British dominions at the time of the publication of his work; if the work is first published within the dominions, he may have copyright in it, though he may be resident abroad at the time of publication. Jeffreys *v.* Boosey, 4 H. L. Cas. 815. See Boucicault *v.* Delafield, 1 Hem. & M. 597.

by residence within the British dominions at the time of publication, owe the Crown a temporary allegiance. An alien friend coming into England or one of the colonies and residing there during and at the time of publication of a work first published in the United Kingdom, is entitled to a copyright in the work so published, no matter where his work was composed or whether he took up his residence solely with a view to publication.[1] But if, at the time of publication, a foreigner is not within the British dominions, he is not a person whom the ordinary copyright statutes are meant to protect.[2]

(b) **By the International Copyright Acts.** — By the International Copyright Acts of *England*, special provision is made for giving the protection of English copyright to foreigners. These acts, 1844 to 1886,[3] provide for copyright in certain specified works first published in such foreign countries as, in the opinion of the Queen, extend reciprocal protection to works first published in British dominions.[4]

(2) *In the United States* — (a) **Prior to the International Copyright Amendments** — *aa.* STATUTORY PROVISIONS. — In pursuance of a policy to encourage native talent, and to protect American authors and artists only, the copyright statutes of the United States, from the foundation of the government to the time of

1. Alien Friend Resident in British Dominions. — 2 Abb. Nat. Dig. 6; Ollendorf *v.* Black, 4 DeG. & Sm. 209, 14 Jur. 1080; Routledge *v.* Low, L. R. 3 H. L. 100; Low *v.* Ward, L. R. 6 Eq. 415. See also D'Almaine *v.* Boosey, 1 Y. & Coll. 288, *per* Lord Abinger.

2. Alien Friend Resident Abroad. — There are a number of early English cases which seem to support the proposition that if a foreign author, not having published abroad, first published in England, he might have the benefit of the English statutes. Bach *v.* Longman, 2 Cowp. 623; Guichard *v.* Mori, 9 L. J. Ch. 227; D'Almaine *v.* Boosey, 1 Y. & Coll. 288; Bentley *v.* Foster, 10 Sim. 329. See also Chappell *v.* Purday, 4 Y. & Coll. 485, 14 M. & W. 303. These cases, however, do not contain any discussion as to whether or not a foreigner resident abroad is entitled to the protection of the English statutes relating to domestic copyright.

What seems to be the first expression of judicial opinion on this subject is the dictum of Baron Parke, who, in pronouncing the judgment of the Court of Exchequer in the case of Chappell *v.* Purday, 14 M. & W. 303, 4 Y. & Coll. 485, decided in 1845, said that the statutes 8 Anne, c. 19, and 54 Geo. III., c. 136, could not be construed as applying to foreigners resident abroad.

But in 1848 the Court of Common Pleas in effect held that a foreigner resident abroad was entitled to a copyright in a work first published in England. Cocks *v.* Purday, 5 C. B. 860, 57 E. C. L. 860. And this case was followed by the Court of Queen's Bench in Boosey *v.* Davidson, 13 Q. B. 257 66 E. C. L. 257, 13 Jur. 678. See also Ollendorff *v.* Black, 4 DeG. & Sm. 209; Buxton *v.* James, 5 DeG. & Sm. 80.

The Court of Exchequer, however, in 1849, adverting to the case of Chappell *v.* Purday, 14 M. & W. 303, 4 Y. & Coll. 485, expressed its adherence to the opinion which it had intimated in that case, and held that a foreign author residing abroad could not have copyright in England under the statutes of 8 Anne, c. 19, and 4 Geo. III., c. 156. Boosey *v.* Purday, 4 Exch. 145, 13 Jur. 918, 18 L. J. Exch. 378.

This conclusion was again reached by the Court of Exchequer in the case of Boosey *v.* Jefferys, 6 Exch. 580, 15 Jur. 540. And, though this decision was overruled by the Exchequer Chamber in 1851 (Boosey *v.* Jefferys, 6 Exch. 580, 15 Jur. 540), upon an appeal being taken to the House of Lords, the judgment of the Court of Exchequer Chamber was in turn reversed, while that of the Court of Exchequer was affirmed. Jefferys *v.* Boosey, 4 H. L. Cas. 815, 3 C. L. R. 625, 1 Jur. N. S. 615, 24 L. J. Exch. 81.

This case was *followed* in Novello *v.* James, 5 DeG., M. & G. 876, and it seems that it must be regarded as the law of England that, except under the provisions of the International Copyright Act, English copyright cannot be acquired by a foreign author resident abroad. Drone on Copyright 226. But see the case of Routledge *v.* Low, L. R., 3 H. L. 100, which came before the House of Lords in 1868, wherein Lords Westbury and Cairns expressed the opinion that Jefferys *v.* Boosey, 4 H. L. Cas. 815, 3 C. L. R. 625, 1 Jur. N. S. 615, 24 L. J. Exch. 81, which turned upon the construction of the statute of 8 Anne, c. 19, is not a binding authority in the exposition of the statute of 5 & 6 Vict., c. 45, and that, correctly construed, the latter statute gives copyright protection to every author, native or foreign, wheresoever he may be resident, if the first publication be made in England.

3. International Copyright Acts of England. — The English law of international copyright is now governed by the following acts: 7 & 8 Vict., c. 12, passed in 1844, repealing 1 & 2 Vict., c. 59; 15 & 16 Vict., c. 12, passed in 1852; 38 & 39 Vict., c. 12, passed in 1875; 49 & 50 Vict., c. 33, passed in 1886.

4. These acts empower the Queen, by order in council, to direct that, as regards literary and artistic work first published in a foreign country, the author shall have copyright therein during the time specified in the order, not exceeding the period during which authors of the like works first published in England have copyright. 49 & 50 Vict., c. 33, Ord. in Council, 2 Dec., 1887, 1st sch., art. 11.

the adoption of the International Copyright Amendments, limited copyright protection to authors and artists who were citizens or residents of the United States, or to their lawful representatives or assigns.[1]

bb. RESIDENT DEFINED. — In order to constitute a person a resident[2] of the United States, within the meaning of the term as used in the copyright law, it is necessary that he shall take up his residence in this country with the intention of remaining and making his home.[3] If he does take up his abode in the United States with the intention of remaining, he becomes a resident, although he may afterwards change his mind, and within a short time remove.[4]

(b) **Provisions of the International Copyright Act.** — By an Act approved March 3, 1891, to take effect July 1, 1895, it was provided that the provisions of the Copyright Act shall apply to a citizen or subject of a foreign state or nation, when such foreign state or nation permits a citizen of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement.[5]

2. Assigns of Author, etc. — *a.* IN GENERAL. — The common-law property in any intellectual production may be assigned by the author, inventor, or designer, before the statutory copyright which may be had therein is obtained,[6]

1. Nonresident Aliens. — For a review of the different copyright enactments in the United States which contained provisions excluding nonresident aliens from the benefits of copyright, see the case of Yuengling *v.* Schile, 12 Fed. Rep. 97, 20 Blatchf. (U. S.) 452. See also Sheldon *v.* Houghton, 5 Blatchf. (U. S.) 285.

2. Resident. — For a definition of the term "resident" in other connections, see the title RESIDENT.

3. Temporary Residence Not Sufficient. — A mere temporary residence is not enough to constitute an author a resident, although he has declared his intention under oath to become a citizen of the United States. Carey *v.* Collier, 56 Niles' Reg. 262, 5 Fed. Cas. No. 2400. In this action the plaintiffs, claiming as the purchasers of the copyright from the author, sought to restrain the publication by the defendant of Captain Marryatt's novel entitled "The Phantom Ship." The only question for the court to decide was whether Captain Marryatt was a resident of the country. It appeared that Captain Marryatt, while traveling through this country, visited Philadelphia, and there filed his declaration of his intention to become a citizen of the United States. But it also appeared that while in this country Captain Marryatt not only spoke of himself as a British citizen, but was an officer in the British navy, and during the trouble in Canada offered his services as a British officer. Judge Betts, in holding that Captain Marryatt was not a resident of the United States, said that "it was evident that a person who was a mere transient visitant, whose family, business, intentions, and relations were all abroad, could not be considered a resident, and the filing a declaration of an intention to become a citizen could not make him one."

4. Residence with Intention of Remaining Permanently Sufficient. — In an action brought by Boucicault, a native of England, for infringement of copyright, which he claimed under the United States statutes in certain plays which he had written, the court, in its instruction to the jury, said: "The plaintiff came to this country in 1853, and remained, pursuing his profession as an actor and author, until 1861, and if at the time of filing the title he had his abode in this country, with the intention of remaining permanently, he was a resident within the meaning of the law, even though he afterwards changed his mind and returned to England. If, however, he was a sojourner, a transient person, or, at the time of this filing had the intention to return to England, he is not entitled to the protection of these laws." Boucicault *v.* Wood, 2 Biss. (U. S.) 34, 7 Am. L. Reg. N. S. 539.

5. 26 U. S. Stat. at L. 1110.

Existence of Reciprocity Determined by the President. — It is further provided by this act that the existence of either of these conditions shall be determined by the President of the United States, by proclamation made from time to time as the purposes of this act may require.

Presidential Proclamations. — The privileges of the copyright law were extended to citizens of Belgium, France, Great Britain and the British possessions, and Switzerland, by the Presidential proclamation of July 1, 1891, 27 U. S. Stat. at L. 981; to subjects of the German empire by a proclamation dated April 15, 1892, 27 U. S. Stat at L. 1021; to subjects of Italy by a proclamation dated Oct. 31, 1892, 27 U. S. Stat. at L. 1043; to subjects of Denmark by a proclamation dated May 8, 1893, 28 U. S. Stat. at L. 1219; to subjects of Portugal by a proclamation dated July 20, 1893, 28 U. S. Stat. at L. 1222; to subjects of Spain by a proclamation dated July 10, 1895, 29 U. S. Stat. at L. 871; to citizens of the United States of Mexico by a proclamation dated February 27, 1896, 29 U. S. Stat. at L. 877; to citizens of the republic of Chili by a proclamation dated May 25, 1896, 29 U. S. Stat. at L. 880.

6. See *supra*, this title, the division *Literary Property*.

in which case the copyright may, pursuant to the express terms of the statutes, be taken out by the assignee.[1] But while the legal assignee of the author may take out the copyright, this can, of course, only be done when the author himself is entitled to a copyright.

b. ASSIGNS OF NONRESIDENT ALIEN AUTHOR. — Hence, under the copyright laws as they existed before the adoption of the International Copyright Amendments, the assignee of a nonresident alien, though himself a citizen of the United States, could obtain no valid copyright by compliance with the requirements of the statutes for obtaining their protection.[2]

3. Proprietor — *a.* USE OF TERM IN THE STATUTES. — Although the use of the word "proprietor" in the copyright laws is as old as the legislation on the subject,[3] the Act of 1870 for the first time used the word in connection with the words "author, inventor, and designer," as one of the persons who may obtain a copyright.[4] And it is so used in the present law.[5]

b. MEANING OF THE TERM. — The word "proprietor," as used in the copyright law, would seem to embrace the author, inventor, or designer and his assigns.[6]

1. U. S. Rev. Stat., § 4952.

Assignee of Right to Reproduce Painting May Copyright. — On or about October 1, 1891, G. Naujok, a German subject resident in Germany, painted a picture in oil. On the fifth of the succeeding month, by an instrument in writing, he assigned to the complainant, also a German subject, the right to the exclusive reproduction of the painting. In the summer of 1892 the picture was sold to some person unknown. The benefit of the International Copyright Act of March 3, 1891, c. 565 (26 U. S. Stat. at L. 1106) having been extended to German subjects by the proclamation of the President of April 15, 1892 (27 U. S. Stat. at L. 1021), the complainant complied with the statutory provisions for obtaining copyright in the painting. In a suit brought against the defendant for copyright infringement, it was held that the complainant came within the words "assigns of any such person," found in section 4952 of the Revised Statutes, and was therefore entitled to statutory copyright by complying with the provisions of the law. Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. Rep. 445.

And in the case of Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808, a suit for the infringement of copyright in a painting, it appeared that an artist, Edouard Bisson, who made a painting called "Floreal," sold the painting to one person, reserving all rights of reproduction, and then assigned the exclusive right of reproduction, publication, and copyright to the complainant, who had the painting registered and complied with the other formal requisites of the act for obtaining copyright. The defendant, among other things, insisted that the complainant was neither the author, inventor, designer, or proprietor of the painting, nor the assign of any such person, within the meaning of the statute, and could not claim any copyright in the painting. But the court held that the complainant, although he was not the owner of the painting itself, nevertheless had such an interest therein as entitled him to a copyright.

2. Prior to the International Copyright Amendments. — Keene *v.* Wheatley, 9 Am. L. Reg. 33, 17 Leg. Int. (Pa.) 349, 4 Phila. (Pa.) 157, 5 Clark (Pa.) 509, 14 Fed. Cas. No. 7644; Yuengling *v.* Schile, 20 Blatchf. (U. S.) 458, 12 Fed. Rep. 97.

Under the International Copyright Amendments. — Such, too, would seem to be the status of an assignee of a work produced by a citizen or subject of a foreign state or nation who is not entitled to protection under the International Copyright Amendments. But under the Act of March 3, 1891, c. 565, § 3 (26 U. S. Stat. at L. 1107), one to whom a German artist gave the exclusive right to publish and reproduce his painting is, of course, entitled to American copyright, the benefit of the International Copyright Act having been extended to German subjects by proclamation of the President. Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. Rep. 445.

3. Statutes Using the Word "Proprietor."—Thus the word "proprietor" may be found in the following statutes: 1 U. S. Stat. at L., p. 125, §§ 2, 3, 4, 6; 2 U. S. Stat. at L., p. 171, §§ 1, 3; 4 U. S. Stat. at L., p. 437, § 3; 11 U. S. Stat. at L., p. 139, § 1; 13 U. S. Stat. at L., p. 540, § 2; 8 Geo. II., c. 13, § 1; 17 Geo. III., c. 57.

4. 16 U. S. Stat. at L., § 86. See Yuengling *v.* Schile, 12 Fed. Rep. 97.

5. U. S. Rev. Stat., § 4952.

6. Instance of Photographer Being Proprietor of Photograph. — Where a photographer photographed an actress in her stage character, with the understanding that she should have all the copies which she desired, free of charge, to do with as she pleased, it was held that the photographer was the author and proprietor of the photograph and was entitled to secure the statutory copyright therein. Press Pub. Co. *v.* Falk, 59 Fed. Rep. 324.

Assignee of Right to Reproduce a Painting Within the Term. — Where an artist sold to one person a picture which he had painted, reserving all rights of reproduction, and afterwards assigned the exclusive right of reproduction, publication, and copyright to another person, it was held that the latter person became the "proprietor" of the painting within the meaning of that term as used in the copyright law, and that the statutory copyright therein was properly secured by him. Werck-

c. EMPLOYER'S RIGHT TO COPYRIGHT WORK OF EMPLOYEE. — Even before the enactment of this law it had been decided, notwithstanding a couple of cases apparently to the contrary,[1] that a person who employs another to prepare a work may, by virtue of the contract of employment, and without any express assignment, become the owner of the literary property therein and be entitled to the statutory copyright.[2] And now that the "proprietor" of a work is expressly mentioned as a person who may obtain a copyright therein, it would seem that the accuracy of this view is no longer open to doubt.[3]

Dependent on Contract of Employment. — But the right of the employer to the copyright which may be had in the product of his employee is dependent on the contract of employment. Where there is an express agreement, its terms will, of course, govern.[4] Where there is no express agreement, the intention of the parties may be determined by the attendant circumstances, which may be such as to imply that the copyright shall be in the employer.[5] But the

meister *v.* Springer Lithographing Co., 63 Fed. Rep. 808.

1. See *supra*, this title and division, the subdivision *Author, Inventor, Designer*.

2. **Employer of Author May Copyright.** — In the case of Lawrence *v.* Dana, 4 Cliff. (U. S.) 1, it appeared that Lawrence, the plaintiff, had given his services gratuitously to Mrs. Wheaton, the proprietor of Wheaton's Elements of International Law, in preparing notes and other matters to be published in a new edition of the work. It was held that Mrs. Wheaton was the proper person to take out the statutory copyright for the new edition of the work.

Where the state of New York employed a reporter to report decisions of the courts of appeals, the validity of a copyright in the reports prepared by him, entered in the name of the secretary of state, "in trust for the state of New York," was sustained, although no formal assignment had been made by the author. The state became entitled to secure the statutory copyright by reason of having employed and paid the reporter. Little *v.* Gould, 2 Blatchf. (U. S.) 165, 2 Blatchf. (U. S.) 362. See *supra*, this title, the division *Literary Property*, subdivision *Rights of Employer and Employee*.

Under the Canadian Copyright Act (Rev. Stat. Can., c. 62), it has been held that if a work is compiled by persons employed for valuable consideration for that purpose, such employment, by virtue of section 16 of the act, works a transfer to the employer of the right to obtain copyright if no reserve is made by the compilers or authors of the compilation. Frowde *v.* Parrish, 27 Ont. Rep. 526, 23 Ont. App. 728.

3. **Under the Present United States Act.** — Carte *v.* Evans, 27 Fed. Rep. 861. See Scribner *v.* Clark, 50 Fed. Rep. 473.

In the case of Schumacher *v.* Schwenke, 23 Blatchf. (U. S.) 373, 25 Fed. Rep. 466, copyright was claimed by the complainant in a painting which represented upon a scroll the head of a newsboy having a number of papers upon his shoulder and the waste end of a cigar in his mouth. On either side of the head foliage and telegraph poles were represented. The painting had been produced in the following manner: The head was copied from a black woodcut print of a painting by an Italian artist. The woodcut was owned by the complainant. The other features — the cigar, the hand, the newspapers, the red feather, the scroll, the telegraph poles, and foliage — were suggested and designed by the president of the complainant company, himself an artist of respectable attainment. The picture which was the result of the idea thus formed was actually painted by an artist in the complainant's employ, who was a resident of the United States, under the direction and supervision of the complainant's president. It was held that the complainant was the proprietor of the painting in the sense in which that term is used in the statute. See Mutual Advertising Co. *v.* Refo, 76 Fed. Rep. 961.

4. **Express Agreement.** — Mackaye *v.* Mallory, 12 Fed. Rep. 328.

An artist who accompanied a government expedition to Japan, in the capacity of master's mate, and with the understanding that all sketches and drawings he should make should belong to the government, has no right to a copyright on his sketches, drawings, and engravings. They have become the property of the government. Heine *v.* Appleton, 4 Blatchf. (U. S.) 125; Com. *v.* Desilver, 3 Phila. (Pa.) 31.

5. Paige *v.* Banks, 13 Wall. (U. S.) 608.

An engraver in the employ of the government can have no copyright in a chart prepared for the government. Copyright, 7 Op. Atty.-Gen. 656.

Under the English Statute, 5 & 6 Vict., c. 45, it has been held that where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer. Sweet *v.* Benning, 16 C. B. 459, 81 E. C. L. 459; Grace *v.* Newman, L. R. 19 Eq. 623.

As to the construction of this statute, see also Hereford *v.* Griffin, 16 Sim. 190; Brown *v.* Cooke, 11 Jur. 77; Richardson *v.* Gilbert, 1 Sim. N. S. 336; Delf *v.* Delamotte, 3 Jur. N. S. 933.

It has been held that under the English Fine Arts Act of 1862, par. 4, or English Copyright Act of 1842, par. 13, a managing director of a limited company who directs drawings for a trade catalogue to be made and prepares the

mere fact of employment does not necessarily make the employer the absolute owner of his employee's productions; if there is nothing in the terms and conditions of the employment and the attendant circumstances implying that the copyright shall belong to the employer, it may be secured by the author.[1]

Work Not Within Scope of Employment. — An employer cannot be considered as the owner of what is written by an author independently of the duties for which the latter is employed and paid.[2]

d. Assign of Nonresident Alien Author. — The introduction of the word "proprietor" into the Act of 1870, in connection with the words "author, inventor, designer," as a person entitled to copyright, was not made with a view to any change in the policy of the copyright laws by which copyright protection was limited to native productions, and the word should be construed in the limited and restricted sense of a person who, by purchase or otherwise, has lawfully acquired the exclusive rights of some native or resident author or artist.[3] The assignee of a nonresident alien author, inventor, or designer, is entitled to United States copyright only under the provisions of the International Copyright Amendments.

4. Executors and Administrators of the Author, etc. — The copyright law of the United States, in its enumeration of the persons who may obtain copyright, mentions not only the author, inventor, designer, and proprietor of the specified productions, but also the executors or administrators of any such person.[4]

5. Right of Trustee to Copyright. — There seems to be little doubt but that a person who is not the author or owner of a work may take out the copyright in his own name and hold it in trust for the rightful owner.[5] And a court of equity may compel an assignment to him.[6]

6. Persons Entitled to Copyright Law Reports — Opinions of the Judges. — If it were possible to secure a copyright at all in the opinions of the court or other parts of a law report prepared by the judges, which is, to say the least, doubtful,[7] it would seem that such copyright might be secured by the state.[8] But,

letter press of the catalogue, the expenses being paid by the company, acts as representative of the company and not as an individual; the company is the proprietor of the work, and registration cannot be made in the director's name. Petty *v.* Taylor, 75 L. T. 545.

1. Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87.

2. **Play Produced by Person Employed as Stage Manager and Actor.** — Where it appeared that Boucicault, an actor and dramatic author, while in the employment of Stewart as a performer and stage manager, verbally agreed with the latter to write a play, and that it should be performed at Stewart's theatre so long as it should continue to draw good audiences, it was held that Boucicault, and not Stewart, was the proper person to take out the copyright. Roberts *v.* Myers, Brunner Col. Cas. 698, 23 Law Rep. 396, 17 Leg. Int. 405, 20 Fed. Cas. No. 11906.

3. **Work of Foreign Artist Not Copyrightable by American Assign as "Proprietor."** — It was accordingly held that no copyright upon a chromo designed by a foreign artist resident abroad could be acquired by his representative resident in the United States as proprietor. Yuengling *v.* Schile, 12 Fed. Rep. 97.

4. United States Rev. Stat., § 4952. See Folsom *v.* Marsh, 2 Story (U. S.) 100.

5. **Trustee.** — London Printing, etc., Alliance *v.* Cox, (1891) 3 Ch. 291, 65 L. T. 60; Hazlitt *v.* Templeman, 13 L. T. N. S. 595; Petty *v.* Taylor, 75 L. T. 545; Little *v.* Gould, 2 Blatchf. (U. S.) 165, 362; Pulte *v.* Derby, 5 McLean (U. S.) 328; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Carte *v.* Evans, 27 Fed. Rep. 861.

6. **Compelling Assignment.** — A court of equity may compel an assignment. Hazlitt *v.* Templeton, 13 L. T. N. S. 595; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Little *v.* Gould, 2 Blatchf. (U. S.) 165; Pulte *v.* Derby, 5 McLean (U. S.) 328.

7. See *supra*, this title, *Subjects of Copyright — Law Reports*.

8. See Gould *v.* Banks, 53 Conn. 415, 55 Am. Rep. 143.

Right of State to Copyright in the Work of Its Judges. — In a number of the cases where the right of the state to secure a copyright in the work of its judges has been discussed, it has been considered from the standpoint of whether or not public policy demands that the publication of reports of the proceedings of the courts shall be free to all. In two cases, however, the question has been viewed from the standpoint of whether or not the state is the "proprietor" of such matter, within the meaning of that term as used in section 4952 of the United States Revised Statutes. In the case of Banks *v.* Manchester, 128 U. S. 244, a bill in equity to restrain the defendant from publishing certain volumes of the Ohio State Reports, it appeared that the reporter for the court had conformed to the provisions of the copyright law and had attempted to obtain a copyright in the reports "for the State of Ohio." In holding that the state could not secure any copyright in the reports

whether these matters are the subject of copyright or not, it is clear that a reporter can have no copyright either in the opinions delivered by the court [1] or in the statement of facts or syllabi prepared by the judges.[2] Nor can copyright in such matter be secured by the judges themselves.[3]

Original Work of Reporter — In General. — The question as to who may secure the copyright which may be had in law reports covering the original work of the reporter depends, firstly, upon whether they are prepared by an unofficial or official reporter, and if by an official reporter, then upon the terms of the statutes which provide for their publication.

Unofficial Reports. — When reports of cases decided by the courts are the result of private enterprise, there can be no question but that the reporter, although he can have no copyright in the opinions or other parts of the reports which are prepared by the judges, can secure a copyright which will protect all those parts which are the result of his own labor.[4]

so far as they were produced by the judges, in the discharge of their judicial duties, the court, by Mr. Justice Blatchford, said: "The copyright claimed to have been taken out by Mr. De Witt in the present case being a copyright 'for the state' is to be regarded as if it had been a copyright taken out in the name of the state. * * * In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus or headnote, be regarded as their author or their proprietor in the sense of section 4952, so as to be able to confer any title by assignment on the state sufficient to authorize it to take a copyright for such matter under that section as the assignee of the author or proprietor. Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. * * * The whole work done by the judges constitutes the authentic exposition and interpretation of the law which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law or an interpretation of a constitution or a statute. * * * In Wheaton *v.* Peters, 8 Pet. (U. S.) 668, it was said by this court that it was 'unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.' What a court or a judge thereof cannot confer on a reporter as the basis of a copyright in him, they cannot confer on any other person, or on the state." See also Banks *v.* West Pub. Co., 27 Fed. Rep. 50. And see the question discussed from this standpoint by Mr. James M. Kerr, in an article entitled "State's Ability to Copyright Judicial Opinions," 36 Cent. L. J. 257.

1. Reporter's Right to Copyright in Work of Judges. — Wheaton *v.* Peters, 8 Pet. (U. S.) 593; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360; Banks *v.* Manchester, 23 Fed. Rep. 143.

2. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360; Banks *v.* Manchester, 23 Fed. Rep. 143.

3. Judge Not "Author" of His Judicial Opinions. — In Banks *v.* Manchester, 128 U. S. 244, Mr. Justice Blatchford, in delivering the opinion of the court, said: "In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus or headnote, be regarded as their author or their proprietor in the sense of section 4952, so as to be able to confer any title by assignment on the state sufficient to authorize it to take a copyright for such matter under that section as the assignee of the author or proprietor."

4. Reporter's Right to Copyright in Original Work. — West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360. See also Little *v.* Hall, 18 How. (U. S.) 165; Paige *v.* Banks, 13 Wall. (U. S.) 608; Chase *v.* Sanborn, 6 Pat. Office Gaz. 932; Farmer *v.* Calvert Lithographing, etc., Co., 5 Chicago Leg. N. 1.

In the case of Gray *v.* Russell, 1 Story (U. S.) 21, Mr. Justice Story, one of the judges who concurred in the decision in Wheaton *v.* Peters, 8 Pet. (U. S.) 593, said that while it is held in that case that the opinions of the court, being published under the authority of Congress, were not the proper subject of copyright, it was as little doubted by the court that Mr. Wheaton had a copyright in his own marginal notes and in the arguments of counsel as prepared and arranged in his works.

In England, while the Crown may, perhaps, by virtue of its prerogative, claim the exclusive right of publishing reports of judicial proceedings (see Copinger on Copyright 285; Millar *v.* Taylor, 4 Burr. 2329; Brewer, J., in Banks *v.* West Pub. Co., 27 Fed. Rep. 50), no such claim has been asserted for many years, and in several cases individuals have been acknowledged by the court as proprietors of copyright in law reports. Sweet *v.* Shaw, 1 Jur. 917; Sweet *v.* Maugham, 11 Sim. 51; Butterworth *v.* Robinson, 5 Ves. Jr. 709; Saunders *v.* Smith, 3 Myl. & C. 711; Sweet *v.* Benning, 16 C. B. 459, 81 E. C. L. 459.

Reports of Judicial Proceedings before House of Lords. — The House of Lords claims exclusive right to appoint a publisher of judicial proceedings before itself. This claim was recognized in Bathurst *v.* Kearsley, Easter Term (1776), and an injunction was granted to restrain the publication of the trial of the Duchess of Kingston. See Gurney *v.* Longman, 13 Ves. Jr. 493.

On the authority of this precedent, Lord Erskine granted an injunction until the hearing to restrain the publication of Lord Mel-

Official Reports. — It has sometimes been argued that where the reports are prepared by an official reporter to whom the government which creates the court of which he is made reporter pays a salary, then whatever property there is in the labors of the reporter belongs to the state and not to him, and that he cannot secure any copyright in the reports.[1] But this is not the view which has been taken by the courts; it is, on the contrary, held that a reporter, even though he may be a sworn public officer who receives a fixed salary for his labors, may, in the absence of legislation exhibiting a contrary intention, secure a copyright in those parts of his reports, such as headnotes, statements of facts, abridgments of the arguments of counsel, footnotes, etc., which are prepared by him.[2] But the state may, of course, secure to itself and its assigns the right to the exclusive publication of the work of its official reporter.[3]

VII. Formalities for Securing Copyright — 1. Terms of Statutory Directions. — The proceedings to obtain copyright are extremely simple.

Filing Title, etc. — The statutes direct that no person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright.[4]

Deposit of Copies, etc. — Nor shall any person be entitled to copyright unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print or photograph, or, in the case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same: provided, that in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above, shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or

ville's trial. Gurney *v.* Longman, 13 Ves. Jr. 493.

1. There is a dictum in the case of Myers *v.* Callaghan, 5 Fed. Rep. 728, by Chief Justice Drummond, to the effect that "if an adequate compensation was paid by the state to the reporter for the work done by him in preparing volumes of reports, then whatever property there was in the volumes arising from the labors of the reporter ought to belong to the state and not to him."

2. **Official Reporter Within Term "Author."** — In Callaghan *v.* Myers, 128 U. S. 617, *affirming* Myers *v.* Callaghan, 5 Fed. Rep. 726, 10 Biss. (U. S.) 139, 20 Fed. Rep. 441, where it was contended that the official reporter of the Supreme Court, in preparing the official edition of the reports of cases decided by the court, was not an author within the meaning of the Act of Congress, and that it was not intended by that act that he should assert a monopoly in the result of his official labors, it was held that he was entitled to a copyright in so much of the reports as were the original product of his own labor, and that these portions of the reports were covered by the copyright taken out by the reporter as author.

3. **Constitutionality of Law Giving State a Copyright in the Official Reporter's Work.** — An early act of the *New York* legislature (New York Laws of 1850, c. 245) which provided that "the copyright of any notes or references made by the state reporter" to any of the reports of the decisions of the Court of Appeals "shall be vested in the secretary of state for the benefit of the people" of the state, was held not to be inconsistent with the provision of the constitution of the state which provided that all "judicial decisions shall be free for publication by any person." The act was construed, not as simply securing to the state a copyright in any footnotes or annotations which the reporter might make, but as giving it a right to copyright the work of the reporter, such as the headnotes and the statements of the arguments of counsel. Little *v.* Gould, 2 Blatchf. (U. S.) 165, 2 Blatchf. (U. S.) 362.

4. U. S. Rev. Stat., § 4956, as amended by the Act of March 3, 1891, 26 U. S. Stat. at L., c. 565, § 3.

drawings on stone made within the limits of the United States, or from transfers made therefrom.[1]

Notice of Copyright. — And it is further provided that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: "Entered according to the Act of Congress, in the year ——, by A B, in the office of the Librarian, at Washington;" or, at his option, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A B."[2]

2. Necessity of Complying with Directions — *a.* IN THE UNITED STATES. — In the United States the varying directions of the different copyright statutes have always been regarded as prescribing essential conditions, the substantial performance of which is necessary in order to entitle one to claim the protection of the copyright law in his published work.[3]

With Respect to Dramatic Compositions. — There can be no question but that the conformity with these requirements is as necessary to the securing of a valid copyright in dramatic compositions as in other publications.[4]

With Respect to Prints, Engravings, etc. — While the statutes provide for the copyrighting of prints, engravings, maps, etc., yet, when these productions are incorporated in a volume, they need not be copyrighted separately, but will be protected by copyrighting the book.[5]

1. U. S. Rev. Stat., § 4956, as amended by the Act of March 3, 1891, 26 U. S. Stat. at L., c. 565, § 3.

2. U. S. Rev. Stat., § 4962, as amended by the Act of June 18, 1874, 18 U. S. Stat. at L. 78. See Act of Aug. 1, 1882, 22 U. S. Stat. at L. 181, amending § 4962 of the Revised Statutes with respect to the place of inscribing the notice of copyright by manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright.

In England, by the Act which gives copyright in prints, it is required that the date of the first publication shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints. 8 Geo. II., c. 13, § 1.

3. Under the Acts of 1790 and 1802. — Wheaton *v.* Peters, 8 Pet. (U. S.) 591; Ewer *v.* Coxe, 4 Wash. (U. S.) 487; King *v.* Force, 2 Cranch (C. C.) 208, 14 Fed. Cas. No. 7791. But see *contra*, Nichols *v.* Ruggles, 3 Day (Conn.) 158, 3 Am. Dec. 262.

Under the Act of 1831. — Struve *v.* Schwedler, 4 Blatchf. (U. S.) 23; Baker *v.* Taylor, 2 Blatchf. (U. S.) 82; Chase *v.* Sanborn, 4 Cliff. (U. S.) 306, 6 Pat. Office Gaz. 932; Callaghan *v.* Myers, 128 U. S. 617.

Under the Act of 1865. — Lawrence *v.* Dana, 4 Cliff. (U. S.) 1.

Under the Act of 1874. — Higgins *v.* Keuffel, 30 Fed. Rep. 627.

Under the Revised Statutes. — Boucicault *v.* Hart, 13 Blatchf. (U. S.) 47, 4 Am. L. Rec. 726; Carillo *v.* Shook, 8 Chicago Leg. N. 258, 22 Int. Rev. Rec. 152, 5 Fed. Cas. No. 2407; Parkinson *v.* Laselle, 3 Sawy. (U. S.) 330, 2 Am. L. T. N. S. 279, 7 Chicago Leg. N. 268, 21 Int. Rev. Rec. 163, 18 Fed. Cas. No. 10762; Chicago Music Co. *v.* J. W. Butler Paper Co., 19 Fed. Rep. 758; Merrell *v.* Tice, 104 U. S. 557; Thompson *v.* Hubbard, 131 U. S. 123. See Callaghan *v.* Myers, 128 U. S. 617.

Under the Act of 1891. — Osgood *v.* A. S. Aloe Instrument Co., 83 Fed. Rep. 470.

Under the Law Establishing the Smithsonian Institution. — But, in Jollie *v.* Jaques, 1 Blatchf. (U. S.) 618, the court in the tenth section of the Act of August 10, 1846 (9 U. S. Stat. at L. 106), establishing the Smithsonian Institution, which section provided for the deposit by the author or proprietor with the librarian of that institution, of one copy of any book, etc., for which a copyright should be secured, and one copy with the Librarian of Congress, within three months from publication, refused so to construe the provision as to make the delivery of the copies a prerequisite to a title to the copyright under the Act of 1831.

4. Article entitled "The Law of Playwrights," 8 So. L. Rev. N. S. 13; Boucicault *v.* Hart, 13 Blatchf. (U. S.) 47; Carillo *v.* Shook, 8 Chicago Leg. N. 258, 22 Int. Rev. Rec. 152, 5 Fed. Cas. No. 2407; Benn *v.* Leclercq, 30 Leg. Int. (Pa.) 185, 18 Int. Rev. Rec. 94, 5 Leg. Op. 145, 3 Fed. Cas. No. 1308.

5. Statistical Atlas — Copyrighting Volume Sufficient. — It has been held that each map in a statistical atlas need not be separately copyrighted. "The alleged invalidity of the copyright is upon the ground that the book or atlas was copyrighted, whereas it is said that each

In the Case of New Editions. — New editions of a copyrighted work are protected by the copyright in the first edition, as to the parts which remain unchanged. But if the new publication contains new and original matter, a new copyright is necessary to the protection of such additional matter, and if none is taken out the new matter becomes public property, just as the original work would have become if a copyright for it had not been secured.[1]

With Respect to Works in Several Volumes, and Periodicals. — The present copyright law provides that for the purpose of the act each volume of a book in two or more volumes, when such volumes are published separately, and each number of a periodical, shall be considered an independent publication subject to the form of copyright.[2]

b. IN ENGLAND. — In England, while compliance with the statute requiring registration[3] may not be necessary to the existence of the copyright, it is necessary to perfect the right to sue.[4]

Under the Copyright Designs Act. — While registration may not be necessary it is required by the first section 8 Geo. II., c. 13, providing for copyright in prints, that the day of the first publication shall be truly engraved with the name of the proprietor on each plate, and printed on every copy. The fulfilment of these requisitions is necessary to enable a man to recover the penalties imposed by the statute; for, while it was formerly doubted whether an action could be maintained without a compliance with these requisitions,[5] it may now be considered as established that no action can be maintained unless the name and date be engraved according to the statute.[6]

3. Sufficiency of Compliance with Directions — *a.* CONSTRUCTION OF THE STATUTES. — It has been declared that under the laws of the United States a copyright title is not perfected without a strict compliance with the provisions of the statute.[7] And no doubt copyright statutes, if they are to be regarded as granting exclusive rights and privileges to individuals, should be strictly construed.[8] But in a later case these acts were regarded rather as securing to the author his original and natural rights, and it was said that the various provisions of the law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work.[9]

b. FILING COPY OF TITLE — (1) *Sufficiency of the Copy.* — The provision requiring a printed copy of the title of the book, etc., to be filed with the Librarian of Congress, has been held to be sufficiently complied with by the

map should have been copyrighted. A statistical atlas is a book of maps, tables, and printed text, and is not simply a bundle of maps, and is properly copyrighted as a whole. There was no necessity of copyrighting separately each map in the book." Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

And, in *England*, it has been held that prints, engravings, etc., forming part of a book are protected by 5 & 6 Vict., c. 45, and need not comply with the requisitions of the statutes which provide for the copyrighting of prints, engravings, etc. Bogue *v.* Houlson, 5 DeG. & Sm. 267; Maple *v.* Junior Army, etc., Stores, 21 Ch. Div. 369.

1. **New Editions.** — Lawrence *v.* Dana, 4 Cliff. (U. S.) 1, 2 Am. L. T. N. S. 402; Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228, 5 Am. L. T. 168; Banks *v.* McDivitt, 13 Blatchf. (U. S.) 163.

2. Act of March 3, 1891, 26 U. S. Stat. at L. 1109.

3. 5 & 6 Vict., c. 45.

4. Goubaud *v.* Wallace, 36 L. T. N. S. 704, 25 W. R. 604.

5. Blackwell *v.* Harper, 2 Atk. 93; Roworth *v.* Wilkes, 1 Campb. 94.

6. Brooks *v.* Cock, 3 Ad. & El. 138, 30 E. C. L. 56; Graves *v.* Ashford, L. R. 2 C. P. 410.

7. **Strict Construction Favored.** — Baker *v.* Taylor, 2 Blatchf. (U. S.) 82, *citing* Wheaton *v.* Peters, 8 Pet. (U. S.) 591; Osgood *v.* A. S. Aloe Instrument Co., 83 Fed. Rep. 470.

8. See the title STATUTES.

9. **Liberal Construction Favored.** — In the case of Myers *v.* Callaghan, 10 Biss. (U. S.) 139, 5 Fed. Rep. 726, Drummond, J., in delivering the opinion of the court, said: "There is what may be called the original right of the author. It is the object of the Acts of Congress to 'secure' the right which thus primarily exists. Indeed, statutes of copyright seem to imply the existence of a natural right of the author to the product of his brain. They are passed in order to make that right after publication, in the language of the constitution, 'exclusive.' So that I am not inclined to agree with the strict construction which has been placed on the Acts of Congress by some of the courts. It seems to me, on the con-

filing of a tracing of the printed title.[1] And it seems that a typewritten copy thereof will be sufficient.[2]

(2) *Variance Between Title Filed and That Published.* — While there may be such a variance between the title filed and that affixed to the published work as to constitute a want of compliance with this requirement and a consequent failure to obtain a valid copyright, it is not every variance that will have this effect. Where the similarity between the title filed and that published is such as to identify them with certainty, a slight variance between the two will not invalidate the copyright.[3] But when the variance is so material

trary, that these various provisions of law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work." And see *infra*, this title and division, the subdivision *Inscribing Notice of Copyright — Contents of Notice — In General.*

1. **Tracing of Printed Title.** — Where a map together with a title in Roman letters was engraved on stone and then printed, and a copy of this printed title thus made was filed with the librarian, it was held that this was a substantial compliance with the statute. Chapman *v.* Ferry, 18 Fed. Rep. 539.

2. **Typewritten Copy of Title.** — In the directions for securing copyright furnished by the Librarian of Congress it is said that a typewritten title will be accepted.

3. **Immaterial Variation.** — The title of a work filed with the Librarian of Congress was in these words: "Pianoforte Arrangement of the Comic Opera, The Mikado, or the Town of Titipu, by W. S. Gilbert and Sir Arthur Sullivan. By George L. Tracy." Later on the publishers delivered at the office of the librarian two copies of the printed book which contained the pianoforte arrangement of Tracy and on another staff the vocal score of the original opera to which the arrangement was an accompaniment, and also contained the songs of the opera, and had this title: "Vocal Score of The Mikado, or The Town of Titipu. Arrangement for Pianoforte, by George Lowell Tracy (of Boston, U. S. A.), of the above named opera by W. S. Gilbert and Arthur Sullivan." On the ground that the published title was sufficient to identify it with substantial certainty with the registered copyright, and no one could possibly be misled by the variations between the two, it was held that the variations were not sufficient to defeat the plaintiff's copyright. Carte *v.* Evans, 27 Fed. Rep. 861.

A firm deposited in the office of the Librarian of Congress the title of a book, in the following words: "Over One Thousand Recipes. The Lake-Side Cook-Book; a Complete Manual of Practical, Economical, Palatable, and Healthful Cookery. Chicago: Donnelley, Loyd & Co." The title with which the book was published was: "The Lake-Side Cook-Book, No. 1: a Complete Manual of Practical, Economical and Palatable and Healthful Cookery. By N. A. D.," — followed by the imprint of the place of publication and the name of the proprietor, and the notice of the copyright on the title-page. It was held that the variance was not material and that there was a sufficient compliance with section 4956 of the Revised Statutes. Donnelly *v.* Ivers, 20 Blatchf. (U. S.) 381, 18 Fed. Rep. 592.

A title filed on December 31, 1887, with the Librarian of Congress, read: "An Outline of the Political and Economic History of the United States, with Maps and Charts. I. History and Constitution. By Alexander Johnston, M. A. II. Population and Industry. By Francis A. Walker, LL.D." The title of one of the books deposited to complete the copyright read: "United States. Part III. Political Geography and Statistics. Copyright, 1888, by Francis A. Walker." The books so deposited were obtained by cutting out of the encyclopædia in which the work was published as a separate article, the leaves or pages on which it was printed. Though a ruling as to the effect of this variance was not, under the circumstances, necessary to the decision of the cause, the court said that "if it were necessary in order to sustain complainants' copyright, there would be much ground for claiming that the published title of the articles in question, and the articles themselves, sufficiently identify them, as against these defendants, with the title filed on December 31, 1887, to bring the case within the doctrine of Carte *v.* Evans, 27 Fed. Rep. 861, which holds that if the title of the book, as published, is substantially the same as that filed in the office of the Librarian of Congress, the copyright is valid. "The title filed in the office of the Librarian of Congress on December 31, 1887, seems to have indicated to the mind of the defendant's counsel that it referred to the encyclopædia articles in question, and there is no claim that defendant was deceived or misled by it." Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

Descriptive Portion of Title — Variance In. — A suit was brought to enjoin the defendants from producing a portion of a play entitled "After Dark," on the ground that such portion was a colorable imitation of a copyrighted play written and owned by the complainant and entitled "Under the Gaslight." In the successive stages of this suit the complainant's copyright was attacked by the defendants on the ground that there had been a want of compliance with the statutory provision requiring a deposit before publication in the proper office of "a printed copy of the title of the book," etc. The title, as filed, was: "Under the Gaslight, A Romantic Panorama of the Streets and Homes of New York. By Augustin Daly, author of 'Leah, the Forsaken,' 'Griffith Gaunt,' 'Taming a Butterfly,' etc." The title as published was: "Under the Gaslight, A Totally Original and Picturesque Drama of Life and Love in These Times. In Five Acts. By Augustin Daly, author of 'Leah, the Forsaken,' 'Griffith Gaunt,' 'Taming a Butterfly,' etc., etc." On the filing of the bill a motion was made for a temporary

that the substantial identity between the two titles is doubtful and might deceive the public into the belief that they refer to different publications, it is fatal.[1]

(3) *Change of Title and Filing Title as Changed.* — An author may find it to his advantage to change the title of his work after he has taken the first step toward obtaining a copyright by filing the title. It has been held under the Revised Statutes that this may be done by filing a copy of the title as changed before the actual publication.[2] Under the present law this may be done on or before the day of publication.[3]

(4) *Abbreviation of Title in Advertisement of Work.* — The use of a part only of the title filed for copyright in an advertisement of the work, cannot, of course, affect the validity of the copyright.[1]

injunction. The motion was denied by the Circuit Court on the ground that the complainant had not a valid copyright in his play because of a material variance between the copy of the title deposited by him to obtain the copyright, and the title of the published play. Daly *v.* Brady, 39 Fed. Rep. 265. An answer to the bill and a replication were filed. On final hearing in the Circuit Court on the pleadings and proofs, the bill was dismissed, the court following the previous decisions as *res judicata*. Daly *v.* Webster, 47 Fed. Rep. 903. But the case being appealed to the Court of Appeals, that court held that there was no material variance, the title being deemed to be substantially "Under the Gaslight." In the opinion delivered by the court it was said: "That there is a difference between the title pages is plain, but we are unable to assent to the proposition that there is a variance in the title. What is the title of a book which the statute requires the author to file? It is the name which is given to the book, and by which it is designated and is to be known; the name by which it is to be called in the speech of the people; by which it is to be inquired for and sold. It may also include a subtitle, but it does not include a description of the book upon the title page. Thus, the title 'Webster's Dictionary' would be the title of the book, although a description of the book as "An American Dictionary of the English language" should follow; and if, in place of 'American,' the words 'United States' should be substituted, there would be no variance. Tried by this rule, we find here no variance in the title. The name of the play, the title to be given to it by the public, and by those who may buy and sell it, is 'Under the Gaslight;' the words immediately following, between the commas, are a mere description of the general character of the work, apparently not intended to be, and not in fact actually, used as any part of the title. The very arrangement of the words by the printer, and the choice of type, tend to show that the author did not mean them for a subtitle, and there is nothing in the record to constrain us to give them any such character." Daly *v.* Webster, 56 Fed. Rep. 483, 1 U. S. App. 573. See also Daly *v.* Brady, 69 Fed. Rep. 285; Daly *v.* Palmer, 6 Blatchf. (U. S.) 256, 6 Fed. Cas. No. 3552.

Publisher's Imprint — Variance in. — In a case in which it was contended that a map published in 1867 was not a new edition of a map published and copyrighted in 1865 and entitled to the protection of that copyright, for the reason that the two publications differed materially with respect to their title, it appeared that the only difference was that the words "Published by S. Farmer & Co., Detroit and Milwaukee, 1865," appearing on the earlier publication in connection with the title were, in the edition of 1867, altered by changing "1865" to "1867." It was held that these words properly constituted no part of the title, and that the variance was immaterial. Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228.

Statement in Title of Number of Volumes. — A work described in the title filed as in a certain number of volumes, may be published in a different number without affecting the validity of the copyright. Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195, 8 Fed. Cas. No. 4215.

1. Blume *v.* Spear, 30 Fed. Rep. 629; Daly *v.* Brady, 39 Fed. Rep. 265. See Daly *v.* Webster, 56 Fed. Rep. 483.

2. Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

3. It is to be noted that by the Revised Statutes as well as the earlier acts the copy of the title is to be filed "before publication" (U. S. Rev. Stat., § 4956), while by the terms of the present law this may be done "on or before the day of publication." 26 U. S. Stat. at L., p. 1107.

4. Departure from Copyright Title in Advertisement of a Work. — The title of a musical composition filed for copyright was "My Own Sweet Darling, Colleen Dhas Machree." This composition was published in a collection of songs. The publication had a front cover on which there was an engraving covering most of the outside page. At the bottom of that page there was a list of seven songs including the above mentioned song, which was given as "Colleen Dhas Machree," over the publisher's name and place of business, as an advertisement of those publications. The inside of the cover was entirely blank. On the next page the song and music in question commenced. Above the music was the title "My Own Sweet Darling, Colleen Dhas Machree." It was held that there was no variance between the title filed for copyright and that published. In the opinion of the court by Wheeler, J., it was said: "The composition was published under its full title, by which exactly it was copyrighted, standing at the head of it on the first page of it. The advertisement on the cover did not indicate that the pieces advertised were

(5) *By Whom Filed.* — The copy of the title may be filed by the agent of the author.[1]

c. DEPOSITING COPY OF WORK — (1) *Of Article Forming Part of Uncopyrighted Work.* — It has been held that this requirement of the statute is sufficiently complied with in the case of a single article by an American author published in a larger work which, by reason of its foreign authorship, is not copyrightable, by taking those sheets or pages which contain the article and depositing them in the librarian's office.[2]

(2) *Time of Depositing Copies.* — The courts in construing paragraph 4956 of the United States Revised Statutes, requiring two copies of the work, for which copyright is sought, to be delivered at the office of the Librarian of Congress, or deposited in the mail addressed to him "within ten days from the publication," have invariably taken the view that the provision does not require the copies to be mailed after publication, but that they may be mailed before the day of actual publication.[3] By the terms of the present law, the deposit of copies is to be made "not later than the day of the publication."[4] If there is a publication prior to such deposit, of course no copyright can be acquired.[5]

d. PUBLICATION. — It has been held that it is essential to the validity of a statutory copyright that the work be published within a reasonable time after the filing of the title page.[6]

e. INSCRIBING NOTICE OF COPYRIGHT — (1) *Contents of Notice* — (a) **In General.** — The object of the provision requiring the notice of copyright is to inform the public of the existence of a copyright, the time of its commence-

printed within; it merely signified that they were published in some shape by the orator. It was not necessary in advertising it that he should describe it in any particular manner; but when he came to printing the thing itself and giving that out, it was necessary that he should follow the title by which he copyrighted it, if he would keep that right. This he did, and the right would seem to be well preserved to him." Blume *v.* Spear, 30 Fed. Rep. 629.

1. **Agent of Author — Right of to File Title.** — In the case of Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764, it was held that the American agent of a foreign publishing firm, negotiating an agreement with an American author to write an article for use in a foreign encyclopædia and have the same copyrighted, has authority to deposit the title of such article for copyright purposes.

2. **Article Published in Foreign Encyclopædia.** — Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

3. **Deposit of Copies Before Publication.** — Thus, in Chapman *v.* Ferry, 18 Fed. Rep. 539, it was held sufficient to deposit the copies after printing and before formal publication.

And in the case of Belford *v.* Scribner, 144 U. S. 488, where the two copies of a book had been deposited one day before the publication, it was held that the statute was substantially complied with.

And in a case where the printed title of a photograph had been sent to the Librarian of Congress on January 6, 1888, and two finished copies had been sent to him on February 22, and within ten days of publication, it was held that there had been a sufficient compliance with this requirement. "It is not necessary that the copies should be mailed after publication; if mailed before, they are mailed within ten days of publication." Falk *v.* Donaldson, 57 Fed. Rep. 32. See the remedial Act of March 3, 1893, 27 U. S. Stat. at L. 743.

Work Published in Several Volumes. — In the case of a work published in several volumes, it has been held that delivery of the first volume within the period limited by law and of the others before action brought was sufficient. Dwight *v.* Appleton, 8 Fed. Cas. No. 4215. But this would not be sufficient under the present statute. Act of March 3, 1891, § 11, 26 U. S. Stat. at L. 1109.

4. 26 U. S. Stat. at L., p. 1106. See Garland *v.* Gemmill, 14 Can. Sup. Ct. Rep. 321. See also the remedial Act of March 3, 1893, 27 U. S. Stat. at L. 743.

5. Osgood *v.* A. S. Aloe Instrument Co., 83 Fed. Rep. 470.

6. Boucicault *v.* Hart, 13 Blatchf. (U. S.) 47, 4 Am. L. Rec. 726; Carillo *v.* Shook, 8 Chicago Leg. N. 258, 22 Int. Rev. Rec. 152, 5 Fed. Cas. No. 2407; Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12. See Centennial Catalogue Co. *v.* Porter, 5 Fed. Cas. No. 2546. *Compare* Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228; Ladd *v.* Oxnard, 75 Fed. Rep. 703.

Instance of Delay Held Not Unreasonable. — It has been held that delaying the publication of a photograph two months and eighteen days after the filing of the title page is not unreasonable. Falk *v.* Gast Lithograph, etc., Co., 48 Fed. Rep. 262.

Loan to Subscribers of Mercantile Ratings Book. — It has been held that there is a sufficient publication in the case of a book of credit ratings, where copies are loaned to subscribers for their use only, but not sold. Ladd *v.* Oxnard, 75 Fed. Rep. 703.

ment and by whom claimed.[1] A substantial compliance with the terms of the provision is all that is necessary.[2]

(b) **Statement of Entry for Copyright.** — It has been held that there is no sufficient compliance with the first of the two forms prescribed by the copyright law for the notice of copyright, unless the notice contains a statement of an entry in the office of the Librarian of Congress.[3] Nor is the second form prescribed by the statute, *i. e.*, the word "copyright," together with the year the copyright was entered and the name of the party by whom it was taken out, sufficiently complied with by the use of the word "registered." [4]

(c) **Date of Entry.** — There can be no valid copyright unless the notice contains the date of depositing the title of the work.[5] But an abbreviation of the date may suffice.[6] And the literal directions of the statute may be departed from with respect to the order of stating the date.[7]

Misrecital of Date. — A notice which gave the date of the copyright as one year later than the actual date of depositing the title page has been held defective.[8] But where the notice, by giving a date one year earlier than the true one, had the effect of shortening the term, the copyright was sustained.[9]

1. **Object of Provision Requiring Notice.** — See Snow *v.* Mast, 65 Fed. Rep. 995; Sarony *v.* Burrow-Giles Lithographic Co., 17 Fed. Rep. 591, on appeal, Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53.

2. **Substantial Compliance with the Provision Sufficient.** — Snow *v.* Mast, 65 Fed. Rep. 995; Myers *v.* Callaghan, 10 Biss. (U. S.) 139, 5 Fed. Rep. 726, *criticising* Baker *v.* Taylor, 2 Blatchf. (U. S.) 82.

3. **Sufficiency of Statement.** — Thus, a copyright notice in the following words: "Entered according to Act of Congress in the year 1878, by H. A. Jackson," was held insufficient for the reason that the words "in the office of the Librarian of Congress at Washington" were omitted. Jackson *v.* Walkie, 29 Fed. Rep. 15.

This notice would, however, have been sufficient had it also contained the word "copyright." Hefel *v.* Whitely Land Co., 54 Fed. Rep. 179.

Canada. — Under the statute of 38 Vict., c. 88, § 9, providing that the notice of copyright to be inserted in the title page of a copyrighted book should be in the following form: "Entered According to Act of Parliament of Canada in the year ——— by A. B. in the office of the Minister of Agriculture," it was held that the omission of the words "of Canada" in said form did not avoid the copyright, but that there was a sufficient compliance with the act. Garland *v.* Gemmill, 14 Can. Sup. Ct. Rep. 321.

4. **"Registered" Not the Equivalent of "Copyright."** — It has been held that the provision of the Act of June 18, 1874, 18 Stat. at L. 78, c. 301, is not complied with in the case of a copyright label by the use of the word "registered." Higgins *v.* Keuffel, 30 Fed. Rep. 627, 140 U. S. 428.

Notice Containing Surplus Words. — It has been held that this form is sufficiently complied with in the following notice: "Copyright entered according to Act of Congress 1889, by T. C. Hefel, civil engineer." In delivering the opinion of the court, Baker, J., said: "The notice embodies the exact words required by the last formula prescribed in the statute, with the additional words, 'Entered according to Act of Congress,' and the words 'civil engineer' following the author's name. These additional words simply amplify the formula prescribed by the statute, without in any manner affecting its meaning. They are to be regarded as surplusage. The maxim *utile per inutile non vitiatur* is decisive." Hefel *v.* Whitely Land Co., 54 Fed. Rep. 179.

5. **Date of Entry — Notice Must Contain.** — King *v.* Force, 2 Cranch (C. C.) 208, 14 Fed. Cas. No. 7791; Thompson *v.* Hubbard, 131 U. S. 123.

6. **Abbreviation of Date Sufficient.** — Thus, notices of copyright in the following form: "Copyright '94. By B. L. Snow," were held sufficient. Snow *v.* Mast, 65 Fed. Rep. 995. And a similar notice was held sufficient in Bolles *v.* Outing Co., 45 U. S. App. 449, 77 Fed. Rep. 966.

7. **Reversing Order of Date and Word "Copyright."** — A notice reading: "1886. Copyrighted by B. J. Falk, New York," though criticised as less symmetrical and concise than the statutory form, has been held sufficient. Falk *v.* Schumacher, 48 Fed. Rep. 222; Falk *v.* Seidenberg, 48 Fed. Rep. 224.

8. **Mistake in Date.** — Where the title of a book was deposited in 1846, and the notice of the entry as printed in the book stated that it had been made in 1847, and there was evidence tending to show the plaintiffs' knowledge of the error before publication, the court held that these facts deprived the plaintiffs of their copyright in the book, notwithstanding the date might have been a mistake. Baker *v.* Taylor, 2 Blatchf. (U. S.) 82.

9. Where the title page of a book was deposited in January, 1867, and the notice printed in the volume, by reason of a mistake in the imprint of the entry, stated that it was entered according to Act of Congress in the year 1866, it was held that this mistake in the notice did not invalidate the copyright. This case was *distinguished* from that of Baker *v.* Taylor, 2 Blatchf. (U. S.) 82, the court saying that "the main difference between that case and this is that here the entry states that the title was deposited in 1866, when, in fact, it was not deposited until 1867. The mistake arose probably from the volume having been printed in another state in 1866, and it was assumed that the certificate of the title page was filed in the

(d) **Name of Person Taking Out the Copyright.** — There is not, of course, any sufficient compliance with the provision requiring the inscription of a copyright notice, if the name of the person taking out the copyright is omitted from the notice.[1]

Giving Surname and Initial of Christian Name. — But the provision is sufficiently complied with by giving the surname of such person with the initial of his Christian name,[2] or even by giving the surname alone.[3]

Giving Trade Name. — And a notice in which the trade name by which the individual taking out the copyright does business is used, instead of the individual name, is sufficient under the statute.[4]

(2) *In What Copies Inserted.* — The notice of copyright must be inserted in

proper office that year. It may be admitted that there is no distinction in principle between that case and this; but it seems to be rather a hard rule to deprive a party of the product of his labor simply because a mistake of this kind has been made. The author or publisher has endeavored to comply in good faith with the provisions of the statute, but has committed an error, unintentionally, it is presumed, in stating the year. According to the imprint contained in the book in this case, the right would expire before it would according to the filing of the certificate of the title with the proper officer; and therefore it would seem no one could be damnified by the error which was committed." Myers *v.* Callaghan, 10 Biss. (U. S.) 139.

Under the English Statute of 8 Geo. II., c. 13, a slight mistake in the date of copyright required to be printed upon the article will not deprive one of the right to the protection of the statute. See Low *v.* Routledge, 33 L. J. Ch. 717; Mathieson *v.* Harrod, L. R. 7 Eq. 270; Correspondent Newspaper Co. *v.* Saunders, 12 L. T. N. S. 540; Murray *v.* Bogue, 1 Drew. 353.

1. Name of Person Taking Out the Copyright. — Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. Rep. 291, 72 Pat. Office Gaz. 418; Thompson *v.* Hubbard, 131 U. S. 123; Osgood *v.* A. S. Aloe Instrument Co., 83 Fed. Rep. 470.

Variance Between Name Given upon Depositing Title and in the Notice. — In a case where the complainant's copyright was attacked on the ground that the printed title was deposited by "E. B. Myers and Chandler," and the printed notice of the entry of copyright in the volume as published purported to show that the copyright was entered by E. B. Myers alone, it was held that, under the circumstances of the case, as the printed notice contained the name of E. B. Myers, the variance was immaterial, and that the statute was substantially complied with, particularly as it was not shown that the defendants were misled by the variance or induced to do or omit anything because of it. Callaghan *v.* Myers, 128 U. S. 617.

Under the English Copyright Designs Act (8 Geo. II., c. 13), which gives a monopoly to the proprietors of prints and prescribes that the day of the first publication "shall be truly engraved with the name of the proprietor on each plate and printed on every such print or prints," it has been held that it is not necessary that the designation "proprietor" be added to the name. Newton *v.* Cowie, 4 Bing. 234, 13 E. C. L. 412; Graves *v.* Ashford, L. R. 2 C. P. 410.

2. Surname, with Initial of Christian Name, Sufficient. — Thus, a copyright notice reading as follows: "Copyright, 1882, by N. Sarony," has been held sufficient. Sarony *v.* Burrow-Giles Lithographic Co., 17 Fed. Rep. 591; Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53.

3. Surname Alone Sufficient. — In the case of Bolles *v.* Outing Co., 45 U. S. App. 449, 77 Fed. Rep. 966, a notice reading, "Copyright 93, by Bolles, Brooklyn," was held sufficient, although the initials or Christian name was omitted. "In the present case the notice not only gave the author's surname, but also his residence; and it appeared by the evidence that the city of his residence was also his place of business, and it did not appear that there was any photographer there or elsewhere of the name of Bolles."

Under the English Act of 8 Geo. II., c. 13, it has been held that giving the surname of the proprietor only, without his Christian name, is sufficient. Newton *v.* Cowie, 4 Bing. 234, 13 E. C. L. 412; Rock *v.* Lazarus, L. R. 15 Eq. 107.

4. Trade Name — Use of in Copyright Notice. — In Scribner *v.* Henry G. Allen Co., 49 Fed. Rep. 854, it appeared that Charles Scribner was at one time doing business under the name of Charles Scribner's Sons, and that during this period he bought the right to obtain a copyright upon a certain book, and did the various acts required to copyright said book, in the name of "Charles Scribner's Sons." Judge Shipman held the notice sufficient. He said: "At common law, individuals are permitted to carry on business under any name or style which they may choose to adopt; * * * and if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used."

This case was followed in Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808, wherein it was held that a copyright notice which read: "Copyright, 1882, by Photographische Gesellschaft." was sufficient under the statute, for the reason that the name Photographic Company used in the notice was the trade name created by the complainant and extensively used by him in his business for many years.

In *England*, under the statute 8 Geo. II., c. 13, § 1, giving copyright in prints and requiring the name of the proprietor to be engraved on each plate and printed on every copy, it has been held that if a trading firm is the proprietor, it is sufficient that the trading name of the firm is put on the article. Rock *v.* Lazarus, L. R. 15 Eq. 107.

the several copies of every edition which the owner of the copyright, as controlling the publication, publishes.[1]

Revised Editions. — The omission in a revised edition of a copyrighted work, of any notice of the original copyright, does not affect the validity of a copyright secured in the new edition, and covering the new and original matter therein, if that copyright is properly noticed.[2]

1. Edition Published by Assignee of Copyright. — The requirement in regard to the insertion of the copyright notice extends to editions published by the grantee of a copyright, during his ownership thereof. Hence, where the assignee of a copyright in a book published an edition thereof without inserting a sufficient copyright notice, it was held that he could not maintain an action, either at law or in equity, against his grantor for infringement. Thompson *v.* Hubbard, 131 U. S. 123.

Work in Several Volumes. — Prior to the passage of the Act of March 3, 1865, it was decided that the "information of copyright being secured," if duly entered in the first volume of a work of several volumes, was sufficient. Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195, 8 Fed. Cas. No. 4215. See Lawrence *v.* Dana, 4 Cliff. (U. S.) 1.

But it has, in effect, been said, referring to the Revised Statutes and those in force prior to their enactment, that, while they do not expressly prescribe that the copyright notice shall be printed in every volume, still, as the chief object of requiring the notice to be given is to inform and warn the public that the book is protected by a copyright which cannot be infringed with impunity, it is clear that the intention of Congress may be often defeated unless the prescribed notice appears in every volume of the work. Drone on Copyright 274.

However, it is now, by an Act of Congress approved March 3, 1891, to take effect July 1, 1891, provided as follows: "That for the purpose of this act each volume of a book in two or more volumes, when such volumes are published separately and the first one shall not have been issued before this act shall take effect, and each number of a periodical shall be considered an independent publication, subject to the form of copyrighting as above." 26 U. S. Stat. at L. 1109.

Removal of Notice After Work Leaves Publisher. — But the copyright of a work may be infringed, although it does not bear the notice of copyright, if it bore the notice at the time it left the publisher. Falk *v.* Gast Lithograph, etc., Co., 54 Fed. Rep. 890.

2. Omission in New Edition of Original Copyright Notice — Validity of New Copyright Not Affected by. — Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Banks *v.* McDivitt, 13 Blatchf. (U. S.) 163.

In the case of Lawrence *v.* Dana, 4 Cliff. (U. S.) 1, a suit for an accounting and for an injunction restraining the violation of an alleged copyright to a certain edition, with notes, of Wheaton's Elements of International Law, it appeared that the complainant Lawrence had, under an agreement with Catharine Wheaton, widow of Henry Wheaton, prepared annotations for Wheaton's Elements of International Law. The annotations were published in two new editions of that work, one in 1853 and the other in 1863. A copyright in each of these editions was taken out by Mrs. Wheaton. The complainant based his claim of title to the additions to and emendations of the text of the two editions published under his supervision, the memoir of the author, notes, and other new matter, upon an agreement between Mrs. Wheaton and himself that she should make no use of his notes, etc., in any new edition of the work without his consent, and that she should give to him the right to make any use that he might see fit to make of his own notes. It was admitted that notice of the copyright of 1836 (an edition having been published in that year) was not published in the editions of 1855 and 1863. The complainant contended that while this destroyed the copyright of 1836, it left those of 1855 and 1863 valid as to the new matter then added, namely, the contributions of the complainant. But the defendant contended that this omission destroyed the copyrights of 1855 and 1863. The court, however, held that the printing of a notice of the copyrights secured in the original editions was not necessary to the validity of the copyright in these editions covering the complainant's additions to, emendations of, and improvements in the original work.

Same — Effect on Original Copyright. — While this was all that was decided, or under the facts of the case could have been decided, in this case, Clifford, J., in delivering the opinion of the court, goes farther, and in *obiter* expressions seems to take the view that the publication of these editions without notice of the copyright secured in the original edition does not constitute an abandonment of the copyright secured in that edition. He says that neglect to comply in a second edition with the requirement that the "information of copyright secured" shall be "inserted in the several copies of each and every edition," will not vitiate the copyright of the original edition, if it was regularly secured. "Publishers may be in the habit of inserting more than one notice in new editions, but there is no Act of Congress prescribing any such condition."

The propriety of this construction of either the law of 1831 under which the decision was rendered, or the provisions of the existing statute, both laws being with regard to their provisions for copyright notice substantially the same, is not free from doubt. There can be no question but that the insertion of a notice of the original copyright is not necessary to the validity of the copyright secured in the revised work. The new and original matter which the new publication contains is protected by the copyright secured on the new edition, even though that copyright only is noticed. But, since copyright can only be secured in that which is new and original (see *supra*, this title, *Subjects of Copyright*), the copyright secured for the new publication merely extends to and

Requirement Limited to Published Editions. — The statute provision requiring the inscription of a notice of copyright refers to a published edition, which is an edition offered to the public for sale or circulation. A card or sheet of miniature copies of copyrighted photographs, intended for the inspection of dealers only, to enable them to give orders, has been held not to be one of the published editions of the photographs, within the meaning of this section.[1]

Copies Deposited with Librarian of Congress. — The act of transmitting to or depositing with the Librarian of Congress two copies of the book for which copyright is sought, is an act required by the Act of Congress, and it is not, under the statute, necessary that such copies shall contain any notice of the copyright itself.[2]

(3) *Place of Inscribing Notice.* — It would seem that the owner of a copyright cannot maintain an action for infringement, unless he has inserted the copyright notice at the specified place.[3]

protects the new matter therein; copyright in the old matter can only be claimed by virtue of the earlier copyright. See Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228. The purpose of the notice of copyright being to inform the public of the existence of copyright, of the time of copyrighting, etc., it is apparent that giving notice of the later copyright only does not give this information. The copyright on the old matter must run from the time when the original copyright was secured, otherwise it would be possible to practically perpetuate the copyright in a work by publishing somewhat altered editions and copyrighting them. But by inserting the notice of the new copyright only, the public is virtually informed that the copyright on all the matter contained in the publication runs from the date given in that notice, when, in fact, the copyright in the old work may have been obtained a number of years before. This, manifestly, would not. under the decision in Baker *v.* Taylor, 2 Blatchf. (U. S.) 82, holding defective a notice which gave the date of the entry of copyright one year later than the true date, be a sufficient compliance with the requirement as to notice, if the publication were merely a new edition without additional or new matter. It is difficult to see why the fact of the publication of the old along with the new matter for which a new copyright is obtained should make a difference in this regard. That it does not, a very able writer on the law of copyright, who favors the view here advanced, has insisted in the following words: "Whether, then, the original work or any unchanged matter which appeared in it is entitled to protection, is to be determined solely by the validity of the original copyright, and is in no wise affected by the fact whether another copyright for an improved edition has or has not been obtained. It is conceded that each copy of every edition which is not different from the original must contain the original notice, and that any copies published without such notice become common property. The principle is the same when the original is reprinted with new matter in a new edition. The new copyright covers the new, but not the old matter; the new notice of entry applies to what then first appears in print, but not to what was before published. In such case the original work is reprinted without the notice of entry of that copyright by which alone it is protected. It must, therefore, become common property, not less than when it appears without the notice of a new entry of copyright." Drone on Copyright 273.

According to this view, then, the publication of a revised edition of a work, with a notice of the new but none of the original copyright, works an abandonment of all except the new matter which the work contains.

Approved Course with Regard to Inserting Copyright Notices in New Editions. — According to this view, it follows that in the case of the publication of a work which consists of old matter already protected by copyright, and of new or revised matter, it is necessary for the full protection of the revised work, *i. e.*, of both the old and new matter which it contains, that a copyright be secured for the revised work, and that notices of both copyrights be inserted in each copy published. While some publishers in publishing new and revised editions of copyrighted works have neglected to insert the notice of the original copyright, others invariably do so. The latter is unquestionably the far safer course to pursue.

If, however, the new publication differs so radically from the earlier publication on which it is based, that it is in all its parts copyrightable as a new and original work (as may well be; see *supra*, this title, the division *Subjects of Copyright*), then the insertion of a notice of the copyright in the former work can, of course, serve no useful purpose. As Mr. Drone (Drone on Copyr. 273) has well said: "The printing of the original notice, or the absence of it, in any subsequent edition can have no effect on the copyright in the new matter of that edition. * * * The revised edition, to the extent that it differs from any preceding edition, is a new work within the meaning of the law."

1. Miniature Copies of Photograph for Use of Dealers. — Hence, the failure to inscribe a sufficient notice of copyright on such copies has been held not to work a forfeiture of the copyright. Falk *v.* Gast Lithograph, etc., Co., 54 Fed. Rep. 890.

2. Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. Rep. 291, 72 Pat. Office Gaz. 418; Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12.

3. Place of Notice. — See Rigney *v.* Raphael Tuck, etc., Co., 77 Fed. Rep. 173.

Musical Compositions. — In the case of a musical composition forming part of a collec-

(4) *In the Case of Paintings.* — It has been contended that the notice need not be placed on the painting itself, but that it will be sufficient if it appears upon the reproductions. It has, however, been held that a published painting is not entitled to the protection of statutory copyright unless the required notice is inscribed upon the painting itself as well as the reproductions.[1]

4. Wrongful Use of Copyright Notice. — The statutes prescribe a penalty of one hundred dollars for the unlawful use of a copyright notice, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States.[2]

Cases in Which Penalty Incurred. — The provision, as it read in the former statutes, has been construed as imposing the penalty only in the case of using the notice on copyrightable articles.[3] But this has been changed by the recent amendment, and it is now immaterial whether the article on which the notice is wrongfully placed is or is not properly a subject of copyright.[4]

Defective Notice. — And it has been held to be immaterial that the notice is defective in that it is inscribed at a place different from that which the statute directs.[5]

Number of Penalties Recoverable. — And it has been held that while it may be true that if, upon different days, under different circumstances, the defendant printed separate copies, each transaction thus separate would constitute a separate offense, yet when the printing of many copies is a single continuous act, only one offense is committed thereby.[6]

Penalty Recoverable by Only One Person. — The penalty is recoverable by only one person, and an action for the penalty brought by two persons cannot be maintained.[7]

VIII. Extent and Limitations of Copyright Protection — 1. Statutory Provisions — Right to Reproduce Copies. — By the terms of the United States Copyright Act, where the proper person complies with the provisions of the law he shall have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the copyrighted work.[8]

Right to Public Representation of Dramatic Composition. — And, in the case of a dramatic composition, he has the sole right of publicly performing or repre-

tion of such compositions, it was held that the notice of copyright was properly inscribed on the first page of the composition. A copyrighted song was published as one of a collection of songs. This collection had a front cover on which there was an engraving covering most of the outside page. At the bottom of that page there was a list of seven songs, including the one in question, as an advertisement. There was no notice of or reference to any copyright on that page. The inside of the cover was entirely blank. On the next page the song and music commenced. Above the music was the title, and below the music was the notice of copyright. It was held that the copyright notice was in compliance with section 1 of the Act of 1874, 18 U. S. Stat. at L. 78, Rev. Stat. Supp. 40, and that there was no loss or abandonment of the copyright by failure to give notice of it. Blume *v.* Spear, 30 Fed. Rep. 629.

Prints. — Under section 5 of the Copyright Act of February 3, 1831 (4 U. S. Stat. at L. 436), requiring a copyrighted engraving to have the information of its being copyrighted "impressed on the face thereof," it was held that when the required notice is plainly engraved on the plate from which a print is taken, within the line of a reasonable margin, and where it would not be covered when properly framed, it is impressed on the face within the meaning of the statute. Rossiter *v.* Hall, 5 Blatchf. (U. S.) 362.

1. Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. Rep. 54, 33 U. S. App. 399, *overruling* Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. Rep. 445.

2. **Penalty for Wrongful Use of Notice.** — U. S. Rev. Stat., § 4963, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1109, and by the Act of March 3, 1897, 29 U. S. Stat. at L. 694. See Rigney *v.* Dutton, 77 Fed. Rep. 176.

Canadian Copyright Act. — The Copyright Act of Canada (Rev. Stat. Canada, c. 62) contains a similar provision. Lancefield *v.* Anglo-Canadian Music Pub. Assoc., 26 Ont. Rep. 457.

3. Rosenbach *v.* Dreyfuss, 2 Fed. Rep. 217, 21 Alb. L. J. 472. See Rigney *v.* Dutton, 77 Fed. Rep. 176.

4. Act of March 3, 1897, 29 U. S. Stat. at L. 694.

5. **Place of Inscribing Notice Immaterial.** — Rigney *v.* Raphael Tuck, etc., Co., 77 Fed. Rep. 173.

6. Taft *v.* Stephens Lith., etc., Co., 38 Fed. Rep. 28.

7. Ferrett *v.* Atwill, 1 Blatchf. (U. S.) 154.

8. U. S. Rev. Stat., § 4952, 26 U. S. Stat. at L. 1107.

senting it or causing it to be performed or represented by others.[1]

Right to Dramatize or Translate. — And authors or their assigns shall have exclusive right to dramatize or translate any of their works for which copyright shall have been obtained under the laws of the United States.[2]

2. Parts of Book Protected by Copyright — *a.* GENERAL RULE. — A copyright secured in a book protects all its contents.[3]

b. BOOK CONSISTING IN PART OF MATTER NOT COPYRIGHTABLE. — While those parts of a book which are not proper subjects of copyright will not, of course, come within the protection of the copyright secured on the whole work, the fact that such matter has been incorporated will not affect the validity of the copyright in the rest.[4]

c. PRINTS, ENGRAVINGS, ETC., CONTAINED IN BOOK. — The copyright secured in a book extends to and protects not only the letter-press but also the prints, engravings, etc., which are contained in and form part of the work.[5]

d. WHETHER TITLE PROTECTED. — It may be that in some special cases, as where it is original, the title of a book will be protected as part of the book itself.[6] But the cases where copyright protection is accorded to the title of a work are exceptional. Indeed, there is much doubt as to whether a copyright extends to the title.[7] At any rate, the copyright secured in a work will not extend to the title if it possesses no originality but consists of expressions in common use.[8]

1. U. S. Rev. Stat., § 4952, 23 U. S. Stat. at L. 1107.

2. U. S. Rev. Stat., § 4952, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1107.

3. Harper *v.* Shoppell, 26 Fed. Rep. 519.

Book Consisting of Number of Independent Compositions. — Where a book consists of a number of independent compositions, and a copyright is secured on the work as a whole, each of the parts will be protected as well as the whole. White *v.* Geroch, 2 B. & Ald. 298; D'Almaine *v.* Boosey, 1 Y. & Coll. 288. Each map in a statistical atlas need not be separately copyrighted; they will be protected by a copyrighting of the work as a whole. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

4. Barfield *v.* Nicholson, 2 Sim. & S. 1; Low *v.* Ward, L. R. 6 Eq. 418; Cary *v.* Longman, 1 East 360; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Black *v.* Henry G. Allen Co, 42 Fed. Rep. 618.

5. Prints, etc., Contained in Book Protected. — Roworth *v.* Wilkes, 1 Campb. 94; Wilkins *v.* Aikin, 17 Ves. Jr. 422; Bogue *v.* Houlston, 5 De G. & Sm. 267, 10 Eng. L. & Eq. 215; Bradbury *v.* Hotten, L. R. 8 Exch. 1; Maple *v.* Junior Army, etc., Stores, 21 Ch. Div. 369; Cobbett *v.* Woodward, L. R. 14 Eq. 407; Harper *v.* Shoppell, 26 Fed. Rep. 519; Munro *v.* Smith, 42 Fed. Rep. 266.

6. Title of Work. — Osgood *v.* Allen, 1 Holmes (U. S.) 185.

7. Weldon *v.* Dicks, 10 Ch. Div. 247; Dicks *v.* Yates, 18 Ch. Div. 76; Munro *v.* Smith, 42 Fed. Rep. 266; Black *v.* Ehrich, 44 Fed. Rep. 793. See 29 Am. L. Rev. 290, 20 Alb. L. J. 218, 10 Cent. L. J. 82, 104, 123.

Title Protected Where Infringement Constitutes a Fraud. — In the case of Dicks *v.* Yates, 18 Ch. Div. 76, it was said that some decisions, such as Metzler *v.* Wood, 8 Ch. Div. 606, and Weldon *v.* Dicks, 10 Ch. Div. 247, apparently giving copyright protection to a title, were in reality cases of common-law fraud, and that they simply affirmed the principle that where one person publishes a book under a certain name the publication of a book by another person under the same name and selling it as though it were the book first published constitutes a fraud.

The cases of Mack *v.* Petter, L. R. 14 Eq. 431, and Kelly *v.* Byles, 13 Ch. Div. 682, were, it seems, decided upon this principle.

In the case of Shook *v.* Wood, 10 Phila. (Pa.) 373, the defendant was restrained by injunction from using the title of a dramatic composition which had been copyrighted, notwithstanding the fact that the body of the play intended to be represented under that title was different from the copyrighted play. "In this instance it appeared clearly to the court from the announcement upon the bills and from the advertisements of defendant that his intention was at least to lead the public to believe that the genuine play of 'Les Deux Orphelines,' or 'The Two Orphans,' of which plaintiffs are owners, was to be performed at his theatre." See also Estes *v.* Williams, 21 Fed. Rep. 189. *Compare* Black *v.* Ehrich, 44 Fed. Rep. 793.

Title Protected as a Trade-mark. — It seems that the exclusive right to the use of a title may, in proper cases, be claimed under the law of trade-mark. Potter *v.* McPherson, 21 Hun (N. Y.) 559. See the title TRADE-MARKS.

8. Title Consisting of Words in Common Use. — Thus, such words as "Charity," "Faith," and the like cannot be appropriated as the title of a copyrighted work and receive the protection of the copyright. Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511. Nor can a hackneyed phrase like "Splendid Misery" be protected by copyright. Dicks *v.* Yates, 18 Ch. Div. 76. Where the words "Post Office Directory" had been used by the plaintiff as the title of a copyrighted work, an injunction restraining the defendants from using these words as a part of

3. Right to Sell by Subscription Only. — The exclusive right of "vending" a copyrighted work, secured to the owner of a copyright by the terms of the United States Copyright Act, protects him in the right to sell the work by subscription only. Thus, if the owner of a copyrighted book intrusts copies of the book to an agent or employee for sale only by subscription and for delivery to the subscribers, and the agent fraudulently sells to non-subscribers who have knowledge or notice of the fraud, such sale is an infringement of the original owner's copyright.[1] This right to enjoy the benefit of the copyright statute results from the fact that the owner has never parted with the title to the book or the copyright, although he parted with the possession of the book.[2]

4. Limitations of Copyright Protection — *a.* IN GENERAL. — The protection afforded by copyright is not permitted to trench upon the domain of patent law.

b. ART OR SYSTEM EXPOUNDED. — Thus, the copyright in a book does not extend to and protect the art or system of which the work is an exposition.[3] That protection of the art or system which a book explains or illustrates is the province not of copyright, but of letters patent.[4]

their directory was refused. Kelly *v.* Byles, 13 Ch. Div. 682. In Schove *v.* Schmincke, 33 Ch. Div. 546, it was said that the mere taking of a title consisting of two ordinary words of the English language, such as "Castle Album," would not be an infringement of copyright.

1. Sale by Subscription Only — Right to, Protected by Copyright. — In the case of Henry Bill Pub. Co. *v.* Smythe, 27 Fed. Rep. 914, the complainant had published Blaine's "Twenty Years of Congress," to be sold only by subscription to buyers of single copies. The defendant surreptitiously procured a few copies which he offered for sale in his bookstore, and the sale was enjoined. In the opinion delivered in this case by Hammond, J., the case of Clemens *v.* Estes, 22 Fed. Rep. 899, was distinguished as follows: "There, as here, the book was sold by subscription; but the agents had purchased the copies of the book and had bound themselves not to sell except by subscription. The defendants had no notice of that agreement of the agents, and the court refused to enjoin them. I do not know that I need to express the opinion here, but it seems to me that the court might have gone further and * * * held that a sale by the agents in violation of their agreement, even with notice to the defendants, would have been no infringement of the copyright. * * * The agents being owners of the copies of the book had a right to sell them, so far as the copyright goes; and their contract not to sell them was not within the domain of the copyright statute." See also Rider, Petitioner, 16 R. I. 271.

2. Harrison *v.* Maynard, 61 Fed. Rep. 689, 26 U. S. App. 99.

3. System of Bookkeeping. — In a case where the complainant sued for the infringement of a book or series of books entitled "Selden's Condensed Ledger, or Bookkeeping Simplified," the object of which was to exhibit and explain a peculiar system of bookkeeping, it appeared that the copyright therein had been secured by the complainant's testator; that the book or series of books of which the complainant claimed copyright consisted of an introductory essay explaining the system of bookkeeping referred to, to which were annexed certain forms or blanks, consisting of ruled lines and headings illustrating the system and showing how it was to be used and carried out in practice. The system effected the same results as bookkeeping by double entry; but by a peculiar arrangement of columns and headings presented the entire operation of a day, a week, or a month on a single page, or on two pages facing each other, in an account book. The defendant used a similar plan so far as results were concerned; but made a different arrangement of the columns, and used different headings. The court said that "if the complainant's testator had the exclusive right to the use of the system explained in his book, it would be difficult to contend that the defendant does not infringe it, notwithstanding the difference in his form of arrangement; but if it be assumed that the system is open to public use it seems to be equally difficult to contend that the books made and sold by the defendant are a violation of the copyright of the complainant's book, considered merely as a book explanatory of the system." It was, however, in an elaborate and instructive opinion delivered in this case by Mr. Justice Bradley, decided that the complainant could not, under the law of copyright, claim exclusive property in a system of bookkeeping by means of a book in which that system was explained. Baker *v.* Selden, 101 U. S. 99.

System of Stenography. — It was held in Griggs *v.* Perrin, 49 Fed. Rep. 15, upon the authority of Baker *v.* Selden, 101 U. S. 99, that the copyright of a book explaining a new system of stenography is not infringed by a book explaining the same system and using the same characters to represent the system, unless the copyrighted book, considered merely as a literary production, is copied.

4. Distinction Between Scope of Copyright and Letters Patent. — In an elaborate and lucid opinion delivered in the case of Baker *v.* Selden, 101 U. S. 99, Mr. Justice Bradley shows that while a copyright may be obtained in a work which expounds an art or system, whether new or old, an exclusive right to the art or system expounded can only be claimed by the law of patent right. He says: "A treatise on the composition and use of medi-

c. THEORIES, SPECULATIONS, OR OPINIONS. — Theories, speculations, or opinions, however original they may be, are not covered by the copyright of a book in which they are propounded or expressed.[1]

d. SUBJECT OF WORK. — There can, of course, be no copyright in the subject of a work.[2]

cines, be they old or new; on the construction and use of ploughs or watches or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective — would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government. The difference between the two things, letters patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book if he pleases; but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries. The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book without getting a patent for the art, the latter is given to the public. The fact that the art [is] described in the book by illustrations of lines and figures, which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book. The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application. Of course these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said that their form is their essence, and their object the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition as are the lines of the poet or the historian's periods. On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright. The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art, would undoubtedly be an infringement of the copyright."

1. Opinions Advanced in Book Not Covered by Copyright. — Pike *v.* Nicholas, L. R. 5 Ch. 251; Simms *v.* Stanton, 75 Fed. Rep. 6. See Stowe *v.* Thomas, 2 Wall. Jr. (C. C.) 547, 2 Am. L. Reg. 210.

Selections of Winning Horse. — The plaintiff, who was the publisher of a registered weekly periodical, inserted each week under the title of "One Horse Selections," a list of horses which he expected to win at races in the ensuing week. The defendants published each day, at race meetings, a sheet or card giving under the title "The Specials, One Horse Finals," a list of horses which the plaintiff and other sporting authorities had selected as likely to win in races on that particular day, with the names of those who had selected them. It was held that the announcement of the horses which the plaintiff had selected as winners was not in the nature of a literary composition which could be protected under the copyright in the plaintiff's periodical. Chilton *v.* Progress Printing, etc., Co., (1895) 2 Ch. 29.

2. Kenrick *v.* Lawrence, 25 Q. B. Div. 99; Centennial Catalogue Co. *v.* Porter, 5 Fed.

e. Form and Size of Book. — Nor does the copyright secured in a book cover its form and size.[1]

f. Plan and Symbols Used in Imparting Information. — A copyright does not extend to and protect the symbols and signs used in a work.[2] or the general plan of imparting the information.[3]

g. Mode of Advertising. — And it has been held that a copyright secured in a work designed for the purposes of advertisement does not protect the plan of advertising adopted.[4]

h. Fair Use of Copyrighted Work. — Copyright differs from patent right in the respect that some use of the contents of a book or treatise antecedently made, composed, and copyrighted by another person may be made by a subsequent writer in making and composing a new book upon the same subject, whether the contents of the antecedent book or treatise were wholly original or were partly original and partly made up of selections from other authors.[5]

IX. Term of Copyright and Renewal — **Original Term.** — The statutes of the United States provide that a copyright shall continue for the term of twenty-eight years from the time of recording the title of the copyrighted work.[6] At the end of this period the whole work, including the title, becomes public property unless there is a renewal in accordance with the provision for an extension.[7]

Cas. No. 2546. See *infra*, this title, the section *Infringement*, subdivision *In the Case of Compilations*.

1. Merriam *v.* Famous Shoe, etc., Co., 47 Fed. Rep. 411. But see the title Trade-marks.

2. **Coloring of Map and Key Thereto.** — Where the complainants had published a series of maps for the use of insurers, using a peculiar system of coloring and signs, explained by a key, and the defendants published maps of a different territory, which were arranged substantially on the same plan, it was held that there was no infringement of the complainant's copyright in their maps. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "The complainants have no more an exclusive right to use the form of the characters they employ to express their ideas upon the face of the map than they have to use the form of type they select to print the key. Scarcely any map is published on which certain arbitrary signs, explained by a key printed at some convenient place for reference, are not used to designate objects of special interest, such as rivers, railroads, boundaries, cities, towns, etc.; and yet we think it has never been supposed that a simple copyright of the map gave the publisher an exclusive right to the use upon other maps of the particular signs and key which he saw fit to adopt for the purposes of his delineations. That, however, is what the complainants seek to accomplish in this case. The defendant has not copied their maps. All he has done at any time has been to use to some extent their system of arbitrary signs and their key." Perris *v.* Hexamer, 99 U. S. 674.

3. **Plan of Imparting Information.** — Burnell *v.* Chown, 69 Fed. Rep. 993.

4. **Plan of Advertising.** — Ehret *v.* Pierce, 10 Fed. Rep. 553, 18 Blatchf. (U. S.) 302.

In a suit where the plaintiff sought to restrain the infringement of a copyrighted chart of artificial teeth, it appeared that the defendant had published a chart which, while not copied from the plaintiff's, was constructed upon the same plan as that. The court held that the plaintiff could have no copyright in the plan, and that therefore the defendant's chart was not an infringement. In delivering the opinion of the court Butler, J., said: "The defendant has not copied and published the plaintiff's charts, but has employed simply the same plan of advertising his own manufacture. That he has done more cannot justly be urged. Has he trespassed upon the plaintiff's rights by so doing? Without considering the question whether the plaintiff has secured a valid copyright for anything, it is sufficient to say that we are well satisfied he has not secured a monopoly of this plan. The copyright laws do not embrace such an object. It could be secured, if at all, only by letters patent. That it could be thus secured we do not mean to suggest. To enlarge upon this point would not be profitable. Its truth, indeed, seems so obvious as to forbid, if not preclude, enlargement." S. S. White Dental Co. *v.* Sibley, 38 Fed. Rep. 751.

5. Lawrence *v.* Dana, 4 Cliff. (U. S.) 1. See *infra*, this title, *Infringement*.

6. U. S. Rev. Stat., § 4953.

Works Out of Print. — Before the expiration of the statutory period, the proprietor of a copyright cannot lose his right of exclusive publication in consequence of the work becoming out of print and obsolete, and of little or no value for a number of years. Weldon *v.* Dicks, 10 Ch. Div. 247.

Publication in Foreign Encyclopædia. — Nor is the copyright in an article lost by reason of its publication in a volume such as a foreign encyclopædia, the bulk of which is *publici juris*. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618, 56 Fed. Rep. 764.

7. **Exclusive Right to Title Expires with Copyright.** — Merriam *v.* Holloway Pub. Co., 43 Fed. Rep. 450; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. Rep. 411.

Renewal Term. — The statutes provide that the author, inventor, or designer, if he be still living, or his widow or children, if he be dead, shall have the right to a renewal for the further term of fourteen years.[1]

Who Entitled to Renewal Term — Assignee of Copyright. — While the language of this provision does not extend to a proprietor as distinguished from an author, it has been held, in cases where the author had transferred his copyright by an agreement which showed that he parted with his whole interest, including the renewal as well as the original term, that the assignee was entitled to the extension.[2]

Formalities for Securing Renewal Term. — To secure this extension the title of the work must be recorded a second time, and the other requirements applicable to the original right be complied with. This must be done within six months before the expiration of the first term. Within two months from the date of the renewal, a copy of the "record" must be published for four weeks in one or more newspapers printed in the United States.[3]

X. Transfer of Copyright — 1. In General. — The transfer of copyright may be effected either by operation of law or by voluntary assignment.

2. Assignment of Partial Interest. — The assignment need not be of the whole interest; an undivided part of a copyright may be assigned so that the copyright may become "the undivided property of joint owners."[4]

3. Assignment to Nonresident Alien. — And the assignment may be to a nonresident foreigner.[5]

4. Necessity of Writing. — Under both the English and American statutes the assignment of a copyright must be in writing,[6] except that in England the

1. U. S. Rev. Stat., § 4965, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1107.

2. **Assignee's Right to Renewal Term.** — Paige *v.* Banks, 13 Wall. (U. S.) 608; Cowen *v.* Banks, 24 How. Pr. (U. S. Ct.) 72. But see Pierpont *v.* Fowle, 2 Woodb. & M. (U. S.) 23.

3. U. S. Rev. Stat., § 4965, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1107.

4. **Transfer of Partial Interest.** — Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764, 42 Fed. Rep. 618; Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808. See Sweet *v.* Cater, 11 Sim. 572; Hudson *v.* Patten, 1 Root (Conn.) 133.

5. **Alien Assignee of Native Owner of Copyright.** — In the case of Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618, it was said that "it will not, probably, be seriously denied that a citizen of the United States who is the owner of a copyright can assign the whole of such copyright to a foreigner." See also Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

In a suit for an injunction to restrain the infringement by the defendants of the plaintiff's copyright in an arrangement or adaptation for the pianoforte of the orchestral score of an opera called "The Mikado, or the Town of Titipu," it appeared that William S. Gilbert and Sir Arthur Sullivan, both British subjects, resident in London, were the authors and composers of the comic opera in question. It was admitted that the orchestral score of the opera had always remained in manuscript, or in print only for the use of the performers, and had never been published either in the United States or in England. The pianoforte arrangement for which the plaintiff claimed a copyright was the composition of George Lowell Tracy, a professional composer and arranger of music, residing in Boston, and a citizen of the United States. The work of composition was performed by Tracy in London, under an agreement made by him with Gilbert and Sullivan, and with the plaintiff who was the representative of their interests in the United States, the latter being also a British subject resident in London, that a copyright of the pianoforte arrangement, when completed, should be taken out in the United States by Tracy and transferred to the plaintiff. For his part of the work Tracy was paid a salary. After the completion of the work, with the consent of Tracy and the plaintiff, a copyright was taken out in the United States in the name of Alexander P. Browne, a resident of Boston and a citizen of the United States, acting as the attorney for all the parties, and was afterwards, with Tracy's approval, assigned by Browne to the plaintiff. The defendants insisted that the plaintiff could have no copyright; that the method of proceeding by which the copyright was procured was a mere evasion of the Copyright Act of the United States, and as such was not entitled to the protection of the court. But it was held that there was nothing of evasion or violation of the law, and that the plaintiff had a valid copyright in the pianoforte arrangement in question. Carte *v.* Evans, 27 Fed. Rep. 861.

6. U. S. Rev. Stat., § 4955; 5 & 6 Vict., c. 45, § 13; 17 Geo. III., c. 57; 54 Geo. III., c. 156, § 4; 25 & 26 Vict., c. 68, § 3; Power *v.* Walker, 3 M. & S. 7; Morris *v.* Kelly, 1 Jac. & W. 461; Clementi *v.* Walker, 2 B. & C. 861, 9 E. C. L. 258; Leyland *v.* Stewart, 4 Ch. Div. 419.

Recording the Assignment. — It is provided by the copyright law of the *United States* that the assignment shall be recorded in the office of the Librarian of Congress within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser

copyright in books may also be by an entry of assignment in the book of registry at Stationer's Hall.[1]

5. Effect of Assignment on Right to Sell Copies — **Sale by Assignor.** — In the absence of special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment, and remaining in his possession.[2]

Sale by Assignee. — So also where an author sells the copyright in a book to a publisher for a certain specified time, the publisher has the right, after the expiration of that period, to sell such copies of the work as he has printed before the expiration of the time limited.[3]

6. Contracts Not Amounting to Assignments of Copyright — **Agreement to Publish.** — An agreement between an author and publisher merely for the publication of a copyrighted work does not constitute an assignment of the copyright.[4]

License to Publish. — Nor does a mere license to publish constitute an assignment of the copyright.[5]

Sale of Plates. — The sale on execution of the copper plate from which a copyrighted work is printed does not pass to the purchaser the right to print and sell the work.[6]

Assignment of Right to Reproduce Play or Sell Copies of Book in Limited Territory. — It has been contended that copyright is indivisible as to territory, and that an assignment of the right to reproduce a musical or dramatic composition, or to sell copies of a book in a restricted territory, amounts to nothing more than a license.[7]

7. Agreement to Assign. — Though a statutory copyright must be in existence before it can be assigned at law,[8] an agreement may be made to assign at a future time,[9] in which case an equitable title may vest in an assignee.[10]

Parol Agreement. — While the assignment of a copyright must be in writing, a parol agreement, based upon a sufficient consideration, to make such an assignment is enforceable.[11]

XI. LICENSE — **Right to Grant License.** — A license to use a copyrighted work may be given by the owner of the copyright.[12]

or mortgagee for a valuable consideration, without notice. U. S. Rev. Stat., § 4955.

1. 5 & 6 Vict., c. 45, § 13. See Shepherd *v.* Conquest, 17 C. B. 441, 84 E. C. L. 441.

2. Sale of Copies by Assignor After Transfer of Copyright. — In Taylor *v.* Pillow, L. R. 7 Eq. 418, where one sold his copyright at auction but retained copies already printed, it was held that he was entitled to sell the copies so retained.

3. Sale by Assignee for a Limited Time After Expiration of Contract Period. — In Howitt *v.* Hall, 10 W. R. 381, 6 L. T. N. S. 348, the author had parted with his copyright "and the exclusive right of sale" for four years to the assignee, and the latter was allowed to sell his stock left unsold at the expiration of the term of four years.

4. Stevens *v.* Benning, 6 De G. M. & G. 223; Reade *v.* Bentley, 3 Kay & J. 271, 4 Kay & J. 656, 4 Jur. N. S. 82; Willis *v.* Tibbals, 33 N. Y. Super. Ct. 220. See Hole *v.* Bradbury, 12 Ch. Div. 886. But *compare* Sweet *v.* Cater, 11 Sim. 572.

Construction of Publishing Contracts. — For cases construing such contracts see Pulte *v.* Derby, 5 McLean (U. S.) 328; Baldwin *v.* Baird, 25 Fed. Rep. 293; Paige *v.* Banks, 13 Wall. (U. S.) 608; Hubbard *v.* Thompson, 25 Fed. Rep. 188, 131 U. S. 123; Little *v.* Hall, 18 How. (U. S.) 165; Willis *v.* Tibbals, 33 N. Y. Super. Ct. 220. See Worthington *v.* Batty 40 Fed. Rep. 479.

Contracts for Presentation of Dramatic Compositions. — Lowenfield *v.* Curtis, 72 Fed. Rep. 105; Ellis *v.* Thompson, 1 N. Y. App. Div. 606.

5. Warne *v.* Routledge, L. R. 18 Eq. 497, Reade *v.* Bentley, 4 Kay & J. 656, 4 Jur. N. S. 82.

6. Stephens *v.* Cady, 14 How. (U. S.) 528, Stevens *v.* Gladding, 17 How. (U. S.) 447.

7. Territorially Restricted Assignment. — It is contended by Mr. Drone (Drone on Copyright 335), on the authority of Keene *v.* Wheatley, 9 Am. L. Reg. 446, 14 Fed. Cas. No. 7644, that copyright is indivisible as to locality, and that an assignment of it as to a particular territory amounts to nothing more than a license to sell within that territory. See Davis *v.* Vories, (Mo. 1897) 42 S. W. Rep. 707.

8. Colburn *v.* Duncombe, 9 Sim. 151; Sweet *v.* Shaw, 1 Jur. 917.

9. Leader *v.* Purday, 7 C. B. 4, 62 E. C. L. 4.

10. Sims *v.* Marryatt, 17 Q. B. 281, 79 E. C. L. 281.

11. Parol Agreement to Assign Enforceable. — Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 91. See Searle *v.* Hill, 73 Iowa 367, 5 Am. St. Rep. 688.

12. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618; Press Pub. Co. *v.* Monroe, 73 Fed.

Effect of License on Title. — In such case the legal title remains in the proprietor; and a beneficial interest, to the extent which is agreed upon, vests in the other party, who has acquired an equitable right in the copyright, and who will be properly styled "an assignee of an equitable interest."[1]

Construction of Licenses. — It seems that the author of an article who has licensed its use in some general book containing articles of a like character, such, for instance, as an encyclopædia, fairly and reasonably intends, in the absence of some explicit declaration to the contrary, that future editions of the book containing the article may be issued, and also that such future editions may be characterized by omissions or additions of other articles, or changes in the other articles within fair limits, if such changes be not inconsistent with the general tenor of the original work.[2]

Whether Writing Necessary. — It seems that under a statute which merely requires the assignment of copyright to be in writing, a license to print and publish a copyrighted work may be given by parol.[3] But by the terms of our copyright law, a license should, at least in the case of some publications, be "in writing, signed in presence of two or more witnesses," to protect the licensee from liability for the statutory penalties.[4]

License by Part Owner. — A part owner of a copyright cannot authorize the publication of the copyrighted work by a stranger except in writing, as required by the statute.[5]

XII. INFRINGEMENT — 1. In General. — In commencing a discussion of the question of infringement it may be premised that the rules determining what constitutes a violation of the common-law property in intellectual productions and those which determine what amounts to an infraction of the protection afforded by statutory copyright are in the main identical.[6]

2. Constituent Elements — *a.* COPYING — (1) *General Rule.* — There can be no infringement unless there has been a copying, either in whole or in part, of the copyrighted work.[7]

Rep. 196, 38 U. S. App. 410, 28 Chicago Leg. N. 248; Davis *v.* Vories, (Mo. 1897) 42 S. W. Rep. 707.

1. Power *v.* Walker, 4 Campb. 9; Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

2. **License to Publish Song in Collection of Songs.** — Grosscup, D. J., in Gabriel *v.* McCabe, 74 Fed. Rep. 743. In this case the defendant had been, by the owner of the copyright, licensed to publish a song in a certain collection, which he did. Later on the defendant published the song in an abridged and also in an enlarged edition of the original collection. In neither the abridged nor the enlarged work was there any change in the print of the music or the words of the copyrighted song, nor was there any change in the music and words of the other songs, except that in the abridgment certain songs were omitted. It was held that the defendant was, by virtue of his license, entitled to make the republications complained of.

3. Power *v.* Walker, 4 Campb. 9.

4. U. S. Rev. Stat., § 4964, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1109; U. S. Rev. Stat., § 4965, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1109. *Compare* U. S. Rev. Stat., § 4966. See Parton *v.* Prang, 3 Cliff. (U. S.) 537.

In Equity. — But in equity a parol license to publish given by the author, and followed by his acquiescence, may deprive him of his right to an injunction to restrain the licensee from publishing the work. Rundell *v.* Murray, 1 Jac. 311; Platt *v.* Button, 19 Ves. Jr. 447. See *infra*, this title, *Remedies for Infringement — Injunction and Accounting.*

5. Press Pub. Co. *v.* Falk, 59 Fed. Rep. 324.

6. **Infringement of Statutory Copyright and Common-law Property Determined by Same Rules.** — Stowe *v.* Thomas, 2 Am. L. Reg. 210, 2 Wall. Jr. (C. C.) 547. But, as is said by Mr. Drone: "The common-law property in a literary composition is violated by any unauthorized public use of it, whether by printing and circulating copies, or by reading it in public. Statutory copyright may be infringed by the circulation of copies, but not by publicly reading copies." Drone on Copyright 100. See *infra*, this title and division, the subdivision *Publication.* See also Burnell *v.* Chown, 69 Fed. Rep. 993.

7. **Copying Necessary to Constitute Infringement.** — Reichardt *v.* Sapte, (1893) 2 Q. B. 308; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Emerson *v.* Davies, 3 Story (U. S.) 768; Perris *v.* Hexamer, 99 U. S. 674; Falk *v.* City Item Printing Co., 79 Fed. Rep. 321.

In Roworth *v.* Wilkes, 1 Campb. 94, which was, among other things, an action for pirating certain prints in a work on fencing, it appeared in evidence that three of the engravings of the defendant represented figures in exactly the same attitudes as the plaintiff's but disguised by different costumes. The defendant gave no evidence to explain the similitude or to repel the presumption which that necessarily caused, and while the verdict was for the

(2) *Similarity Without Infringement.* — And since there can be no infringement of copyright without a copying, the mere fact of a similarity between two works does not make one an infringement of the other.[1]

Similar Work Produced in Ignorance of Copyrighted Work. — If a person, while unacquainted with a copyrighted work, by his own independent labor produces something similar, there is no infringement.[2]

Similarity Resulting from Common Subject-matter or Origin. — Nor does one work violate the copyright in another simply because there is a similarity between the two, if the similarity results from the fact that both works deal with the same subject,[3]

plaintiff, Lord Ellenborough said that it was to be considered whether there was "such a similitude and conformity between the prints that the person who executed the one set must have used the others as a model. In that case he is a copyist of the main design. But if the similitude can be supposed to have arisen from accident, or necessarily, from the nature of the subject, or from the artist having sketched designs merely from reading the letter-press of the plaintiff's work, the defendant is not answerable."

1. Distinction Between Infringement of Copyright and Patent Right. — As was said in the case of Lawrence *v.* Dana, 4 Cliff. (U. S.) 80, by Clifford, J.: "Copyright differs in this respect from patent right, which admits of no use of the patented thing without the consent or license of the patentee. Persons making, using, or vending to others to be used, the patented article, are guilty of infringing the letters patent, even though they may have subsequently invented the same thing without any knowledge of the existence of the letters patent; but the recomposition of the same book without copying, though not likely to occur, would not be an infringement."

In the case of Johnson *v.* Donaldson, 18 Blatchf. (U. S.) 289, 3 Fed. Rep. 22, Wallace, J. said: "Assuming the plaintiff to have been the artist and designer of the picture copyrighted by him, the defendant was not liable if he did not avail himself, directly or indirectly, of the plaintiff's production. A copyright secures the proprietor against the copying by others of the original work, but does not confer upon him a monopoly in the intellectual conception which it expresses. An artist cannot acquire such an exclusive right to the conception embodied and expressed in his picture as to preclude others from the exercise of their own creative genius or artistic skill, or from availing themselves of any part of the general contribution of artistic production. The law of copyright originated in the recognition of the right of an author to be protected in the manuscript which is the title of his literary property. This protection could not be adequate unless he was invested with the exclusive privilege of copying the manuscript, whether for sale or for publication. It does not rest upon any theory that the author has an exclusive property in his ideas, or in the words in which he has clothed them. If each of two persons should compose a poem identically alike, he who first composed it would have no priority of title over the other, nor would he acquire priority by first publishing it. The law of copyright would protect each in his own manuscript, but would not prevent either from using his own."

2. Work Similar to Copyrighted Work Produced Independently Thereof. — In a case involving the question of the infringement of an ingenious plan for advertising artificial teeth it appeared that the plaintiff, a manufacturer of artificial teeth, had copyrighted and published charts showing illustrated sections of teeth (in connection with numbers) so arranged as to convey information respecting their character, size, shape, etc., and enabling purchasers to order what they needed without inspection. The defendant, also a manufacturer of artificial teeth, procured engraved illustrations of the teeth made by him, arranged in sections (accompanied by numbers), and printed them on charts; and thus conveyed to purchasers the same character of information respecting his manufacture as the plaintiff's charts afforded. In holding that the defendant was not liable to the charge of infringement Butler, J., in delivering the opinion of the court, said: "The defendant is not liable unless he has copied — 'pirated' — the plaintiff's charts, or some part of them. If he devised the same plan in ignorance of what the plaintiff had done, it is clear, we believe, that he has not infringed any privilege secured by the plaintiff. The proofs do not justify a conclusion that he has so copied. His own positive testimony that he has not, but that he worked out the scheme in ignorance of what the plaintiff had done, is not overborne by the circumstances which the plaintiff invokes to prove the contrary." S. S. White Dental Co. *v.* Sibley, 38 Fed. Rep. 751.

3. Similarity Due to Fact of a Common Subject. — Pike *v.* Nicholas, L. R. 5 Ch. 251; Bullinger *v.* Mackey, 15 Blatchf. (U. S.) 550. See Wilkins *v.* Aikin, 17 Ves. Jr. 422; Lawrence *v.* Cupples, 9 Pat. Office Gaz. 254, 15 Fed. Cas. No. 8135.

The complainants, who were manufacturers of church furniture, prepared and published a book of engravings thereof, containing also a price-list, and procured the book to be copyrighted. The defendant, a manufacturer of school and church furniture, manufactured goods from designs taken from the complainant's illustrations, and also published a book containing illustrations of his goods with price-list. Several of these illustrations bore a striking resemblance to those of the complainants, but the defendant contended that its illustrations were in truth of his own goods, and that the similitude of the illustrations resulted from the fact that the goods were alike. It was held that the plaintiff's illustrations were not infringed. In delivering the opinion of the court Severens, J., said: "The defendants may lawfully manufacture just such goods. Can they not publish correct illustra-

or have a common source.[1]

(3) *Translation.* — On the ground that a translation is not, properly speaking, a copy or transcript, it has been held that the publication of a translation does not infringe the copyright in the original work.[2] This decision has, however, been questioned by text-writers.[3] And, by the present law, authors and their assigns have the exclusive right to translate any of their works for which copyright is secured.[4]

b. PUBLICATION — (1) *In General.* — There can be no infringement of copyright unless there is a publication of the piratical production.[5]

(2) *Public Reading and Recitation.* — Hence the use of a copyrighted work for the purpose of public reading or recitation, not being a publication,[6] is not piracy.[7]

(3) *Stage Presentation in Dramatic Form.* — For the same reason the presentation on the stage of a play founded upon a copyrighted work — for example, a novel — has, in *England*, been held not to be an infringement of the copyright.[8] This rule is perhaps to be followed in the *United States* with

tions of them as adjuncts of their sale? Ought they to be restrained from doing this because the complainants, having done the same thing, have copyrighted illustrations which, while representing their own goods, represent those of the defendant also? It is clear that the books of both parties are published and used solely as means for advertisement. To say that the defendant has not the right to publish correct illustrations of its goods must practically result in creating a monopoly, in goods modeled on those designs, in the complainants, and thus give all the benefits of a patent upon unpatented and unpatentable articles. Sales of merchandise are made largely by samples, and when the articles are bulky, as in case of furniture, illustrations are the only representations that can be made to the eye of the public at large; and it is altogether likely that to withdraw the right to make them from one of the parties would put him out of the field of competition. It does not appear to me that such results can be accomplished in this way." Lamb *v.* Grand Rapids School Furniture Co., 39 Fed. Rep. 474.

1. Similarity Due to Fact of a Common Source. — Pike *v.* Nicholas, L. R. 5 Ch. 251; Emerson *v.* Davies, 3 Story (U. S.) 768; Brightley *v.* Littleton, 37 Fed. Rep. 103.

Reproductions of Same Picture. — A second or subsequent engraving may be taken from the original picture without thereby pirating the first engraving. De Berenger *v.* Wheble, 2 Stark. 548, 3 E. C. L. 525.

The publication and sale of chromos designed from a picture found in a foreign publication do not constitute a breach of copyright of similar chromos, where such copyright was obtained after the circulation of such foreign publication, and where the defendant did not avail himself either directly or indirectly of the plaintiff's production. Johnson *v.* Donaldson, 3 Fed. Rep. 22.

2. Doctrine that Translations Are Not Infringements. — In 1853 it was so decided by the United States Circuit Court for the eastern district of Pennsylvania, in the case of Stowe *v.* Thomas, 2 Wall. Jr. (C. C.) 547, 2 Am. L. Reg. 231, wherein it was held that the publication of a German translation did not infringe Mrs. Stowe's copyright in "Uncle Tom's Cabin."

And certain dicta in the *English* cases of Wyatt *v.* Barnard, 3 Ves. & B. 77; Burnett *v.* Chetwood, 2 Meriv. 441, note; and Prince Albert *v.* Strange, 2 De G. & Sm. 652, seem to be in favor of the opinion that a translation is not an infringement.

In Burnett *v.* Chetwood, 2 Meriv. 441, note, Lord Macclesfield restrained a man from publishing the translation of a Latin work, but the ground on which he proceeded was that it was not for the benefit of the public that a translation should be published.

3. Criticisms of the Doctrine.—Drone on Copyr. 445 *et seq.*; High on Inj. 1016; Kerr on Inj. 369.

Re-translation. — It has been held in *England* that if an English work is translated into a foreign language, the publication of a re-translation of the latter work into English constitutes an infringement of the copyright in the original work. Murray *v.* Bogue, 17 Jur. 219, 1 Drew 353.

4. Abrogation of the Doctrine by Statute. — U. S. Rev. Stat., § 4952, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1107.

5. Sale of Cut Produced from Copyrighted Picture. — One who makes a plate from which a copy of a picture in an illustrated paper that is copyrighted can be produced, and sells the plate to another without intending or even expecting that it was to be used in competition with the owner of the picture, is not guilty of infringement of the copyright. Harper *v.* Shoppell, 26 Fed. Rep. 519. And see Harper *v.* Shoppell, 28 Fed. Rep. 613. *Compare* Sanborn Map, etc., Co. *v.* Dakin Pub. Co., 39 Fed. Rep. 266.

6. See *supra*, this title, *Literary Property — What Constitutes Publication.*

7. See Mikado, etc., Case, 25 Fed. Rep. 783.

Distribution of Copies Among Audience. — But copies may not, upon the occasion of the recitation or performance, be distributed among the audience. Tinsley *v.* Lacy, 1 Hem. & M. 747.

8. Rule in England. — In the case of Reade *v.* Conquest, 9 C. B. N. S. 755, 99 E. C. L. 755, 30 L. J. C. P. 209, it was held that the dramatization of a novel and causing it to be represented on the stage without the author's consent is no infringement of his copyright therein. With regard to the plaintiff's contention that his statutable right was infringed by

reference to copyrights secured under the former statutes,[1] whenever the right to dramatize the work has not been reserved.[2] But under the provisions of the present law, the right to dramatize a work is secured by a copyright therein.[3]

(4) *Stage Presentation of Dramatic Compositions.* — A legislative enactment securing generally to literary proprietors a copyright for a limited period, but containing no special provision as to theatrical representation, does not, in the case of a dramatic literary composition which has been published in print, include the sole right of such representation.[4] Consequently, if a copyright is secured on a published dramatic composition under a statute of this kind, the work, while protected against the multiplication of copies, will not be infringed by a stage representation.[5] The present copyright laws of both *England* and the *United States*, however, contain provisions by which copyright in dramatic composition secures the exclusive right of stage presentation or performance.[6]

(5) *Gratuitous Distribution of Copies.* — The reproduction of a copyrighted work for gratuitous distribution is as much an infringement of the copyright as if the reproduction is for the purposes of sale.[7]

c. FRAUD NOT ESSENTIAL. — Fraud is not an essential element of infringement. Hence if a copyright has been in fact violated, the intention with which it was done is immaterial.[8] It has, however, been said that evidence of innocent intention may have a bearing upon the question of fair use.[9]

the act of the defendant, Williams, J., in delivering the judgment of the court, said: "It was held, however, in the case of Coleman *v.* Wathen, 5 T. R. 245, that representing a public dramatic piece of the plaintiff's upon the stage was not a publication within the meaning of the 8 Anne, c. 19, so as to subject the defendant to the penalty imposed by the statute. And the second section of the 5 & 6 Vict., c. 45, defining 'copyright' to mean 'the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied, seems to furnish a complete answer to the plaintiff's claim under the statute." See also Toole *v.* Young, L. R. 9 Q. B. 523; Schlesinger *v.* Bedford, 63 L. T. 762.

1. Rule in United States. — Under the former copyright law of the United States it was provided that an author might reserve the right to dramatize his work. United States Rev. Stat., § 4952.

2. Mr. Drone, in his work on Copyright, says of the English rule that if it "is a sound exposition of the English law, it must be adopted also in the United States. The statutes of the two countries are substantially the same on this point, and hence should be construed alike." Drone on Copyright 458. See also Daly *v.* Byrne, 43 N. Y. Super. Ct. 261, *affirmed* in 77 N. Y. 182.

3. 26 U. S. Stat. at L. 1107.

4. Coleman *v.* Walthen, 5 T. R. 245; Murray *v.* Elliston, 5 B. & Ald. 657, 7 E. C. L. 226. See also Russell *v.* Smith, 12 Q. B. 217, 64 E. C. L. 217; Prince Albert *v.* Strange, 2 De G. & Sm. 652; Keene *v.* Wheatley, 9 Am. L. Reg. 33, 17 Leg. Int. (Pa.) 349, 4 Phila. (Pa.) 157, 5 Clark (Pa.) 501, 14 Fed. Cas. No. 7644.

5. Keene *v.* Wheatley, 9 Am. L. Reg. 33, 17 Leg. Int. (Pa.) 349, 4 Phila. (Pa.) 157, 5 Clark (Pa.) 501, 14 Fed. Cas. No. 7644; Palmer *v.* De Witt, 47 N. Y. 542, 7 Am. Rep. 480.

6. 3 & 4 Wm. IV., c. 15; U. S. Rev. Stat., § 4952, 26 U. S. Stat. at L. 1107. See Tompkins *v.* Halleck, 26 Alb. L. J. 23.

7. Sale of Copies Not Necessary — Gratuitous Distribution. — Novello *v.* Sudlow, 12 C. B. 177, 74 E. C. L. 177; Tinsley *v.* Lacy, 1 Hem. & M. 747; Ager *v.* Peninsular, etc., Steam Nav. Co. 26 Ch. Div. 637.

8. Intent Immaterial. — Clement *v.* Maddick, 1 Giff. 98, 5 Jur. N. S. 592, 33 L. T. 117; Scott *v.* Stanford, L. R. 3 Eq. 718; Roworth *v.* Wilkes, 1 Campb. 94; Lee *v.* Simpson, 3 C. B. 871, 54 E. C. L. 871; Reed *v.* Holliday, 19 Fed. Rep. 325; Fishel *v.* Lueckel, 53 Fed. Rep. 499.

Inadvertent Infringement. — Thus a person may become liable for infringement although he did not know that the work was copyrighted. Harper *v.* Shoppell, 26 Fed. Rep. 519; Millett *v.* Snowden, 1 West. L. J. 240, 17 Fed. Cas. No. 9600.

And a person may infringe the copyright in a work of the very existence of which he is not aware. Where the author of a drama published a novel based upon it, and containing several scenes from the drama, and the defendant caused another drama to be constructed from the novel, taking many of the scenes from the novel which had been imported into the novel from the original drama, it was held that this constituted an infringement of the plaintiff's copyright in his drama. Reade *v.* Conquest, 11 C. B. N. S. 479, 103 E. C. L. 479.

Ignorance of the registration of a design does not excuse its piracy. MacRae *v.* Holdsworth, 2 De G. & Sm. 496; Mallett *v.* Howitt, W. N. (1879) 107.

See *infra*, this title and division, the subdivision *What Copying Constitutes Infringement — Indirect Copying.*

9. Intention — Importance of on Question of Fair Use. — Folsom *v.* Marsh, 2 Story (U. S.) 106; Webb *v.* Powers, 2 Woodb. & M. (U. S.) 497; Lawrence *v.* Dana, 4 Cliff. (U. S.) 81. In the last-

3. What Copying Constitutes Infringement — *a.* GENERAL RULE. — Infringement of copyright consists of a copying of the whole or a part of the copyrighted work. This copying may consist of but is not limited to a literal reproduction; it also includes the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alteration to disguise the piracy.[1]

b. CONSIDERATIONS CONTROLLING THE QUESTION OF INFRINGEMENT. — Whether the use made of a copyrighted work is to be deemed to be a fair or justifiable use, or is to be considered an infringement of copyright, depends upon a variety of considerations. The amount of the matter appropriated is, of course, important,[2] but it is not always of controlling importance. The question whether there is an infringement of copyright or not is often affected by other considerations, as the value of the material taken,[3] and the importance of it to the sale of the original work.[4] It has been said that in deciding

cited case, Clifford, J., said: "Evidence of innocent intention may have a bearing upon the question of 'fair use;' and where it appeared that the amount taken was small, it would doubtless have some probative force in a court of equity in determining whether an application for an injunction should be granted or refused; but it cannot be admitted that it is a legal defense where it appears that the party setting it up has invaded a copyright. Cary *v.* Faden, 5 Ves. Jr. 24; Reade *v.* Lacy, 1 Johns. & H. 524; Bramwell *v.* Halcomb, 3 Myl. & C. 738."

But in Story *v.* Holcombe, 4 McLean (U. S.) 306, the court said: "In Folsom *v.* Marsh, 2 Story (U. S.) 106, it is said: 'No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purposes of fair and reasonable criticism. On the other hand, it is as clear that if he thus cites the most important parts of the work, with a view not to criticise but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.' This doctrine seems to consider the intention with which the citations are made as necessary to an infringement. In Cary *v.* Kearsley, 4 Esp. N. P. 168, Lord Ellenborough takes the same view. But I cannot perceive how the intention with which extracts were made can bear upon the question. The inquiry is, what effect must the extracts have upon the original work? If they render it less valuable by superseding its use, in any degree, the right of the author is infringed; and it can be of no importance to know with what intent this was done."

1. Copyright Infringed by Literal Reproduction or Reproduction with Colorable Variation. — Greene *v.* Bishop, 1 Cliff. (U. S.) 186; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Emerson *v.* Davies, 3 Story (U. S.) 768; Lawrence *v.* Cupples, 9 Pat. Office Gaz. 254, 15 Fed. Cas. No. 8135; Bullinger *v.* Mackey, 15 Blatchf. (U. S.) 550.

In the case of Springer Lithographing Co. *v.* Falk, 59 Fed. Rep. 707, in which the plaintiff claimed that his copyright in a photograph had been infringed by the defendant's publication of a lithographic reproduction, the court below instructed the jury as follows: "Did the lithographs contain the main design, the substantial ideas, the distinctive characteristics of the original photograph, only so far varied as to intend to evade the law, without actual evasion? * * * If defendants have reproduced, in substance and effect, the general characteristics of the original, though some minor particulars are intentionally avoided, then there is an infringement."

In the recent case of West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756, which was a suit brought for the infringement of the complainant's copyright in syllabi of law reports, Lacombe, J., in delivering the opinion of the court, said: "It is not the law that a copyrighted syllabus can be infringed only by a reproduction of its original language. It is the unfair appropriation of the labor of the original compiler that constitutes the offense. Identity of language will often prove that the offense was committed, but it is not the sole proof; and when the offense is proved relief will be afforded, irrespective of any similarity of language. For example, if, in a case like this, defendant's editors should one and all testify that they made up their digest from complainant's syllabi, so as to save the time and trouble necessarily involved in an independent examination of each opinion, there can be no doubt that such digest would be held to infringe, although the work were so cleverly done that no identity of language could be found in a single paragraph."

2. Quantity of Matter Taken. — See *infra*, this title and division, the subdivision *Partial Reproduction*.

To constitute an infringement it is not necessary that the later work should be a substitute for the original work. Bohn *v.* Bogue, 10 Jur. 420; Reed *v.* Holliday, 19 Fed. Rep. 325. See Sweet *v.* Shaw, 1 Jur. 917.

3. Value of Material Taken. — Folsom *v.* Marsh, 2 Story (U. S.) 116; Gray *v.* Russell, 1 Story (U. S.) 11; Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228.

Lord Cottenham, in the cases of Bramwell *v.* Halcomb, 3 Myl. & C. 737, and Saunders *v.* Smith, 3 Myl. & C. 711, adverting to this point said: "When it comes to a question of quantity it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity."

4. Injury to Sale of Original. — A test frequently applied is whether the extracts as used

questions of this sort the court must look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[1] The question of piracy, in all cases, is whether a material and substantial part of the prior work has been taken.[2]

Copying with Improvements and Additions. — There are dicta to be found in the reports to the effect that a subsequent writer may use the works of a previou writer if improvements, corrections, or additions are made.[3] But this is not the law.[4]

Copying with Acknowledgment of Source. — Nor does the fact that an infringer acknowledges the source from which the appropriated matter was derived have any bearing on the question of infringement; while the acknowledgment shows that he did not intend to pass as his own the work of another, it does not relieve him from legal liability.[5]

Copying in Accordance with Custom. — And the custom of newspapers as to copying from each other's columns has been held to have no effect upon the question of liability for infringement.[6]

Copying by Author Who Has Parted with Copyright. — The author who has parted with his copyright in a book has no right to reproduce substantially the same matter in another publication.[7]

c. PARTIAL REPRODUCTION — (1) *In General.* — While it is impossible to lay down any very definite rule as to the extent of borrowing which is required

are likely to injure the sale of the original. Harper *v.* Shoppell, 26 Fed. Rep. 519.

1. Summary of Considerations. — Story, J., in Folsom *v.* Marsh, 2 Story (U. S.) 116, *quoted with approval* by Vice-Chancellor Wood, in Scott *v.* Stanford, L. R. 3 Eq. 718. See also Bradbury *v.* Hotten, L. R. 8 Exch. 1.

A subsequent writer may make a fair and legitimate use of a prior publication, but he may not copy or imitate it to such an extent as to damage the property of the author in his copyright. If so much is taken that the value of the original is sensibly diminished, or the reports of the original matter are substantially and to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy. Scott *v.* Stanford, L. R. 3 Eq. 718; Smith *v.* Chatto, 23 W. R. 290, W. N. (1874) 231.

2. Chatterton *v.* Cave, 2 C. P. Div. 42; Drury *v.* Ewing, 1 Bond (U. S.) 540; Gilmore *v.* Anderson, 38 Fed. Rep. 846.

Form of Publishing Pirated Matter Immaterial. — It is of no consequence in what form the works of another are used; whether it be by a simple reprint, or by incorporating the whole or a large portion thereof in some larger work. Thus if, in one of the large encyclopædias of the present day, the whole or a large portion of a scientific treatise of another author should be incorporated, it would be just as much a piracy upon the copyright as if it were published in a single volume. Gray *v.* Russell, 1 Story (U. S.) 11.

3. Improvements in Appropriated Matter — Effect of. — See Cary *v.* Kearsley, 4 Esp. N. P. 170; Matthewson *v.* Stockdale, 12 Ves. Jr. 275; Martin *v.* Wright, 6 Sim. 298.

4. Even if a work otherwise piratical be in some respects an improvement on the original work, it is still an infringement. Drury *v.* Ewing, 1 Bond. (U. S.) 540. No man is entitled to avail himself of the previous labors of another for the purpose of conveying to the public the same information, even though he may append additional information to that already published. Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Wheaton *v.* Peters, 8 Pet. (U. S.) 591; Gray *v.* Russell, 1 Story (U. S.) 11; Scott *v.* Stanford, L. R. 3 Eq. 724.

5. Acknowledging Use of Copyrighted Work. — Bohm *v.* Bogue, 10 Jur. 420; Scott *v.* Stanford, L. R. 3 Eq. 718; Walter *v.* Steinkopff, 67 L. T. 184, 46 Alb. L. J. 350. See Pike *v.* Nicholas, L. R. 5 Ch. 251; Gilmore *v.* Anderson, 38 Fed. Rep. 846. *Compare* Cobbett *v.* Woodward, L. R. 14 Eq. 407.

6. Custom as to Copying — Question of Infringement Not Controlled By. — Walter *v.* Steinkopff, 67 L. T. 184, 46 Alb. L. J. 350. In the opinion delivered in this case by North, J., it was said: "The plea of the existence of such custom, or habit, or practice, of copying as is set up can no more be supported when challenged than the highwayman's plea of the custom of Hounslow Heath. It has often been relied upon as a defense in such cases, but always has been repudiated by the courts. In one of the early cases, Wyatt *v.* Barnard, 3 Ves. & B. 77, the defendant relied on 'the usual practice' among publishers of magazines to take articles from each other, but Lord Eldon pointed out that such a custom could not control the law. In the most recent case I recollect, Maxwell *v.* Somerton, 30 L. T. N. S. 11, where the general custom of provincial papers to make such extracts from other papers was relied on, Bacon, V. C., said that the injunction must go against the defendants, as they had done acts of which the plaintiff could legally complain. Lawful use for reviewing was right, but unauthorized copying of whole articles was illegal, and the custom of trade which had been alleged was no justification for breach of law."

7. Colburn *v.* Simms, 2 Hare 543.

to constitute a piracy, it may be said that it certainly is not necessary to constitute an invasion of copyright that the whole, or even a large portion, of a work be copied.[1] If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially and to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy.[2] But copyright is not always invaded by reproducing a part of a work; to constitute an infringement a material and substantial part of the work must have been taken.[3]

(2) *Extracts and Quotations* — **In General.** — Thus it is not necessarily piracy for a reviewer or commentator to make use of extracts or quotations from a copyrighted work, for the purpose of fair exposition or reasonable criticism.[4]

For the Purpose of Criticism or Comment. — If extracts and quotations are taken for the purposes of criticism, comment, or illustration, considerable license is allowed,[5] for the selection of extracts for such purposes, so far from being injurious, is often beneficial to the sale of the book from which they are taken.[6]

For Other Purposes. — Extracts or quotations may be taken for other purposes than those of criticism and comment. Thus a writer may make use of passages from a copyrighted book for the purpose of illustrating or enforcing the propositions of the text.[7] But the limits of permissible use of extracts for this purpose are much narrower than when they are taken for the purpose of criticism and comment.[8]

Limitations of Right to Take Extracts. — In either case it is illegitimate to publish

1. In the case of Bramwell *v.* Halcomb, 3 Myl. & C. 738, Lord Cottenham said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital parts of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity." See also Saunders *v.* Smith, 3 Myl. & C. 711; D'Almaine *v.* Boosey, 1 Y. & Coll. 288.

2. Reproduction of Part Only May Constitute Piracy. — Scott *v.* Stanford, L. R. 3 Eq. 718; Smith *v.* Chatto, 23 W. R. 290, W. N. (1874) 231; Bramwell *v.* Halcomb, 3 Myl. & C. 737; Saunders *v.* Smith, 3 Myl. & C. 711; Wilkins *v.* Aikin, 17 Ves. Jr. 422; Mawman *v.* Tegg, 2 Russ. 385; Greene *v.* Bishop, 1 Cliff. (U. S.) 186; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Folsom *v.* Marsh, 2 Story (U. S.) 100, 9 Fed. Cas. No. 4901; Richardson *v.* Miller, 20 Fed. Cas. No. 11791, 12 Pat. Office Gaz. 3, 15 Alb. L. J. 340, 3 L. & Eq. Rep. 614; Webb *v.* Powers, 2 Woodb. & M. (U. S.) 514; Reed *v.* Holliday, 19 Fed. Rep. 325; Harper *v.* Shoppell, 26 Fed. Rep. 519; Simms *v.* Stanton, 75 Fed. Rep. 6, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), pp. 163, 164.

3. Reproduction of Material and Substantial Parts Necessary. — Pike *v.* Nicholas, L. R. 5 Ch. 251; Bradbury *v.* Hotten, L. R. 8 Exch 1; Chatterton *v.* Cave, L. R. 10 C. P. 572, 2 C. P. Div. 42, L. R. 3 App. 483.

Reproduction of Single Cut from Periodical. — In the case of Harper *v.* Shoppell, 26 Fed. Rep. 519, a cut originally published in Harper's Weekly had been reproduced in the New York Illustrated Times, but Wallace, J., doubted whether the appropriation of such a small part of the plaintiffs' publication constituted an infringement of their copyright. It was declared, however, that it was not necessary to determine the question.

In Bradbury *v.* Hotten, L. R. 8 Exch. 1, the piracy complained of was the publication of nine caricatures of Napoleon III. originally printed separately in numbers of Punch, issued within the period of 1849 to 1867. While this was held to constitute an infringement, it was doubted whether the publication of a single picture would have been piracy. Kelly, C. B., said: "It is said that to copy a single picture, at all events, could not be an infringement of the plaintiffs' copyright, but it is impossible to lay that down as a general rule."

4. Walter *v.* Steinkopff, 67 L. T. 184, 46 Alb. L. J. 350; Harper *v.* Shoppell, 26 Fed. Rep. 519.

5. Roworth *v.* Wilkes, 1 Campb. 94; Whittingham *v.* Woolen, 2 Swanst. 428.

6. Bell *v.* Whitehead, 8 L. J. Ch. N. S. 141.

7. Clerk and Lind. on Torts 539.

8. Kerr Inj. 364.

Instances of Excessive Use of Extracts. — Where the proprietor of a law digest copied from The Jurist headnotes of cases reported therein, it was held to be an abuse of the right to make extracts. Sweet *v.* Benning, 16 C. B. 459, 81 E. C. L. 459. So also a man was restrained from copying reports of law cases from a work of the plaintiff. Sweet *v.* Shaw, 1 Jur. 917. And again, in the case of Dickens *v.* ———, *cited* in 8 L. J. Ch. N. S. 141, the proprietor of a provincial newspaper was restrained from publishing large extracts from a novel, unaccompanied by criticism. And the printing and selling of a drama, large passages of which were taken from a novel, was held to be an infringement of the copyright in the novel. Tinsley *v.* Lacy, 1 Hem. & M. 747. So also where a man possessed a copyright in a play and in a novel which had been founded on the play, a dramatized version of the novel containing scenes and passages which were common to both play and novel was held to be an infringement of the copyright in the play. Reade *v.* Lacy, 1 Johns. & H. 524. See also Sweet *v.* Cater, 11 Sim. 572.

extracts to such an extent that the publication may serve as a more or less complete substitute for the work from which they are borrowed.[1] A test frequently applied is whether the extracts as used are likely to injure the sale of the original work.[2] If so much is taken that the value of the original is sensibly diminished, or the labors of the author are substantially or to an injurious extent appropriated, that is sufficient in law to constitute a piracy.[3]

d. INDIRECT COPYING. — There may be an infringement without a direct taking from the copyrighted work; it may be by taking from another work into which the copyrighted matter has previously been incorporated.[4]

e. DRAMATIZATION WITH PUBLICATION IN PRINT. — It has been said that the publication in print of an unauthorized dramatization of a copyrighted work is a clear case of piracy.[5]

f. ABRIDGMENT — (1) *Whether Fair Abridgment Constitutes Piracy.* — The courts have declared that a fair and *bona fide* abridgment of a copyrighted work does not constitute an infringement of the copyright.[6] This doctrine has, however, been criticised both by text writers and judges.[7] And doubtless

1. Maxwell *v.* Somerton, 22 W. R. 313, W. N. (1874) 19; Smith *v.* Chatto, 23 W. R. 290, W. N. (1874) 231; Roworth *v.* Wilkes, 1 Campb. 94; Story *v.* Holcombe, 4 McLean (U. S.) 308; Greene *v.* Bishop, 1 Cliff. (U. S.) 186; Harper *v.* Shoppell, 26 Fed. Rep. 519; Folsom *v.* Marsh, 2 Story (U. S.) 100; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1. See Wilkins *v.* Aikin, 17 Ves. Jr. 422.

Instance of Excessive Quotations. — The defendants published a work containing an original essay on modern English poetry, biographical sketches of forty-three modern poets, and selections from their poems. Among these selections were six short poems and extracts from a larger poem written and copyrighted by Campbell, constituting altogether the bulk of his work. It was alleged that these selections were made for the purpose of illustrating the essay. An injunction was granted restraining the publication of the defendants' work. Campbell *v.* Scott, 11 Sim. 31.

2. See Black *v.* Murray, 9 Sc. Sess. Cas. (3d ser.) 341.

3. Bohn *v.* Bogue, 10 Jur. 420; Smith *v.* Chatto, 23 W. R. 290, W. N. (1874) 231.

4. Murray *v.* Bogue, 17 Jur. 219, 1 Drew. 353; Schlesinger *v.* Turner, 63 L. T. 764; Gilmore *v.* Anderson, 38 Fed. Rep. 846; Springer Lithographing Co. *v.* Falk, 59 Fed. Rep. 707. See *infra*, this title and section, the subdivision *In the Case of Prints, Engravings, etc.*

5. Drone Copyr. 456, *citing* Tinsley *v.* Lacy, 1 Hem. & M. 747. See also Reade *v.* Lacy, 1 Johns. & H. 524. "For then a material part of a work entitled to protection is taken without license, and printed in violation of the statute and against principles judicially established." Drone Copyr. 456.

But it is held that the dramatization of a novel and stage representation of the drama is not an infringement of the copyright in the novel, for the reason that there is no publication. See *supra*, this division, *Publication*.

6. **Doctrine that Fair Abridgment Is No Infringement.** — Gyles *v.* Wilcox, 2 Atk. 141; Dodsley *v.* Kinnersley, Ambl. 403; Newbery's Case, Lofft 775; Webb *v.* Powers, 2 Woodb. & M. (U. S.) 497; Story *v.* Holcombe, 4 McLean (U. S.) 306. See Tonson *v.* Walker, 3 Swanst. 672.

In the leading American case of Lawrence *v.* Dana, 4 Cliff. (U. S.) 78, Clifford, J., said: "Whatever might be thought if the question was an open one, it is too late to agitate it at the present time, as the rule is settled that the publication of an unauthorized but *bona fide* abridgment or digest of a published literary copyright, in a certain class of cases at least, is no infringement of the original."

7. **Criticisms of the Doctrine.** — Kerr Inj. 369; Drone Copyr. 434–445; Clerk & Lind. L. of T. 541; Dwight L. of Pers. & Pers. Prop. 504; article entitled "Is an Abridgment an Infringement of the Copyright of the Original Work?" 3 Am. L. Reg. 129.

In the life of Lord Hardwicke, contained in his Lives of the Lord Chancellors, Lord Campbell says: "I must own that I much question another rule he [Lord Hardwicke] laid down with respect to literary property, although it has not yet been upset. Gyles *v.* Wilcox, 2 Atk. 142. And see Lofft 775. I confess I do not understand why an abridgment tending to injure the reputation and to lessen the profits of an author should not be considered an invasion of his property." Lives of Lord Chancellors, vol. 5, p. 56, Am ed., p. 72.

In the case of Story *v.* Holcombe, 4 McLean (U. S.) 306, the court, while yielding to the authority of the precedents, said: "If this were an open question I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged — the principles in a condensed form of the original book. Now, it would be difficult to maintain that such a work did not affect the sale of the book abridged. * * * The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author — a right secured by law. * * * But a contrary doctrine has been long established in England under the Statute of Anne, which in this respect is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law than a rule of reason or justice."

the proposition that an abridgment is not a piracy must, as has been said, be received with many qualifications.[1]

(2) *What Constitutes Fair Abridgment* — **In General.** — What constitutes a fair or *bona fide* abridgment which will not infringe copyright is, or under particular circumstances may be, a question of great difficulty.[2] Indeed, it has been said that no certain line can be drawn to distinguish a fair abridgment, but that every case must depend on its own circumstances.[3]

Abridgment Calculated to Supersede the Principal Work. — An abridgment or digest of any kind of the contents of a copyrighted publication, if it is of a character calculated to supersede the principal work, will constitute an infringement of the copyright in that work.[4]

Colorable Shortening by Omission or Selection of Parts, with New Arrangement. — A mere colorable shortening of the original work by the omission of certain passages, or the mere selection or different arrangement of parts of the original work so as to bring the work within a smaller compass, is not a fair and *bona fide* abridgment.[5]

Essentials of Fair Abridgments Summarized. — In an early American case it was decided that an abridgment in which there is a substantial condensation of the materials of the original work, the making of which requires intellectual labor and judgment, does not constitute an infringement of the copyright in the principal work.[6] And in a later case the court expressed itself as inclined to adopt this rule in cases where it also appears that the abridgment was made *bona fide* as such, and that it is not of a character to supersede the copyrighted publication.[7]

g. DIGESTING LAW REPORTS. — Unquestionably, the decisions of the courts may be digested from copyrighted law reports without infringing the copyright. Thus, a digest which is made from such reports by extracting the principle or substance of the decisions and putting it into new language does

1. Story, J., in Gray *v.* Russell, 1 Story (U. S.) 19.

And in Dickens *v.* Lee, 8 Jur. 183, Knight Bruce, V. C., said: "I am not aware that one man has the right to abridge the works of another. On the other hand, I do not mean to say that there may not be an abridgment which may be lawful — which may be protected; but to say that one man has the right to abridge and so publish in an abridged form the work of another, without more, is going much beyond my notion of what the law of this country is."

2. In Dickens *v.* Lee, 8 Jur. 183, Knight Bruce, V. C., adopting the language of Lord Eldon in Wilkins *v.* Aikin, 17 Ves. Jr. 422, said that the test was whether there had been a legitimate use of the original work "in the fair exercise of a mental operation deserving the character of an original work." But Story has said (2 Story Eq. Jur. 939), in commenting on the language of Lord Eldon in Wilkins *v.* Aikin, 17 Ves. Jr. 422: "This is another mode of stating the difficulty, rather than a test affording a clear criterion to discriminate between the cases."

3. Sir Thomas Clarke, M. R., in Dodsley *v.* Kinnersley, Ambl. 403.

4. In Lawrence *v.* Dana, 4 Cliff. (U. S.) 79, Clifford, J., said: "Unless it be denied that a legal copyright secures to the author 'the sole right and liberty of printing, reprinting, publishing, and vending the book' copyrighted, it cannot be held that an abridgment or digest of any kind, of the contents of the copyrighted publication, which is of a character to supersede the original work, is not an infringement of the franchise secured by the copyright." See also Sweet *v.* Benning, 16 C. B. 459, 81 E. C. L. 459; Gray *v.* Russell, 1 Story (U. S.) 19.

5. **Mere Colorable Shortening of Original.** — Campbell *v.* Scott, 11 Sim. 38, and note; Gyles *v.* Wilcocks, 3 Atk. 269; Butterworth *v.* Robinson, 5 Ves. Jr. 709; Folsom *v.* Marsh, 2 Story (U. S.) 107; Lawrence *v.* Dana, 4 Cliff. (U. S.) 79. See Greene *v.* Bishop, 1 Cliff. (U. S.) 186.

Substantially the same views are expressed in the case of Tinsley *v.* Lacy, 1 Hem. & M. 747; and the vice-chancellor in that case, speaking of the authorities by which fair abridgments have been sustained, goes on to say that the courts have gone far enough in that direction and charges that it is difficult to acquiesce in the reason sometimes given that the compiler of an abridgment is a benefactor to mankind by assisting in the diffusion of knowledge.

Key to Copyrighted Text-book. — Where the defendant had published a teacher's key to the plaintiff's grammar, consisting of diagrams and sentences extracted from the plaintiff's book, it was held that the plaintiff's copyright was infringed. Reed *v.* Holliday, 19 Fed. Rep. 325.

6. Folsom *v.* Marsh, 2 Story (U. S.) 105. See Webb *v.* Powers, 2 Woodb. & M. (U. S.) 497. 29 Fed. Cas. No. 17,323.

7. Lawrence *v.* Dana, 4 Cliff. (U. S.) 79.

not violate the copyright.[1] But it is otherwise in the case of the mere stringing together of the headnotes found in the reports, if the headnotes so appropriated are, as they may be,[2] covered by the copyright in the reports.[3]

4. In the Case of Compilations — *a.* GENERAL PRINCIPLES. — Perhaps the most difficult questions with regard to infringement arise where neither of the two works, of which one is claimed to be a piracy of the other, is strictly original, but both are based on materials which are common property.[4]

Mode of Infringing. — The infringement of such works — directories, maps, guide-books, statistical tables, digests, etc. — may be in two ways. The method and arrangement of the second book may be borrowed from the first, or the matter contained in the second may not be the result of independent knowledge, but merely a reproduction of the first.[5]

Right of Independent Treatment of Subject. — The compiler of such a book does not, by copyrighting his book, acquire a monopoly of the subject of which the book treats. Any other person may select the same subject, and, going to the original or public sources of information, make a similar work.[6]

Restrictions on Use of Prior Works. — But the subsequent compiler must investigate for himself from the original sources which are open to all. He cannot use the labors of a previous compiler *animo furandi*, and save his own time by copying the results of the previous compiler's study, although the same results could have been attained by independent labor; he is bound to set about doing for himself that which the first compiler has done.[7]

1. **Digests of Law Reports Not Necessarily Piratical.** — West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360.

In the case of Sweet *v.* Benning, 16 C. B. 459, 81 E. C. L. 459, Jervis, C. J., said: "A digest undoubtedly may be made from the published reports without necessarily subjecting the compiler to a charge of piracy; for instance, where the party applies the exertion and skill of his own brain in extracting the principle or the substance of the decisions before him, dressing it up in his own language so as to produce an original work."

2. See *supra*, this title, the division *Subjects of Copyright*, subdivision *Law Reports*.

3. **Digests Compiled by Copying Headnotes of Copyrighted Reports.** — In a suit by the publishers of a periodical work called "The Jurist" against the defendants, for publishing in "The Monthly Digest" portions of reports of cases contained in the plaintiff's publication, it appeared that the reports alleged to have been pirated by the defendant consisted of double reports in each case — a detailed report of the facts of the case, with arguments and the judgment of the court, and an abstract in the shape of what is commonly called a side or marginal note, which professed to state the principles of law laid down in the case, if any such there were, or a summary statement of the facts and the decision of the court thereon. The compiler of "The Monthly Digest" had taken the short report or headnote verbatim. It was held that this constituted a violation of the plaintiff's copyright. Sweet *v.* Benning, 16 C. B. 459, 81 E. C. L. 459.

A somewhat similar case was that of Butterworth *v.* Robinson, 5 Ves. Jr. 709. There the defendant reprinted the facts and the judgments, copying them from the plaintiff's work and arranging them alphabetically under appropriate heads. It was held that the mere fact of their being so analytically arranged did not constitute the piratical publication a new work, so as to protect its author and publisher from the consequences of his unauthorized invasion of the plaintiff's copyright. The injunction prayed for was accordingly granted.

4. **Compilations.** — Story, J., in Emerson *v.* Davies, 3 Story (U. S.) 768.

5. Clerk & Lind. L. of T. 540.

6. Banks *v.* McDivitt, 13 Blatchf. (U. S.) 163; Matthewson *v.* Stockdale, 12 Ves. Jr. 270; Lewis *v.* Fullarton, 2 Beav. 6; Lawrence *v.* Cupples, 9 Pat. Office Gaz. 254, 15 Fed. Cas. No. 8135; Blunt *v.* Patten, 2 Paine (U. S.) 397; Brightley *v.* Littleton, 37 Fed. Rep. 103; Simms *v.* Stanton, 75 Fed. Rep. 6. See Burnell *v.* Chown, 69 Fed. Rep. 993.

7. Banks *v.* McDivitt, 13 Blatchf. (U. S.) 163; Kelly *v.* Morris, L. R. 1 Eq. 697; Hogg *v.* Kirby, 8 Ves. Jr. 215; Longman *v.* Winchester, 16 Ves. Jr. 269; Lewis *v.* Fullarton, 2 Beav. 6; Jarrold *v.* Houlston, 3 Kay & J. 708, 3 Jur. N. S. 1051; Gray *v.* Russell, 1 Story (U. S.) 11; Emerson *v.* Davies, 3 Story (U. S.) 768; List Pub. Co. *v.* Keller, 30 Fed. Rep. 772; Brightley *v.* Littleton, 37 Fed. Rep. 103; American Trotting Register Assoc. *v.* Gocher, 70 Fed. Rep. 237. See Matthewson *v.* Stockdale, 12 Ves. Jr. 270; Scott *v.* Stanford, L. R. 3 Eq. 718; Wilkins *v.* Aikin, 17 Ves. Jr. 422; Lawrence *v.* Cupples, 9 Pat. Office Gaz. 254, 15 Fed. Cas. No. 8135.

Illustrations. — In the case of Kelly *v.* Morris, L. R. 1 Eq. 697, after saying that "in the case of a dictionary, map, guide-book, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done," Vice-Chancellor Wood gives the following illustrations: "In case of a road-book, he must count the milestones for himself.

Permissible Use of Prior Works. — But it does not follow that no use whatever may be made of prior compilations.[1] It has been said that a compiler may make use of a prior compilation to verify his own work.[2] And it has been

In the case of a map of a newly discovered island, * * * he must go through the whole process of triangulation just as if he had never seen any former map; and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained." See List Pub. Co. *v.* Keller, 30 Fed. Rep. 772.

Common Material — Direct Appropriation of from Copyrighted Work. — A copyrighted work called "The Canadian Parliamentary Companion," contained biographical sketches of members of Parliament and others which the author had procured from the subjects for the purpose of his book. The defendant, in preparing a similar work, sent circulars to a number of public men, asking for short biographical sketches, and, being by some of them referred to the plaintiff's book, took from that work the sketches to which he was so directed. This was held to constitute an infringement. Gemmill *v.* Garland, 12 Ont. Rep. 139, *affirmed* in Garland *v.* Gemmill, 14 Can. Sup. Ct. Rep. 321. Gwynne, J., in delivering the opinion of the Supreme Court of Canada, said: "It must, I think, be admitted that the defendant set about the compiling his work in a perfectly legitimate manner by addressing circulars to each member of Parliament, requesting him to furnish a short sketch of his life for publication in the defendant's work. If all the gentlemen who received these circulars had answered them by writing, in their own language, short sketches of their lives, and had sent them to the defendant for publication in his book, he would have had as much right to have published these sketches in the language in which they were sent to him, or in an abridgment thereof prepared by himself, as the plaintiff had to publish like sketches furnished to him, although the language in which both sketches might be expressed should be very similar; but, unfortunately for the defendant, it appears that several of the gentlemen who had received the defendant's circular, instead of furnishing him with the biographical sketches he had asked for, replied to the effect that they had already supplied such a sketch to the plaintiff for publication and which was published in his book. The defendant, conceiving this sufficient authority to entitle him to take from the plaintiff's book the biographical sketches of such gentlemen as so referred him to the plaintiff's work, did copy them from the plaintiff's book, and thus, ignorantly perhaps, but not the less actually, was guilty of the piracy of which the plaintiff has accused him. To the extent of the matter so copied the plaintiff has established his right to have an injunction."

1. Justifiable Use of Prior Compilations. — In the case of Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228, Longyear, J., said: "The following rule laid down by Mr. Copinger (Copinger's Law of Copyright 91) comes as near to defining this right as anything I have been able to find or can invent. He says: 'The rule appears now to be settled that the compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken, and subjects it to such revision and correction, as to produce an original result; provided, that he does not deny the use made of such preceding works, and the alterations are not merely colorable.'"

In another case it was in substance said that some use of prior works, even to copying of small parts, is, in such cases, tolerated, if the main design and execution are in reality novel or improved, and not a mere cover for important piracies from others. Webb *v.* Powers, 2 Woodb. & M. (U. S.) 512.

Lord Mansfield said: "In all these cases the question of fact to come before a jury is, whether the alteration be colorable or not. There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So, in the case of prints: no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here any more than in the other instances; but upon any question of this nature the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby become more serviceable." Sayre *v.* Moore, 1 East 361, note.

2. Use of Prior Publication to Verify Work. — Sir W. Page Wood, V. C., in Kelly *v.* Morris, L. R. 1 Eq. 697, and in Scott *v.* Stanford, L. R. 3 Eq. 718. And in Jarrold *v.* Houlston, 3 Kay & J. 708, 3 Jur. N. S. 1051, the same learned judge, after referring to the right of the compiler to use a former compilation as a guide to the authorities, said: "There is also another legitimate way of using the plaintiff's work. * * * The legitimate use is this: where an author has by his own pains and labor collected his materials and got his work into shape, he may quite innocently look into another work by a prior author to see whether there were any facts or illustrations which he himself had omitted. For instance, it is alleged in the present case that the works consulted by the defendant, when he is treating of heat and the communication of heat, only mention two methods of communicating it, radiation and conduction, and do not mention convection; and that the defendant therefore must have taken his information about convection from the plaintiff s work. Now, it seems to me that it would be a proper and allowable use for the defendant to make of

held that a writer may resort to a predecessor on the same subject as a guide to the original authorities.[1]

Test of Piracy. — It has been laid down as the clear result of the authorities in cases of this nature, that the true test of piracy is to ascertain whether the author of the alleged piratical work has in fact used the plan, arrangement, and illustrations of the copyrighted work as the model of his own work, with colorable alterations and variations only, to disguise the use thereof, or whether the work is the result of his own labor, skill, and use of common materials and common sources of knowledge open to all men, and the resemblances are either accidental or arising from the nature of the subject; in other words, whether the defendant's work is *quoad hoc* a servile or evasive imitation of the copyrighted work, or a *bona fide* or original compilation from other common and independent sources.[2]

b. DIRECTORIES. — By applying the above-stated principles in the case of directories, it has been held that the compiler may take the names and addresses from a previous publication of the same character and give them to his canvassers that they may go and make independent inquiry, but he may not use the entries as a whole and simply get them verified.[3] "It is safe to say that the compiler of a general directory is not at liberty to copy any part, however small, of a previous directory, to save himself the trouble of collecting the materials from original sources."[4]

c. DICTIONARIES. — The compiler of a dictionary has a right to make use of a previously published dictionary as a source of information, but has no right to copy its arrangement and definitions.[5]

the plaintiff's book — which is in some respects a dictionary, as it were, of science, or of the scientific subjects there handled — if he were to examine it to see whether he had in his own work enumerated all the known methods of communicating heat." And see West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360; Mead *v.* West Pub. Co., 80 Fed. Rep. 380.

1. Using Work to Find Authorities. — Pike *v.* Nicholas, L. R. 5 Ch. 251. See also Jarrold *v.* Houlston, 3 Kay & J. 708, 3 Jur. N. S. 1051; Morris *v.* Wright, L. R. 5 Ch. 279.

2. Story, J., in Emerson *v.* Davies, 3 Story (U. S.) 793, *quoted with approval* in Simms *v.* Stanton, 75 Fed. Rep. 6.

3. Use of Directories. — Morris *v.* Wright, L. R. 5 Ch. 279, *explaining* Kelly *v.* Morris, L. R. 1 Eq. 697, and Morris *v.* Ashbee, L. R. 7 Eq. 34. See Lawrence *v.* Cupples, 9 Pat. Office Gaz. 254, 15 Fed. Cas. No. 8135.

4. Wallace, J., in List Pub. Co. *v.* Keller, 30 Fed. Rep. 772.

"Society" Directories. — In a case between the proprietors and publishers of rival "society" directories, which purported to give the names and addresses of those persons in New York city who were supposed to be people of fashion, the complainant asserted that its copyrighted directory, the "List," was infringed by the defendant's directory, the "Social Register." In the opinion delivered in this case, Wallace, J., said that it was not necessary to apply as strict a rule as would have been required if the two publications were general directories. He said: "They are designed to provide a catalogue, in convenient form, of the names and addresses of a selected class of eligible persons. They are original to the extent that the selection is original. Their commercial value depends upon the judgment and knowledge of the author respecting the social standing and society relations of a limited class of the general public. When the selection is made, each compiler must of necessity reproduce the same names and addresses, so far as the selections coincide, and must arrange them in alphabetical order. The law of copyright only requires the subsequent compiler to do for himself that which the first compiler has done. The same sources of original information are open to each. Either of the present parties could lawfully use the general city directory to obtain the correct addresses of the selected persons; nor is it doubted that the defendant had the right to use the complainant's book for the purpose of verifying the orthography of the names, or the correctness of the addresses, of the persons selected. But, if the defendant has used the List to save himself the trouble of making an independent selection or classification of the persons whose names appear in the Social Register, although he may have done so only to a very limited extent, he has infringed the complainant's copyright." List Pub. Co. *v.* Keller, 30 Fed. Rep. 772.

5. Use of Dictionaries. — In a suit for the infringement of copyright in a Swedish-English dictionary, the plaintiff's evidence tended to show that his book contained about thirty thousand Swedish words in most common use, with short English definitions, which he composed; that the defendant's book contained about ten thousand of the same Swedish words and a few other words, with similar English definitions, made by taking the plaintiff's book and striking out English words with their definitions, slightly changing the definitions of those remaining, adding a few other Swedish words with their definitions, and printing the result, omitting the root in succeeding words

d. MAPS AND CHARTS. — Since the natural objects from which maps and charts may be made are open to the examination of all, it is very clear that a copyright secured in a work of this description does not prevent another author from designing another chart by independent labor of his own. But the subsequent compiler may not avail himself of the previous work to the extent of copying, but must resort either to independent surveys [1] or to prior works which are not protected by copyright.[2] But the copyright in a map is not infringed unless the work has been copied, either in whole or in part.[3] One map is not infringed by another simply because the latter is arranged substantially upon the same plan, especially if it does not delineate the same territory.[4]

e. LAW REPORTS. — Similar principles are to be applied in ascertaining the extent to which a later reporter may avail himself of copyrighted law reports previously published. Unquestionably he may avail himself of the matter contained in the prior publication, such as the opinions, decisions, and syllabi prepared by the court, which is not within the scope of copyright protection,[5] and use it precisely as any other matter which is free to the public.[6] Then, too, he may use the copyrighted matter as a guide in the preparation of his own work to verify its accuracy or detect errors, omissions, or faults.[7] But

with different terminations from the same root. In sustaining the verdict of the jury, in so far as it was for the plaintiff, the court said: "The jury must have found that the plaintiff's composition of English definitions accompanying the Swedish words was copied. Each Swedish word was a topic for the composition of an English definition; and the plaintiff's copyright would protect his literary work in composing them, however short they might be upon each topic. * * * The omission of the roots of words following those in which they were printed left them to be understood; and they were represented by the space in connection with the terminations as fully as if there, in making out the words." Chils *v.* Gronlund, 41 Fed. Rep. 145.

1. Use of Maps and Charts. — Blunt *v.* Patten, 2 Paine (U. S.) 397; Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228, 5 Am. L. T. 168, 5 Chicago Leg. N. 1, 7 Am. L. Rev. 365, 4 Leg. Gaz. 333, 8 Fed. Cas. No. 4651; Sanborn, Map, etc., Co. *v.* Dakin Pub. Co., 39 Fed. Rep. 266. See Johnson *v.* Donaldson, 3 Fed. Rep. 22; Gray *v.* Russell, 1 Story (U. S.) 11; Emerson *v.* Davies, 3 Story (U. S.) 768.

Substantial Copying with Change in Scale and Color. — It is difficult to say, in some cases, what constitutes an infringement of the copyright of a map; but where the subsequent map appears to have been substantially copied from the prior one, without alteration or revision, except in scale and color, there is clearly an infringement which authorizes a court of equity to enjoin the sale of such infringing map and to require the publisher to account for the profits arising from the sale thereof. Chapman *v.* Ferry, 18 Fed. Rep. 539.

The reduction of a chart to a smaller scale is not original work; it is piracy. Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228, 5 Am. L. T. 168, 5 Chicago Leg. N. 1, 7 Am. L. Rev. 365, 4 Leg. Gaz. 333, 8 Fed. Cas. No. 4651.

2. Blunt *v.* Patten, 2 Paine (U. S.) 397.

3. Perris *v.* Hexamer, 99 U. S. 674.

Altering Plain Chart According to Mercator's Projection. — In an early case, where it appeared that a sea chart made as a plain chart had been altered according to Mercator's projection, and the new chart contained corrections of errors in the soundings and other improvements, it was held that there was no infringement. Sayre *v.* Moore, 1 East 361, note.

4. Adopting General Arrangement of Copyrighted Map. — The complainants had published for the use of those engaged in the business of fire insurance a series of maps of certain wards of the city of New York, so marked with arbitrary coloring and signs, explained by a reference or key, that an insurer could see at a glance what were the general characteristics of the different buildings within the territory delineated, and many other details of construction and occupancy necessary for his information when taking risks. The defendant made the necessary examination and survey, and published a similar series of maps of Philadelphia. At first, he used substantially the same system of coloring and signs, and consequently substantially the same key, that had been adopted by the complainants, but afterwards he changed his signs somewhat, and of course changed his key. It was held that the publication of the defendant did not infringe the copyright of the complainants. In delivering the opinion of the court, Mr. C. J. Waite said: "It needs no argument to show that the defendant's maps are not copies, either in whole or in part, of those of the complainants. They are arranged substantially on the same plan, but those of the defendant represent Philadelphia, while those of the complainants represent New York. They are not only not copies of each other, but they do not convey the same information." Perris *v.* Hexamer, 99 U. S. 674.

5. See *supra*, this title, the division *Subjects of Copyright*.

6. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360.

7. Permissible Use of Copyrighted Matter in Prior Reports. — West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360.

he may not avail himself of the protected matter to the extent of copying it, either literally or with colorable variations.[1]

5. In the Case of Prints, Engravings, etc. — Substantial Copying Constitutes Infringement. — As in the case of other publications,[2] there may be an infringement of a copyright in a print, engraving, or other work of a like character, without an exact reproduction; a substantial copying will be sufficient.[3] But there can be no infringement unless there has been an adoption of the essential features and substance of the alleged original.[4]

Mode of Copying Immaterial — In General. — The owner of a copyright in a print, engraving, etc., is, under the laws of both *England* and the *United States*, protected against any reproduction, without regard to the mode in which the

1. Callaghan *v.* Myers, 128 U. S. 617, *affirming* Myers *v.* Callaghan, 10 Biss. (U. S.) 139, and Myers *v.* Callaghan, 20 Fed. Rep. 441; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756.

Infringement of Law Reports. — In the case of Callaghan *v.* Myers, 128 U. S. 617, the complainant was the owner of Illinois reports, prepared by one Freeman, the copyright covering only the headnotes, statements of facts, etc. The defendants published a series of reports containing the same opinions and with headnotes, etc., which they claimed were original. It was held that the defendants' publication constituted an infringement. Mr. Justice Blatchford, in delivering the opinion of the court, quoted with approval from the opinion delivered in Myers *v.* Callaghan, 5 Fed. Rep. 726, 10 Biss. (U. S.) 139, by Circuit Court Judge Drummond: "The defendants Ewell and Denslow, who were employed by the other defendants to annotate these decisions or reports, both state, upon examination, that their work was independent of that of Mr. Freeman; but it appears from the evidence that all the volumes of Mr. Freeman were used in thus editing or annotating; and although it may have been their intention to make an independent work, it is apparent, from a comparison of the Freeman volumes and those of the defendants, that the former were used throughout by the editors employed by the defendants. It is true that in each volume, perhaps in the majority of cases, there is the appearance of independent labor performed by them, without regard to the volumes of Mr. Freeman; but yet in every volume it is also apparent that Mr. Freeman's volumes were used; in some instances words and sentences copied without change, in others changed only in form; and the conclusion is irresistible that for a large portion of the work performed in behalf of the defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman. Undoubtedly it was competent for an editor to take the opinions of the Supreme Court, and possibly from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to sit down, and, with the copyrighted volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the original sources of information, to the decisions of the court, the briefs of counsel, the records on file in the clerk's office, without regard to the regular volumes of reports. Any one who has tried it can easily understand the difference between the headnotes of two persons, equally good lawyers, and equally critical in the examination of an opinion, where they are made up independent of each other; and, bearing in mind this fact, it seems to be beyond controversy that although in many, and perhaps most, instances there is a very considerable difference between the headnotes of the defendants' volumes and those of the plaintiff, the latter have been freely used in the preparation of the former. I conclude, therefore, that the defendants have, in the preparation of those volumes, from 32 to 38 inclusive, of the Illinois Reports, used the volumes of the plaintiff so as to interfere with his copyright." And the opinion of Judge Drummond, delivered in the case of Myers *v.* Callaghan, 20 Fed. Rep. 441, was quoted from as follows: "Upon comparing parts of each of the volumes, those of the complainant and of the defendants, one with the other, I think there can be no doubt that in some respects, in each case, the Freeman volume has been used by the defendants in the headnotes, the statements of facts, and the arguments of counsel. That is, there are certain unmistakable *indicia* that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information, namely, the opinions of the judges, the records, and the arguments of counsel."

2. See the preceding subdivisions of this section.

3. Harper *v.* Wright, etc., Lamp Mfg. Co., (1896) 1 Ch. 142; Moore *v.* Clarke, 9 M. & W. 692; West *v.* Francis, 5 B. & Ald. 737, 7 E. C. L. 247; Roworth *v.* Wilkes, 1 Campb. 94; Richardson *v.* Miller, 12 Pat. Office Gaz. 3, 15 Alb. L. J. 340, 3 L. & Eq. Rep. 614, 20 Fed. Cas. No. 11791; Falk *v.* Brett Lithographing Co., 48 Fed. Rep. 678; Falk *v.* Donaldson, 57 Fed Rep. 32; Springer Lithographing Co. *v.* Falk, 59 Fed. Rep. 707.

Copying Picture, Omitting Tint, Title, and Plate Mark, constitutes an infringement. Fishel *v.* Lueckel, 53 Fed. Rep. 499.

Enlarged Drawing of Photograph. — The publication of an enlarged drawing of a photograph constitutes an infringement of the photograph. Bolton *v.* Aldin, 65 L. J. Q. B. 120.

4. Lucas *v.* Cooke, 13 Ch. Div. 872; Hanfstaengl *v.* Empire Palace, (1894) 3 Ch. 109, *affirmed* in Hanfstaengl *v.* Baines, (1895) App. 20, 64 L. J. Ch. 81.

reproduction is effected.[1]

Photographic Reproduction. — Thus it has been held that the photographic reproduction of a copyrighted painting, engraving, etc., constitutes an infringement of the copyright.[2]

Tableau Representation of Picture. — But it has, however, been held in *England* that the representation of copyrighted pictures upon the public stage in the form of "living pictures" does not constitute an infringement.[3]

Indirect Copying. — When a copyrighted work of this description is copied, it is of no consequence whatever that the reproduction was not effected by the direct copying of the work itself; a copy of a copy may be an infringement of the copyright in the original.[4]

6. In the Case of Dramatic Compositions — **In General.** — The same general rules heretofore stated are to be applied in determining what constitutes an infringement of dramatic compositions; there must be either a literal copying or colorable imitation of a material and substantial part.[5]

Reproducing Mechanical Contrivances and Stage Scenes. — Though the copyright in a play does not necessarily include stage contrivances used in its production,[6] it

1. Lithographic Reproduction of Painting. — It has been held that the copyright in a painting is infringed by a lithographic reproduction of the picture. Schumacher *v.* Schwencke, 30 Fed. Rep. 690.

Stamping Imitation of Photograph on Article of Manufacture. — And it has been held that stamping an imitation of a photograph in raised figures on leather chair bottoms and backs constitutes an infringement. Falk *v.* Howell, 37 Fed. Rep. 202.

But under the *English* Copyright Act a pattern to be used for Berlin wool, taken from an engraving, was held not to be a copy within the meaning of the statute. Dicks *v.* Brooks, 15 Ch. Div. 22.

2. Photographic Reproduction of Paintings. — *Ex. p.* Beal, L. R. 3 Q. B. 387; Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. Rep. 445.

Photographic Reproduction of Engravings. — Gambart *v.* Ball, 14 C. B. N. S. 306, 108 E. C. L. 306; Graves *v.* Ashford, L. R. 2 C. P. 410; Rossiter *v.* Hall, 5 Blatchf. (U. S.) 362.

3. Hanfstaengl *v.* Empire Palace, (1894) 2 Ch. 1.

Under Statute Giving Right of Printing. — In a case where the plaintiff had engraved a print and had it copyrighted, and the defendant, having purchased one of the prints, had it copied on canvas in colors on a very large scale, and with dioramic effects, it was held that under the statute of 8 Geo. II., c. 13, giving to the inventor of any historical or other print the sole right and liberty of printing and reprinting the same, the public exhibition by the defendant of his diorama did not constitute an infringement of the plaintiff's copyright. Martin *v.* Wright, 6 Sim. 297.

4. Springer Lithographing Co. *v.* Falk, 59 Fed. Rep. 707.

Photographing Engraving of Picture. — Thus it has been held that where an engraving of a copyrighted picture is photographed, the photograph is an infringement of the copyright in the picture. *Ex. p.* Beal, L. R. 3 Q. B. 387.

Reproducing Lithograph of Painting. — And where the owner of a copyright in a painting published and sold lithographic copies thereof, it was held that it was an infringement of the copyright to reproduce and publish copies of the lithographs. Schumacher *v.* Schwencke, 30 Fed. Rep. 690.

Reproduction of Tableau Representation of Pictures. — And it would seem that the publication of sketches of *tableaux vivants* reproducing copyrighted paintings constitutes an infringement of the copyright in the paintings. See Hanfstaengl *v.* Empire Palace, (1894) 3 Ch. 109. *affirmed* in Hanfstaengl *v.* Baines, (1895) App. 20.

It would, it is apprehended, be a piracy for a photographer to arrange a group after a picture, and then to touch up and color his photograph so as to resemble the picture. In Turner *v.* Robinson, 10 Ir. Ch. Rep. 121, 510, the defendant was charged with piracy in having copied a painting representing the death of Chatterton. He denied direct copying, but admitted having seen the original while on exhibition, and claimed that he had made his photographs from an arrangement of figures, objects, and scenery, which he had prepared in his own gallery. The court said: "The stereoscopic slides are not photographs taken directly from the picture, in the ordinary mode of copying; but they are photographic pictures of a model itself copied from, and accurately imitating, in its design and outline, the petitioner's painting. It is through this medium that the photograph has been made a perfect representation of the painting. Thus the object contrived and achieved, and the consequent injury, are the very same as if the copy had, in breach of confidence, been made on the view, and by the eye; and no court of justice can admit that an act illegal in itself can be justified by a novel or circuitous mode of effecting it. If it is illegal, so must the contrivance be by means of which it was effected." *Compare* Falk *v.* City Item Printing Co., 79 Fed. Rep. 321.

5. Goldmark *v.* Kreling, 35 Fed. Rep. 661. See Palmer *v.* De Witt, 47 N. Y. 542, 7 Am. Rep. 480.

6. Mechanical Stage Contrivances. — Serrana *v.* Jefferson, 33 Fed. Rep. 347. See *supra*, this title, the division *Subjects of Copyright*, subdivision *Dramatic Composition*.

may be infringed by the reproduction of dramatic scenes forming part of the play.[1]

7. In the Case of Musical Compositions. — In the case of music, it has been said that piracy exists where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding of variations makes no difference in the principle.[2]

8. In the Case of Translations. — While the translation of an uncopyrighted work may be the subject of copyright,[3] any other than the first translator has an equal right to translate the original work and to publish his translation, but he must not make an unfair use of the translation already published.[4]

9. In the Case of Titles to Works. — If the title of a book is embraced within the protection of the copyright secured in the work,[5] there must be, in order to constitute an infringement, a similarity or colorable imitation of the title.[6] There seems to be some question as to whether or not there can be any remedy for the infringement of the title of a book if there is no piracy of the book itself.[7]

10. Sale of Work by Purchaser under Agreement for Restricted Use. — Where the owner of a copyright in a work sells a copy under an agreement for a restricted use, the purchaser, while he cannot multiply copies, may sell the copy to an innocent purchaser without either of them being guilty, under the copyright statutes, of an infringement.[8] He may, however, be punished for the violation of his agreement, as may also his vendee if the latter participates in the fraud.[9]

1. **Scenes.** — Daly *v.* Palmer, 6 Blatchf. (U. S.) 256; Daly *v.* Webster, 56 Fed. Rep. 483, 1 U. S. App. 573. See *supra*, this title, the division *Subjects of Copyright*, subdivision *Dramatic Composition*.

2. **Musical Compositions.** — Lord Lyndhurst on D'Almaine *v.* Boosey, 1 Y. & Coll. 288. See also Daly *v.* Palmer, 6 Blatchf. (U. S.) 269; Reed *v.* Carusi, Taney's Dec. (U. S.) 72; Millett *v.* Snowden, 1 West. L. J. 240, 17 Fed. Cas. No. 9600; Blume *v.* Spear, 30 Fed. Rep. 629.

Perforated Slips for Organettes No Infringement of Sheet Music. — In a case where the plaintiffs were the owners of a valid copyright in a certain song and musical composition entitled "Cradle's Empty, Baby's Gone," and the defendant had made perforated papers which when used in organettes produced the same music, it was held that there was no infringement of the plaintiff's copyright. Kennedy *v.* McTammany, 33 Fed. Rep. 584.

3. See *supra*, this title, the division *Subjects of Copyright*.

4. Wyatt *v.* Barnard, 3 Ves. & B. 77; Story, J., in Emerson *v.* Davies, 3 Story (U. S.) 780; Shook *v.* Rankin, 6 Biss. (U. S.) 477.

5. See *supra*, this title, the division *Extent and Limitations of Copyright Protection*.

6. **Illustrations.** — The title "Why and Because" has been held not to be infringed by the title "The Reason Why." Jarrold *v.* Houlston, 3 Jur. N. S. 1051.

"Old Sleuth" has been held not to be infringed by "Old Sleuth the Detective." Munro *v.* Smith, 42 Fed. Rep. 266.

On the other hand, "The Children's Birthday Text Book" was thought to infringe upon the title "The Birthday Scripture Text Book." Mack *v.* Petter, L. R. 14 Eq. 431. See also Metzler *v.* Wood, 8 Ch. Div. 606.

7. **Infringement of Title Alone.** — In Jollie *v.* Jaques, 1 Blatchf. (U. S.) 627, Mr. Justice Nelson said: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected the title goes with it, as certainly as the principal carries with it the incident." In commenting upon this case Shepley, J., in an opinion delivered in Osgood *v.* Allen, 1 Holmes (U. S.) 185, 7 Am. L. Rev. 568, said: "The only doubt expressed by Mr. Justice Nelson in that case is as to how the question might be decided in case of a valid copyright of a book and an infringement of the title by the defendant. While expressing no opinion upon this question, the reasoning by which he arrives at the conclusion that when the book fails to be protected the title goes with it would seem clearly to point to a similar result in a case of alleged infringement of copyright of the book; namely, that if there was no piracy of the copyrighted book, there could be no remedy under the act for the use of a title which could not be copyrighted independently of the book."

8. Clemens *v.* Estes, 22 Fed. Rep. 899; Harrison *v.* Maynard, 61 Fed. Rep. 689, 26 U. S. App. 99.

9. See Clemens *v.* Estes, 22 Fed. Rep. 899; Harrison *v.* Maynard, 61 Fed. Rep. 689, 26 U. S. App. 99.

Sale by Assignee Outside of Territory Granted Him. — In the case of Hudson *v.* Patten, 1 Root (Conn.) 133, the plaintiff owned the copyright for a given territory, and another owned it for a different territory. The latter employed the plaintiff to print for him a number of copies to be sold in his own territory, but the defendant, having purchased them, sold them in the plaintiff's territory. This was held piracy or infringement of the plaintiff's copyright, although they were genuine or lawfully printed copies.

11. Importation of Copies. — The copyright statutes contain provisions against the importation of copies of copyrighted works.[1] And it has been held in *England* that where an international copyright is owned by different persons in different countries, the owner in one country has no right to import the work into the other's country.[2]

XIII. Persons Liable for Infringement — 1. Printer and Publisher. — Under the terms of our copyright law [3] both printer and publisher are equally liable to the owner of the copyright for an infringement.[4]

2. Vendor. — It has been said that the vendor of a work which invades the copyright of another will be liable for infringement of copyright on the same grounds that the vendor of a machine or other mechanical structure is held liable, in the case of patent-rights, for selling the manufactured article without the license or consent of the patentee.[5]

Vendor Without Knowledge of Infringement. — It has been held under the *English* statutes that an action may be maintained against a man for selling pirated copies of a print or engraving, though he may have no knowledge that they are piratical.[6]

3. Officers of Infringing Corporation. — It has been held that the officers of a corporation cannot be held solely liable for an infringement of copyright by the corporation.[7]

XIV. Remedies for Infringement — 1. Enumeration of Remedies. — There are three remedies for an infringement: An action of debt for certain penalties

1. Importation of Piratical Copies. — U. S. Rev. Stat., §§ 4964 and 4965, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1109; 7 & 8 Vict., c. 12, § 10. See Pitts *v.* George, (1896) 2 Ch. 866, 75 L. T. 320, 66 L. J. Ch. 1; Frowde *v.* Parrish, 27 Ont. Rep. 526.

2. Pitts *v.* George, (1896) 2 Ch. 866, 75 L. T. 320, 66 L. J. Ch. 1.

3. U. S. Rev. Stat., § 4965, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1107.

Liabilities for Penalties. — See *infra*, this title, the division *Remedies for Infringement.*

4. Liability of Printer. — In the case of Belford *v.* Scribner, 144 U. S. 488, the infringing books had been printed by two of the defendants under a contract with the third defendant, who published and sold them, and it was held that they were equally liable with the publisher for the infringement.

In Sarony *v.* Ehrich, 28 Fed. Rep. 79, a former judgment against a lithograph company which had printed the piratical prints for the defendants, who had published and circulated them, was held to constitute a bar to further recovery.

Liability of Manufacturer of Plate for Infringing Picture. — Where a person makes a cut of a copyrighted picture and sells it to the publishers of an illustrated newspaper, he will not, it has been held, be liable for infringement in a case where there is no evidence that he contemplated that the purchasers would make any illegitimate use of the plate. "The cut was capable of use innocently in various ways, having no relation to the publication and sale of a newspaper. * * * The law will not assume without evidence, or simply upon proof that the defendant sold the plate to the proprietors of a newspaper, that he intended to authorize a violation of the plaintiffs' rights." Harper *v.* Shoppell, 26 Fed. Rep. 519. But if he knows at the time of selling the plate that it will be used for the purpose of reproducing a copyrighted picture in the purchaser's newspaper, it is otherwise, and he will be responsible with the publishers as a joint tortfeasor. Harper *v.* Shoppell, 28 Fed. Rep. 613. See Harper *v.* Shoppell, 26 Fed. Rep. 519.

5. Greene *v.* Bishop, 1 Cliff. (U. S.) 186.

Liability of Vendor of Play for Performance. — And in case of a copyrighted play, the vendor of a piratical copy is liable for a representation of the pirated play by the vendee. Daly *v.* Palmer, 6 Blatchf. (U. S.) 256.

6. Knowledge of Infringement. — Gambart *v.* Sumner, 5 H. & N. 5. In the opinion delivered in this case by Bramwell, B., it was said: "The 8 Geo. II., c. 13, made it necessary to prove knowledge in proceedings against a person for selling a pirated engraving or print. The 17 Geo. III., c. 57, which was passed to amend the former act, omits the word 'knowingly,' and enables the person having a copyright in a print or engraving to maintain an action against persons found selling pirated copies of it without proof of guilty knowledge. This act referring to the former statute and confirming it, the argument is stronger than if in the preceding statute the legislature had been silent on the subject."

7. It was so held in a case where the evidence showed that the alleged infringing acts were committed by the corporation of which the defendant was president, contrary to the express instructions of the defendant and without his knowledge, and that the first intimation he had that the pirated matter had been published by the corporation was when he was served with the papers in the case. "In these circumstances it would be contrary to the well-settled rules of equity to hold this defendant alone personally liable for such wrongful acts, merely because he was an officer of said corporation." Stuart *v.* Smith, 68 Fed. Rep. 189. See the title Officers and Agents (of Private Corporation).

and forfeitures prescribed by the statute; a suit in equity for an injunction to restrain further infringement, as an incident to which an account of the profits made by the infringer may be ordered by the court; an action at common law for damages. In *England* the proprietor of a copyright may have the importation of pirated copies stopped at the custom house.[1]

Right to Both Injunction and Penalties. — Not only may the owner of a copyright which has been infringed maintain an action at law for the statutory penalty, but he may at the same time bring a suit in equity for an injunction. The copyright law contemplates both remedies, the action at law to secure indemnity for the past, the injunction to give protection for the future.[2]

2. Injunction and Accounting — *a.* IN GENERAL. — Whenever, in the opinion of the court, the circumstances of the case require it, they will grant an injunction, either temporary while awaiting a final decision, or permanent when the infringement on the copyright has been proved.[3] While this remedy would, no doubt, exist independently of any legislative authorization,[4] it has been expressly recognized in the copyright law of the *United States*.[5]

b. INJUNCTION TO RESTRAIN THREATENED PIRACY. — The courts are slow in granting an injunction before a defendant's work has been published.[6] It

1. **Importations, Stoppage of.** — See the title Customs, 5 Encyc. of the L. of Eng. 87.

2. **Injunction Pending Qui Tam Action.** — Accordingly it has been held that an injunction may be granted, although a *qui tam* action for a penalty is pending. Schumacher *v.* Schwencke, 25 Fed. Rep. 466.

In England it has been held that where the copyright act creates a new offense and imposes a penalty, the ancillary remedy by injunction may still be had. Cooper *v.* Whittingham, 15 Ch. Div. 501, 49 L. J. Ch. 752, 43 L. T. 16, 28 W. R. 720.

Waiver of Penalties. — In the case of Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228, the plaintiff's bill for an injunction was demurred to on the ground that it did not waive the forfeiture of the printed copies of the defendant's map, and the penalty of one dollar for each copy, as provided by statute in such cases, but on the contrary prayed that such forfeiture and penalty might be inflicted in addition to the relief by injunction and an accounting for profits. Longyear, J., delivering the opinion of the court, said: "The proposition here is, that equity will not grant its assistance by way of injunction and an accounting as to the profits, unless complainant, as a condition of his prayer for such assistance, shall expressly waive the forfeitures and penalty. No reason, based upon principle, is advanced in support of the proposition, neither can I see that any exists."

But it is sometimes stated in the *English* books that a man who seeks relief by way of injunction will be required by the court, as a condition of its existence, to waive the penalty or forfeiture. Kerr Inj. 349, *citing* Colburn *v.* Simms, 2 Hare 543. But see Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228.

3. **Injunction to Protect Right to Sell by Subscription.** — In a case where the defendant had purchased copies of a book, which was sold by subscription only, from the plaintiff's agent, to whom they had been sent for delivery to subscribers, an injunction was granted restraining him from selling the copies so obtained. Henry Bill Pub. Co. *v.* Smythe, 27 Fed. Rep. 914.

Ordering the Surrender of Copies of Etchings. — Where a person obtains possession by purchase of impressions of etchings, the plates of which are the property of another, knowing that the vendor has obtained such impressions through a breach of trust, a court of equity will interfere by injunction, and, without giving him the right to try the question of property at law, will order the impressions to be delivered up. Prince Albert *v.* Strange, 2 DeG. & Sm. 652, 13 Jur. 507, 1 Macn. & G. 25, 18 L. J. Ch. 120, 13 Jur. 109.

Injunction to Protect Common-law Property. — The property which the author of an intellectual production has in his work at common law may be protected by injunction. Goldmark *v.* Kreling, 25 Fed. Rep. 349.

4. **Basis of Remedy in England.** — In Lawrence *v.* Smith, 1 Jac. 471, Lord Eldon said: "Our jurisdiction, unless I mistake, is founded upon this: that the law does not give a complete remedy to those whose literary property is invaded; for if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease. The court, therefore, interposes by injunction; but not in cases where an action cannot be maintained."

5. **Statutory Recognition of Remedy in United States.** — Our copyright law provides as follows: "The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable." U. S. Rev. Stat., § 4970.

6. **Injunction Refused Before Publication of Defendant's Work.** — In Morris *v.* Wright, L. R. 5 Ch. 279, it was held that, until the defendant's work has been published and there is evidence of the actual contents, an injunction will not be granted upon evidence by the plaintiff of

has, however, been done.[1]

c. INJUNCTION BEFORE PERFECTION OF COPYRIGHT. — There is some authority for the proposition that, although a copyright is not perfect until all the requirements of law are complied with, still, by taking the incipient steps, a right is acquired which chancery will protect until the other acts may be done.[2]

d. CESSATION OF INFRINGEMENT. — The cessation of the infringement, although removing the occasion for an injunction, in no way deprives the complainant of his right to such equitable relief.[3]

e. DETERMINATION OF PLAINTIFF'S RIGHT AT LAW — (1) *Not a Prerequisite to Granting Injunction.* — And it is not necessary to the granting of an injunction that the complainant shall have first settled his right at law and obtained a verdict of a jury in his favor touching the alleged infringement.[4]

(2) *Special Cases in Which Required.* — There are, however, some cases in which the court will require that this be done.[5]

Where Plaintiff's Right Is Doubtful. —Thus, where there is a reasonable doubt as to the plaintiff's right, an injunction will be refused until it has been established in an action at law.[6]

f. GROUNDS FOR REFUSING INJUNCTION — (1) *Action at Law Not Maintainable.* — Where an action at law cannot be maintained an injunction will not be granted.[7]

(2) *Insignificance of Infringement.* — In cases where the invasion of copyright is slight as to both the quantity and value of the matter copied, and the pirated matter is quite out of proportion to the mass of the original matter, the court will not, as a general rule, interfere by way of injunction, but will leave the plaintiff to his remedy at law for damages.[8] But there may be cases where the pirated matter, though small in quantity, is so material and of such

the mode employed by the defendant in preparing his work.

1. **Injunction Granted Before Publication.** — In a case where the defendant had made preparations for the public representation of the plaintiff's copyrighted musical composition, intending to anticipate the performance by the plaintiff, an injunction restraining the proposed performance by the defendant was granted. Thomas *v.* Lennon, 14 Fed. Rep. 849.

2. Pulte *v.* Derby, 5 McLean (U. S.) 328; Boucicault *v.* Wood, 2 Biss. (U. S.) 34. *Compare* Centennial Catalogue Co. *v.* Porter, 3 Cent. L. J. 460, 2 W. N. C. (Pa.) 601, 5 Fed. Cas. No. 2546.

3. Gilmore *v.* Anderson, 38 Fed. Rep. 846.

4. **Prior Determination of Plaintiff's Right at Law Not Necessary.** — "It is claimed that complainant is not entitled to an injunction for the reason that it does not appear by the bill that he has settled his right at law, and obtained a verdict of a jury in his favor touching the alleged infringement. Such, no doubt, was formerly the law, and now, in some cases, the court will, no doubt, require that to be done. But it is now well settled that both the right and the infringement may be set up and adjudicated in a court of equity without having been first determined at law.' Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228, *citing* Phillips on Patents, chapters 20 to 24; Hill on Inj. 391, 392; 2 Story's Eq., pp. 246-248; Stevens *v.* Gladding, 17 How. (U. S.) 447; Motte *v.* Bennett, 2 Fisher Pat. Cas. 642; Ogle *v.* Ege, 4 Wash. (U. S.) 584.

5. See Farmer *v.* Calvert Lithographing, etc., Co., 1 Flipp. (U. S.) 228.

6. Walcot *v.* Walker, 7 Ves. Jr. 1; Anonymous, 1 Vern. 120; Grierson *v.* Jackson, 1 Ridgew. L. & S. 304; Blunt *v.* Patten, 2 Paine (U. S.) 397. See Ogle *v.* Ege, 4 Wash. (U. S.) 584; Miller *v.* McElroy, 1 Am. L. Reg. 198.

7. Walcot *v.* Walker, 7 Ves. Jr. 1; Lawrence *v.* Smith, 1 Jac. 471.

8. **Invasion of Copyright Slight.** — Mawman *v.* Tegg, 2 Russ. 394; Baily *v.* Taylor, 1 Russ. & M. 73

In the case of Sweet *v.* Cater, 11 Sim. 572, it was said that if the pirated matter is not considerable, that is, where passages which are neither numerous nor long have been taken from different parts of the original work, the court will not interfere to restrain the publication of the work complained of, but will leave the plaintiff to his remedy at law.

In the case of Webb *v.* Powers, 2 Woodb. & M. (U. S.) 498, the pirated matter pervaded the whole work and could not be separated from the rest of the work without destroying the whole work, but as it was small both in quantity and value, the court did not interfere, on the ground that the remedy would be disproportionate to the injury. See Greene *v.* Bishop, 1 Cliff. (U. S.) 203, 10 Fed. Cas. No. 5763.

Where Pirated Matter Constitutes Small Part of Plaintiff's but Bulk of Defendant's Work. — In a case where the pirated matter formed a very small portion of the plaintiff's work, but constituted the bulk of the defendant's work, an injunction was granted. Kelly *v.* Hooper, 4 Jur. 21.

value in quality that the court will interfere by injunction.[1] And it has been said that the plaintiff ought not to be remitted to his action for damages where the court can see that from the impossibility of estimating these damages the remedy must be entirely fallacious.[2]

(3) *Laches or Acquiescence of Plaintiff.* — A plaintiff may lose his right to an injunction on account of laches or acquiescence. Since equity will not entertain a stale demand,[3] an injunction will be refused if it appears that the plaintiff has consented to the infringement, or has been guilty of unreasonable delay, after learning of the infringement, in bringing suit.[4] Generally, delay will not be sufficient to operate as a bar unless it is of such a nature or is under such circumstances as to raise a presumption of abandonment by the plaintiff.[5]

Length of Delay. — The length of the time which must elapse in order to bar the plaintiff's right to an injunction depends largely upon the circumstances of each case, and has not been definitely settled.[6]

Plaintiff's Knowledge of the Infringement. — As in all other cases in which the plaintiff's right to equitable relief is contested on the ground of laches, it must be shown that the plaintiff was aware of the infringement.[7]

g. PROOF OF DAMAGES NOT NECESSARY. — If a plaintiff shows his title to a copyright, and its infringement, the court will grant an injunction without proof of actual damages.[8]

1. **Where Matter Copied Is Valuable.** — Bohn *v.* Bogue, 10 Jur. 420; Saunders *v.* Smith, 3 Myl. & C. 736; Bramwell *v.* Halcomb, 3 Myl. & C. 738; Bell *v.* Whitehead, 8 L. J. Ch. N. S. 141, 3 Jur. 68.

In Kelly *v.* Hooper, 4 Jur. 21, it appeared that the defendant had taken only three and a half pages from the plaintiff's directory of eight hundred and seventy pages, but these formed a large part of the defendant's almanac and constituted its chief value. An injunction was granted.

In Cobbett *v.* Woodward, L. R. 14 Eq. 407, the defendant had taken eight lines from the plaintiff's work. It was held that the defendant was not entitled to use them without acknowledgment of the source from which they came, and that the plaintiff was entitled to an injunction to restrain the publication of these eight lines.

2. Farmer *v.* Elstner, 33 Fed. Rep. 494.

3. See the titles EQUITY; LACHES.

4. **Refusal of Injunction Because of Laches.** — Saunders *v.* Smith, 3 Myl. & C. 711, 2 Jur. 536; Rundell *v.* Murray, 1 Jac. 311, 23 Rev. Rep. 75; Lewis *v.* Chapman, 3 Beav. 133; Cooper *v.* Mattheys, 8 Law Rep. 413; Southey *v.* Sherwood, 2 Meriv. 435; Chappell *v.* Sheard, 2 Kay & J. 117, 1 Jur. N. S. 996; Platt *v.* Britton, 19 Ves. Jr. 447; Tinsley *v.* Lacy, 1 Hem. & M. 747.

In Rundell *v.* Murray, 1 Jac. 311, the owner, or the party who asserted the copyright, had permitted Mr. Murray to publish the work, which after a certain time turned out to be productive; and, fourteen years having elapsed since the transaction took place, the plaintiff was desirous of re-asserting her title to the copyright, and gave notice to Mr. Murray not to publish after that time, as she herself was desirous of publishing. Lord Eldon refused the injunction for which she applied, and, after commenting upon the case, said: "There has often been great difficulty about granting injunctions where the plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and, therefore, without saying with whom the right is, whether it is in this lady or whether it is concurrently in both, I think it is a case in which strict law only ought to govern."

5. Hogg *v.* Scott, L. R. 18 Eq. 444; Buxton *v.* James, 5 DeG. & Sm. 80; Greene *v.* Bishop, 1 Cliff. (U. S.) 186. See also Maxwell *v.* Somerton, 30 L. T. N. S. 11.

Delay Pending Establishment of Title at Law. — A delay will not prejudice the plaintiff if solely caused by his awaiting the result of litigation, whether prosecuted by himself or others, to settle a doubtful question of law involving the validity of his title. Buxton *v.* James, 5 DeG. & Sm. 80.

Delay for the Purpose of Examining the Infringing Work. — A delay may be justified by showing that it was necessarily consumed in the comparison of the two works for the purpose of ascertaining how much of the plaintiff's work had been appropriated. Mawman *v.* Tegg, 2 Russ. 385.

6. **Duration of Delay.** — It has been held that if the proprietor of a copyright fails to assert any claim, he is barred by a delay of fifteen years, Platt *v.* Button, 19 Ves. Jr. 447; fourteen years, Rundell *v.* Murray, 1 Jac. 311, 23 Rev. Rep. 75; or even of six and a half years, Lewis *v.* Chapman, 3 Beav. 133

On the other hand, it has been held that an injunction may be obtained after the copyright has been infringed to the plaintiff's knowledge for a period of four years. Hogg *v.* Scott, L. R. 18 Eq. 444.

7. Lewis *v.* Fullarton, 2 Beav. 6; Chappell *v.* Sheard, 2 Kay & J. 117, 1 Jur. N. S. 996; Weldon *v.* Dicks, 10 Ch. Div. 247.

8. **Proof of Actual Damages Not Necessary.** — Tinsley *v.* Lacy, 32 L. J. Ch. 535; Reed *v.* Hol-

h. TEMPORARY INJUNCTION — WHEN GRANTED — (1) *General Rule.* — The nearest approach to the statement of a general rule governing the granting of an interlocutory injunction is, that where the plaintiff has made a *prima facie* case in regard to the existence of the copyright and its infringement, and there is no great inequality between the injury which the defendant will possibly sustain if it is granted and the injury which the plaintiff will suffer if it is denied, the court will grant a temporary injunction [1] as to so much of the work at least as is a plain infringement of the plaintiff's copyright.[2]

(2) *Considerations Controlling the Question* — **In General.** — It has been said that "the question of granting a temporary injunction is affected by many considerations. It depends chiefly on the extent of doubt as to the validity of the copyright, whether it has been infringed; the damages which the plaintiff will sustain if it is withheld, and the defendant suffer if it is granted."[3]

Copyright in Plaintiff. — No injunction will be granted unless the court is reasonably satisfied that the plaintiff has a valid copyright.[4]

Validity or Existence of the Copyright. — Thus a preliminary injunction will be refused if the court entertains a reasonable doubt as to the existence or validity of the copyright.[5] And it is immaterial whether the doubt arises as to the facts of the case or as to the law.[6]

liday, 19 Fed. Rep. 325; Fishel *v.* Lueckel, 53 Fed. Rep. 499. See Cobbett *v.* Woodward, L. R. 14 Eq. 407; Farmer *v.* Elstner, 33 Fed. Rep. 494. But see Saunders *v.* Smith, 3 Myl. & C. 711, where it was held that where the proportion of piracy was very small an injunction would not issue without proof of actual injury or that injury would probably occur.

1. General Rule as to Temporary Injunction. — Jarrold *v.* Houlston, 3 Kay & J. 708, 3 Jur. N. S. 1051; Shook *v.* Rankin, 6 Biss. (U. S.) 477; Little *v.* Gould, 2 Blatchf. (U. S.) 165; Reed *v.* Holliday, 19 Fed. Rep. 325; Scribner *v.* Stoddart, 9 Rep. 137, 19 Am. L. Reg. N. S. 433, 8 W. N. C. (Pa.) 61, 21 Fed. Cas. No. 12561; Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 39; Sanborn Map, etc., Co. *v.* Dakin Pub. Co., 39 Fed. Rep. 266.

2. Banks *v.* McDivitt, 13 Blatchf. (U. S.) 170.

3. Drone on Copyright 516, *quoted* in Scribner *v.* Stoddart, 9 Rep. 137, 19 Am. L. Reg. N. S. 433, 8 W. N. C. (Pa.) 61, 21 Fed. Cas. No. 12561.

Refusal of Interlocutory Injunction on Demurrable Bill. — The court will not, it has been said, grant an interlocutory injunction on the face of a bill which it sees clearly could not be sustained on demurrer. Ladd *v.* Oxnard, 75 Fed. Rep. 703.

Doubtfulness of Plaintiff's Right to Equitable Relief. — Upon a motion for a preliminary injunction to restrain the infringement of the plaintiff's copyright of a book written by Mrs. Fanny Stenhouse, it appeared that the book was copyrighted under an agreement between them that she should furnish the manuscript of the work, which he should copyright and publish, and use his "very best exertions and facilities to secure the speedy sale of," and pay her twelve cents on each copy sold; and that she would not cause to be published in her name or otherwise anything which might injure or interfere with the sale of the book. The publication sought to be restrained was of the same work, emanating from her since, in a newspaper. She had an interest in the copyright, but was not made a party to the suit, either by being joined as a plaintiff in protecting it, or as a defendant for inequitably violating her agreement not to injure or interfere with the sale of the book. The proofs brought on the hearing of the motion tended to show that the plaintiff had not continued the efforts required by the agreement for the sale of the book, and that sales had quite or nearly ceased. In denying the motion the court said: "Damages from any further apprehended publication by the defendant would be comparatively slight. Whether the plaintiff is so carrying out the agreement on his part as to entitle him to equitable relief without joining the author, or against publication coming from her, is so doubtful in the present aspects of the case as to make preliminary restraint of what will be of such slight injury appear to be unwarrantable, in the exercise of the discretion involved in granting or refusing such motions." Worthington *v.* Batty, 40 Fed. Rep. 479.

4. Drone on Copyright. 517; American Trotting Register Assoc. *v.* Gocher, 70 Fed. Rep. 237.

5. Doubt as to Existence of Copyright a Ground for Refusal. — Walcot *v.* Walker, 7 Ves. Jr. 1; Scribner *v.* Stoddart, 21 Fed. Cas. No. 12561; Jollie *v.* Jaques, 1 Blatchf. (U. S.) 618; Martinetti *v.* Maguire, Deady (U. S.) 216, 1 Abb. (U. S.) 356, 16 Fed. Cas. No. 9173; Miller *v.* McElroy, 1 Am. L. Reg. 198, 2 Pa. L. J. 305, 17 Fed. Cas. No. 9581; Yuengling *v.* Schile, 12 Fed. Rep. 97; Lamb *v.* Grand Rapids School Furniture Co., 39 Fed. Rep. 474.

Insufficient Proof of Copyright. — It has been held that where the plaintiff has shown a copyright of a book and a copy of a book having the same title, and that the defendant is publishing a book containing extracts from it, but has not shown that the copy produced is a copy of the book copyrighted, and the defendant denies that it is, there is no ground for a preliminary injunction. Humphreys' Homeopathic Medicine Co. *v.* Armstrong, 30 Fed. Rep. 66.

6. Scribner *v.* Stoddart, 21 Fed. Cas. No. 12561; Little *v.* Gould, 2 Blatchf. (U. S.) 165.

Sufficiency of Plaintiff's Title. — The plaintiff is not required to make out a clear legal title. All that is required is that he make out a fair *prima facie* title, whether legal or equitable,[1] or a clear color of title with assertion of right.[2]

Agency to Sell. — But a mere agent to sell has not such a real interest in a work as will entitle him to relief.[3]

Infringement of the Copyright. — And though the plaintiff's copyright is established, if there is a doubt as to whether or not it has been infringed, the injunction will still be denied.[4]

Comparative Injury to Respective Parties. — The courts will also take into consideration the comparative injury which is likely to result to the respective parties in consequence of granting or denying the injunction. Inasmuch as the granting of a writ of injunction rests in the sound discretion of the court, to be exercised upon all the circumstances of the case, and the object being to prevent mischief, the writ will not be issued where very great injury would be likely to ensue to the defendant from granting a motion, and little or none to the plaintiff from its denial.[5]

Defendant's Financial Responsibility. — The ability of the defendant to respond to any damages that may be assessed on final hearing is also an important element to be considered upon an application for a temporary injunction.[6]

i. COMPELLING DEFENDANT TO KEEP ACCOUNT OF SALES AND PROFITS.— Where a temporary injunction is refused, the court may compel the defendant to keep an account of all sales and profits while awaiting a final hearing.[7]

1. **Equitable Title Sufficient.** — Pierpont *v.* Fowle, 2 Woodb. & M. (U. S.) 23; Little *v.* Gould, 2 Blatchf. (U. S.) 181.

An equitable interest limited in point of time is sufficient. Sweet *v.* Cater, 11 Sim. 572.

2. Oxford, etc., Universities *v.* Richardson, 6 Ves. Jr. 689; Mawman *v.* Tegg, 2 Russ. 391.

Contest Over Title. — The mere fact that the title to a copyright under a contract of sale is in dispute does not prevent the granting of an injunction against infringement. Pierpont *v.* Fowle, 2 Woodb. & M. (U. S.) 23.

3. Nicol *v.* Stockdale, 3 Swanst. 687.

4. **Doubt as to Fact of Infringement a Ground for Refusal.** — Blunt *v.* Patten, 2 Paine (U. S.) 397; Miller *v.* McElroy, 2 Pa. L. J. 305, 1 Am. L. Reg. 198, 17 Fed. Cas. No. 9581. See Morris *v.* Wright, L. R. 5 Ch. 279.

Interlocutory Injunction Refused Notwithstanding Infringement. — In a case where the proprietor of a newspaper sought to restrain the piracy of a "list of hounds," the court was of the opinion that although the piracy might be established, the list was liable to such frequent changes, and a correct list was so easily obtained, that it was not a case for an interlocutory injunction. Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324. In the opinion delivered in this case by Malins, V. C., it was said: "I do not think it is a case to be decided on an interlocutory application; and my reason is this: this list must be corrected from week to week; it could not be a correct list from the 1st of November until April, or to the end of the hunting season. Changes must take place; the list of masters, huntsmen, and whips can hardly continue to be correct, even for a week. Now, suppose I were to grant an injunction, how can it be acted upon? The defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get the information from the masters of the hunts, and next week bring out a very correct list; and how am I to know the way in which they got their information? At present, I do not see that I can interfere."

5. **Possibility of Undue Injury to Defendant a Ground for Refusal.** — M'Neill *v.* Williams, 11 Jur. 344; Spottiswoode *v.* Clarke, 2 Phil. 157; Scribner *v.* Stoddart, 21 Fed. Cas. No. 12561; Hanson *v.* Jaccard Jewelry Co., 32 Fed. Rep. 202; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 53 Fed. Rep. 265; Goldmark *v.* Kreling, 25 Fed. Rep. 349. See Ainsworth *v.* Bentley, 14 W. R. 630, W. N. (1866) 117.

In the case of M'Neill *v.* Williams, 11 Jur. 344, Knight Bruce, V. C., said: "Of late years the tendency or inclination of the Court of Chancery has, I think, been, and properly been, rather to restrict and to diminish than to extend or increase the class or number of cases in which it interferes by injunction in cases of contested copyright before the establishment of the legal title; the court has, of late years especially, given great weight to the consideration of the question, which of the two parties to the dispute is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature against them, and to the consideration also of the very possible if not probable effect which an injunction may have to the defendant's prejudice in an action."

In the case of Miller *v.* McElroy, 2 Pa. L. J. 305, 1 Am. L. Reg. 198, 17 Fed. Cas. No. 9581, the court, in denying the motion for a preliminary injunction, said: "It is my desire and intention to keep myself free and open upon all the points that may hereafter be presented to my judgment in the case. Were I to grant the injunction, I should decide the questions I have stated, as well as others, affirmatively for the complainant."

6. Hanson *v.* Jaccard Jewelry Co., 32 Fed. Rep. 202.

7. **Refusal of Injunction and Ordering of Account of Sales and Profits to Be Kept.** — Jollie *v.*

j. PERMANENT INJUNCTION. — After the final hearing, if the court is satisfied that the copyright has been infringed, a permanent injunction will ordinarily be granted to restrain further infringement.[1]

k. SCOPE OF INJUNCTION — (1) *In General.* — An injunction may be against the whole or only a part of the infringing work.[2]

(2) *Where Pirated and Original Matter Are Separable.* — Where the pirated matter can be readily separated from the rest of the work without destroying the use and value of the original matter, the injunction will be limited to the parts copied.[3] Especially will this be done where an injunction is likely to lead to consequences to the defendant out of all proportion to the damage done to the plaintiff.[4]

(3) *Where Pirated and Original Matter Are Not Separable.* — If the parts which have been copied are considerable in amount, and are so intermixed with those which are original that they cannot be separated, an injunction will go against the whole work generally.[5]

l. ACCOUNT OF PROFITS — **Incident to Right to Injunction.** — The right to an account of profits is incident to the right to an injunction in copyright cases.[6]

Jaques, 1 Blatchf. (U. S.) 618. See Blank *v.* Manufacturing Co., 3 Wall. Jr. (C. C.) 196.

In the case of Hubbard *v.* Thompson, 14 Fed. Rep. 689, the court, while refusing an injunction *simpliciter*, ordered that the defendant should give a bond to answer to any damages that might be adjudged against him in the case, and that he should keep an account of all the books by him thereafter sold or otherwise disposed of, and preserve an account of those books theretofore sold or disposed of.

And in West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 53 Fed. Rep. 265, a preliminary injunction was granted, with leave to the defendant to continue to furnish the book, alleged to be an infringement, to regular subscribers and others with whom it had contracted to deliver it, upon giving bond to keep account of sales and to pay such damages as might be awarded to the complainant.

1. Jollie *v.* Jaques, 1 Blatchf. (U. S.) 618; Folsom *v.* Marsh, 2 Story (U. S.) 100; Story *v.* Holcombe, 4 McLean (U. S.) 306; Greene *v.* Bishop, 1 Cliff. (U. S.) 186; Daly *v.* Palmer, 6 Blatchf. (U. S.) 256; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Murray *v.* Bogue, 1 Drew 353. *Compare* Whittingham *v.* Wooler, 2 Swanst. 428.

2. Scope of Injunction Restraining Unauthorized Sales of Subscription Work. — In Henry Bill Pub. Co. *v.* Smythe, 27 Fed. Rep. 914, the defendant, a dealer in books, who had wrongfully obtained possession of a number of copies of a copyrighted work which was sold by subscription only, was enjoined from selling such copies, but the court refused to grant an injunction restraining him from dealing in the book in the future otherwise than as he might deal with the plaintiff, or from interfering with the local agent of the work.

3. Injunction Limited to Parts Copied. — Jarrold *v.* Houlston, 3 Kay & J. 708; Morris *v.* Ashbee, L. R. 7 Eq. 40; Webb *v.* Powers, 2 Woodb. & M. (U. S.) 497; Greene *v.* Bishop, 1 Cliff. (U. S.) 203, 10 Fed. Cas. No. 5763; Emerson *v.* Davies, 3 Story (U. S.) 768; Story *v.* Holcombe, 4 McLean (U. S.) 306; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360.

4. The complainant was the author and proprietor of an elaborate book of one thousand and twenty-four pages, entitled "A History of Detroit and Michigan, or the Metropolis Illustrated." The defendant's publication was a pamphlet of two hundred and seventy-four pages, entitled "The Industries of Detroit," the first seventy pages of which were mainly historical, and contained about one hundred short extracts from the complainant's book. The remaining two hundred pages consisted of advertisements only. It was held that, as three-fourths of the extracts from complainant's book, and practically all to which he could lay claim as original matter, were contained in the first eleven pages of the pamphlet, and as to enjoin the whole would cast a disproportionate pecuniary loss on the defendant, the injunction should extend only to this portion. Farmer *v.* Elstner, 33 Fed. Rep. 494.

5. Where Original and Pirated Matter Not Separable. — Mawman *v.* Tegg, 2 Russ. 387; Lewis *v.* Fullarton, 2 Beav. 6; Kelly *v.* Morris, L. R. 1 Eq. 697; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756.

"Thus, in Mawman *v.* Tegg, 2 Russ. 385, Lord Eldon says: 'If the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses, in any work, to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the other parts of the work cannot be separated, and if by that means the injunction which restrains the publication of my literary matter prevents also the publication of his own literary matter, he has only himself to blame.'" *Quoted* in Farmer *v.* Elstner, 33 Fed. Rep. 494.

6. Hole *v.* Bradbury, 12 Ch. Div. 809; Stevens *v.* Gladding, 17 How. (U. S.) 447; Fishel

Profits Recoverable — General Rule. — It has been said that "the defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies." [1] But it has been declared that this rule is not applicable in all cases,[2] and that the just and proper rule is to ascertain the profits which the defendant made by reason of his piracy of the complainant's work and fix that as the measure of the complainant's damages.[3] The account is limited to the net profits actually made and the moneys actually received by the wrongdoer.[4]

Where Pirated and Original Matter in Defendant's Publication Are Not Separable. — But this rule, limiting the amount of the complainant's recovery to the profits which the defendant realized by his piracy, is not applicable where the pirated portions of the defendant's work are so intermingled with the original matter that they cannot well be distinguished from it; in such cases the entire profits realized by the defendant will be given to the plaintiff.[5]

3. Penalties and Forfeitures — *a.* STATUTORY PROVISIONS. — The copyright statutes of the *United States* make provision for the infliction of certain penalties and forfeitures in the case of infringement.[6]

b. CONSTRUCTION OF THE PROVISIONS. — The provisions of the statute which provide for penalties and forfeitures are penal in their character and must therefore be construed strictly.[7]

v. Lueckel, 53 Fed. Rep. 499; Falk *v.* Gast Lithograph, etc., Co., 54 Fed. Rep. 890, 14 U. S. App. 15; Pierpont *v.* Fowle, 2 Woodb. & M. (U. S.) 23.

1. Rule Applied in Pike v. Nicholas. — Vice-Chancellor James, in Pike *v.* Nicholas, L. R. 5 Ch. 261.

2. Criticisms of the Rule. — The application of this rule was contended for on the part of the complainant in the case of Scribner *v.* Clark, 50 Fed. Rep. 473. But Blodgett, D. J., said: "The proof in this case shows, and it is a conceded fact, that the infringing book published by the defendants was a cheap edition intended for popular sale at news stands, a small edition of a little over 9,000 copies having been sold at about sixty cents a copy, and a still cheaper edition having been put upon the market at ten cents a copy, of which the defendant sold 60,671 copies. While the rule contended for as to the measure of damages may have been a proper one in the case of Pike *v.* Nicholas, L. R. 5 Ch. 261, it seems to me it is not the proper rule in this case, inasmuch as the defendants only used part of the material of the complainant's book, and as their edition was a much cheaper one, and their sales at a very much lower price. If the defendants had put their editions upon the market at the same price at which the complainant sold his books, the rule in Pike *v.* Nicholas might be adopted here; but it does not follow that if defendants had put upon the market such editions of their book as were published by the complainant they could, or would, have sold over 70,000 copies. The fair and rational presumption from the facts is that it was the low price at which the defendants' books were offered in the market that caused these large sales. It seems to me the just and proper rule in this, as in all other cases of this character, is to ascertain the profits the defendants made by their piracy of the complainant's work, and fix that as the measure of the complainant's damages."

And in the case of Colburn *v.* Simms, 2 Hare 560, Wigram, V. C., said: "The court does not by an account accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them all to the party who has been injured. In doing that the court may give the injured party more in fact than he is entitled to, for *non constat* that a single additional copy of the more expensive work would have been sold if the injury by the sale of the cheaper work had not been committed. The court does not give anything more than the account."

3. Approved Rule. — Scribner *v.* Clark, 50 Fed. Rep. 473.

4. Colburn *v.* Simms, 2 Hare 560. See Callaghan *v.* Myers, 128 U. S. 617.

Commissions Received by a Bookseller for the sale of a pirated book are profits, and must be accounted for to the owner of the copyright. Stevens *v.* Gladding, 2 Curt. (U. S.) 608.

5. Rule Where Pirated and Original Matter Are Not Separable. — Mawman *v.* Tegg, 2 Russ. 385; Callaghan *v.* Myers, 128 U. S. 617; Belford *v.* Scribner, 144 U. S. 488.

6. For the provisions of the Act, see U. S. Rev. Stat., § 4964, as amended by the Act of March 3, 1891, 26 U. S. Stat. at L. 1109; U. S. Rev. Stat., § 4965, as amended by the Act of March 3, 1891, 26 U. S. Stat. at L. 1109, and the Covert Act of March 2, 1895, 28 U. S. Stat. at L. 965. See Thornton *v.* Schreiber, 124 U. S. 612.

7. Provisions Strictly Construed. — Schreiber *v.* Sharpless, 6 Fed. Rep. 175; Taylor *v.* Gilman, 24 Fed. Rep. 632; Backus *v.* Gould, 7 How. (U. S.) 798; Sarony *v.* Ehrich, 23

c. EXTENT OF PIRACY NECESSARY TO INCUR PENALTIES. — As has been shown elsewhere in this article, one book may be a copy of another, so as to infringe the copyright, although a part only of the copyrighted book is appropriated.[1] But it has been questioned whether the word "copy" in the section which provides for a forfeiture of piratical copies of a copyrighted book is to be taken in this sense.[2] While this question has not been adjudicated under the present law, a reliable text writer on the law of copyright says that although the courts may hold that the appropriation of an entire work is not necessary to subject the wrongdoer to the penalty of forfeiture, they may, on the other hand, hold that such penalty is not necessarily incurred by taking a part, though such part may be enough to amount to piracy for which an action for damages will lie.[3] As is pointed out by the same authority, this question can only arise in the case of the infringement of the copyright in a book; for, in the case of maps, charts, dramatic or musical compositions, prints, etc., the statute provides for penalties and forfeitures in case of piracy "either in whole or in part."[4]

d. PERSONS LIABLE FOR THE STATUTORY PENALTIES — **In Case of Infringement by an Agent.** — Because of the penal character of the provision for penalties, it has been held that where the infringement is by an agent in pursuance of his employment, but without the knowledge of the principal, the statutory penalty cannot be enforced against the principal.[5] It seems, however, that in such cases it will be otherwise as to the agent.[6] And if the infringement

Blatchf. (U. S.) 556, 28 Fed. Rep. 79; Falk *v.* Heffron, 56 Fed. Rep. 299.

1. See *supra*, this title, the division *Infringement*, the subdivisions *What Copying Constitutes Infringement — Partial Reproduction.*

2. **Decisions Under the Act of 1831.** — Under the Act of Congress of 1831 (4 U. S. Stat. at L. 436), it was held that the statutory penalty was only incurred by a reprint or transcript of the entire work, and that the reproduction of a part of a copyrighted work, although amounting to an infringement of the plaintiff's copyright, was not enough to constitute a case for forfeiture. Rogers *v.* Jewett, Brunner Col. Cas. 683, 22 Law Rep. 339, 20 Fed. Cas. No. 12012. The contrary doctrine had previously been affirmed by the Circuit Court of the United States in another circuit by a *pro forma* ruling in Backus *v.* Gould, 7 How. (U. S.) 798, which was an action for the penalties under the Act of 1831 for the publication of parts of certain books. The case was taken for review to the Supreme Court of the United States; but the question was not passed upon by that tribunal, which simply decided that the penalty was limited to the sheets found in the possession of the defendant. Backus *v.* Gould, 7 How. (U. S.) 798. See Rooney *v.* Kelly, 14 Ir. C. L. R. 158.

3. Drone on Copyright, pp. 488–490.

4. U. S. Rev. Stat., § 4965, as amended by Act of March 3, 1891, 26 U. S. Stat. at L. 1109, and the Covert Act of March 2, 1895, 28 U. S. Stat. at L. 965.

In Brady *v.* Daly, 83 Fed. Rep. 1007, it was contended that the statutory damages provided for by section 4966 of the copyright law are incurred only when substantially the whole of a copyrighted play is reproduced: but it was held that they were incurred by the appropriation of only one scene, that constituting an infringement.

5. **Infringement by Agent — Principal's Liability.** — Schreiber *v.* Sharpless, 6 Fed. Rep. 175 17 Fed. Rep. 589, 110 U. S. 76; Taylor *v.* Gilman, 24 Fed. Rep. 632.

6. **Agent's Liability.** — In a case where the defendant, who had charge of the dry-goods department of a general merchandise firm, had caused lithographic copies of a copyrighted photograph to be made, for the purpose of being used as labels for the goods of the firm, and a number of these copies were distributed as labels on cambrics, while others were found in the defendant's department of the store, a verdict against the defendant for the penalties prescribed by the copyright law was sustained. Schreiber *v.* Thornton, 17 Fed. Rep. 603. But on appeal it was held that the prints were at no time in possession of the defendant, but in that of the firm by which he was employed, and since the penalty for which a defendant is liable is for copies "found in his possession," there could be no recovery of the statutory penalties against the defendant in this case. Thornton *v.* Schreiber, 124 U. S. 612. It seems that the court was of the opinion that the defendant's employer had knowledge of and had consented to the infringement; for, in the opinion of the court, delivered by Mr. Justice Miller, it is said: "The attempt was made to establish the fact that Thornton had the possession or control of these prints, by showing that he was the man who first conceived the idea of getting up and using them in the business of Sharpless & Sons; that he did in effect order the photograph to be made, and only showed it to Mr. Sharpless after this was done. Thornton, however, states that before it was used, and a month before the time the prints were found at the store by the plaintiffs, Mr. Sharpless had known about the photograph and copy, that he approved it, and that the bills were paid by his firm." In another action, based upon the same transaction, brought by the same plain-

is directed or authorized by the principal, he will be liable to the penalties.[1]

Personal Representatives of Defendant. — Since an action to recover the statutory penalties and forfeitures abates by the death of the defendant, it cannot be prosecuted against the personal representatives of the infringer.[2]

e. COPIES OR SHEETS FOR WHICH PENALTIES ATTACH — **Copies Found in Possession of Infringer.** — While a broader construction seems to have been given to the statute in certain early cases,[3] the later authorities are agreed that the penalty is not recoverable for every sheet which the defendant has published, but that it is limited to the sheets in the defendant's possession.[4] According to the most recent cases, it is not enough that the sheets have been in the defendant's possession, but they must have been actually found there some time prior to the commencement of the action.[5]

Penalty Limited by Number of Sheets. — Since the statute is penal, it cannot be extended by construction beyond its plain terms, which give the penalty for each sheet. And if more than one copy of the copyrighted work is printed upon a sheet, the penalty cannot be inflicted for each copy, but must be limited to each sheet.[6]

f. DAMAGES TO PLAINTIFF IMMATERIAL. — In an action for the statutory penalty, it is not necessary or material to show injury to the plaintiff in consequence of the infringement.[7]

g. FORFEITURE WHERE ALL COPIES ARE DESTROYED. — Where all the copies have been destroyed it is not necessary to decree forfeiture.[8]

4. Damages for Infringement — Not Recoverable in Equity. — As has already been shown,[9] there may be a recovery of profits in a suit in equity for infringement of copyright. But the copyright law, unlike that governing patents,[10] makes no provision for the recovery of damages in such suits.[11]

Whether Recoverable When Penalties Are Prescribed. — Since it is an established principle of statutory construction that where a statute provides a new remedy for an existing right, not inconsistent with the common-law remedy, the latter is not abolished,[12] it would seem that an action at law for damages will lie

tiffs against the firm itself, the evidence showed the copying to have been done by the firm's employee, Mr. Thornton, without its assent or knowledge. Schreiber *v.* Sharpless, 6 Fed. Rep. 175.

1. See Thornton *v.* Schreiber, 124 U. S. 612.

Thus where a person furnishes copyrighted pictures to a photogravure company, orders copies to be made, and gives general directions as to how the work shall be done, he is liable as joint tortfeasor although the company agreed to take the risk of infringement. Fishel *v.* Lueckel, 53 Fed. Rep. 499.

2. Schreiber *v.* Sharpless, 17 Fed. Rep. 589; Schreiber *v.* Sharpless, 110 U. S. 76.

3. **Construction of the Statute in Early Cases.** — In Millett *v.* Snowden, 1 West. L. J. 240, 17 Fed. Cas. No. 9600, the court ruled that if the jury found that the defendant had republished the copyrighted matter without leave obtained in writing of the plaintiff, they must then "proceed to ascertain the number of sheets proved to have been sold or offered for sale, * * * and return a verdict of one dollar for each sheet so sold or offered to be sold." In Reed *v.* Carusi, Taney's Dec. (U. S.) 72, 20 Fed. Cas. No. 11642, the jury were charged by Chief Justice Taney that if they found the defendant liable, they should "find the number of copies caused to be printed for sale by him within two years before the suit was brought." Apparently in neither of these cases was the point made that the copies printed had not actually been in the defendant's possession See Bolles *v.* Outing Co., 45 U. S. App. 449, 77 Fed. Rep. 966.

4. **Penalty Limited to Sheets in Defendant's Possession.** — Backus *v.* Gould, 7 How. (U. S.) 798; Sarony *v.* Ehrich, 23 Blatchf. (U. S.) 556, 28 Fed. Rep. 79; Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195, 8 Fed. Cas. No. 4215; Thornton *v.* Schreiber, 124 U. S. 612.

5. **Penalty Limited to Sheets Found in Defendant's Possession.** — Bolles *v.* Outing Co., 45 U. S. App. 449, 77 Fed. Rep. 966. See Thornton *v.* Schreiber, 124 U. S. 612.

6. **Where Several Piratical Copies of a Photograph Are Printed on One Sheet,** it has been held that the amount of the penalty to be imposed is not to be determined by counting the number of copies and allowing one dollar for each copy. And this rule is not affected by the fact that the sheets have been cut up into parts, each containing a copy of the photograph. The penalty will still be limited to one dollar for each of the whole sheets. Falk *v.* Heffron, 56 Fed. Rep. 299.

7. Springer Lithographing Co. *v.* Falk, 59 Fed. Rep. 707, 20 U. S. App. 296.

8. Scribner *v.* Clark, 50 Fed. Rep. 473.

9. See *supra*, this title and division, the subdivision *Injunction and Accounting*.

10. See the title PATENTS.

11. **Damages Not Recoverable in Equity.** — Chapman *v.* Ferry, 8 Sawy. (U. S.) 191.

12. Suth. Stat. and Stat. Constr., par. 202. See the title STATUTES.

notwithstanding the fact that the statute prescribes penalties for forfeitures but does not provide a remedy for damages. The English and Canadian laws have been so construed,[1] and this construction of our law is favored by text writers.[2]

Recoverable for Piracy of Books and Dramatic Compositions. — While our statute makes express provision for the recovery of "damages" for the infringement of copyright in books and dramatic compositions,[3] these statutory damages have been held to be in the nature of forfeitures.[4]

5. Right of Licensee to Bring Suit. — Suit for the protection of the common-law property in a dramatic composition may be brought by the licensee of a general owner, where such licensee has an exclusive license to produce the work in a specified territory for a definite period,[5] especially if, by the terms of his license, he is to bring all suits for the protection of his rights.[6]

6. Limitation of Actions — Actions for Forfeitures and Penalties. — By the express terms of the copyright law, all actions for the statutory penalties and forfeitures must be brought within two years after the cause of action has arisen.[7]

Actions in Equity. — But no such restriction is laid upon the right to bring an action in equity. Where the complainant has not been guilty of laches,[8] his suit will not be barred.[9]

XV. JURISDICTION — Actions Based on the Common-law Property. — Actions for the infringement of the common-law property in intellectual productions must be brought in a state court,[10] unless a federal court has jurisdiction by reason of the citizenship of the parties,[11] in which case redress may be sought in either tribunal.

Actions Based on Statutory Copyright. — The United States courts have exclusive jurisdiction of actions for the infringement of statutory copyright.[12]

Actions for the Statutory Penalties and Forfeitures. — The statutory penalties and

1. Beckford *v.* Hood, 7 T. R. 620; Cadell *v.* Robertson, 5 Pat. App. Cas. 493; Roworth *v.* Wilkes, 1 Campb. 94; Colburn *v.* Simms, 2 Hare 543; Bernard *v.* Bertoni, 14 Quebec 219. See also Thompson *v.* Symonds, 5 T. R. 41; Sheriff *v.* Coates, 1 Russ. & M. 159.

2. Drone on Copyright 573.

Damages Recoverable for Infringement of Common-law Right. — Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410.

3. U. S. Rev. Stat., § 4964, 26 U. S. Stat. at L. 1109; U. S. Rev. Stat., § 4966, as amended by Act of January 6, 1897, 29 U. S. Stat. at L. 481; Boucicault *v.* Wood, 2 Biss. (U. S.) 34.

4. Daly *v.* Brady, 69 Fed. Rep. 285; Wheeler *v.* Cobbey, 70 Fed. Rep. 487.

5. Aronson *v.* Baker, 43 N. J. Eq. 365.

6. Aronson *v.* Fleckenstein, 28 Fed. Rep. 75.

7. U. S. Rev. Stat., § 4968. See Boucicault *v.* Wood, 2 Biss. (U. S.) 34.

Action for Statutory Damages for Piracy of Dramatic Compositions. — And this limitation has been held to apply to actions for the damages provided for by section 4966 of the United States Revised Statutes. Daly *v.* Brady, 69 Fed. Rep. 285.

Damages Recoverable for Piracy of Book. — So, too, damages provided for by section 4964 of the United States Revised Statutes have been held to be forfeitures, and an action for their recovery is, therefore, under the statute, barred by a lapse of two years. Wheeler *v.* Cobbey, 70 Fed. Rep. 487.

8. See *supra*, this title and division, the subdivision *Grounds for Refusing Injunction.*

9. Greene *v.* Bishop, 1 Cliff. (U. S.) 186.

10. Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12. See Woolsey *v.* Judd, 11 How. Pr. (N. Y. Super. Ct.) 49.

Action under Agreement for Right to Perform a Play. — A state court has jurisdiction of an action to determine the rights of the respective parties under an agreement by the defendant with the plaintiff for the exclusive right to have and perform a certain play. Widmer *v.* Greene, 56 How. Pr. (N. Y. Supreme Ct.) 91.

11. Little *v.* Hall, 18 How. (U. S.) 165; Press Pub. Co. *v.* Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410.

In Keane *v.* Wheatley, 9 Am. L. Reg. 45, the Circuit Court of the United States had jurisdiction by reason of the citizenship of the parties.

12. Potter *v.* McPherson, 21 Hun (N. Y.) 562.

Actions to Recover Statutory Damages for Piratical Performance of Dramatic Compositions. — Jurisdiction of actions to recover the damages prescribed by section 4966 of the United States Revised Statutes is vested in the federal courts. Daly *v.* Brady, 69 Fed. Rep. 285.

Actions to Restrain Infringement in Foreign Country. — It has been held in England that an English court has no jurisdiction, at the instance of the English proprietor of the performing right of a musical dramatic work of an English author, to restrain a threatened infringement by a British subject in any foreign country comprised in the international copyright union. "Morocco Bound" Syndicate *v.* Harris, (1895) 1 Ch. 534.

forfeitures are not enforceable in equity; they are only recoverable in actions at law.[1]

Actions for Damages. — And it is so with regard to damages as distinguished from profits.[2]

XVI. Evidence — 1. Of the Existence of Copyright — *a.* Burden of Proof. — In every suit for infringement of copyright the plaintiff must show that he has a valid copyright in the work for which he claims copyright protection.[3]

Showing Compliance with Statutory Formalities. — This requires him to show a sufficient compliance with the statutory directions for securing copyright; he must in some way prove the registry of the title,[4] the deposit of copies,[5] and the copyright notice. With regard to the provision for a copyright notice, it may be said that a *prima facie* case of compliance may be established by general testimony; it is not required that there should be separate, distinct, and specific proof as to each of the published copies.[6]

b. Competency of Evidence — **Deposit of Title.** — The statutes require the librarian of Congress to keep a record of titles deposited, and direct that a copy shall be given the proprietor whenever required.[7] Unquestionably, such copy is competent evidence of the deposit of the title.[8]

Deposit of Copies. — Compliance with the provision which requires the deposit of copies with the librarian may be shown by evidence of the deposit of copies in the mail, properly addressed.[9] Or, it may be shown by the certificate of the librarian, and this certificate need not be under seal.[10] It would seem that it may also be proved by a record kept by the librarian in the course of the discharge of his official duties.[11]

Notice of Copyright. — Compliance with the provision which requires a copyright notice to be inscribed upon the several copies of the copyrighted work may be shown by the testimony of the persons who have charge of the preparation of all the published copies.[12]

2. Of the Infringement — *a.* Burden of Proof. — In addition to showing

1. Chapman *v.* Ferry, 8 Sawy. (U. S.) 191, 12 Fed. Rep. 693; Stevens *v.* Cady, 2 Curt. (U. S.) 200; Stevens *v.* Gladding, 17 How. (U. S.) 447; Trow City Directory Co. *v.* Curtin, 36 Fed. Rep. 829.

2. Chapman *v.* Ferry, 8 Sawy. (U. S.) 191, 12 Fed. Rep. 693.

3. Chase *v.* Sanborn, 4 Cliff. (U. S.) 306, 6 Pat. Office Gaz. 932, 5 Fed. Cas. No. 2628; Chicago Music Co. *v.* J. W. Butler Paper Co., 19 Fed. Rep. 758.

4. Chase *v.* Sanborn, 4 Cliff. (U. S.) 306, 6 Pat. Office Gaz. 932, 5 Fed. Cas. No. 2628.

5. Chase *v.* Sanborn, 4 Cliff. (U. S.) 306, 6 Pat. Office Gaz. 932, 5 Fed. Cas. No. 2628; Burnell *v.* Chown, 69 Fed. Rep. 993; Merrell *v.* Tice, 104 U. S. 557.

6. Falk *v.* Gast Lith., etc., Co., 40 Fed. Rep. 168.

7. U. S. Rev. Stat., § 4957.

8. It was provided by the Act of 1831, U. S. Stat. at L. 436, that a printed copy of the title of the work intended to be copyrighted should be filed with the clerk of the district court of the district wherein the author or proprietor should reside. The section also required that the clerk should forthwith record such title in a book, in words prescribed in the section, and give a copy of the title under the seal of the court to the author or proprietor whenever he should require the same.

In an action for the infringement of a copyright secured under this act, it was held that a copy of the title given by the clerk in pursuance of this provision was *prima facie* evidence of the deposit of the title. Callaghan *v.* Myers, 128 U. S. 617.

Under the Canadian Copyright Act the certificate of registration of a copyright is *prima facie* evidence that the requirements of the law previous to its issuance have been complied with. Bernard *v.* Bertoni, 14 Quebec 219.

9. **Deposit of Copies in the Mail.** — In the case of Blume *v.* Spear, 30 Fed. Rep. 629, the orator testified that he deposited two copies of the book in the mail and got an acknowledgment of the receipt of the copies over the official signature of the librarian in answer. This receipt was put in evidence, but there was no evidence as to how the copies were addressed. It was held that compliance with the statutory provision had been shown.

10. **Certificate of Librarian Competent Evidence.** — Belford *v.* Scribner, 144 U. S. 488.

In Merrell *v.* Tice, 104 U. S. 557, the court, while expressly refraining from saying whether or not the librarian's certificate is competent evidence of the deposit of copies, held that the certificate given in evidence in that case was so defective as not to be competent evidence. See references to this case in Blume *v.* Spear, 30 Fed. Rep. 629. The case is *distinguished* in Callaghan *v.* Myers, 128 U. S. 617.

11. See Daly *v.* Webster, 56 Fed. Rep. 483; Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764. See also the title Record.

12. Falk *v.* Gast Lith., etc., Co., 40 Fed. Rep. 168.

title to a valid copyright, the plaintiff who sues for an infringement must, of course, establish the infringement.[1]

b. COMPETENCY OF EVIDENCE — **Similarity Between the Two Works.** — Since one work may be similar to another without having been derived from or based upon it,[2] mere resemblance between two works does not necessarily show that the one is a piracy of the other.[3] Identity of contents, arrangement, and combination is, however, strong evidence that the second book was borrowed from the first, because it is highly improbable that the two authors would express their thoughts and sentiments in the same language throughout a book or treatise of any considerable size, or adopt the same arrangement or combination in their publication.[4]

How Proved. — The similarity between the alleged infringement and the work of which it is claimed to be a piracy should be shown by introducing both works in evidence, and not by the testimony of a person who has examined both works.[5]

Fact of Common Errors. — The fact that two works, one of which is claimed to be a piracy of the other, contain common errors, is competent evidence to show an unfair use of the earlier work.[6] It has been said that this is especially so in the case of compilations where a close resemblance is the necessary consequence of the use of common materials.[7]

3. Of Profits. — As to the profits made by the infringer, it has been held that the plaintiff makes a *prima facie* case by showing the selling price and the usual manufacturer's cost.[8]

CORAL. — See CAMEO.

CORAM NOBIS — CORAM VOBIS. — See ENCYC. OF PLEADING AND PRACTICE, vol. 5, p. 26.

CORAM NON JUDICE. (See the titles JUDGE; JUDGMENTS AND DECREES; JURISDICTION; JUSTICES OF THE PEACE.) — *Coram non judice* means, before one who is not the proper judge. Where an action is brought and determined in a court which has no jurisdiction over the matter, it is said to be *coram non judice*.

CORD. (See the title WEIGHTS AND MEASURES.) — A measure of wood or bark, containing one hundred and twenty-eight cubic feet, being the quantity contained in a pile eight feet long, four feet broad, and four feet high. Such a pile is called a cord.[9]

1. Chase *v.* Sanborn, 4 Cliff. (U. S.) 306.

Proving Infringement in Part. — It has been held that a complainant does not, by proving that part of his work has been infringed, and convincing the court that it will be difficult to prove the rest, relieve himself from the burden of proving the infringement. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. Rep. 360.

2. See *supra*, this title, *Infringement*.

3. Emerson *v.* Davies, 3 Story (U. S.) 768. The mere circumstance that two syllabi of the same opinion are expressed in identical language is not always sufficient proof that one was borrowed from the other, especially if the statement is familiar and brief. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756.

4. Reade *v.* Lacy, 1 Johns. & H. 524; Roworth *v.* Wilkes, 1 Campb. 94; Lawrence *v.* Dana, 4 Cliff. (U. S.) 80; Emerson *v.* Davies, 3 Story (U. S.) 768; Myers *v.* Callaghan, 20 Fed. Rep. 441; Chapman *v.* Ferry, 18 Fed. Rep. 539.

5. Boucicault *v.* Fox, 5 Blatchf. (U. S.) 87.

Proof of Authorship. — The fact that the plan, arrangement, and combination of a copyrighted work originated in the brain of the author may be proved by some other person than such author. Bullinger *v.* Mackey, 15 Blatchf. (U. S.) 550.

6. **Infringement Shown by Coincidence of Errors.** — Mawman *v.* Tegg, 2 Russ. 393; Lawrence *v.* Dana, 4 Cliff. (U. S.) 1; Chapman *v.* Ferry, 18 Fed. Rep. 539; Chicago Dollar Directory Co. *v.* Chicago Directory Co., 24 U. S. App. 636, 66 Fed. Rep. 977; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756; Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12. See Mead *v.* West Pub. Co., 80 Fed. Rep. 380.

7. List Pub. Co. *v.* Keller, 30 Fed. Rep. 772.

8. Myers *v.* Callaghan, 24 Fed. Rep. 636. See Gilmore *v.* Anderson, 42 Fed. Rep. 267.

9. **Cord.** — Bouv. Law Dict.; Kennedy *v.* Oswego, etc., R. Co., 67 Barb. (N. Y.) 169. A *cord* has been defined by statute in several of the states to consist of a quantity equal to a pile eight feet in length, four feet in width,

CORN. (See the title CROPS; and see GRAIN.) — "Corn" is defined to be a cereal grain, and the word is commonly used in the United States in place of Indian corn or maize.[1]

CORNCRIB. — A crib for storing corn.[2]

and four feet in height. Mass. Gen. Stat. (1882), c. 60, § 73; N. Car. Rev. Stat. (1883), § 3049; R. I. Pub. Stat. (1882), c. 128, § 1; Vt. Rev. Laws (1880), § 3711; Va. Code (1873), c. lxxxviii., § 8. Or of one hundred and twenty-eight cubic feet. Ohio Rev. Stat. (1883), § 4434; Va. Code (1873), c. lxxxviii., § 8. Provision is made in these statutes that the wood shall be well stowed and packed; and the measurement in Massachusetts, Rhode Island, and Vermont includes one-half of the kerf.

A *Massachusetts* statute defined a ***cord*** of wood. In Colton *v.* King, 2 Allen (Mass.) 319, the court said: "The declaration is upon an account annexed, for 542⅝ ***cords*** of wood. The proof was not of any number of ***cords*** sold, but of a bargain by which a partial and imperfect measurement was agreed upon by which to fix the quantity to be paid for, the plaintiffs admitting that it did not give the true quantity. We are of opinion that a declaration for the sale and delivery of a certain number of ***cords*** of wood must be interpreted as meaning ***cords*** such as the statute defines, and is not supported by proof of a special agreement that a less quantity should be delivered and accepted as a ***cord*** under the contract between the parties. Hockin *v.* Cooke, 4 T. R. 315."

In Kennedy *v.* Oswego, etc., R. Co., 67 Barb. (N. Y.) 169, it was said: "When a contract is made for the purchase and sale of a given number of ***cords*** of wood, the vendor is bound to deliver, and the vendee is entitled to receive, one hundred and twenty-eight cubic feet for each ***cord*** of wood so contracted for." It was accordingly held that the purchaser, though informed that the wood was but three feet long, was not bound to accept a pile of such eight feet long by four feet high as a ***cord***, in the absence of a special contract to do so, or a well-known custom or usage which recognizes such a pile as a ***cord***. See the title USAGES AND CUSTOMS.

The Sale of a Part of a Cord of wood is not a sale "by the ***cord***" within an act providing a penalty for such, unless the wood is measured by the appointed measurer. Pray *v.* Burbank, 12 N. H. 267.

Larceny. — "Twenty-five ***cords*** of wood" is a sufficient description of the subject of a larceny in an indictment. It sufficiently indicates that the property was personal, and not real. State *v.* Parker, 34 Ark. 158.

1. Wood *v.* State, 18 Fla. 969.

Indian Corn. — In the *United States* ***corn*** is now generally and popularly restricted in its meaning to maize or Indian ***corn***. Wood *v.* State, 18 Fla. 969; State *v.* Nipper, 95 N. Car. 653; Com. *v.* Pine, 3 Pa. L. J. 411. The word ***corn***, referring to grain, as used in this country, ordinarily means Indian ***corn***, and not the cereal grains generally, unless the meaning is enlarged by the circumstances of its employment. Thus, a representation that a mill was capable of grinding forty bushels of ***corn*** per hour, is not shown to be untrue by proof that it would grind only fifteen bushels of mixed ***corn*** and oats per hour. Kerrick *v.* Van Dusen, 32 Minn. 317.

In a larceny act ***corn*** does not mean a cereal, or wheat, or barley, or oats, but Indian maize, that having been the principal breadstuff here. Sullins *v.* State, 53 Ala. 474. In that case the court said: "***Corn***, here, whatever it may elsewhere signify, or whatever it may have signified elsewhere, does not mean a cereal, or wheat, or barley, or oats, or mere grain. It means that which is termed Indian maize, and is and has been the principal breadstuff here."

In the same act, "outstanding crop of ***corn***" means the crop in the field, not gathered thence and housed, without reference to its state; it is not confined to that which remains beyond the proper time for housing, or to matured ***corn*** in a condition to be housed. Sullins *v.* State, 53 Ala. 474. See OUTSTANDING; and the title CROPS.

In *England* ***corn*** is a comprehensive or general term, including all kinds of grain. Park on Ins. 112; 1 Parsons on Mar. Ins. 627, n. 2. In the memorandum clause of a policy of insurance, ***corn*** was held to include pease and beans. Mason *v.* Skurray, Park on Ins. 112. Malt also comes within the designation as being ***corn*** in a manufactured state. Moody *v.* Surridge, 2 Esp. N. P. 633. But rice does not. Scott *v.* Bourdillion, 2 B. & P. N. R. 213.

Corn — Provisions. — ***Corn*** has been held to be embraced within an exemption from execution of all such provisions as may be on hand for family use. The court said: "It is certainly not an unreasonably liberal construction of this statute to hold that ***corn***, so generally used in this country for bread, is embraced by the term 'provisions.' Whether the plaintiff had on hand a surplus of ***corn***, or only such quantity as was necessary for family use, was a question to be determined by the jury, from the evidence, and the instruction properly left it to them." Atkinson *v.* Gatcher, 23 Ark. 103.

Larceny. — In State *v.* Nipper, 95 N. Car. 653, it was held that a charge that the defendant stole three bushels of ***corn*** is supported by proof that he stole three bushels of ***corn*** in the ear. The court said: "In this country the term ***corn*** applies mainly to maize or Indian ***corn***, and it does not necessarily imply shelled ***corn***. In a general sense, one in common use, it implies ***corn*** either shelled or in the ear. Thus it is said of a farmer that he produced on his farm a thousand bushels of ***corn***, without reference to whether it is shelled or not. And so it is said there is stored in a house a thousand bushels of ***corn***: this implies that quantity shelled or unshelled. To say that a quantity of ***corn*** is shelled, or that it is unshelled, is to describe its condition in a certain respect; to say it is red, or white, or speckled, is to describe it in another respect and give it greater particularity."

2. **Burglary.** (See generally the title BURGLARY, vol. 5, p. 54.) — Metz *v.* State, 46 Neb.

CORNER. — 1. A "corner" is the intersection of two converging lines or surfaces; an angle, whether internal or external; as the corner of a building, the four corners of a square, the corner of two streets. Also, the space between two converging lines or surfaces.[1]

2. A "corner" is a monopolizing of the marketable supply of a stock or commodity, through purchase for immediate or future delivery, generally by a secretly organized combination, for the purpose of raising the price; as a "corner" in wheat.[2]

CORODIES. (See generally the titles ANNUITIES, vol. 2, p. 386; INCORPOREAL HEREDITAMENTS; PENSIONS.) — "Corodies" were a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance; *e. g.*, a bishopric was at one time saddled with the maintenance of at least one royal chaplain; in lieu of which (especially when due from ecclesiastical persons) a pension or sum of money was sometimes substituted. And these might be reckoned a species of incorporeal hereditaments, though not chargeable on or issuing out of any corporeal inheritance, but only charged on the person of the owner in respect of his inheritance.

547, in which case it was held that a ***corncrib*** was a storehouse and warehouse within the meaning of the *Nebraska* statute defining burglary.

In Wood *v.* State, 18 Fla. 969, it was held that a ***corncrib*** was not necessarily a building, ship, or vessel, within the statute against burglary. The court said: "The indictment is further defective in that it does not charge the breaking and entering a building, ship, or vessel. The breaking and entering is alleged to have been into a ***corncrib***, not a building called a ***corncrib***. We have been unable to find this word ***corncrib*** in Worcester's Dictionary, and it is not necessarily a building, ship, or vessel. Corn is defined to be a cereal grain, and the word is commonly used in this country in place of Indian corn or maize. ***Crib*** has various definitions, as the manger of a stable, a bin, a frame for a child's bed, a small habitation, and is used in the latter sense by Shakespeare. * * * Nowhere else do we find it used in the sense of a building. The indictment is defective, and judgment is arrested."

Corncrib — Arson. (See generally the title ARSON, vol. 2, p. 932.) — Where a statute defined burning of a "cornpen" containing corn, as arson in the second degree, it was held that ***corncrib*** containing corn had substantially the same signification as "cornpen." Cook *v.* State, 83 Ala. 62.

In Brown *v.* State, 52 Ala. 347, it is said that a ***corncrib*** is undoubtedly both a house and a building within the statute against arson. The court said: "The evidence as to what was in the ***crib*** at the time it was burned was irrelevant, although it was proper to show the purpose for which the building had been used, by the testimony that 'he kept corn and fodder in it,' in order to identify it with the kind of ***crib*** described in the indictment — to wit, a ***corncrib***."

1. Century Dict. See generally the titles BOUNDARIES, vol. 4, p. 756; DEEDS; VENDOR AND PURCHASER.

A conveyance of a certain amount of land lying in the southwest ***corner*** of a certain section describes the general position of the land with sufficient certainty. The "***corner*** is a base point from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines the quantity conveyed." Walsh *v.* Ringer, 2 Ohio 333.

2. Century Dict. Such manipulation of the market is illegal. See the titles CONSPIRACY, vol. 6, p. 848; ILLEGAL CONTRACTS; STOCK AND PRODUCE EXCHANGE. And see the following cases: Sampson *v.* Shaw, 101 Mass. 145; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Foss *v.* Cummings, 149 Ill. 353; Solomon *v.* Warner, 64 L. T. 598; Cameron *v.* Durkheim, 55 N. Y. 425. In Kirkpatrick *v.* Bonsall, 72 Pa. St. 158, the court said: "Worse even than this, it tempts men of large capital to make bargains of stupendous proportions, and then to manipulate the market to produce the desired price. This, in the language of gambling speculation, is making a ***corner***; that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market, at the will of the gamblers, and then to place its price within their power. Such transactions are destructive of good morals and fair dealing, and of the best interests of the community."

CORONERS.

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For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the titles* DEAD BODIES; PHYSICIANS AND SURGEONS; PUBLIC OFFICERS; SHERIFFS, CONSTABLES, AND MARSHALS.

I. DEFINITION. — **A Coroner** is a county or municipal officer, whose principal function in modern times is to hold inquests upon the bodies of persons who may be supposed to have died violent deaths.[1]

1. Century Dict; Bouv. L. Dict.
In the case of *In re* Ward, 30 L. J. Ch. 775, Lord Campbell said: "This [the office of coroner] is a very ancient and important office in the realm of England. The coroner next to the sheriff is the most important civil officer

History of the Office. — The office of coroner is of great antiquity. Whether or not coroners were known in Saxon times, the historical development of the office may be traced back to a period not much subsequent to the Norman Conquest of England.[1] In these early days the coroner had a variety of duties, and was a much more important functionary than his modern representative. His duties appear to have extended to hearing appeals of felony, taking the appeals of approvals, and the confessions and adjurations of felons who had fled to sanctuary, keeping a record of outlawries, and inquiring for and securing to the king treasure-trove, wrecks, deodands, and the forfeited chattels of felons.[2]

II. Different Kinds of Coroners. — Coroners in England have been divided into four classes — official coroners, franchise coroners, coroners by election for boroughs, and coroners by election for counties.[3]

Official Coroners. — The Lord Chief Justice of England is *ex officio* supreme coroner over all England, and the judges of the High Court of Justice are *ex officio* sovereign coroners.[4]

Franchise Coroners exist where by grant to particular persons or corporations they have the power to make or be coroners within their franchises.[5]

Borough Coroners are coroners chosen for boroughs having a separate court of quarter sessions under the provisions of the Municipal Corporations Act and subsequent legislation.[6]

County Coroners. — The statute of Westminster 1, c. 10 (3 Edw. I.), enacts "that through all shires sufficient men shall be chosen to be coroners." The number was not defined, but varied by usage, there being in some shires six and in some four, in some two and in some only one.[7] Coroners under this

in the county, and he performs the duty of the sheriff when the sheriff is disabled from doing so; and there are peculiar duties ascribed to him, more particularly to inquire into the manner in which persons have come to their deaths where there is any reason to suppose they may not have been by natural means; and on that inquiry, a jury being sworn, the jury have all the rights of a grand jury to find a verdict of murder, and on that finding the party accused may be tried, and may be sentenced to death."

The Word "Coroner." — In early times the coroner was called *custos placitorum coronæ*, as being charged with the duty of keeping a record of all matters in the county in any way concerning criminal justice. 1 Pollock and Maitland History of Eng. Law 520. The name, which is clearly derived from *corona*, answers exactly to the Scotch and provincial "crowner," and may refer to the office as concerned principally with pleas of the crown and the preservation of the peace, 2 Hawk. P. C., c. 9, § 1; Crabb's History of Eng. Law, (1st Am. ed.), p. 149; 1 Bl. Com. 346; or as having charge of the preservation of the interests of the crown in regard to forfeitures, treasure-trove, and the like.

1. It is stated in Nathaniel Bacon's Discourse on the Laws and Government of England, that coroners are mentioned in the reign of King Alfred (Bacon on Gov. 66; 6 Vin. Abr. 242); and the statement is adopted in Jervis on Coroners, but later authorities are inclined to the view that the office was not regularly instituted until the latter half of the twelfth century. 1 Pollock and Maitland History of Eng. Law 519; Gross, Introduction to Select Coroners' Rolls; Crabb's History of Eng. Law (1st Am. ed.) 149.

2. See 2 Bacon's Abr. 432; 6 Vin. Abr. 243; Gross, Introduction to Select Coroners' Rolls; 1 Bl. Com. 248; 2 Kent Com. 248; Crabb's History of Eng. Law (1st Am. ed.) 150. See also *infra*, this title, *Powers and Duties — As a Judicial Officer — Generally.*

By chapter 17 of Magna Charta, coroners were forbidden to hear pleas of the crown.

3. Steven's Dig. Criminal Procedure, art. 44; Coroners' Act 1887 (50 & 51 Vict., c. 71).

By the old authorities coroners are divided into three classes: first, *virtute officii* (official coroners); second, *virtute cartæ sive commissionis* (franchise coroners); third, *virtute electionis* (elective coroners), including until modern times only county coroners. 2 Bacon's Abr. 424; 2 Hale Pl. C. 53.

4. Steven's Dig. Cr. Proc., art. 45; Jervis on Coroners 2, 49; 2 Hale P. C. 53; Coroners' Act 1887; 4 Inst. 73; Berkley's Case, 2 Sid. 90, 101, 144; 6 Vin. Abr. 251.

5. **Franchise Coroners.** — 2 Bacon's Abr. 424. See Dearing's Case, Cro. Eliz. 193.

Thus the Mayor of London is by charter coroner of London. The Bishop of Ely has by charter power to make coroners within the Isle of Ely. Similar powers are vested in the Dean and Chapter of Westminster, and in other bodies. 2 Bacon's Abr. 424; 2 Hale P. C. 53; Steven's Dig. Cr. Proc., § 46.

By the provisions of the English Coroners' Act 1887 (50 & 51 Vict., c. 71), franchise coroners are so defined as to include all coroners except county, borough, and official coroners.

6. **Borough Coroners.** — 5 & 6 Wm. IV., c. 76; Municipal Corporations Act 1882, § 171; Coroners' Act 1887, § 33; Reg. *v.* Grimshaw, 10 Q. B. 747, 59 E. C. L. 747.

7. 2 Inst. 175; F. N. B. 163; Jervis on Coroners 6; 2 Hale's P C. 56; Stat. 28 Edw. III., c. 6.

act were chosen by all the freeholders of the county court for life or good behavior.[1] But under a recent statute in England coroners are chosen by the county council instead of elected by the freeholders of the county.[2] These elective coroners are the true original of the office in the United States, official and franchise coroners being here unknown.

III. Election and Appointment — **Mode of Election at Common Law and in England.** — At common law and in England, until recently, county coroners were chosen by the legal freeholders in the county.[3]

Statutory Changes in England. — The ancient mode of electing coroners was abolished by the Local Government Act of 1888 (51 and 52 Vict., c. 41), providing for the appointment of the coroner by the county councils for the county and county districts.

Statutory Changes in America. — In America statutory provisions generally enact that a coroner shall be elected by the voters of the counties, though in some states they are appointed for counties, while in others they are elected or appointed for districts and cities.[4] The number to be elected is dependent upon statute.

IV. Qualifications. — The qualifications requisite to the holding of the office of coroner are usually found in the qualifications prescribed for county officers. They include age,[5] citizenship,[6] residence within the county,[7] and the non-acceptance of incompatible offices.[8] At common law and in *England*

The number not being limited, the lord chancellor may at discretion upon the petition of freeholders with the approbation of the justice issue a writ for the election of one or more additional coroners. *In re* Coroner of Salop, 3 Swanst. 181.

1. 1 Bl. Com. 347.

2. English Local Government Act 1888, § 5.

3. See *supra*, *Different Kinds of Coroners*.

Manner of Choosing by Writ "de Coronatore Eligendo." — Coroners were chosen by the freeholders in the county court pursuant to the writ *de coronatore eligendo*. The writ was directed to the sheriff, and issued out of and was returnable into chancery. Bacon's Abr., Coroners (3); 2 Hawk. P. C., c. 9, §§ 5–10; 2 Inst. 174–99; 1 Roll. 121; 1 Bl. Com. 347; F. N. B. 163; 3 Hawk. P. C. 103, c. 9–10. See also Matter of Election of Coroner, 2 Russ. 475; Matter of Coronership, 1 Macn. & G. 377; Reg. *v.* Diplock, L. R. 4 Q. B. 549.

Whenever there was a vacancy in the office of coroner, it was the right of the freeholders of the county to have the writ issued for the election of a new coroner. *In re* Coronership of Hempstead, 5 De G. M. & G. 230.

Only Legal Freeholders to Vote. — The qualification of a voter for coroner was the possession of a legal freehold, and an equitable interest was insufficient. A common in gross conferred no right to vote. Reg. *v.* Day, 3 El. & Bl. 859, 77 E. C. L. 859, 1 Jur. N. S. 107, 2 C. L. R. 1685, 23 L. J. Q. B. 317.

4. See the statutes generally.

In *Louisiana* a coroner is elected by the qualified electors of the parish, and must be a lawful citizen of the state, of fair education, good moral character, and must be possessed of general business qualities, and must have a medical or surgical education. In *Rhode Island* the town councils of the several towns and the city councils respectively elect as many coroners for their towns and cities as they deem fit. In *Connecticut* the coroner is appointed by the judges of the supreme court upon recommendation of the state attorney. In *New Hampshire* he is appointed by the governor and council. In *West Virginia* he is appointed by the county court. In *Tennessee* he is elected by justices of the peace in county court assembled.

5. **Age.** — Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293; People *v.* Dean, 3 Wend. (N. Y.) 438; Green *v.* Burke, 23 Wend. (N. Y.) 503. See Crocker on Sheriffs, p. 398.

6. **Citizenship.** — Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293; Matter of O'Neill, 27 Hun (N. Y.) 599; People *v.* Dean, 3 Wend. (N. Y.) 438.

7. **Residence.** — People *v.* Brite, 55 Cal. 79. See Yonkey *v.* State, 27 Ind. 236; McCarthy *v.* Froelke, 63 Ind. 507; McComas *v.* Krug, 81 Ind. 331, 42 Am. Rep. 135; Rogers *v.* Slonaker, 32 Kan. 194.

Qualifications Generally. — A coroner should have five qualities: "He should be *probus homo; legalis homo;* of sufficient knowledge and understanding; of good ability and power to execute his office according to his knowledge; and, lastly, of diligence and attendance for the due execution of his office. And this for three purposes: (1) The law presumes that he will do his duty and not offend the law, at least for fear of punishment, whereunto his lands and goods are subject; (2) that he be able to answer the king all such fines and duties as belong to him, and to discharge the county thereof; (3) and, lastly, that he may execute his office without bribery." 4 Inst. 174.

8. **Incompatible Offices** — *Justice of the Peace and Coroner.* — The offices of justice of the peace and coroner are incompatible under the constitution of *Maine*. Opinion of Justices, 3 Me. 487; Bamford *v.* Melvin, 7 Me. 14. See also Maddox *v.* Ewell, 2 Va. Cas. 59; Hawk. P. C., bk. 2, c. 8, p. 48. But see Davis *v.* Justices, 7 Q. B. Div. 513.

Coroner and County Commissioner. — Under a statute of *Kansas* that no person holding any

to-day, except in the case of coroners appointed for boroughs, a property qualification prevails; it being required that the coroner be possessed of sufficient means to answer in damages for misconduct in office.[1] In the *United States*, however, no such qualification exists, though statutes in most of the states have given the necessary protection, by requiring from the coroner an official bond.

V. Oath and Bond — Must Take Official Oath and Give Bond. — A person elected or appointed to the office of coroner is usually required, before entering upon the duties thereof, to subscribe and file an official oath, and in many of the states he must give an official bond in such penalty and with such sureties as the particular statute prescribes.[2]

The Nature of the Oath is determined by statute. The oath usually required is that he will faithfully discharge the duties of his office, and in the *United States*, in many instances, he is also required to swear to support the Constitution of the United States and of the state under which his office is held.[3]

Bonds — When Required. — In a majority of the states statutes require the coroner to give bond before entering upon the duties of his office,[4] and by the provisions in some of the states additional bonds may be required where he discharges the duties of a sheriff.[5] In some states it seems, however, that no bond is necessary unless a coroner is called upon to act as the sheriff's substitute.[6]

Effect of Not Taking Oath or Giving Bond. — Statutes requiring the taking of an oath or the giving of a bond usually require that it be done before entering upon the duties of office or within a specified time.[7] Such statutes, however, are usually directory, and not mandatory,[8] and it seems to be well settled that a failure to comply with such statutes will not avoid the acts of a *de facto* coroner so far as the public or the rights of interested third parties are concerned.[9]

state, county, township, or city office shall be eligible to the office of county commissioner, it was held that the coroner is a county officer and not eligible. Rogers *v.* Slonaker, 32 Kan. 191.

Compatible Offices. — The offices of deputy sheriff and coroner are distinct and not incompatible offices; and one is not disqualified from acting as coroner by holding the office of deputy sheriff. Colby *v.* Dillingham, 7 Mass. 475; Wood *v.* Quincy, 11 Cush. (Mass.) 493.

1. Property Qualification. — A county coroner to be eligible for office must be a fit person, having land in fee sufficient in the same county whereof he may answer to all manner of people. 14 Edw. III., c. 8, § 1; Coroners' Act 1887 (50 & 51 Vict., c. 71, § 12).

Qualifications Requisite for Borough Coroner. — For the office of coroner of a borough, no qualification by estate, residence, or otherwise is required. All that is necessary is that he is a fit person, not being an alderman or councilor. 5 & 6 Wm. IV., c. 76.

Knighthood Once Essential. — In ancient times it was necessary that the coroner be a knight possessing sufficient means to answer to all manner of people, for if he had not enough estate to answer all fines and duties imposed, the county, as his superior and surety, and as a punishment for selecting an inefficient officer, must answer for him. Later this requirement was dispensed with. 2 Inst. 176; 2 Hawk. P. C. 42.

Constitutional Inhibitions — Construction. — Under the provisions of the constitution of *Texas* declaring that "no person shall hold or exercise at the same time more than one civil office of emolument," it was held that the law which requires the coroner, where there is no sheriff or the sheriff is disqualified, to perform certain duties ordinarily attached to the office of sheriff, is not inconsistent with said provision of the constitution. Powell *v.* Wilson, 16 Tex. 59.

2. Nason *v.* Dillingham, 15 Mass. 170; Apthorp *v.* North, 14 Mass. 167; Buckman *v.* Ruggles, 15 Mass. 181, 8 Am. Dec. 98; People *v.* McKinney, 52 N. Y. 374. And see the statutes of the several states.

3. See Stim. Am. St. L., § 224.

Oath to Be Administered by Sheriff. — When chosen, the sheriff shall give him the oath to do his office. F. N. B. 163 *M.*

4. Bond. — McBee *v.* Hoke, 2 Spears L. (S. Car.) 138; Young *v.* Com., 6 Binn. (Pa.) 88. See the statutes generally.

5. Additional Bonds When Acting as Sheriff. — See particularly the statutes of *Alabama*, *Mississippi*, *Tennessee*, and *Ohio*.

6. See particularly the statutes of *New York* and *Virginia*.

7. McBee *v.* Hoke, 2 Spears L. (S. Car.) 138. See also the statutes generally.

8. McBee *v.* Hoke, 2 Spears L. (S. Car.) 138; State *v.* Falconer, 44 Ala. 696; State *v.* County Ct., 44 Mo. 230.

9. Acts of Officer De Facto Valid Though No Oath of Office Taken. — The acts of an officer *de facto*, though his title be bad by reason of a failure to take the oath of office, are valid so far as they concern the public or the rights of interested third parties. People *v.* Hopson, 1

VI. Powers and Duties — Judicial and Ministerial. — The powers and duties of the coroner are both judicial and ministerial; what may be called his original jurisdiction is judicial; his ministerial functions being exercised mainly when acting in the place of the sheriff.[1]

1. As a Judicial Officer — *a.* Generally. — At common law the office of coroner was one of great dignity. Its jurisdiction was quite extensive, the limits of which have been the subject of conflicting opinions. The statute *de officio coronatoris* (4 Edw. I.), in affirmance of the common law, defined the powers of the coroner, and this statute is the basis of his modern jurisdiction.[2]

Duties Defined — Principal Duties. — The principal judicial function of the coroner, and the one which virtually characterizes his office in modern times, in both England and America, is that of investigating the causes of sudden, violent, and unnatural deaths.[3]

Other Duties at Common Law. — The duties of the coroner at common law were also exercised in preserving the property of the crown in wrecks,[4] and treasure-

Den. (N. Y.) 574; Bucknam *v.* Ruggles, 15 Mass. 182, 8 Am. Dec. 98.

"On general principles the choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms only, which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable. * * * Where an omission to take the oath of office, the want of some qualification, or any irregularity in the appointment are proved by competent testimony, then and not till then the question arises concerning their necessity or importance, and it seems to be well settled that when the irregularity, whatever it may be, is not punishable at all, or only by a penalty, the acts of the officers are still valid in respect to third persons who may be interested in such acts. They are valid also in respect to the public, so that justice may not fail." Johnston *v.* Wilson, 2 N. H. 202, 9 Am. Dec. 50.

Acts of De Facto Officer Valid Though No Bond Given. — Where the objection to a return by a coroner was that he had not renewed his official bond, or that he had not given a new one, it was held that the want of a bond did not invalidate his official acts, as he was *de facto* a coroner. Mabry *v.* Turrentine, 8 Ired. L. (30 N. Car.) 201. See also McBee *v.* Hoke, 2 Spears L. (S. Car.) 138; State *v.* Hill, 2 Spears L. (S. Car.) 150; State *v.* Bates, 23 Iowa 96.

Levy Held Valid Though No Bond Given. — The levy of an execution by a coroner who had not given bond for the faithful execution of his office was held valid. His commission, and his having taken the oaths and declarations, constituted him a *de facto* officer. Nason *v.* Dillingham, 15 Mass. 170.

Where Bond Given — Presumption of Approval from Lapse of Time. — Where a bond given to secure the faithful performance of a coroner by the principal was duly executed and delivered to the presiding judge and subscribed by him and handed to the court, and more than two years afterwards the bond was found on the files of the court, and there was no record that it was determined to be sufficient, the presumption is that it was approved, and was received by the court as the security required by the statute. Apthorp *v.* North, 14 Mass. 170.

Suit on Bond — Evidence. — In a suit on a coroner's bond, proof that he had served and returned a writ directed to him as coroner was held to be sufficient evidence that a commission had issued to him. Young *v.* Com., 6 Binn. (Pa.) 88.

Bond — Liability of Sureties Where Coroner Acts as Sheriff. — The sureties upon the official bond of a coroner are accountable on such bond for his acts while acting as *ex officio* sheriff. Tieman *v.* Haw, 49 Iowa 312.

Bonds — Within Statute. — The Act of 1793 authorizing official bonds to be put in suit by persons injured by the misconduct of the officers, without an assignment, is an affirmance of the common law, and although coroner's bonds are not mentioned in it they may be sued on in the same manner. McRae *v.* Evans, 2 Dev. L. (13 N. Car.) 383.

1. Office — Judicial and Ministerial. — The office and power of a coroner are either judicial or ministerial; but principally judicial. 1 Bl. Com. 348; Bacon's Abr., Coroner (C); Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 274; Giles *v.* Brown, 1 Mill (S. Car.) 230; Yeargin *v.* Siler, 83 N. Car. 348.

2. 2 Hawk. P. C., c. 9, § 19; 2 Bacon's Abr. 427; Pickett *v.* Erie County, 19 W. N. C. (Pa.) 60.

3. See the statutes of the several states.

The duties of the coroner under the statutes of *Indiana* are limited to the investigations of sudden or violent deaths, the ascertainment if possible of the manner of such deaths, etc. Jameson *v.* Bartholomew County, 64 Ind. 540.

4. Jurisdiction Concerning Wrecks of the Sea. — "Concerning wreck of the sea, wheresoever it be found, if any one lay hands upon it, he shall be attached by good and safe pledges, and the price of the wreck shall be valued and delivered to the towns." 4 Edw. I.; 1 Black. Com. 349; 2 Bacon's Abr. 428; Giles *v.* Brown, 1 Mill (S. Car.) 230.

New York. — Under the Revised Statutes of New York it is made the duty of the coroner to pursue all necessary measures for saving and securing wrecked property; to take possession thereof in whose hands soever the same may be; to cause the value of the property to be appraised, and to keep the same in

trove,[1] in pronouncing judgment of outlawry,[2] in inquiries concerning certain felonies,[3] and when acting as conservator of the peace.[4]

b. INVESTIGATING EXTRAORDINARY DEATHS — 1. *Generally.* — The most important function of the office of coroner is that of holding inquests as to the causes of violent and extraordinary deaths.[5] This duty is judicial in its nature.[6]

When Inquest to Be Held. — It is the duty of the coroner to hold an inquest whenever the circumstances surrounding a death are of such a character as to support a reasonable belief that it resulted from violence or other unlawful means.[7] The decision of the question rests in the sound discretion of the

some safe place to answer the claims of those entitled to its possession. N. Y. Town Law (Laws 1890, c. 569), § 138; 1 N. Y. Rev. Stat. (Banks's 9th ed.), p. 762.

1. Jurisdiction Concerning Treasure-trove. — In *England* treasure-trove belongs to the crown, and the duty of ferreting out the finders, and in like manner those who are suspected thereof, devolves upon the coroner. Bract., b. 3, c. 6; 2 Hawk. P. C., c. 9, § 36; 1 Black. Com. 349; 4 Inst. 271; Giles *v.* Brown, 1 Mill (S. Car.) 230. See also the title TREASURE-TROVE.

2. Jurisdiction Concerning Proclamations of Outlawry. — Judgment of outlawry is given by the coroner at the fifth county court upon the party's not appearing to the exigent. 3 Bl. Com. 283; Proctor's Case, 2 Dyer 222*b*; Rex *v.* Wilkes, 4 Burr. 2527.

"If there be two coroners in a county, the calling upon the exigent may be by one of them, and likewise one alone may give the judgment of outlawry; but it seems the return must be by two in ministerial acts." Bac. Abr., Outlawry, (E.) 4.

3. Felonies Not Causing Death. — In these cases jurisdiction extended to taking of appeals and not to inquests. 4 Inst. 271; 2 Hale P. C. 65; 2 Hawk. P. C., c. 9, §§ 35, 38 *et seq.*; Reg. *v.* Herford, 3 El. & El. 129, 107 E. C. L. 129.

4. Coroners as Conservators of the Peace. — Coroners become magistrates by virtue of their election and appointment, and may bind any person to the peace who makes an affray in their presence. Jervis on Cor. (3d ed.) 30; 2 Hawk. P. C., c. 8, § 5.

5. Sudden and Violent Deaths to Be Investigated. — In 2 Hale's P. C. 57, it is said: "Regularly the coroner hath no power to take inquisitions but touching the death of a man and persons *subito mortuis*."

In Lancaster County *v.* Dern, 2 Grant's Cas. (Pa.) 262, it was held that there was no necessity that the death should be both violent and sudden in order to give the coroner jurisdiction, and it was declared that "when the death occurs from any violence done to a person by another, although such violence may not terminate the life of the party injured suddenly, it is still the duty of the coroner to hold an inquest."

In 2 Hale's P. C. 62, the deaths which its the coroner's duty to investigate are thus classified: "Now sudden violent deaths, which are all within the coroner's office to inquire, are of these kinds: 1. *Ex visitatione Dei.* 2. *Per infortunium*, where no other had a hand in it, as if a man falls from a house or cart. 3. By his own hand, as *felo de se.* 4. By the hand of another man, where the offender is not known. 5. By the hand of another, where he is known, whether by murder, manslaughter, *se defendendo*, or *per infortunium*."

6. Coroner Holding Inquests in the Performance of a Judicial Function — *England.* — Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 274; Garnett *v.* Ferrand, 6 B. & C. 611, 13 E. C. L. 277; Reg. *v.* Taylor, 9 C. & P. 672, 38 E. C. L. 284.

California. — People *v.* Devine, 44 Cal. 452.

Missouri. — Boisliniere *v.* St. Louis County, 32 Mo. 375; Houts *v.* McCluney, 102 Mo. 13.

New Jersey. — Jewell *v.* Hutchinson, 31 N. J. L. 71.

New York. — Crisfield *v.* Perine, 15 Hun (N. Y.) 201.

North Carolina. — State *v.* Knight, 84 N. Car. 792.

Pennsylvania. — Lancaster County *v.* Mishler, 100 Pa. St. 626; Uhler *v.* County, 1 L. V. (Pa.) 213; Power of Coroner, etc., 11 Phila. (Pa.) 387.

South Carolina. — Giles *v.* Brown, 1 Mill (S. Car.) 230.

Washington. — Rodolph *v.* Mayer, *cited* in 1 Wash. Ter. 119.

Cannot Delegate Authority to Deputy. — A coroner in the absence of statutory provision cannot appoint a deputy to hold an inquest; his function in this respect being judicial. 2 Hale Cr. L. 58; Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 274, 1 Chit. Rep. 745, 18 E. C. L. 220; Matter of Daws, 8 Ad. & El. 936, 35 E. C. L. 564. See also *Ex p.* Carruthers, 2 M. & R. 397, 17 E. C. L. 309.

Statutes Authorize the Appointment of a Deputy. — In *England*, by 6 & 7 Vict., c. 83, coroners are empowered to appoint deputies who may act where from any lawful or reasonable cause the coroner is absent. Reg. *v.* Johnson, L. R. 2 C. C. 15, 12 Cox C. C. 264; Reg. *v.* Perkin, 7 Q. B. 165, 53 E. C. L. 165.

The Coroners' Act 1892 (55 & 56 Vict., c. 56) contains the present law as to deputy coroners.

Provision is also made by statute in some of the states for the appointment of deputies. See, for instance, the statutes of *Tennessee* and *Illinois*.

7. When Inquest to Be Held. — Clark County *v.* Calloway, 52 Ark. 361; Lancaster County *v.* Holyoke, 37 Neb. 328; Lancaster County *v.* Mishler, 100 Pa. St. 624; Northampton County *v.* Innes, 26 Pa. St. 156.

The coroner's power to hold inquests "is to be exercised within the limits of a sound discretion. There ought at least to be a reasonable suspicion that the party came to his death by violent or unnatural means; for if the

coroner, and the presumption is that in holding an inquest he has acted in good faith and for sufficient cause.[1] But the power is not one to be exercised capriciously or arbitrarily,[2] and if an inquest has been held where there were no circumstances tending to show that death was due to an unnatural cause, it has been decided that the county cannot be compelled to pay the coroner for his services.[3] But there are authorities holding that the coroner's action cannot be reviewed.[4]

Deaths in Prison. — At common law it is the duty of the coroner to inquire of the deaths of all persons whatsoever who die in prison, "because it may be possibly presumed that the prisoner died by the ill usage of the jailer;"[5] and this has been required by statute in *New York* where there is "reason to believe that the death of the prisoner arose from any other cause than ordinary sickness."[6]

(2) *The Inquest* — (a) **Status of the Court.** — In *England*, a coroner's court is a court of record;[7] but otherwise in the *United States*. Here it is a court of an inferior jurisdiction, not of record.[8]

(b) **Time, Place, and Manner of Holding — Time of Holding.** — When an inquest is

death, however sudden, were from fever or other apparent visitation of God, there is no occasion (with the exception before mentioned in case of prisoners) for the coroner's interference." 1 East P. C. 382.

Where, however, a coroner has received information of a sudden and violent death from a responsible source, and he is in receipt of no evidence negativing the violence, it has been held that the holding of an inquest becomes his duty, no discretion, under the circumstances, being left him. *In re* Hull, 9 Q. B. Div. 689.

Where Justified in Acting. — A coroner is justified in acting upon information which, if true, would make it his duty to hold an inquest, if he believes the truth of the information. Reg. *v.* Stephenson, 13 Q. B. Div. 331.

Unless the circumstances indicate that death has occurred from other than natural causes, no inquest should be held. Clark County *v.* Calloway, 52 Ark. 364; Uhler *v.* County, 1 L. V. (Pa.) 213; *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. Rep. 14; Marvin Shaft Inquest, 3 Pa. Co. Ct. Rep. 10; Stoecker's Inquest, 5 Kulp (Pa.) 487; Pfouts's Case, 7 Pa. Co. Ct. Rep. 265; Bender's Case, 8 Pa. Co. Ct. Rep. 664; McFadgen *v.* Chester County, 10 Pa. Co. Ct. Rep. 124; Watson *v.* Beaver County, 9 Pa. Co. Ct. Rep. 495, 27 W. N. C. (Pa.) 469; Muzzy *v.* Hamilton County, 2 West. L. J. (Ohio) 426.

Death Resulting from Suicide or from the Negligence of the Deceased. — Where the facts are known and clearly point to a case of suicide, or where the evidence shows that death resulted from the negligence of the deceased himself, and no one is suspected of contributing to his death, no inquest should be held. Witmore's Inquest, 14 Pa. Co. Ct. Rep. 463; Crosby's Inquest, 3 Pittsb. (Pa.) 425; Jones's Inquest, 1 Pa. Co. Ct. Rep. 19. See Howarth's Case, 2 Luz. Leg. Reg. (Pa.) 119.

1. Discretion of Coroner — Presumption that He Acted Properly. — Jameson *v.* Bartholomew County, 64 Ind. 524; Boisliniere *v.* St. Louis County, 32 Mo. 375; Lancaster County *v.* Mishler, 100 Pa. St. 624; Kirk *v.* Murphy, 16 Tex. 654, 67 Am. Dec. 640.

2. Rex *v.* Justices, 11 East 229; Lancaster County *v.* Mishler, 100 Pa. St. 624. See also Reg. *v.* Clerk, 1 Salk. 377.

3. Improper Inquest — Coroner Not Entitled to Fees. — Clark County *v.* Calloway, 52 Ark. 361; Lancaster County *v.* Mishler, 100 Pa. St. 624.

In Rex *v.* Justices, 11 East 229, the Court of King's Bench refused to reverse the action of the justices of Kent in refusing to allow to a coroner his fees for holding an inquest. The court said that as the statute vested in the justices authority to allow the coroner's fees for all inquests "duly taken," it saw no reason for interfering in the absence of evidence that they had exercised their judgment with any undue bias.

4. Coroner's Discretion Not Reviewable. — Boisliniere *v.* St. Louis County, 32 Mo. 375. In this case the court said: "There is not (nor could there be, in the nature of things) any classification of circumstances by law circumscribing his [the coroner's] action, or fixing precisely the limits of his authority. The nature of his duties and the object to be attained must guide his discretion, acting, as we must presume he does, under a sense of his obligations as an officer and the sanction of an oath. When called upon to act he will decline or proceed to the investigation, accordingly as the circumstances of the particular case are or are not of such a suspicious character as to render proper an official examination; and of these he is the sole judge. * * * The law has imposed no limits on the discretion of the coroner by means of any preliminary inquiry or otherwise for the purpose of restricting his actions in making inquests; and when he acts the presumption is that he has acted in proper cases. There is manifestly nothing in the statute to warrant the commissioners to revise the action of the coroner, or that gives them a discretion in respect to his fees." But *compare* State *v.* Marshall, 82 Mo. 484.

5. 2 Hale P. C. 57; 2 Hawk. P. C., c. 9, § 21; 1 East P. C. 378.

6. N. Y. Rev. Stat. (Banks's 9th ed.), p. 1968.

7. Garnett *v.* Ferrand, 6 B. & C. 611, 13 E. C. L. 277.

8. Crisfield *v.* Perine, 15 Hun (N. Y.) 200.

necessary, it must be held within a convenient time after notice of death.[1]

Holding on Sunday. — Following the established rule that Sunday is *dies non juridicus*,[2] it has been said that the inquisition must not be conducted on Sunday,[3] but it has been adjudged that an inquest was not void because held on that day.[4]

Place of Holding. — An inquest is properly held in the territory of the coroner in whose jurisdiction the body is found, without regard to where the death occurred or where the injury was received.[5]

Manner of Holding — Must Be Super Visum Corporis. — The inquest must be held upon the view of the body — *super visum corporis* — and an inquest otherwise taken by a coroner is void.[6]

Where Body Cannot Be Found. — Where the body cannot be found, the coroner has no authority to proceed with an inquest.[7]

Where Body Buried Must Be Exhumed. — Where the body has been buried before the coming of the coroner, or before an opportunity has been given for a view by himself and jury, it ought to be exhumed.[8]

1. 2 Hale P. C. 58; 2 Hawk. P. C., c. 9, §§ 23, 29; Reg. *v.* Clerk, 1 Salk. 377.

Inquest Not to Be Unnecessarily Delayed. — A coroner is not justified in delaying an inquest upon a dead body in a state of decomposition, for so long a period as five days, in order that the body may be identified and buried, and registered under the right name. The mere fact that it has been placed in a mortuary would make no difference. *In re* Hull, 9 Q. B. Div. 689.

Adjournment — Effect. — Where an inquest on a dead body is adjourned, and is not formally opened on the day appointed, and is further adjourned, the court is dissolved, and everything else done in the matter is *coram non judice*. Reg. *v.* Payn, 34 L. J. Q. B. 59, 10 Jur. N. S. 1150.

2. Mackalley's Case, 9 Coke 66*b*. See the title SUNDAY.

3. 2 Hale P. C. (1st Am. ed.) 58, note [10], citing 2 Burn 30.

4. Inquests Not Void Because Held on Sunday. — In Blaney *v.* State, 74 Md. 153, it was decided that an inquest held by a coroner and a commitment signed by him on Sunday were not void on that account. The court said: "Of course, no judicial act can be done on Sunday, but it does not follow that no step can be taken on that day to apprehend a criminal. An inquest held by a coroner's jury, and the commitment by a coroner or magistrate of an accused to jail are rather ministerial than judicial acts; they are certainly not of that judicial character which precludes their being performed on Sunday. State *v.* Sneed, 84 N. Car. 816. * * * Society would be absolutely at the mercy of desperadoes and criminals, if the officers charged with the duty of enforcing the law and bringing the guilty to justice were powerless to act ministerially on Sunday." See also 1 Minor's Inst. (3d ed.) 120.

5. Inquest to be Held in County Where Body Found. — Reg. *v.* Grand Junction R. Co., 3 Perry & D. 57, 11 Ad. & El. 128, note; Jameson *v.* Bartholomew County, 64 Ind. 524; Bartholomew County *v.* Jameson, 86 Ind. 154; Pickett *v.* Erie County, 19 W. N. C. (Pa.) 60, 3 Pa. Co. Ct. Rep. 23. But see Reg. *v.* Great Western R. Co., 3 Q. B. 333, 43 E. C. L. 759, where it was held that the coroner of a borough had no jurisdiction to inquire in cases of death occurring by an accident happening out of the borough.

Inquisition Taken Without the Limits of Jurisdiction Should Be Quashed. — Where a person was found drowned in a river within the concurrent jurisdiction (exclusive of all others) of the coroner of a city and the admiralty, and the body was taken to a place on shore beyond the city limits, it was held that the coroner and jury of the city could not view the body at such place for the purpose of taking an inquest, and that an inquisition taken on such view should be quashed. Reg. *v.* Hinde, 5 Q. B. 944, 48 E. C. L. 944, 13 L. J. M. C. 150, 8 Jur. 927.

6. Inquest Must Be Super Visum Corporis. — 2 Hale P. C. 58; 2 Hawk. P. C., c. 9, § 23; 1 East P. C. 379; Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 274; Pickett *v.* Erie County, 19 W. N. C. (Pa.) 61; Lancaster County *v.* Mishler, 100 Pa. St. 624; Com. *v.* Harman, 4 Pa. St. 269; Northampton County *v.* Innes, 26 Pa. St. 156.

Where a body has been duly viewed, however, the jury may retire to some convenient place to take the testimony and deliberate upon their verdict. 2 Hawk. P. C., c. 9, § 25.

7. Body Not Found or Too Decomposed for View. — If the body cannot be found, or hath lain so long before the coroner hath viewed it that he can be no way assisted by his view in the taking of his inquest, the inquest ought not to be taken by the coroner (unless he have a special writ or commission for that purpose), but by justices of the peace or other authorized justices who may proceed on the testimony of witnesses without a view. 2 Hawk. P. C., c. 9, § 23. See also Anonymous, 1 Rolle 217; Anonymous, 1 Vent. 352.

8. 2 Hale P. C. 58; 2 Hawk. P. C., c. 9, §§ 23 24.

Exhumation Distinguished from Body Stealing. — The provisions of the Penal Code (§ 311) of *New York*, describing the offense of body-stealing, do not apply to an exhuming of a body by a coroner, under whose direction an examination was made, there having been application and affidavits sufficient to give jurisdiction, although the person alleged to have

When Not to Be Exhumed Without Order of the Court. — In cases, however, where the body has been buried so long a time that it may reasonably be presumed that its decomposed condition would render a view both dangerous and unnecessary, a coroner ought not to proceed with an inquest without a special order from the court.[1]

Holding One Inquest Over Several Bodies. — Where several persons have been killed by the same cause, under circumstances warranting an inquest, the coroner, in his discretion, has authority to hold one inquest over the several bodies.[2]

Right to Hold Second Inquest Over Same Body. — A coroner has no power, after holding an inquest *super visum corporis*, to hold a second inquest upon the same body, the first not having been quashed or set aside by the court.[3]

(c) **Provision for Holding Inquest When Coroner Absent.** — Where the coroner is absent from the county, or unable to attend, it is generally provided by statute that a justice of the peace may hold an inquest, and in doing so he has all the power and can perform all the duties pertaining to the office of coroner.[4]

(d) **Proceedings** — *aa.* THE JURY — **Summoning Jurors.** — Whenever, in the discretion of the coroner, an inquest is necessary, it becomes his duty to summon jurors qualified to act, to appear before him forthwith at such place as he shall appoint to make inquiries concerning the death.[5]

been poisoned was poisoned, if at all, in another state, and brought to New York for burial, and although there was no jury summoned. People *v.* Fitzgerald, 105 N. Y. 146, 59 Am. Rep. 483.

1. Hawk. P. C., § 23; Rex *v.* Saunders, 1 Stra. 167; Anonymous, 1 Stra. 533; Reg. *v.* Clerk, 1 Salk. 377.

In R. *v.* Causey, *cited* 2 Bac. Abr. 429, it was held that if a coroner make his inquisition on view of the body after long putrefaction, it was a matter in the discretion of the court as to whether such inquisition be received.

In Rex *v.* Bond, 1 Stra. 22, the filing of an inquisition taken five years after the death, upon a view of a skull which the coroner "assured the jury he knew by a particular mark was the deceased's," was stayed by the court.

2. One Inquest Over Several Bodies. — Reg. *v.* West, 1 G. & D. 481, 1 Q. B. 826, 41 E. C. L. 796, 5 Jur. 485; St. Clair County *v.* Bollman, 15 Ill. App. 279; Francis *v.* Tioga County, 8 Pa. Co. Ct. Rep. 163.

Or Several Inquests. — Weaver *v.* County, 2 L. V. (Pa.) 408; Marvin Shaft Inquest, 3 Pa. Co. Ct. Rep. 10.

Bodies Separated. — Nineteen persons came to their death suddenly and almost simultaneously by an explosion of fire damp in a coal mine. The coroner held a separate inquest over each body at the respective homes of the deceased, qualifying the same jury separately over each body, and the inquest returned a separate finding in each case. It was held that this was the necessary and proper course to pursue under the circumstances, and that the coroner was entitled to his legal fees in each case. Fayette County *v.* Batton, 108 Pa. St. 591. See Rambo *v.* Commissioner, 1 Chest. Co. Rep. (Pa.) 416.

3. Reg. *v.* White, 3 El. & El. 137, 107 E. C. L. 137; People *v.* Budge, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 519; 2 Hale P. C. 59.

Where Second May Be Held. — "If the coroner take an inquisition without view of the body, he may take a second inquisition *super visum corporis*, and that second inquisition is good, for the first was absolutely void." 2 Hale P. C., p. 58.

4. Stevens *v.* Harrison County, 46 Ind. 541; Wormeley *v.* Com., 10 Gratt. (Va.) 667.

Jurisdiction Statutory. — The jurisdiction, however, is purely statutory, and must appear on the face of the record. Reitlinger's Inquest, 30 Pittsb. Leg. J. (Pa.) 39; Reitnauer's Inquest, 14 Pa. Co. Ct. Rep. 46; Lee's Case, 9 Pa. Co. Ct. Rep. 474; *Ex p.* Schultz, 6 Whart. (Pa.) 273; *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. Rep. 14.

New Jersey. — Under 1 N. J. Gen. Stat. 1895, p. 897, § 4, a justice of the peace is only authorized to act as coroner when a coroner cannot be had in due time to take an inquest. The fact that he may be more conveniently located, that he has received first notice, that he has performed in good faith the first official act believing that a coroner could not be had in due time, no one of these facts nor all of them together will authorize a justice of the peace to act when it plainly appears that a coroner might have been had in due time. Chadwick *v.* Errickson, 40 N. J. L. 159.

Coroner Appearing Before Burial May Assume Control. — Where a body requires almost immediate burial, and a justice of the peace has taken charge of it for that purpose, a coroner appearing before it has been finally disposed of may at his option assume control of it, and have the costs taxed and receive them. The justice of the peace will be entitled only to reasonable compensation for services rendered before the coroner arrived. Chadwick *v.* Errickson, 40 N. J. L. 159.

Alderman as Coroner. — An alderman being an *ex officio* justice of the peace under a statute providing that in the absence of the coroner a justice may hold an inquest, the alderman may act when circumstances are such that a justice has jurisdiction. Pickett *v.* Erie County, 19 W. N. C. (Pa.) 62.

5. See Stat. 4 Edw. I., and statutes of different states in affirmance of the common law. See also Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 274; Cunningham *v.* City Coroner, 2 Nott & M. (S. Car.) 454.

Number of Jurors to Be Summoned. — The number of jurors to be summoned is regulated by statute, and varies according to the provisions of the statutes.[1]

Number to Compose Jury. — The number to compose the jury is likewise dependent upon statute, some states requiring six and others twelve; the number, however, is usually six.[2]

Swearing Jury. — When the required number of jurors attend they must be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death, and to render verdict thereon according to the evidence offered them or arising from the inspection of the body.[3]

Compensation of Juror. — In the absence of statutory provision, a juror is entitled to no remuneration; due provision, however, is made by statute in England and in most of the states of the Union.[4]

bb. WITNESSES — **Summoning and Examining.** — A coroner has the power to compel the attendance of witnesses by subpnœa, and it is his duty to summon before him, and examine as a witness, every person he has reason to believe has any knowledge concerning the cause of the death under investigation.[5]

Physicians and Surgeons. — He should also, as a general rule, summon a physician or surgeon.[6] The physician or surgeon so summoned may be compelled to testify to his opinion as to the cause of death from a superficial view of the body,[7] but he cannot be compelled to touch the body or do the more

1. See the statutes of the several states.

2. **Presumption as to Number.** — After a verdict the court will presume that a coroner's inquisition was found by the required number of jurors. Taylor *v.* Lambe, 6 D. & R. 188, 4 B. & C. 138, 10 E. C. L. 293.

3. **Swearing Jurors.** — See 2 Hale P. C. 59, 60; Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 274; and the statutes of the several states.

The jury need not be sworn *super visum corporis*. It is only necessary that they be sworn before viewing the body. Reg. *v.* Ingham, 5 B. & S. 257, 117 E. C. L. 257, 9 Cox C. C. 508. But see Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 274.

After a juror has been sworn it was held that he could not be removed by the coroner. Rex *v.* Stukely, 12 Mod. 493.

When jurors are summoned they must attend, and for a refusal to attend may be fined by the coroner. *Ex p.* M'Annully, T. U. P. Charlt. (Ga.) 310.

4. **Compensation of Jury.** — In the absence of statutory provision, a jury is entitled to no compensation. Kennedy *v.* Seamans, 60 Ga. 612; Green *v.* Wynne, 66 N. Car. 530. Nor to mileage or traveling expenses. Marvin Shaft Inquest, 3 Pa. Co. Ct. Rep. 10; *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. Rep. 14.

Fees of Jurors Where Several Deaths from Same Accident. — Where a jury is impaneled on several cases of death occurring from the same accident, fees will be allowed in but one case. Weaver *v.* County, 2 L. V. (Pa.) 408.

Construction of Statute Regulating Compensation. — Where a statute enacts that "the fee of each juror attending an inquest held over a dead body shall be one dollar per day," it was held that the words "held over a dead body" are merely explanatory, and the true meaning of the statute is that each juror shall be paid a *per diem* of one dollar, regardless of the number of inquests. St. Clair County *v.* Bollman, 15 Ill. App. 279.

5. **Coroner May Compel Attendance of Witnesses.** — A coroner has, by the common law, full authority to compel obedience to his subpœnas. In this respect he stands on the same footing as other judicial officers, and if witnesses do not obey his summons he may compel attendance by attachment and punish by fine and imprisonment. "Coroner's Power to Compel Attendance of Witnesses — Power of Coroner," etc., 11 Phila. (Pa.) 387; "Power of Coroner," etc., 32 Leg. Int. (Pa.) 142, 7 Leg. Gaz. (Pa.) 125.

May Punish for Contempt a Witness Refusing to Testify. — A witness may be punished by the coroner for disobedience in refusing to testify. People *v.* Taylor, 59 Cal. 651.

He is not bound, however, to criminate himself, nor to answer in regard to any circumstances tending thereto. Hendrickson *v.* People, 10 N. Y. 13, 61 Am. Dec. 721.

A party suspected of the commission of a crime is not a witness in the meaning of a statute providing for the punishment of a witness for refusing to testify; he cannot be compelled to testify; his statements must be made of his own volition. People *v.* Taylor, 59 Cal. 651.

Where made, however, of his own volition, they may be used in evidence against him. Hendrickson *v.* People, 10 N. Y. 13, 61 Am. Dec. 721.

And they should not be excluded by the coroner on the ground that they may tend to criminate the witness. Wakley *v.* Cooke, 4 Exch. 511, 19 L. J. Exch. 91.

6. **When Physician to Be Summoned.** — In all cases of death by violence, *post-mortem* examinations should be made, and a physician or surgeon should be examined as to the cause of death. Rex *v.* Quinch, 4 C. & P. 571, 19 E. C. L. 533; Com. *v.* Harman, 4 Pa. St. 271.

7. **Where Physician So Summoned, He Is Merely a Witness.** — St. Francis County *v.* Cummings, 55 Ark. 421; Allegheny County *v.* Watt, 3 Pa. St. 462.

nauseous and dangerous work of opening it.[1]

Fees of Witnesses. — Where a witness is summoned he is entitled to no fee, in the absence of statute.[2]

Examination Need Not Be Taken in Presence of Accused. — The examination of witnesses need not be taken in the presence of the party suspected or accused, and the absence of an accused party is no ground for the quashing of an inquisition.[3]

Accused Has No Right to Produce Witnesses. — Where a party accused is present, he has no right to produce witnesses in his own behalf or to cross-examine those giving testimony tending to criminate him.[4]

All Material Witnesses to Be Examined. — It is, however, the duty of the coroner to present before the jury all the material testimony within his power, touching the death, whether for or against the accused.[5]

Counsel. — The right of a party suspected or accused, to be present with counsel, rests within the discretion of the coroner; the privilege is usually allowed, however.[6]

Testimony to Be Reduced to Writing. — All the testimony given to the jury that is material should be reduced to writing by the coroner.[7] It is not necessary that the very words of the witnesses be reported; it is sufficient if the coroner put in writing the effect of the testimony of each witness.[8] The greatest possible accuracy, however, should be observed on all material points of inquiry, and the fair and obvious meaning of the words spoken, and not the final result of the evidence, should be given.[9]

cc. THE AUTOPSY. — The coroner may cause a post-mortem examination, in the nature of an autopsy, to be made where a superficial view of the body is insufficient to determine the cause of death, and where the circumstances, in

1. **Physician Cannot Be Compelled to Perform Autopsy.** — St. Francis County *v.* Cummings, 55 Ark. 421; Allegheny County *v.* Watt, 3 Pa. St. 462.

2. **Remuneration Dependent upon Statute.** — The fees of witnesses are dependent entirely upon statute. Houts *v.* McCluney, 102 Mo. 13; Cushman *v.* Washington County, 45 Iowa 255; Sanford *v.* Lee County, 49 Iowa 148; Reg. *v.* Justices, 11 Jur. 819.

And where there is no statute, witnesses are entitled to no remuneration. *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. Rep. 14; Marvin Shaft Inquest, 3 Pa. Co. Ct. Rep. 10; *In re* Coroner's Inquest, 2 Del. Co. Rep. 446, 475, 1 Pa. Co. Ct. Rep. 677.

3. People *v.* Collins, 20 How. Pr. (N. Y. Oyer & T. Ct.) 111, 11 Abb. Pr. (N. Y.) 406.

4. People *v.* Collins, 20 How. Pr. (N. Y. Oyer & T. Ct.) 111, 11 Abb. Pr. (N. Y.) 406.

5. **Coroner to Present to Jury All Material Testimony.** — A coroner, on an inquisition *super visum corporis*, ought, however, to hear evidence on oath, not only on the part of the people, but also on the part of the persons accused. Rex *v.* Scorey, 1 Leach C. C. 43; 1 Hale P. C. 415; 2 Hale P. C. 60, 61.

6. **Counsel.** — The examination before a coroner being only a preliminary examination, and not being conclusive against the accused, it seems that the suspected party is not entitled, as of right, to have a person skilled in the law present as an advocate. See Cox *v.* Coleridge, 1 B. & C. 37, 8 E. C. L. 17.

Counsel may be present, however, "to advise with him as to his rights as to answering any question that may be put to him when under examination." Crocker on Sheriffs, 414.

7. **Testimony to Be Reduced to Writing.** — Stat. 1 and 2 Ph. & M., c. 13, enacts: "Every coroner upon any inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessory or accessories to the same before the murder, etc., shall put in writing the effect of the evidence given to the jury before him, being material." And see the statutes of the several states.

8. **Coroner to Record Effect of Evidence.** — The inquest should not report the evidence, but only the effect thereof. *In re* Coroner's Inquest, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. Rep. 14.

9. **"Effect" Defined.** — "It is true that the statute does in terms only require the coroner to put in writing the effect of the evidence. But this must not be taken to give him a latitude, such as hath been but too often taken by persons of this description, to the great perversion of truth and justice, of putting down, not the words of the witnesses, but his own conception of their tendency. It is doubtless the meaning of the act, that the examination of the witnesses should be taken down with the greatest possible accuracy as to all material points of the inquiry; otherwise one great benefit of the act, which is to enable the court to compare the examination with the evidence then given, must be defeated. The effect mentioned therein means the true and genuine sense of the evidence as delivered in detail, not indeed in letters, syllables, or even words; though these should not needlessly be departed from; but the fair and obvious meaning of the words spoken, and not the final result of the evidence." 1 East's Pl. of C. 384.

his discretion, warrant a thorough investigation.[1] In such cases he may employ an expert to examine the body.[2]

1. Autopsies Should Be Made. — St. Francis County *v.* Cummings, 55 Ark. 421; Clark County *v.* Kerstan, 60 Ark. 508; Dearborn County *v.* Bond, 88 Ind. 102; Jay County *v.* Gillum, 92 Ind. 511; Dubois County *v.* Wertz, 112 Ind. 268; Greene *v.* Monroe County, 72 Miss. 306; Northampton County *v.* Innes, 26 Pa. St. 157; Allegheny County *v.* Watt, 3 Pa. St. 462.

"The statute of Edw. the 4th, regulating the duties of the coroner in respect to an inquest *super visum corporis*, is in affirmance of the common law, one of the great advantages of which is its constant adaptation to the progress of business, the advanced state of the sciences, and the habits of the people. In this enlightened age, a coroner who would consign to the grave the body over which he held an inquest, without availing himself of the lights which the medical science has placed within his reach, would, in most cases, fall short of what his official duty requires. A thorough examination, aided by professional skill, is in general absolutely necessary to the proper administration of justice. Without such examination, groundless suspicions may be entertained, and prosecutions commenced, at once cruel to the objects of them, expensive to the county, and wasteful of the time and talents of all persons engaged in them. But this is not all. Without an examination of the body recently after death, and a complete demonstration from the evidence thus in the power of the commonwealth that the death was caused by violence, the guilty agent cannot be convicted. When, from an omission to employ a physician to examine the body, the cause of death is left in doubt, the accused must in general escape; because, in all cases of doubt, he has a right, under the law, to demand an acquittal. Thus the guilty may be again let loose upon society, and the people be deprived of that protection which the law was intended to provide." The court by Lewis, C. J., in Northampton County *v.* Innes, 26 Pa. St. 157.

Publicity of Autopsy Discretionary. — A coroner may, in his discretion, determine what person besides the surgeon may be present, the *post-mortem* examination not being a part of the inquest in the sense that every person has the right to attend. Considerations of delicacy or respect for the feelings of relatives may often require that the public should not be admitted. Crisfield *v.* Perine, 15 Hun (N. Y.) 202.

Necessity of Autopsy a Matter of Discretion. — The employment of a physician to make an autopsy rests on the sound discretion of the coroner, and may be exercised whether the jury deemed such employment requisite or not. St. Francis County *v.* Cummings, 55 Ark. 419.

Limitation by Statute. — The power of coroners in *Georgia* to employ physicians for the purpose of holding an autopsy is limited by the Code (vol. 3, ed. 1895, § 1266) to cases where the verdict of a jury suggests death from poison. Farrell *v.* Roads, etc., Com'rs, 57 Ga. 347.

2. Selection of Expert — Matter of Discretion. — A coroner has the power to select a physician or surgeon for the purpose of making a *post-mortem* examination. The selection is with him a matter of discretion, and the county commissioners have no power to appoint a surgeon to perform such services. Jameson *v.* Bartholomew County, 64 Ind. 524; Dearborn County *v.* Bond, 88 Ind. 102; Jay County *v.* Gillum, 92 Ind. 511; Dubois County *v.* Wertz, 112 Ind. 268; Allegheny County *v.* Shaw, 34 Pa. St. 301. Nor can a coroner permanently appoint one. Reg. *v.* Finlay, 11 Ir. R. C. L. 498.

Expert Need Not Be a Resident of the County. — The coroner of a county, in holding an inquest upon the body of a person found within the county, and supposed to have come to his death by casualty or violence, is not limited, where medical skill is needed, to the employment of a physician residing within the county. Jameson *v.* Bartholomew County, 64 Ind. 524.

Liability of County for Employment of Expert. — The liability of a county, in the absence of statutory provision for fees due a physician for making a *post-mortem* examination at the request of a coroner, has, in a recent case, been denied. Fears *v.* Nacogdoches County, 71 Tex. 337. However, in Com. *v.* Harman, 4 Pa. St. 271, *cited* and *approved* in Allegheny County *v.* Shaw, 34 Pa. St. 301, the Supreme Court of Pennsylvania held that an action lies at common law against the county by a physician for services rendered; and in Rutherford *v.* Harris County, 3 Tex. App. Civ. Cas, § 114; St. Francis County *v.* Cummings, 55 Ark. 419; Pickett *v.* Erie County, 19 W. N. C. (Pa.) 60, 3 Pa. Co. Ct. Rep. 23, the liability of a county seems upheld. See also Greene *v.* Monroe County, 72 Miss. 306.

Fees Regulated by Statute. — Statutory provisions, however, generally regulate and determine the county's liability. Sanford *v.* Lee County, 49 Iowa 148; Stevens *v.* Harrison County, 46 Ind. 541; Van Hoevenbergh *v.* Hasbrouck, 45 Barb. (N. Y.) 197; Cushman *v.* Washington County, 45 Iowa 255; Jameson *v.* Bartholomew County, 64 Ind. 526; Dearborn County *v.* Bond, 88 Ind. 102; People *v.* Niagara County, (Supreme Ct.) 38 N. Y. St. Rep. 964.

In *Mississippi*, beyond the fees provided in the Code of 1892, § 824, no allowance can be made by supervisors for professional skill in *post-mortem* examinations. Greene *v.* Monroe County, 72 Miss. 306.

Where Inquest Held by Coroner with Improper Motives. — It is no defense to the claim of a physician for fees for a *post-mortem* examination, that the inquest was held with illegal and impure motives at the instance of others, unless the physician himself knew of the fact. Jameson *v.* Bartholomew County, 64 Ind. 524. Nor is it necessary that a physician should see that the jury deem it necessary. Pueblo County *v.* Marshall, 11 Colo. 84. But see Greene *v.* Monroe County, 72 Miss. 306.

Extent of Liability of County — One Physician. — In the absence of statute a county is liable for services of but one physician called to make a *post-mortem* examination. *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. Rep. 14.

dd. Reaching a Verdict — **Coroner to Instruct Jury on Questions of Law.** — It is the province of the jury to determine the facts of the case; but it is the duty of the coroner to instruct the jury on the law, and respectful consideration should be shown such instructions by the jury.[1]

Jury to Retire for Verdict. — After hearing all the evidence offered before them, the jury should retire to some convenient place and deliberate upon their verdict. Such deliberation should be in private, and not even the coroner should be allowed to participate.[2]

ee. The Inquisition — **Defined.** — The written statement of the verdict of the jury, returned for the purpose of a particular inquiry, as distinguished from an indictment, is, properly speaking, the inquisition.[3]

Effect of Inquisition. — In *England* a person may be prosecuted upon the inquisition of a coroner's jury.[4] The finding of such inquisition is equivalent to the finding of the grand jury.[5] In the *United States* no person can be tried upon a coroner's inquisition, the effect of the inquisition being merely to render the party accused liable to arrest.[6]

Inquisition to Be Returned to Proper Court. — Where an inquisition has been drawn up and duly signed by the coroner and jury, it should be returned, together with the recognizances and examinations of the witnesses, to the next term of the court having jurisdiction of such matter.[7]

ff. Binding Over Witnesses. — Where the inquisition charges any person with the commission of a crime, as principal or as an accessory before the fact, it becomes the duty of the coroner to bind over all witnesses who prove any material fact against the party accused.[8]

Should Not Bind Over Witnesses for Defense. — It is not his duty, however, nor is he supposed, to bind over those called for the purpose of exculpating the accused.[9]

gg. Arrest of Accused — **Coroner to Issue Warrant.** — When a coroner's jury find that the death of the deceased was occasioned by the act of another by criminal means, and the party committing the crime is ascertained by the inquisition

1. Vaughn Rep. 160. See also Rex *v.* Bayley, Car. C. L. 243.

The coroner, after hearing the evidence and such observations by counsel or solicitors as he thinks fit to hear, ought to sum up the evidence to the jury. Stephen's Crim. Pro., art. 226.

Coroner to Accept Presentment of Jury. — The coroner must accept such a presentment as the jury makes. Smith's Case, Comb. 386.

2. Crocker on Sheriffs, 415.

Where a coroner, upon being informed that the jury had arrived at a verdict, entered the room where they were in consultation and took their verdict there before returning to open court, it was held that this was misconduct for which the inquisition would be quashed. *In re* Mitchelstown Inquisition, 22 L. R. Ir. 279.

3. Reg. *v.* Ingham, 5 B. & S. 257, 117 E. C. L. 257. See also the title Coroner's Inquests, 5 Encyc. of Pl. and Pr. 49.

Signing — Sealing. — The coroner must, when the verdict is returned, record it in the form of an inquisition, which must be signed by him and by all the jurors, by their marks if they cannot write, and it is usually sealed by the coroner and the jurors. Stephen's Digest of the Law of Criminal Procedure, art. 228.

4. 2 Hale P. C. 61; Rex *v.* Cole, 3 Campb. 371; Rex *v.* Cole, 2 Leach C. C. 1095; *In re* Ward, 30 L. J. Ch. 775.

5. **Distinction.** — "The finding of a grand jury is regarded as of more weight than an inquisition taken before the coroner; as the court will, in their discretion, bail after the latter, but always refuse after the former; the reason of which may be that in the one case they can look into the depositions to see if the evidence supports the charge of murder, whereas, in the other, the investigation is secret, and does not admit of a summary revision." 1 Chit. Cr. L. 164; 2 Hale P. C. (1st Am. ed.) 61, note; Rex *v.* Dalton, 2 Stra. 911; Rex *v.* Magrath, 2 Stra. 1242.

6. People *v.* Collins, 20 How. Pr (N. Y. Oyer & T. Ct.) 111; *Exp.* Anderson, 55 Ark. 527.

7. Buckhurst's Case, 1 Keb. 280, pl. 81; Chit. Cr. L. 163. See also the statutes of the various states.

8. Reg. *v.* Taylor, 9 C. & P. 672, 38 E. C. L. 284.

9. Reg. *v.* Taylor, 9 C. & P. 672, 38 E. C. L. 284.

How Witnesses for Defense Recognized. — Under 30 and 31 Vict., c. 35, § 3, whenever a person is committed for trial on a coroner's inquisition, investigation of the case should be made by a magistrate, in order that the prisoner may call his witnesses and have them recognized to appear at the trial. Reg. *v.* Spoor, 11 Cox C. C. 550. See also Wormeley *v.* Com., 10 Gratt. (Va.) 658; Matter of Ramscar, 63 How. Pr. (N. Y. Supreme Ct.) 255, 10 Abb. N. Cas. (N. Y.) 442. See statutes of different states.

and is not in custody, the coroner should issue a warrant for his apprehension.[1]

Power to Commit. — At common law a coroner is authorized to commit the accused to jail, there to await trial.[2]

Right of Accused to a Hearing before Magistrate. — Statutes in many of the states, however, now entitle the accused, when arrested, to a hearing before a magistrate.[3]

hh. Disposition of Body — **Coroner to Grant Permit for Burial.** — After the body has been duly viewed the coroner may grant a permit for its burial.[4]

ii. Disposition of Property Found upon Body. — The disposition of property found upon the deceased is regulated by statute in most of the states.[5] Property found on or near the person of the deceased should be taken by the coroner and delivered to those who prove their title to the same.[6] If the property is unclaimed, or is necessary to defray the expenses of burial made by the county at the instance of the coroner, provision is usually made that the coroner shall deliver the same to the county treasurer, or to such person as the particular statute may designate, to be applied and disposed of by him as the particular statute may direct.[7]

1. Chit. Cr. Law 164; 2 Hale P. C. 63; Stephen's Dig. Cr. Pro., art. 229; People *v.* Collins, 20 How. Pr. (N. Y. Oyer & T. Ct.) 111.

2. **Coroner to Commit Accused.** — The coroner is a committing magistrate, and it is his duty, if the jury find any person guilty of homicide, to commit such person to prison to await his trial. "Power of Coroner," etc., 11 Phila. (Pa.) 387. The duty was his by common law, the statute 4 Edw. I., § 2 (in affirmance of common law), enacting "and how many soever shall be culpable by inquisition * * * shall be taken and delivered to the sheriff and committed to jail."

At Common Law the Accused Is Entitled to No Preliminary Hearing. — A person committed to jail by a coroner for the crime of murder is, in the absence of statute, entitled to no preliminary examination before a magistrate or otherwise, although the mittimus for sending him to prison issues solely upon an inquisition conducted in his absence. *Ex p.* Anderson, 55 Ark. 527.

3. **Statutory Provisions Entitle Accused to Hearing before Magistrate.** — In *New York* a person against whom an inquisition has been found by a coroner's jury is entitled to a hearing before a magistrate, whether arrested before or after the filing of such inquisition. The magistrate should proceed to examine the charge contained in the inquisition, and hold the defendant to answer or discharge him therefrom, the manner of proceeding being the same in all respects as upon a warrant on an information. Matter of Ramscar, 63 How. Pr. (N. Y. Supreme Ct.) 255, 10 Abb. N. Cas. (N. Y.) 442. See also Wormeley *v.* Com., 10 Gratt. (Va.) 658, and statutes of Colorado, Indiana, Iowa, Michigan, Montana, North Dakota, Nebraska, New York, Ohio, Oklahoma, Virginia, West Virginia, Wyoming.

Privilege May Be Waived. — Where a person accused by the coroner's inquisition was arrested by a justice of the peace, acting as coroner, and committed to jail, and there remained until indicted by the grand jury, and, being arraigned upon the indictment before the County Court, without pleading thereto demanded to be tried for the offense by the Circuit Court, and such demand was granted, it was held that whether or not he had the right to demand to be carried before the justice of the peace to be examined for the offense, he had waived the right by demanding in the County Court to be tried for the offense in the Circuit Court. Jackson *v.* Com., 23 Gratt. (Va.) 919.

Power to Bail. — In the absence of statutory provisions the coroner has no power to bail. Vickers on Police Officers and Coroners, p. 232. But see statutes of different states.

Provision in England. — By 22 Vict., c. 33, §§ 1, 2, it is provided that in every case in which a coroner's jury shall have found a verdict of manslaughter it shall be lawful for the coroner or deputy before whom the inquest was taken to accept bail, if in his discretion the circumstances warrant it. Stephen's Dig. Cr. Pro., art. 230; Coroner's Act 1887, § 5 (2).

4. Grindon's Lex Coronatoria 180; English Coroner's Act, 1887, § 18 (6); 2 Birdseye's N. Y. Rev. Stat. (2d ed.) 2424.

Unclaimed Bodies — Burial Expenses. — It is provided by statute in a number of states that when an inquest is held by the coroner, and no other person takes charge of the body of the deceased, he must cause it to be decently interred, and if there is not sufficient property belonging to the estate of the deceased to pay the necessary expenses of the burial, the expenses are legally charged against the county. Cal. Political Code, § 4286. See also the statutes of Colorado, Idaho, Iowa, Minnesota, Mississippi, Montana, New Hampshire, North Dakota, Oregon, Tennessee, Utah, Washington, and West Virginia.

5. See, for instance, the statutes of Alabama, Florida, Idaho, Indiana, Nebraska, New York, Ohio, and Wyoming.

6. **When Refusal to Deliver Amounts to a Conversion.** — In *Massachusetts*, where, by the provisions of the statute, coroners are required to deliver property forthwith to those entitled to its care and possession, the refusal of a coroner to deliver the property upon due demand and proof of ownership was held to amount to a conversion for which he was liable. Smiley *v.* Allen, 13 Allen (Mass.) 465.

7. See statutes cited above.

Statutes to Be Strictly Complied With. — Where

(e) **Expenses of Inquest.** — The expenses of an inquest are not chargeable against the estate of the deceased.[1] Where allowed they are properly chargeable to the county or town, and not to the state.[2]

(f) **Record of Inquest as Evidence — On the Trial of Accused.** — The inquisition is admissible to prove the *corpus delicti*, but it cannot be used to fix the accused with the commission of the crime.[3]

Depositions Admissible. — Where there is a variance between the testimony given by a witness on the trial of the accused, and that elicited on the inquest, his deposition taken by the coroner may be admitted in evidence to discredit him.[4]

In Civil Actions. — On the trial of civil actions growing out of a coroner's inquest, as, for instance, a suit for the recovery of fees, etc., the record of the proceedings may be introduced by either party and is *prima facie* proof of the facts stated therein.[5]

2. As a Ministerial Officer — Duties Exercised when Performing the Functions of a Sheriff. — In his ministerial capacity the duties of the coroner are exercised merely when he performs the duties of a sheriff.[6]

Common-law Doctrine. — When just exception can be taken to the sheriff for suspicion of partiality, as that he is interested in the suit or action, or of kindred to either plaintiff or defendant, process must be awarded to the coroner instead of the sheriff.[7] A coroner cannot serve process where there is no sheriff,[8] nor is he authorized to perform the duties of the sheriff where that

the public officials of a county assume to dispose of the money or effects of a deceased person, under and by authority of a statute, all the essential requirements of the statute must be followed, or the rights of the legal representatives to the fund will remain unaffected. Oh Chow *v.* Brockway, 21 Oregon 440.

1. **Not Chargeable Against the Estate of the Deceased.** — By the common law no costs were allowed for the holding of an inquest, the coroner, jurors, and witnesses being compelled to perform their duties without compensation. Fees for service, however, are now universally allowed by statute, though usually without expressly providing by whom the same shall be paid. In all such cases, however, it seems that these fees constitute no charge whatever against the estate of the deceased. "The object of the coroner's inquest is to ascertain whether the person died by felony or accident, and if by felony, to discover the guilty person or persons. The inquest is a proceeding judicial in character, and is one step taken in the enforcement of the criminal laws of the land. The widow, heirs, creditors of the estate, and all other persons have an equal interest in enforcing such laws. It is unreasonable to suppose that the legislature ever intended to impose upon the estate of a deceased person the burden of paying the costs and fees arising on such an inquest." Houts *v.* McCluney, 102 Mo. 13.

2. **Properly Chargeable Against County.** — The expenses of an inquest are properly chargeable against the county, and not against the state. Galloway *v.* Shelby County, 7 Lea (Tenn.) 121.

3. State *v.* Parker, 7 La. Ann. 84, *cited* and *approved* in State *v.* Johnson, 10 La. Ann. 456; U. S. Life Ins. Co. *v.* Vocke, 129 Ill. 557. See also National Union *v.* Thomas, 10 App. Cas. (D. C.) 277, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 177.

Inquisition Not Prima Facie Evidence. — Where the inquest pronounces one guilty it is not even *prima facie* evidence against him on his trial. Crisfield *v.* Perine, 15 Hun (N. Y.) 203.

Weight Formerly Given to Inquisition. — Anciently the law gave such high credit to an inquisition of death found before a coroner, that judges would not receive a verdict acquitting a person of the death of a man, where the inquest of the coroner's jury charged him with the commission of the crime, unless the jury finding such acquittal had also found what other person did the fact, or by what means the party came to his death, because it appeared by the coroner's view on record that a person was killed. 13 Edw. IV, c. 3, pl. 7. But this opinion seems now exploded. 2 Hawk. P. C., c. 9, § 33; Bacon's Abr., Coroner (D).

4. Reg. *v.* Colmer, 9 Cox C. C. 506; Rex *v.* Oldroyd, 1 R. & R. C. C. 87; People *v.* Devine, 44 Cal. 452; Com. *v.* Hawkins, 3 Gray (Mass.) 463; Stephens *v.* People, 19 N. Y. 549.

5. Prince of Wales, etc., Assoc. Co. *v.* Palmer, 25 Beav. 605; Lancaster County *v.* Mishler, 100 Pa. St. 624. See also Reg. *v.* Gregory, 8 Q. B. 508, 15 L. J. M. C. 38, 10 Jur. 387.

6. 2 Hawk. P. C., c. 9, § 55, note; 1 Bl. Com. 349.

7. **Coroner as Sheriff's Substitute.** — Wimbish *v.* Willoughby, Plowd. 73; State *v.* Monk, 3 Ala. 415; Richardson *v.* Croft, 1 Bailey L. (S. Car.) 264; Giles *v.* Brown, 1 Mill (S. Car.) 230; 1 Bl. Com. 349; Bacon's Abr., tit. Coroner (C). See also Anonymous, 2 Vent. 216.

8. **Where There Is No Sheriff, the Coroner Can not Serve.** — Process shall not be made to the coroner where there is no sheriff, or where the sheriff is dead, for the sheriff is an officer immediate to the court, for process shall not issue to the coroner unless in special case. 22 Henry VI., c. 51; Brook's Abr., Process, 70; 6 Viner's Abr. 254.

The coroners are not the proper officers of the court in any other case but where the sheriff is absolutely improper, not where there is no sheriff at all. Rex *v.* Warrington, 1 Salk. 152.

officer is merely unable to act, as from sickness or otherwise, and no incapacity exists.[1]

Under Statutes. — Statutes in most of the states require process to be awarded to the coroner in all cases in which the sheriff is a party, and to this extent they affirm the common law.[2] In some states the authority of the coroner to perform the duties of sheriff is not limited to cases where just exception can be taken to the sheriff; where a vacancy occurs in the office of sheriff, the coroner becomes *ex officio* sheriff until the office is filled by appointment or otherwise.[3]

When Exception Is Taken to Sheriff, Process Must Be Directed to Coroner. — Where a sheriff is incapacitated to execute a writ, it must be directed to the coroner. If directed to the sheriff the coroner cannot execute it.[4]

See also Richardson *v.* Croft, 1 Bailey L. (S. Car.) 264. And *compare* Paddock *v.* Cameron, 8 Cow. (N. Y.) 212.

1. Coroner Not to Serve Process where Sheriff Merely Unable to Act. — Where a sheriff is unable to attend on account of sickness or is absent from the county, and there are no circumstances that would have rendered him unable to act had he been present, his deputy, and not the coroner, is the proper party to serve process. State *v.* Monk, 3 Ala. 415; Minott *v.* Vineyard, 11 Iowa 90.

2. Statutes Authorize Coroner to Execute Process where Sheriff Is a Party. — In most of the states statutory provisions authorize the coroner to serve process in all cases in which the sheriff is disqualified, through interest, to act.

Alabama. — Nabors *v.* Thomason, 1 Ala. 590; State *v.* Monk, 3 Ala. 417; Roberts *v.* Beeson, 4 Port. (Ala.) 164; Johnson *v.* McLaughlin, 9 Ala. 554; Barnett *v.* Bass, 10 Ala. 956; Gresham *v.* Leverett, 10 Ala. 384; Patterson *v.* Gaston, 17 Ala. 226.

Colorado. — Toenniges *v.* Drake, 7 Colo. 472; Coon *v.* Rigden, 4 Colo. 279.

Connecticut. — Case *v.* Humphrey, 6 Conn. 139.

Georgia. — Johnson *v.* Shurley, 58 Ga. 417.

Iowa. — Beard *v.* Smith, 9 Iowa 50; Currens *v.* Ratcliffe, 9 Iowa 309; Minott *v.* Vineyard, 11 Iowa 92; Chord *v.* McCoy, 1 Morr. (Iowa) 311.

Kentucky. — Gowdy *v.* Sanders, 88 Ky. 346.

Louisiana. — Jacobs *v.* Ducros, 7 Rob. (La.) 116.

Massachusetts. — Thayer *v.* Ray, 17 Pick. (Mass.) 166; Com. *v.* Moore, 19 Pick. (Mass.) 340; Carlisle *v.* Weston, 21 Pick. (Mass.) 536.

Mississippi. — Dyson *v.* Baker, 54 Miss. 24.

Missouri. — State *v.* Smith, 90 Mo. 37, 59 Am. Rep. 4; Moss *v.* Thompson, 17 Mo. 405; Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470.

Nebraska. — Keith *v.* Heffelfinger, 12 Neb. 498; Barlass *v.* May, 16 Neb. 647.

North Carolina. — Witkousky *v.* Wasson, 69 N. Car. 39; Edwards *v.* Tipton, 77 N. Car. 222.

Ohio. — Murphy *v.* Swadener, 33 Ohio St. 85.

South Carolina. — May *v.* Walters, 2 McCord L. (S. Car.) 470; Giles *v.* Brown, 1 Mill (S. Car.) 230.

Tennessee. — Stewart *v.* Magness, 2 Coldw. (Tenn.) 310, 88 Am. Dec. 598.

Texas. — Mays *v.* Forbes, 11 Tex. 284.

Washington Territory. — Rodolph *v.* Mayer, 1 Wash. Ter. 133.

Jurisdiction Extends to Criminal as well as Civil Cases. — The statutory provision authorizing the coroner to act where the sheriff is interested, etc., applies to criminal as well as civil cases, and upon the filing of the affidavit required by statute showing prejudice or interest of the sheriff, the coroner shall be directed to act in place of the sheriff. State *v.* Hardin, 46 Iowa 623, 26 Am. Rep. 174.

Coroner to Serve Process Against Sheriff Only when Process Issues from Court of Record. — Under a statute of *Wisconsin* which provides that when a sheriff is a party to an action, the coroner shall serve process therein, it was held that the provision relates only to actions in courts of record, and does not apply to a suit before a justice of the peace. Cron *v.* Krones, 17 Wis. 401.

Degree of Interest Disqualifying Sheriff. — Where a sheriff is directly or pecuniarily interested he cannot serve process or otherwise act. Weston *v.* Coulson, 1 W. Bl. 506; First Parish *v.* Cole, 8 Mass. 96; Brewer *v.* New Gloucester, 14 Mass. 216; Thayer *v.* Ray, 17 Pick. (Mass.) 166; Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; Jackson *v.* Chew, 3 Cow. (N. Y.) 299.

"It is not indispensable to the sheriff's disqualification that he should be a party to the record, or that he should have a pecuniary interest. If he stands in such a relation in respect to one of the parties as would probably make him solicitous for his success, he is incompetent to execute process in the manner of serving which he is invested with any latitude of discretion." Johnson *v.* McLaughlin, 9 Ala. 551. See also Cham *v.* Matthew, Cro. Eliz. 581; Morgan *v.* Wye, Cro. Eliz. 574; Gregory *v.* Booker, Cro. Eliz. 586. But see Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 410; Jackson *v.* Rathbone, 3 Cow. (N. Y.) 297.

Coroner Not to Serve Process Because Deputy Sheriff a Party. — The fact that the deputy sheriff is a party is not such an interest as authorizes a coroner to serve process. Browning *v.* Bancroft, 5 Met. (Mass.) 88; Gordon *v.* Bonter, 6 U. C. L. J. 112. But see Graves *v.* Smart, 75 Me. 295; Colby *v.* Dillingham, 7 Mass. 475.

3. Coroner as Sheriff. — State *v.* Monk, 3 Ala. 415; Tieman *v.* Haw, 49 Iowa 312; Reed *v.* Reber, 62 Ill. 240; Paddock *v.* Cameron, 8 Cow. (N. Y.) 212; Mays *v.* Forbes, 11 Tex. 286.

4. Process Must Be Directed to Coroner. — Weston *v.* Coulson, 1 W. Bl. 506; Nabors *v.* Thomason, 1 Ala. 590; Sewall *v.* Bates, 2 Stew. (Ala.) 464; Johnson *v.* McLaughlin, 9 Ala. 551; Pope *v.* Stout, 1 Stew. (Ala.) 375; Adamson *v.* Parker, 3 Ala. 727; Gresham *v.* Leverett, 10 Ala. 384; Governor *v.* Lindsay, 14

Powers and Rights of Coroner when Acting as Sheriff. — Whenever the coroner is required to perform the duties of the sheriff, all rights and powers of the sheriff devolve upon him.[1]

Arrest of Sheriff. — When the sheriff himself becomes amenable to the law, the duty of arresting him devolves upon the coroner.[2] At common law the coroner must make his house or some other place than the common jail a prison for the sheriff's detention, and he is liable for an escape if he commit him to the jail, of which the sheriff by law has the charge.[3]

Appointment of Deputy. — Whenever the coroner acts in the place of the sheriff in the execution of process or other ministerial services merely, he may act by deputy just as a sheriff might.[4]

VII. Privileges and Liabilities — 1. As a Judicial Officer. — The privileges and liabilities of a coroner in his judicial capacity are determined by the status of his court. Thus, in *England*, where a coroner's court is a court of record, his privileges, immunities, and liabilities are those ordinarily belonging to

Ala 658; Colby *v.* Sampson, 5 Mass. 311; Arnold *v.* Wynn, 26 Miss. 338; Murphy *v.* Swadener, 33 Ohio St. 85; Brown *v.* Barker, 10 Humph. (Tenn.) 347. But see Kirk *v.* Murphy, 16 Tex. 654, 67 Am. Dec. 640.

Service of Process a Special Authority. — The service of process by the coroner being a special authority, and not coming within the general duties of that officer, all the facts necessary to give him the power should be made to appear in the writ itself; and a general direction to him is not sufficient. Carlisle *v.* Weston, 21 Pick. (Mass.) 536.

Where, in the case of the inability of a sheriff to execute process, the coroner is authorized to act as his substitute, it will be presumed, in a case where the coroner has so acted, that the facts existed which rendered it proper for him to act in the particular case. Beach *v.* Schmultz, 20 Ill. 185; Kirk *v.* Murphy, 16 Tex. 654, 67 Am. Dec. 640.

Although Authority Does Not Appear — Objection Too Late. — Though the authority to serve does not appear on the face of the writ which is directed to and served by the coroner, yet if the contrary does not appear, and the defendant does not except at the time of his entering his appearance, he cannot take exception afterwards. Simonds *v.* Parker, 1 Met. (Mass.) 508; Carlisle *v.* Weston, 21 Pick. (Mass.) 535; Sawyer *v.* Price, 6 Ala. 285.

Where Directed to Coroner — May Be Served by Special Deputy. — A coroner may appoint a special deputy to serve a writ; and where a writ issued to a coroner was executed by his deputy, it was held to be good. Jewell *v.* Hutchinson, 31 N. J. L. 71; Clecott *v.* Dennys, Cro. Eliz. 67.

Presumption — When Directed to Coroner. — Where an execution is directed to the coroner it will be presumed, in the absence of proof to the contrary, that the proper officer so directed it. Cook *v.* Chicago, 57 Ill. 268.

Execution Must Be Directed to Coroner Where Mesne Process Issues to Him. — Where the original process issues to the coroner because the sheriff or deputy was interested, all subsequent process must issue to him, although the reason for sending the process to the coroner may have ceased because the office of sheriff had passed into other hands. And if the subsequent process be to the new sheriff, it is error. 5 Com. Dig., Officer, G. 13. See also Tugge *v.* Smith, 6 T. B. Mon. (Ky.) 77.

De Facto Coroner. — Process directed to one who is coroner *de facto*, and executed by him, is good. Gunby *v.* Welcher, 20 Ga. 336.

Coroner Estopped to Deny His Authority. — A coroner to whom execution has been directed, and who acts under it, is estopped in an action against him on his official bond for misconduct in reference to the execution, from denying his authority to act under it, and it is unnecessary, therefore, in such an action, to show that the sheriff was incapacitated to act from interest, or that the sheriff's office was vacant. Longacre *v.* State, 2 How. (Miss.) 637.

1. Yeargin *v.* Siler, 83 N. Car. 348; Reed *v.* Reber, 62 Ill. 240; Jervis on Coroners 75. And see the statutes of the several states.

When process is awarded to the coroner to be executed, he is, as the old books say, expressly *locum tenens vicecomitis*, and has the common-law powers of a sheriff. Kent, C. J., in Day *v.* Brett, 6 Johns. (N. Y.) 22.

Sale of Property by Coroner. — A coroner may convey land sold by him under execution. Winslow *v.* Austin, 5 J. J. Marsh. (Ky.) 411.

Directions Regulating Sales to Be Strictly Followed. — Though a coroner in his sales should pursue strictly the directions of the act which regulates sheriff's sales, yet a sale being advertised for a day different to which the plaintiff, the defendant in execution, and the officer have all assented cannot work the dissolution of the contract made for such sale by a third person who has been in no wise affected by the irregularity. O'Bannon *v.* Kirkland, 2 Strobh. L. (S. Car.) 29.

2. **Coroner to Arrest Sheriff.** — See Day *v.* Brett, 6 Johns. (N. Y.) 22; N. Y. Code Civ. Pro., §§ 174, 175.

Coroner May Call to His Aid Power of the County Where Sheriff to Be Arrested. — Under the *New York* Code of Procedure in force in 1861, §§ 185 and 419, the coroner may call to his aid the power of the county in a proper case in executing an order for arrest in an action in which the sheriff is a party. Slater *v.* Wood, 9 Bosw. (N. Y.) 16.

3. **When Arrested, where Sheriff to Be Incarcerated.** — Day *v.* Brett, 6 Johns. (N. Y.) 22. See also Adams *v.* Vose, 1 Gray (Mass.) 51.

4. **Appointment of Deputy.** — Clecott *v.*

judges of courts of record.[1] No action lies against him for any matter done by him in the exercise of his judicial functions.[2] In the *United States* his court is a court of inferior jurisdiction, and not of record, and his privileges are correspondingly abridged and his liabilities extended.[3]

2. As a Ministerial Officer. — In his ministerial capacity, his privileges and liabilities are those of the sheriff, whose substitute he is.[4]

Dennys, Cro. Eliz. 67; Adamson *v.* Parker, 3 Ala. 727; Jewell *v.* Hutchinson, 31 N. J. L. 71; Yeargin *v.* Siler, 83 N. Car. 350; Rowland *v.* Thompson, 65 N. Car. 110.

1. Garnett *v.* Ferrand, 6 B. & C. 611, 13 E. C. L. 277.

2. Garnett *v.* Ferrand, 6 B. & C. 611, 13 E. C. L. 277. See also the title JUDGES.

A coroner holding an inquest is not liable for words falsely and maliciously spoken by him in summing up to the jury. Thomas *v.* Churton, 2 B. & S. 475, 110 E. C. L. 475.

Where a coroner causes the arrest of a person on a warrant issued by him as a result of the verdict of a jury in an inquest held by him, but without jurisdiction, he is liable in a civil action for false imprisonment. Foxall *v.* Barnett, 2 El. & Bl. 928, 75 E. C. L. 928.

Privileged from Arrest. — A coroner on his way to hold an inquest is privileged from arrest in a civil process; and this privilege extends to a deputy where acting as coroner. *Ex p.* Deputy Coroner, 3 L. T. N. S. 754, 6 H. & N. 501. See also Callaghan *v.* Twiss, 9 Ir. L. Rep. 422.

A coroner is exempt from serving on juries. Com. Dig., Officer, G. 16.

Liability for Accepting Money for Not Holding Inquest. — A coroner, in taking a sum of money for not holding an inquest, is guilty of an indictable offense, whether he has authority or not for taking an inquisition. Rex *v.* Harrison, 1 East P. C. 382.

Liability — Holding Inquest for Private Party. — It is a misdemeanor in office for a coroner to hold an inquest for a private party. Watson *v.* Beaver County, 9 Pa. Co. Ct. Rep. 495, 27 W. N. C. (Pa.) 469.

3. Status in United States Generally. — In Crisfield *v.* Perine, 15 Hun (N. Y.) 200, *affirmed* 81 N. Y. 622, it was held that a person who was excluded by a coroner from a room where a *post-mortem* examination was about to be made upon the body of a person upon whose death the coroner was holding an inquest, was not entitled to maintain an action against the coroner for an assault and battery founded upon such exclusion. The court declared that a *post-mortem* examination conducted by surgeons employed by the coroner was not a part of the inquest in such a sense that every citizen had a right to be present, but that a discretion was vested in the coroner to determine whether any person, or what persons beside the surgeons, might be present. In discussing the general status of a coroner with regard to responsibility for his acts, it was said: "It is a court of inferior jurisdiction. A magistrate of a court of inferior jurisdiction, not of record, when sued for an act done by him in his official capacity, in order to justify must show that he had authority to do the act complained of. Nothing will be implied in his favor."

4. See also *supra*, this title, *Powers and Duties — As a Ministerial Officer*.

Statutory Provisions Protecting Sheriff Apply to Coroner. — The statutory provision for service of process and the protection afforded thereunder, apply to a coroner to whom a requisition has issued in a proceeding against the sheriff for the claim and delivery of personal property. Manning *v.* Keenan, 73 N. Y. 45.

Liability — Misappropriation of Returns. — A *fi. fa.* at the suit of one against an administrator was placed in the hands of a coroner, and a *venditioni exponas* in favor of the administrator was also delivered, requiring him to make sale of certain property for the purpose of recovering the amount of a judgment. On the *venditioni exponas*, the coroner made the sum of eight hundred dollars, which he paid to the administrator therein, and returned a *fi. fa.* "no property found." It was held that it was the duty of the coroner to have retained the money collected on the *venditioni exponas*, and make his special return both on the writ and on the *fi. fa.*, setting forth the facts and praying the order of the court for its appropriation. In a proper case, the officer might require a bond to indemnify him for making such a return, and where he acted with promptness and good faith he would be relieved from the payment of damages if the party on whose execution the money was collected should move against him, under the statute, for failing to pay over the sum. Not having thus proceeded, the coroner was liable upon a rule suggesting that with due diligence the money could have been made on the *fi. fa.* Barnett *v.* Bass, 10 Ala. 951.

Liability upon Arrests. — Where a coroner has arrested upon execution he can, like a constable, only carry the prisoner to the jail and offer to deliver him with a copy of the precept. If the sheriff refuse to receive and safely keep him, or if the sheriff is not there, nor any keeper appointed by him to receive and confine the prisoner, the coroner has done his duty, and if afterwards the prisoner go at large it is the escape of the sheriff. Colby *v.* Sampson, 5 Mass. 312.

Liability — How Enforced. — The penalties to which coroners are subjected by the *Alabama* Act of 1833, for default in execution of process, may be recovered in the summary mode pointed out by the Act of 1807. The latter act, so far as it prescribes a remedy and mode of proceedings, is not repealed by the former. Patterson *v.* Gaston, 17 Ala. 225. See also Riley *v.* Marshall, 5 Ala. 682.

Evidence Admissible in Mitigation of Damages. — In an action against a coroner for taking slaves from the possession of the plaintiff, which the latter had hired for a term, and for which hire he had given his notes, the fact that in a suit on these notes he interposed as a defense that his possession had been deter-

VIII. TERM OF OFFICE. — In England a coroner is appointed for life.[1] His incumbency of office may be determined by resignation, by the acceptance of an incompatible office, or by his removal for cause.[2]

In the United States he is chosen for a term of years, but, as in England, the authority and duties imposed by the office may be terminated sooner.[3]

By Whom Vacancy Filled. — Vacancies are filled by the appointive power for the state or county, as the case may be. Where the office is a county office, it is usually filled by the governor, though the right is determined entirely by statute, and in some of the states the authority is vested in the county courts; in others, in the county commissioners.[4]

IX. REMUNERATION. — No Remuneration at Common Law. — At common law a coroner was entitled to neither fees nor salary, the office being strictly honorary.[5]

Statutory Changes. — Remuneration, however, is now universally accorded by statute, either in the form of fees or by payment of a salary.[6]

mined by the act of the coroner, and thereby obtained a rebatement, is admissible in evidence in mitigation of damages, for the party is not entitled to two satisfactions for the same injury. McLane *v.* Miller, 10 Ala. 856.

1. **Holds Office During Good Behavior.** — In England a coroner holds office for life, or during good behavior. 1 Bl. Com. 348; 1 Broom & Had. Com. 417.

2. **Resignation — When to Take Effect.** — The rule in relation to resignations of coroners is that such resignations take effect on their acceptance by the proper authorities, and until so accepted they are simply offers to resign. Rogers *v.* Slonaker, 32 Kan. 191; State *v.* Clayton, 27 Kan. 442, 41 Am. Rep. 418. *Contra*, see Olmsted *v.* Dennis, 77 N. Y. 378; People *v.* Porter, 6 Cal. 26.

3. See the statutes of the different states.

4. See the statutes of the several states.

Where Coroner Has Absconded. — The governor has power to fill by appointment the vacancy in the office of coroner, where it appears that the elected coroner has notoriously absconded from the county in which he was elected. Erie County Coroner, 11 Pa. Co. Ct. Rep. 136.

Time for Which Appointment Made. — The time for the governor to supply the vacancy by appointment is, in New York, confined to the interval between the time the vacancy happens and the filling of the office at the next general election. People *v.* Parker, 6 Hill (N. Y.) 52. But see the statutes of the different states.

5. 1 Bl. Com. 347, 348; 2 Inst. 216; Bac. Abr., Coroner (G.); Reg. *v.* Herford, 3 El. & El. 132, 107 E. C. L. 132; Houts *v.* McCluney, 102 Mo. 16.

6. **Provision Statutory.** — The allowance of remuneration is a creature of statute. It must be paid in the amounts and in the manner so specified. Houts *v.* McCluney, 102 Mo. 16; Bartholomew County *v.* Bryan, 22 Ind. 398.

In the United States remuneration is usually allowed in fees.

In England payment to coroners is now in the form of salaries. *Ex p.* Driffield, L. R. 7 Q. B. 207.

Where Statute Does Not Fix the Amount — Reasonable Compensation Allowed. — Where the amount of a fee to be allowed a coroner for the performance of a duty is not expressly provided for by statute, such compensation as is reasonable will be allowed him. Cook *v.* Multnomah County, 8 Oregon 172.

Conditions Precedent to Right to Remuneration — Due Taking of Inquisition. — The due taking of an inquisition by a coroner was held a condition precedent under Stat. 25 Geo. II., c. 29, to a coroner's being entitled to certain fees. Reg. *v.* Justices, 11 Jur. 819, 16 L. J. M. C. 167.

In Burnett *v.* Lackawanna County, 1 Lack. Jur. (Pa.) 410, and Watson *v.* Beaver County, 9 Pa. Co. Ct. Rep. 495, 27 W. N. C. (Pa.) 469, it was held that a coroner is entitled to no compensation for the making of preliminary inquiries to determine the necessity of an inquest; and in Burns's Case, 5 Pa. Co. Ct. Rep. 549, it was held that a coroner is entitled to no costs where sufficient inquiry would have shown that no reasonable suspicion of a violent or unnatural death existed.

Paying Over Moneys. — It is the duty of the coroner of the city of New York, when acting as sheriff, to pay over to the city all fees received by him as such, and he is not entitled to salary as coroner until he does so. People *v.* Myers, 61 Hun (N. Y.) 500, *affirmed* in 131 N. Y. 644.

Where Separate Inquests Held — Deaths Resulting Simultaneously and from Same Cause. — Where several deaths have occurred at the same time and place, from the same cause, under circumstances warranting an inquest, the coroner is entitled, where several inquests were held, to fees for viewing each body, summoning and qualifying each inquest, and returning and qualifying witnesses in each case, where from the position of the several bodies separate views were necessary. Fayette County *v.* Batton, 108 Pa. St. 591; Marvin Shaft Inquest, 3 Pa. Co. Ct. Rep. 10; Rambo *v.* Commissioners, 1 Chest. Co. Rep. (Pa.) 416.

Where One Inquest Held. — If a coroner views several bodies in one inquest, he is entitled to fees in only one case for summoning and qualifying witnesses. Francis *v.* Tioga County, 8 Pa. Co. Ct. Rep. 163.

Remuneration Where Inquest Held in Lands Ceded to the United States. — Where land was purchased by the United States with the consent of the state of Pennsylvania for the pur-

X. REMOVAL — 1. Manner of Removal. — In *England*, a coroner may be removed by authority of the great seal,[1] the power vested in the Lord Chancellor being exercised, upon sufficient cause, through the instrumentality of the writ *de coronatore exonerando*.[2] Statutes provide further that upon conviction for extortion or other malfeasance or misfeasance in office the court before which a coroner is tried may adjudge his removal, and the writ from chancery then issues as a matter of course.[3] In the *United States* due provision is made for his removal in the statutes of the several states, the mode and manner being the course usually prescribed for the removal of sheriffs.[4]

2. Cause of Removal. — The causes of removal, except where made the subject of special legislation, are those prescribed for the removal of public officers generally.[5] They embrace incompetency, neglect of duty, malfeasance and misfeasance in office.[6]

CORPORAL. — Belonging or relating to the body.[7]

pose of erecting forts, and a proviso to the consent to purchase was "that nothing herein contained shall extend, or be construed to extend, so as to impede or prevent the execution of any process, civil or criminal, under the authority of this state," it was held, in an action brought by a coroner for the recovery of his fees for holding an inquest over the bodies of a number of citizens killed by an explosion, that he was entitled to his fees, being authorized by the proviso to hold the inquest. Allegheny County *v.* McClung, 53 Pa. St. 482.

Mileage. — Where two or more inquisitions are held by a coroner at the same place on the same day, a statute providing generally for the payment of mileage does not entitle him to more than one traveling fee in going to and from the place of inquest. People *v.* Niagara County, (Supreme Ct.) 38 N. Y. St. Rep. 964; Rex *v.* Warwick, 5 B. & C. 430, 11 E. C. L. 264, 8 D. & R. 147; Marvin Shaft Inquest, 3 Pa. Co. Ct. Rep. 10. See also Rex *v.* Oxfordshire, 2 B. & Ald. 203.

Pennsylvania — Special Statutes. — Under the Act of May 9, 1889 (Bright. Purd. Dig. 399), a deputy coroner is not to be paid in fees in counties in which the population exceeds 150,000. The act is unconstitutional as to such counties, and applies apparently only to counties already having deputy coroners. Com. *v.* Grier, 9 Pa. Co. Ct. Rep. 444; Fogarty *v.* Schuylkill County, 13 Pa. Co. Ct. Rep. 454.

How fees earned by the coroner of Philadelphia and made by law the basis of his salary are to be computed, see Philadelphia *v.* Gilbert, 37 Leg. Int. (Pa.) 376.

1. *Ex p.* Pasley, 3 Dr. & War. 34; *Ex p.* Parnell, 1 Jac. & W. 431.

Authority Independent of Statute. — The great seal has power independent of the statute 25 Geo. II., c. 29, to remove a coroner from office for neglect of duty or misconduct in office. *Ex p.* Parnell, 1 Jac. & W. 433.

2. Proceedings upon Removal. — The practice upon proceedings for the removal of a coroner is to issue, at the same time that the writ *de coronatore exonerando* is issued, the writ *de coronatore eligendo* for the selection of a new coroner. Though they do not bear the same date, the *fiat* is usually put to them the same day, and it is only necessary that the former writ be served first. *Ex p.* Parnell, 1 Jac. & W. 431.

3. 25 Geo. II., c. 29, § 6; Coroner's Act, 1887, 50 and 51 Vict., c. 71.

4. See the statutes of the different states.

The Constitution of Kentucky provides two modes of removing officers from office: by impeachment, which applies to every civil officer in the state, and by indictment, which applies to sheriffs, coroners, surveyors, jailers, sheriffs, etc. Lowe *v.* Com., 3 Metc. (Ky.) 240.

5. See the statutes of the different states. See also the title PUBLIC OFFICERS.

6. Neglect. — The absence of a coroner from the county for a period of twelve months, while undergoing imprisonment, is a sufficient ground for his removal from office, although during his absence another coroner of the county had performed his duties. *Ex p.* Parnell, 1 Jac. & W. 431; Erie County Coroner's Case, 1 Pa. Dist. Rep. 224.

Misbehavior in Office — Refusal to Hold Inquest. — Where a coroner, upon the assembling of a jury summoned to attend an inquest, was in a state of intoxication, and refused, after keeping the jury waiting for two hours, to hold the inquest, it was held sufficient ground for his removal under a statute authorizing his removal for inability or misbehavior in office. Matter of Ward, 3 De G. F. & J. 700; *In re* Hull, 9 Q. B. Div. 689.

Suppressing Inquisition. — In Buckhurst's Case, 1 Keb. 280, a coroner not returning an inquisition of murder to the next jail delivery, but suppressing it, was discharged from office. 1 East P. C. 385.

Unreasonable Delay. — Due diligence must be exercised by a coroner in the discharge of his duties. An inquest on a decomposed body unnecessarily delayed, on the ground that the body may be identified, buried, and registered under its proper name, amounts to misbehavior in office and may be a cause of removal. *In re* Hull, 9 Q. B. Div. 689.

7. Webster's Dict.

Corporal Punishment. (See the titles PARENT AND CHILD; SCHOOLS.) — Any kind of ***corporal*** privation or suffering, inflicted directly by way of penalty for an offense. It includes imprisonment, and is set in contradistinction to fine. People *v.* Winchell, 7 Cow. (N. Y.) 525.

Where a statute provided for bail except in cases where ***corporal*** punishment is inflicted, it was held that the term "***corporal*** punishment" did not include imprisonment. The

CORPORAL OATH. (See the titles OATH; PERJURY.)—A "corporal oath" was a solemn oath, so called from the ancient usage of touching the *corporale*, or cloth that covered the consecrated elements.[1]

CORPORATE. (See the title CORPORATIONS, *post.*) — Corporate means relating to a corporation.[2]

court said: "The phrase 'corporal punishment,' in its enlarged meaning undoubtedly embraces all kinds of punishment of, or inflicted upon, the body, including imprisonment; hence the attorney-general contends that, where imprisonment is a part of the penalty, this court is without power to admit the prisoner to bail upon writ of error. * * * In our opinion, however, the term '*corporal* punishment,' in the statute, is used in its primary and restricted meaning, and denotes punishment upon the body, such as whipping, rather than punishment of the body, such as imprisonment. *Corporal* punishment in the public schools or in the family is usually understood to imply some process by which pain is inflicted upon the body of the offender." Ritchey *v.* People, 22 Colo. 251, *citing* 21 AM. AND ENG. ENCYC. OF LAW (1st ed.) 768.

Corporal Imbecility means sexual impotency, not necessarily permanent. Where it was alleged as ground for a divorce that the respondent was, at the time of marriage, "ever since has been, and now is, laboring under a *corporal* imbecility," the latter term was held not to import, *ex vi termini*, a confirmed and incurable impotency. It has no precise technical meaning, and may be a merely temporary imbecility. Ferris *v.* Ferris, 8 Conn. 166. See generally the title DIVORCE.

1. Jackson *v.* State, 1 Ind. 185.

Perjury. — In this country the term *corporal oath*, as used in indictments for perjury, is considered to mean an oath taken according to the custom and usages of the country. Accordingly, such an indictment, alleging that the accused was sworn and took his *corporal oath*, is sustained by evidence that the oath was taken in the usual manner, as by holding up the hand. "The term *corporal oath*," said the court, "must be considered as applying to any bodily assent to the oath of the witness." State *v.* Norris, 9 N. H. 96. The same point was decided in the same way in another state, where it was said: "However it may have been in somewhat olden time in Europe, we think that now, at least in our state, *corporal oath* and 'solemn oath' are used synonymously, and an oath taken with uplifted hand may be properly described by either term." Jackson *v.* State, 1 Ind. 184. In this case was quoted, with approval, Webster's definition of corporal oath: "A solemn oath, so called from the ancient usage of touching the *corporale*, or cloth that covered the consecrated elements" in the eucharist.

Where it was objected to an indictment for perjury, which alleged that the defendant did, "in due form of law, take his *corporal oath*," that it did not state that he took his oath on the Gospels, or in the presence of Almighty God by uplifted hand, the form used was held sufficient. The words *corporal oath* may stand for lifting an arm or other bodily member. Respublica *v.* Newell, 3 Yeates (Pa.) 412.

In Com. *v.* Iarboe, 89 Ky. 143, it was held, where the facts averred in an indictment for perjury showed that the defendant was sworn in the usual form, that an additional averment that he took his *corporal oath* was mere surplusage. The court said: "What is termed a *corporal oath* was anciently administered by touching the cloth that covered the consecrated elements, or, as some suppose, from the fact that the party taking it was required to lay his hand upon the Bible; but a *corporal oath*, as latterly understood, means merely a solemn oath, although the name is derived from the ancient usage just mentioned."

2. Corporate Rights. — In Warner *v.* Beers, 23 Wend. (N. Y.) 154, it is said: "*Corporate* rights are well defined by Chancellor Kent and others to be franchises or peculiar privileged grants, of the nature of incorporeal property. Such franchises when they are granted for pecuniary or other purposes valuable to private interest, are of the nature of monopolies, and are always granted exclusively by the sovereign power, directly or indirectly."

Same — Taxation. (See also the titles CORPORATIONS; MUNICIPAL CORPORATIONS; TAXATION.) — A railway act prescribed the rate and manner of taxing railway companies, and further provided that the act might be at any time amended or repealed, but not so as to alter the *corporate* rights of the companies formed under it. It was held that the term "*corporate* rights" meant only such essentials and fundamental rights as attach to corporations, and did not include incidental privileges and immunities, such as a special standard of taxation. Detroit City St. R. Co. *v.* Guthard, 51 Mich. 180.

Corporate Authorities. — A statute provided that the *corporate* authorities should have the power to license, regulate, etc., the sale of intoxicating liquors. The court said: "By the term '*corporate* authorities,' as we understand it, is evidently meant those officers of cities and villages to whom is given the ordinance-making power, which, in cities of the second class, to which Crete belongs, are the mayor and council thereof." State *v.* Andrews, 11 Neb. 524. See also the titles INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS.

The constitution of *Illinois* conferred the power of taxation upon the *corporate* authorities. It was held that by the term "*corporate* authorities" must be understood those municipal officers who are either directly elected by the population to be taxed, or appointed in some mode to which they have given assent. Hessler *v.* Drainage Com'rs, 53 Ill. 106; Lovingston *v.* Wider, 53 Ill. 302; Harward *v.* St. Clair, etc., Levee, etc., Co., 51 Ill. 130; Cornell *v.* People, 107 Ill. 372. See the title TAXATION.

Corporate Franchise or Business. — A statute provided for a tax upon the *corporate* franchise or business of a company. The court said: "By the term '*corporate* franchise or business,' as here used, we understand is meant

(not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a ***corporate*** capacity; and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability." Home Ins. Co. *v.* New York, 134 U. S. 599.

Corporate Purposes. — See the titles CORPORATIONS; MUNICIPAL CORPORATIONS; ULTRA VIRES.

Corporate Powers. — See the titles CORPORATIONS; ULTRA VIRES.

Corporate Power or Privilege. — The constitution of *Minnesota* forbade the enactment of any special or private laws granting ***corporate*** powers or privileges. It was held that a statute authorizing a village to issue bonds for water-works was not a grant of the ***corporate*** power or privilege. The court said: "The constitutional amendment of 1881 was, with certain changes, not material here, copied bodily from the constitutional amendment of 1871 in the state of Wisconsin, subdivision 7 (the one here involved) being verbatim subdivision 7 of the amendment of 1871 in that state. In 1874, seven years before we adopted it, this subdivision had been construed by the Supreme Court of Wisconsin as relating only to acts of incorporation thereafter to be granted, and as not impairing the legislative power of alteration or repeal in respect to charters granted prior to the adoption of the constitutional amendment. Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425, 560. In that case, Chief Justice Ryan, speaking for the court, said: 'We feel bound to hold, and find no difficulty in holding, the phrase in the amendment, "to grant ***corporate*** powers or privileges," to mean *in principio donationis*, and equivalent to the phrase, "to grant ***corporate*** charters." This is implied not only by the word "grant," but also by the word ***corporate***. A franchise is not essentially ***corporate***; and it is not the grant of franchise which is prohibited, but of ***corporate*** franchise — that is, as we understand it, franchise by act of incorporation.' This construction has been uniformly adhered to by the courts of that state. From 1881 down to the adoption of the much more sweeping and radical amendment of 1891, the legislature of this state assumed and acted upon the same construction. The acts are very numerous amending by special law the special charters of villages organized prior to 1881. Large interests are doubtless now dependent upon the validity of such legislation. To now declare it invalid would result in very serious consequences. In view of these facts, we are of opinion that, whether this construction, considered as a new question, is right or wrong, it ought now to be followed and adhered to. An additional reason for such a conclusion is the fact that such a construction can only affect the past, inasmuch as the amendment of 1881 on the subject of special legislation has been superseded by the more sweeping one of 1891, adopted in November, 1892. It is also significant that in subdivision 10 of the amendment of 1881 prohibiting the enactment of special laws incorporating any town or village there were omitted the words (found in the Wisconsin amendment), 'or to amend the charter thereof.' Our conclusion, therefore, is that Sp. Laws 1891, c. 175, authorizing the defendant village to issue these bonds, was not a grant of a ***corporate*** power or privilege, within the meaning of the constitutional amendment of 1881." Brady *v.* Moulton, 61 Minn. 185.

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CROSS-REFERENCES.

For matters of PROCEDURE, *see the title* CORPORATIONS, vol. 5, ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 52.

As to the Consolidation, Dissolution, and Reorganization of Corporations, see the titles, respectively, CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800; DISSOLUTION OF CORPORATIONS; REORGANIZATION OF CORPORATIONS.

As to the Acknowledgment of Deeds, etc., see the title ACKNOWLEDGMENTS, vol. 1, p. 510.

As to the Removal of Officers, see the title AMOTION, vol. 2, p. 316.

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As to the Powers, etc., in the matter of By-laws, see the title BY-LAWS, vol. 5, p. 86.

As to the Powers, Duties, etc., of Corporate Officers and Agents, see the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; DE FACTO OFFICERS.

As to the Powers and Liabilities of Promoters, see the title PROMOTERS.

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As to the Operation and Effect of Usury Laws, see the title USURY.

As to Particular Kinds of Corporations, see such titles as ACCIDENT INSURANCE, vol. 1, p. 284, *and references there given;* BANKS AND BANKING, vol. 3, p. 787, *and references there given;* BENEVOLENT OR BENEFICIAL

ASSOCIATIONS, vol. 3, p. 1041; *BOOM COMPANIES*, vol. 4, p. 707; *BRIDGES*, vol. 4, p. 918; *BUILDING AND LOAN ASSOCIATIONS*, vol. 4, p. 999; *CANALS*, vol. 5, p. 111; *CARRIERS OF GOODS*, vol. 5, p. 154, *and references there given; CARRIERS OF PASSENGERS*, vol. 5, p. 474, *and references there given; ELECTRIC-LIGHT COMPANIES; FOREIGN CORPORATIONS; GAS COMPANIES; INSURANCE, and references there given; MUNICIPAL CORPORATIONS; NATIONAL CORPORATIONS; RAILROADS, and references there given; RELIGIOUS SOCIETIES; SAFE-DEPOSIT AND TRUST COMPANIES; STOCK AND PRODUCE EXCHANGES; TELEGRAPH AND TELEPHONES; WATER COMPANIES.*

And for other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles AGENCY, vol. 1, p. 930; *ARBITRATION AND AWARD*, vol. 2, p. 533; *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 1; *CAR-TRUST ASSOCIATIONS*, vol. 5, p. 744; *CHARITIES*, vol. 5, p. 893; *EMINENT DOMAIN; IMPAIRMENT OF OBLIGATION OF CONTRACTS; JOINT-STOCK COMPANIES; PARTNERSHIP; POLICE POWER; PROXIES; RECEIVERS; SEALS; SOCIETIES AND CLUBS; STATUTES; TRADE COMBINATIONS AND CORPORATE TRUSTS; UNITED STATES COURTS; VOTING TRUSTS.*

I. SCOPE OF THE TITLE. — This article is confined to a discussion of private corporations, and its scope is further limited by reason of the fact that separate articles have been made of certain of the most important divisions into which this branch of the subject naturally falls. The titles of these, and of all other articles in which corporations and kindred topics are treated, will be found in the table of cross-references at the beginning of this article.

II. ORIGIN AND HISTORY. — Blackstone seems to have fallen into error in attributing the origin of corporations to the Romans.[1] While corporations were recognized in the Twelve Tables (Table VII.), it appears that Solon permitted "such associations, whether for purposes of mere affection, of business, or of devotion," subject only to the condition that their purposes should not be contrary to the general law of the land.[2]

III. DEFINITION, GENERAL NATURE, AND DISTINCTIONS — 1. Definition. — A corporation is a body created by law, consisting of one or more individuals, and possessed of a franchise by virtue of which it subsists as a body politic, under a special designation, with the capacity of succession either perpetual or for a limited period, and which in many respects is regarded and acts as an individual.[3]

1. 1 Bl. Com. 468.

Under the Roman Law, corporations were always aggregate. They were called *universitates* or *collegia*, from many being gathered into one. The maxim of the Roman law was that *tres faciunt collegium*, although if, by a subsequent contingency, the number was reduced to one, the corporation was still considered to exist. In such a contingency the maxim was *si universitas ad unum redit, et stat nomen universitatis.* 1 Minor's Inst. 500; 1 Bl. Com. 468; Browne's Civ. & Adm. Law 141; Dig., lib. l., 16, 85; Dig., lib., liii., 4, 7.

2. 1 Minor's Inst. 499; Cooper's Just. Inst. 594; Dig., lib. 47, tit. 22, 4; 1 Kent's Com. 525, note.

3. **Definition.** — 1 Bl. Com. 123; Bacon's Abr., Corp. (A); 1 Kyd on Corporations 13; Vin. Abr., Corp. (A. 2); Co. Litt. 250, *a*; 2 Kent's Com. 267; Falconer *v.* Campbell, 2 McLean (U. S.) 195; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9; Warner *v.* Beers, 23 Wend. (N. Y.) 103; People *v.* Watertown, 1 Hill (N. Y.) 616; Merrick *v.* Van Santvoord, 34 N. Y. 208; State *v.* Milwaukee, etc., R. Co., 45 Wis. 579.

Marshall's Definition. — In Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, Marshall, C. J., defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." See also U. S. Bank *v.* Deveaux, 5 Cranch (U. S.) 61; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497; State University *v.* Williams, 9 Gill & J. (Md.) 365.

Kent's Definition. — "A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succes-

2. General Nature. — As a general rule, a corporation is to be regarded as a legal entity, separate and apart from the natural persons composing it.[1] But,

sion, and of acting, in several respects, however numerous the association may be, as a single individual." 2 Kent's Com., 267.

Absence of Conscience and Soule. — In Tipling *v.* Pexall, 2 Bulst. 233, Lord Coke said: "The opinion of Manwood, Chief Baron, was this, as touching Corporations, that they were invisible, immortall, and that they had no soule; and therefore no Subpœna lieth against them, because they have no Conscience nor soule; a Corporation is a Body aggregate; none can create soules but God, but the King creates them, and therefore they have no soules; they cannot speak, nor appear in Person, but by Attorney; and this was the opinion of Manwood, Chief Baron, touching Corporations."

Composed of Persons in Their Political Capacity. — A corporation aggregate is an artificial and intellectual being, composed generally of persons in their natural capacity, but it may also be composed of persons in their political capacity of members of other corporations. State University *v.* Williams, 9 Gill & J. (Md.) 365.

State a Corporation. — In Indiana *v.* Woram, 6 Hill (N. Y.) 33, it is said: "That a state is a corporation cannot be doubted. It is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation."

Constitutional and Statutory Definitions. — The term "corporation" has in several instances been defined by constitutional and statutory provisions, of which the following are given as illustrations:

California. — "A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes." Civ. Code of Cal. (1897), § 283; San Luis Water Co. *v.* Estrada, 117 Cal. 168.

Georgia. — "A corporation is an artificial person created by law for specific purposes, the limit of whose existence, powers, and liabilities is fixed by the act of incorporation usually called its charter." Code of Georgia (1895), § 1831.

Louisiana. — Under the Constitution of Louisiana of 1879, art. 240, it is provided that the term "corporation" as used in the constitution shall be construed to include all joint stock companies or associations having any power or privileges not possessed by individuals or partnerships.

Pennsylvania. — A similar provision is found in the constitution of Pennsylvania, art. 16, § 13.

Vermont. — And also in the Code of Vermont (1894), § 3675.

"Person" Includes a Corporation. — The word "person" when used in a public statute includes artificial as well as natural persons, unless it clearly appears from the context that the term has been used in a more limited sense. Society, etc., *v.* New Haven, 8 Wheat. (U. S.) 465; People *v.* Riverside, 66 Cal. 288; South-western R. Co. *v.* Paulk, 24 Ga. 356; Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; British Commercial L. Ins. Co. *v.* Tax Com'rs, etc., 31 N. Y. 32. And see the cases cited under PERSON.

Act of Congress. — A state is not a corporation as the term is used in section 103 of the Act of Congress of June 30, 1864, as amended by that of March 3, 1865, which declares "that every person, firm, company, or corporation owning or possessing, or having the care or management of any railroad, canal, steamboat, ship," etc., "engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States, * * * shall be subject to, and pay, a duty of two and one-half per centum upon the gross receipts of such railroad, canal, steamboat, ship," etc. State *v.* Atkins, 35 Ga. 315.

1. Considered as a Distinct Entity. — Reg. *v.* Arnaud, 9 Q. B. 806, 58 E. C. L. 806, 16 L. J. Q. B. 50, 11 Jur. 279; New York Ice Co. *v.* Parker, 8 Bosw. (N. Y.) 688, 21 How. Pr. (N. Y.) 302; State *v.* Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541. See also Newcastle, etc., R. Co. *v.* Brumback, 5 Ind. 543; Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85; Cutshaw *v.* Fargo, 8 Ind. App. 694, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 203; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9.

Statement of the Rule. — "The individuals composing these associations are united in one body, and the members lost in the corporate existence. It is not the individual members, but the legal being which acts and transacts business." People *v.* Watertown, 1 Hill (N. Y.) 616. To the same effect is Niagara County *v.* People, 7 Hill (N. Y.) 504.

"It will be kept in mind that the corporate body, for purposes of ownership, and indeed for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy, when at the same time the former is insolvent, and *vice versa*. The corporation has no right to appropriate, sell, or otherwise dispose of any of the property or effects of a corporator. The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire property may be swept away from it by sequestration, or other means, and yet its franchises will remain vested in the corporators until they are either abandoned or forfeited to the state. All these propositions are familiar to the courts and the profession, and are well sustained by authority." Fietsam *v.* Hay, 122 Ill. 293, 3 Am. St. Rep. 492.

Residence Not Dependent upon the Residence of Its Stockholders. — A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which by its laws created the corporation. It is therefore necessary that it be made to appear that the artificial being was brought into existence

as has been said, this abstract idea of a corporation is a mere fiction introduced by the law for the convenience of corporations, and when such fiction is urged to an intent and purpose not within the reason and policy of the fiction it should be disregarded and the corporation considered as an aggregation of persons.[1]

3. Distinctions — *a.* BETWEEN CORPORATIONS AND JOINT STOCK COMPANIES. — While there are various points of similarity between corporations and joint-stock companies, such as their capacity of continued existence unaffected by the death or withdrawal of members, the mode in which their operations are carried on through designated officers and agents, and the assumption by both of a corporate name, there is nevertheless a well-defined distinction arising from the fact that, in the absence of legislation, the members of joint-stock companies are liable to contribute to the debts of the company, while in case of corporations the members, as a general rule, are liable for the debts of the company only to the extent of the shares of the capital stock actually contributed by them.[2]

b. BETWEEN CORPORATIONS AND GUILDS. — In an early case, a distinction was drawn between a corporation and a guild, society, or fraternity, based upon the fact that while corporations must be formed under a royal charter or Act of Parliament, guilds may be formed by municipal ordinance.[3]

c. BETWEEN CORPORATIONS AND PARTNERSHIPS. — There is certainly some resemblance between a corporation and a partnership, inasmuch as each may consist of two or more persons associated together and acting in concert for the promotion of some private or public object; but the differences are very obvious. Partners may change the name of the firm when they please; the name of the corporation remains until the legislature, upon the application of the corporators, shall alter it. Suits in favor of or against a partnership must be carried on in the names of the partners; the corporators are not named in suits for or against the corporation. There is no such joint and several liability between corporators as between partners. The corporator may transfer his shares at pleasure, and the purchaser becomes a member; partners cannot introduce new members into the firm without the consent of

by the law of some state other than that of which the adverse party is a citizen. Muller *v.* Dows, 94 U. S. 444. And see the title FOREIGN CORPORATIONS.

1. Considered as an Aggregation of Persons. — People *v.* North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843; State *v.* Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541. See also Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; Gelpcke *v.* Blake, 19 Iowa 263. And see the titles STOCKS; STOCKHOLDERS.

2. Distinction Between Corporations and Joint-Stock Companies — *England.* — Harrison *v.* Timmins, 4 M. & W. 510; Matter of Monmouthshire, etc., Banking Co., 2 De G. M. & G. 562; Bartlett *v.* Pentland, 1 B. & Ad. 704, 20 E. C. L. 475.

United States. — Fargo *v.* Louisville, etc., R. Co., 6 Fed. Rep. 787; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566.

Maine. — Frost *v.* Walker, 60 Me. 468.

Massachusetts. — Atty.-Gen. *v.* Mercantile Marine Ins. Co., 121 Mass. 524; Hoadley *v.* Essex County, 105 Mass. 526; Taft *v.* Ward, 106 Mass. 518; Tappan *v.* Bailey, 4 Met. (Mass.) 529; Tyrrell *v.* Washburn, 6 Allen (Mass.) 466; Whitman *v.* Porter, 107 Mass. 522.

Nebraska. — Batty *v.* Adams County, 16 Neb. 44.

New Hampshire. — Dow *v.* Sayward, 12 N. H. 271.

New York. — Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573; People *v.* Watertown, 1 Hill (N. Y.) 622; Sandford *v.* New York, 15 How. Pr. (N. Y. Supreme Ct.) 172; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9; Townsend *v.* Goewey, 10 Wend. (N. Y.) 424, 32 Am. Dec. 514; Wells *v.* Gates, 18 Barb. (N. Y.) 557; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539.

And see the title JOINT-STOCK COMPANIES.

Under the Laws of New York joint-stock companies have all the attributes of a corporation except a common seal, and in respect to the absence of a common seal merely they are like partnerships. Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157. See also Maltz *v.* American Express Co., 1 Flipp. (U. S.) 611.

3. Robinson *v.* Groscot, Comb. 372. See also Year Book 49 Edw. III., 4 *b;* Rex *v.* Beardwell, 2 Keb. 52.

Difference Between Corporation and Fraternity. — " A corporation is properly an investing the people of the place with the local government thereof, and therefore their law shall bind strangers; but a fraternity is some people of a place united together in respect of a mystery and business into a company, and their laws

all concerned. The corporators have no legal interest in the corporate property; it could not be levied on or taken by execution for the particular debt of the corporator; the real and personal estate of partners is held by themselves.[1]

IV. CLASSIFICATION—1. In General. — Corporations may be variously classified, the classification depending upon the point of view from which they are regarded.[2]

2. Aggregate and Sole. — With reference to the number of persons composing a corporation, it is either aggregate[3] or sole.[4]

and ordinances cannot bind strangers, for they have not a local power or government." Cuddon *v.* Eastwick, 1 Salk. 192.

1. *Per* Putnam, J., in Russell *v.* McLellan, 14 Pick. (Mass.) 63; Pratt *v.* Bacon, 10 Pick. (Mass.) 123; Niagara County *v.* People, 7 Hill (N. Y.) 504. And see the title PARTNERSHIP.

Corporations Cannot Be Constituted by Agreement. — By the common law a corporation cannot, like a partnership, be constituted by the agreement of the parties, but only under authority from the sovereign power. 1 Bl. Com. 472; Stowe *v.* Flagg, 72 Ill. 397; Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531; People *v.* Watertown, 1 Hill (N. Y.) 616; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; State *v.* Bradford, 32 Vt. 50.

Companies or societies which are not sanctioned expressly by the legislature pursuant to some general or special law are nothing more than ordinary partnerships, and the laws respecting them are the same. Wells *v.* Gates, 18 Barb. (N. Y.) 554.

2. Classification—New York Statute. — Under section 2 of the General Corporation Law of New York, Laws of 1890, c. 563, corporations are classified as follows.

1. A municipal corporation.
2. A stock corporation.
3. A non-stock corporation.
4. A mixed corporation.

A stock corporation shall be either:

1. A moneyed corporation;
2. A transportation corporation; or
3. A business corporation.

A non-stock corporation shall be either:

1. A religious corporation, or
2. A membership corporation.

A mixed corporation shall be either:

1. A cemetery corporation;
2. A library corporation;
3. A co-operative corporation;
4. A Board of Trade corporation, or
5. An agricultural and horticultural corporation.

A transportation corporation shall be either:

1. A railroad corporation, or
2. A transportation corporation other than a railroad corporation.

White on Corporations, § 2, p. 3.

3. Corporations Aggregate. — Thomas *v.* Dakin, 22 Wend. (N. Y.) 70; People *v.* Watertown, 1 Hill (N. Y.) 616.

Story's Definition. — In Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, Story, J., said: "An aggregate corporation at common law is a collection of individuals united into one collective body under a special name, and possessing certain immunities, privileges, and capacities in its collective character which do not belong to the natural persons composing it."

"The Distinction Between an Aggregate and Sole Corporation, growing out of their different modes of constitution and forms of action, is striking and obvious. A bishop or parson acting in a corporate capacity and holding property to him and his successor in right of his office, has no need of a corporate name; he requires no peculiar seal; he performs all legal acts under his own seal, in his own name and name of office; his own will alone regulates his acts; and he has no occasion for a secretary, for he need not keep a record of his acts; no need of a treasurer, for he has no personal property except the rents and proceeds of the corporate estate, and these he takes to his own use when received. By-laws are unnecessary, for he regulates his own action by his own will and judgment, like any other individual acting in his own right. But it is not necessary to pursue the comparison into all its details; the points suggested are sufficient to show the legal distinctions between the two classes of corporations." *Per* Shaw, C. J., in Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122.

4. Corporations Sole. — The King of England has always been regarded as a sole corporation. Co. Litt. 43; 1 Bl. Com. 469; 1 Kyd on Corporations, 20.

A Man May Compose a Corporation Sole as Trustee for the Benefit of Others, of which the most familiar instance is the chamberlain of the city of London, who may take a recognizance to himself and his successors in trust for the orphans. Fulwood's Case, 4 Coke 64; Cro. Eliz. 464; 1 Kyd on Corporations, 20.

Corporations Sole Are Usually Ecclesiastical, as a bishop or a vicar, and are therefore very rare in the United States. Where the minister of a parish was seized, however, before the Revolution, of a freehold as *persona ecclesiæ* in the same manner as in England, he and his successors did not cease to be a corporation sole for that purpose after the states became independent. Pawlet *v.* Clark, 9 Cranch (U. S.) 292; Weston *v.* Hunt, 2 Mass. 501; Brunswick *v.* Dunning, 7 Mass. 447.

Cannot Take Personalty in Succession. — Chancellor Kent, in his Commentaries, says that there are very few points of corporation law applicable to corporations sole. They cannot, according to the English law, take personal property in succession, and their corporate capacity in that respect is confined to real property. 2 Kent's Com. 273; 1 Kyd on Corporations, 76; Co. Litt, 46 *b;* Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 124.

Certain Officers as Sole Corporations. — The

3. Ecclesiastical and Lay. — Some corporations are, from the particular purposes to which they are devoted, denominated ecclesiastical, or, as they are usually called in the United States, religious;[1] and some lay.[2]

4. Civil and Eleemosynary. — Lay corporations may themselves be subdivided into civil[3] and eleemosynary.[4]

legislature of a state may pass acts directing bonds in certain cases to be made payable to persons holding certain offices and to their successors in office, as to the governor and his successors, the chairman of the county court and his successors; and these individuals then become sole corporations by force of the acts of the legislature, for the particular object contemplated, and a bond taken in pursuance of those laws would go to the successor, and not to the executor of the obligee. Ferebee *v.* Sanders, 3 Ired. L. (25 N. Car.) 360. See also McDowell *v.* Hemphill, 1 Winst. L. (60 N. Car.) 96; Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122.

No Corporation Sole under General Laws. — As the general laws under which private corporations are now usually formed almost always establish a minimum number of subscribers to the certificate of incorporation, a private corporation sole is necessarily of most infrequent occurrence. 2 Stims. Stat. Law., § 8004.

In Louisville Banking Co. *v.* Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335, it is said: "There is no such being in this state as a sole corporation, and certainly none such allowed to be created by the statute."

1. Ecclesiastical Corporations. — 1 Bl. Com. 470; 2 Kyd on Corporations, 22–25; 2 Kent's Commentaries; Terrett *v.* Taylor, 9 Cranch (U. S.) 43; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518. See also the title RELIGIOUS SOCIETIES.

Religious Corporations in the United States are not to be regarded as ecclesiastical corporations, in the sense of the *English* law, which were composed entirely of ecclesiastical persons and subject to the ecclesiastical judicatories, but as belonging to the class of civil corporations to be controlled and managed according to the principles of the common law as administered by the ordinary tribunals of justice. Robertson *v.* Bullions, 11 N. Y. 243.

Statutes Changed by the Revolutionary War. — In Turpin *v.* Locket, 6 Call (Va.) 115, it is said that ecclesiastical corporations, or, more properly speaking, bodies politic, being erected for the purpose of perpetuating the rights of the Established Church, must be presumed to have ceased as soon as the constitution was established which did not admit of any establishment of religion in Virginia, and therefore the laws which regarded them as a part of the body politic were repealed by the Revolution.

New York Statute. — It has been decided that a religious corporation formed pursuant to the statute of this state (Laws of 1813, c. 60), consists not of the trustees alone, but of the members of the society; that the society itself is incorporated, and not merely the trustees and its members are the corporators; that the relation of the trustees to the society is not that of a private trustee to the *cestui que trust*, but they are the managing officers of the corporation and trustees in the same sense in which the president and directors of a bank or railroad company are trustees, and are invested in regard to the temporal affairs of the society with the powers specifically conferred by the statute and with the ordinary discretionary powers of similar corporate officers. Robertson *v.* Bullions, 11 N. Y. 243, *affirming* 9 Barb. (N. Y.) 64; Bellport *v.* Tooker, 29 Barb. (N. Y.) 256; Gram *v.* Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161. See also First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281.

And the amendatory act to this act (Laws 1863, c. 45) while it changes as to Roman Catholic churches the mode of the selection of trustees and vests in them the exclusive power of management and control, does not constitute the trustees the corporation in place of the congregation. People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512. See also Columbia Bank *v.* Gospel Tabernacle Church, 127 N. Y. 361.

2. "Lay Corporations are corporations intended for secular purposes, or, as is sometimes said, not very accurately, composed of secular and not clerical persons. They are either civil or eleemosynary." 1 Minor's Inst. 504; 1 Bl. Com. 470; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

3. Civil Corporations are such as are erected for a variety of temporal purposes. The king of England, for instance, is made a corporation to prevent, in general, the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the crown entire. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, and the like, and some for the advancement and regulation of manufactures and commerce, such as the trading companies of London and other towns. The objects for which civil corporations are founded are various. 1 Bl. Com. 470. See also Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

4. "Eleemosynary Corporations, or those created for charitable purposes, are such as are constituted for the perpetual distribution of the free alms of the founders of them, to such purposes as they have directed. Of this description are hospitals for the maintenance of the poor, sick, or impotent, and colleges or schools for the promotion of piety and learning. The establishment of an institution for the dissemination of learning has always been considered a charity. The true test of an institution is its origin and objects. If it is founded on donations, and has for its purpose the accomplishment of a charity by the distribution of alms, it most unquestionably is eleemosynary." American Asylum *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112. See also, to like effect, 2 Kent's Commentaries 274; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Vincennes University *v.* Indiana, 14 How. (U. S.) 268; Trustees, etc., *v.* Eagle Bank, 7

5. Public and Private. — With reference to their powers and the purposes of their creation, corporations are either public [1] or private.[2]

Distinction Between Public and Private Corporations. — The distinction between public and private corporations is strongly marked, and as to all essential purposes they correspond only in name. Public corporations, strictly speaking, are such only as are founded by the government for public purposes where the whole interests belong also to the government. They are political institutions erected to be employed in the administration of the government. There is no contract between the government and the governed, for but one party is concerned, the public; and the inhabitants upon whom the powers and privileges are conferred are mere trustees to hold and exercise such powers for the public good. Upon such corporations the creating power may impose such modifications, extensions, or restrictions as the general interests and public exigencies may require without infringing private rights. All other corpora-

Conn. 476; Hearns *v.* Waterbury Hospital, 66 Conn. 98; Board of Education *v.* Greenebaum, 39 Ill. 610; Bakewell *v.* Board of Education, (Ill. 1893) 33 N. E. Rep. 186; State *v.* Adams, 44 Mo. 570. See further Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 56 Am. Rep. 776; People *v.* Fitch, 16 Misc. Rep. (N. Y.) 465, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 188.

For a Full Discussion of the nature of eleemosynary corporations, see the title CHARITIES, vol. 5, p. 893.

1. Public Corporations. — Vincennes University *v.* Indiana, 14 How. (U. S.) 268; Dean *v.* Davis, 51 Cal. 406; Cleaveland *v.* Stewart, 3 Ga. 283; School Trustees *v.* Tatman, 13 Ill. 27; Hagerstown *v.* Sehner, 37 Md. 193; Talbot County *v.* Queen Anne's County, 50 Md. 259; Heller *v.* Stremmel, 52 Mo. 309; Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148.

Story's Definition. — "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties, and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes where the whole interests belong also to the government." Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

An Instrument of the Government. — A public corporation is one that is created for a political purpose, with political power to be exercised for purposes connected with the public good in the administration of civil government. It is an instrument of the government subject to the control of the legislature, and its members are officers of the government appointed for the discharge of public duties. State University *v.* Williams, 9 Gill & J. (Md.) 365.

An Incorporated Educational Institution which is endowed exclusively by the state is a public corporation. Dart *v.* Houston, 22 Ga. 506, *distinguishing* Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Board of Education *v.* Brunswick, 72 Ga. 353; Richmond County *v.* Augusta, 90 Ga. 634. *Compare* Allen *v.* McKeen, 1 Sumn. (U. S.) 276.

No Contract Between the State and the Corporators. — If the property possessed by a corporation is altogether the property of the state; if the corporators have paid and done nothing amounting to a valuable consideration for the act of incorporation; in fine, if there is no contract upon a valuable consideration between the state and the corporators, it is a public not a private corporation. State University *v.* Winston, 5 Stew. & P. (Ala.) 17. See also Mobile School Com'rs *v.* Putnam, 44 Ala. 506.

2. Private Corporations. — Miners' Bank *v.* U. S., 1 Greene (Iowa) 553; State University *v.* Williams, 9 Gill & J. (Md.) 365. And see the cases cited in the succeeding note.

Charter Declaration as to Character of the Corporation. — A mere declaration in the charter of a company that it is a public corporation will not have the effect to make it a public corporation where the character of the corporation is evidently of a private nature. Bonaparte *v.* Camden, etc., R. Co., 1 Baldw. (U. S.) 205.

Public Institution Not Necessarily a Public Corporation. — While an institution founded exclusively by private donors for purposes of general charity, such as a hospital for the poor, the sick, the disabled, or the insane, may well be regarded as a public institution, yet in the sense of the law a far more limited, as well as more exact, meaning is intended by a public institution or corporation. "Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government." Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Allen *v.* McKeen, 1 Sumn. (U. S.) 276; State *v.* Adams, 44 Mo. 570.

State a Stockholder. — The Act of Assembly of the state of *Pennsylvania*, passed on the 16th of June, 1836, which prescribed the mode of issuing executions against corporations, excepted from its operation "a county, township, or other public corporate body." It was held that a corporation in which the state owned the principal part of the stock was not a public corporate body within the meaning of the exception. Huntingdon, etc., Turnpike Co. *v.* Wallace, 8 Watts (Pa.) 316.

State the Only Stockholder, — In Miners' Bank *v.* U. S., 1 Greene (Iowa) 553, it is said: "Had the stock been entirely owned by the state, it would have possessed the character of a public corporation." See also Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Allen *v.* McKeen, 1 Sumn. (U. S.) 297.

And for a Full Discussion of the rights and liabilities of a state as a stockholder in a corporation, see the title STATES.

tions are private. They are designed to regulate private interests, and their charters are contracts which cannot be impaired or changed without the consent of the corporation.[1]

Quasi-public Corporations. — A distinction has also been made between public corporations, mere private corporations, and corporations which directly benefit and accommodate the public, such as railroads, turnpikes, and canal corporations, which have been denominated *quasi*-public corporations. Because of the benefit to accrue to the public, the power to exercise the right of eminent domain is usually conferred upon such corporations, but such delegation of power does not make them, strictly speaking, public corporations.[2]

1. Public and Private Corporations Distinguished — *United States.* — Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Allen *v.* McKeen, 1 Sumn. (U. S.) 276.

Alabama. — Logwood *v.* Planters', etc., Bank, Minor (Ala.) 23; State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30; Wolfe *v.* Underwood, 91 Ala. 523, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 186.

California. — Dean *v.* Davis, 51 Cal. 406; People *v.* Williams, 56 Cal. 647.

Illinois. — Board of Directors *v.* Houston, 71 Ill. 318; Andrews *v.* People, 84 Ill. 28.

Iowa. — Miner's Bank *v.* U. S., 1 Greene (Iowa) 553.

Maine. — Yarmouth *v.* School Trustees, 1 Am. L. Reg. 596.

Maryland. — State University *v.* Williams, 9 Gill & J. (Md.) 365.

Massachusetts. — Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122.

Mississippi. — Governor *v.* Gridley, Walk. (Miss.) 328.

New Jersey. — Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233.

New York. — People *v.* Morris, 13 Wend. (N. Y.) 325; Rouse *v.* Moore, 18 Johns. (N. Y.) 407; People *v.* Holstein-Friesian Assoc., 41 Hun (N. Y.) 439.

Pennsylvania. — Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242.

Vermont. — Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

See the two notes preceding, and the title MUNICIPAL CORPORATIONS; and see *infra*, this title, *Creation and Organization — Amendment and Repeal.*

2. Quasi-public Corporations. — Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85; McKim *v.* Odom, 3 Bland (Md.) 407; Foster *v.* Fowler, 60 Pa. St. 27; Whiting *v.* Sheboygan, etc., R. Co., 25 Wis. 167, 3 Am. Rep. 30. See also Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; Allegheny County *v.* McKeesport Diamond Market, 123 Pa. St. 164. And see such titles as CANALS; EMINENT DOMAIN; HIGHWAYS; RAILROADS; TURNPIKES.

Distinction Between Quasi-public and Other Corporations. — "So, also, there are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a *quasi*-public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike, and canal companies; and corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefits resulting from the promotion of trade and the development of the general resources of the country." Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Delegation of Right of Eminent Domain Does Not Constitute a Corporation Public. — While, "in the popular meaning of the term, nearly every corporation is public, inasmuch as they are all created for the public benefit, yet, if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus, all bank, bridge, turnpike, railroad, and canal companies are private corporations. In these and other similar cases the uses may, in a certain sense, be called public, but the corporations are private, as much so as if the franchises were vested in a single person. The state, by virtue of its right of eminent domain, may take private property for public purposes upon making compensation. It may delegate this power to a private corporation by reason of the benefit to accrue to the public from the use of the improvements to be constructed by the corporation. But such delegation of power, to be used for private emolument as well as public benefit, does not clothe the corporation with the inviolability or immunity of public officers performing public functions." Rundle *v.* Delaware, etc., Canal, 1 Wall. Jr. (C. C.) 275. See also Board of Directors *v.* Houston, 71 Ill. 318; Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233; Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148.

Not Quasi Public When Without Righ of Eminent Domain. — Where the legislature has power by a general law to require corporations to pay a tax upon the excess of the market value of all capital stock thereof over the value of their real estate and machinery taxable in the city or town where they are situated, it has been held that a gaslight company incorporated under a charter which did not authorize it to take private property not already appropriated to public use or improvements upon it was not a public corporation in such sense as to exempt its property from taxation in the city or town where it was situated. Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75.

A Racing Corporation Is Not a Quasi-public Corporation. — In Corrigan *v.* Coney Island Jockey Club, 2 Misc. Rep. (N. Y. Super. Ct.) 512, it appeared that the defendant was a corporation

6. Quasi Corporations. — Besides corporations proper, there are *quasi* corporations, or corporations *sub modo*, such as associations and government institutions possessing only a portion of the attributes which ordinarily distinguish public or private corporations.[1]

V. Creation and Organization — 1. Power to Create — *a.* In General. — The power of creating corporations is one appertaining to sovereignty, and can only be exercised by that branch of the government in which it is legally vested. Being a means whereby other powers are exercised, and not an end of government in itself, it will, even though not expressly granted by a constitution, follow from the grant of other powers which are carried into execution by its means.[2]

organized under the laws of the state of *New York*, and the owner of a race-track; that one of the objects for which it was formed was the improvement of a breed of horses; that to accomplish this object it conducted horse races; and that to induce owners of thoroughbred race horses to compete and raise the standard of such horses, the defendant made up what are known as "stake" and "purse" races, which were run at its track each year. It was held that such a corporation was a private one, and not a *quasi*-public corporation. Dugro, J., delivering the opinion of the court, said: "It has been repeatedly held that railroad, telegraph, and telephone companies are *quasi*-public servants. The nature of their business makes them so, and they are, therefore, bound to serve the public on reasonable terms, with impartiality. They are almost always endowed with the right to appropriate private property, presumptively upon the theory that such corporations are *quasi*-public servants, as their business is one in which the public has a direct and positive interest. The plaintiff claims that the defendant should be considered to be under a duty similar to that of the companies referred to. This claim will not meet with sanction here. The defendant is a private corporation. It exercises no franchises which clothe it in the premises with any public duty. It is under no duty to offer stakes or purses, and if, in the transaction of its business, it has seen fit to offer these as inducements through which to further its business, it is its own way of transacting its own business for its own private ends. It does not appear that it has ever held itself out for public service, any more than is done by a bank or an insurance company. It may choose its own customers, and may do or refuse to do any particular business offered it."

1. Quasi Corporations. — 2 Kent's Commentaries 274; Hedges *v.* Madison County, 6 Ill. 567; Bush *v.* Shipman, 5 Ill. 186; Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63; Fourth School Dist. *v.* Wood, 13 Mass. 193; Damon *v.* Granby, 2 Pick. (Mass.) 345; North-Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109. And see the titles Municipal Corporations; Joint-stock Companies.

In Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169, Parsons, C. J., said: "We distinguish between proper aggregate corporations and the inhabitants of any district who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds in England, and counties, towns, etc., in this state."

Where a body had capacity to make contracts in reference to county affairs, and had perpetual succession, it was held that, if not a corporation in the full sense of the term, it was a *quasi* corporation, and might sue and be sued in regard to any matter in which, by law, it had rights to be enforced, or was under obligations which it refused to fulfil. Levy Ct. *v.* Coroner, 2 Wall. (U. S.) 501.

The Overseers of the Poor, being the public agents and trustees of the towns, in respect to the poor, have, without any express authority from the legislature, a capacity to sue coextensive with their public trusts and duties. They are corporations *sub modo*. Rouse *v.* Moore, 18 Johns. (N. Y.) 407. See the title Poor and Poor Laws.

2. An Attribute of Sovereignty. — Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Hoadley *v.* Essex County, 105 Mass. 519; Murphy *v.* Farmers' Bank, 20 Pa. St. 415; Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9. See also cases *infra*, this section.

It is only the sovereign power of the state which can create corporate franchises, and all who presume to exercise them without the consent of such authority are liable to information in the nature of a quo warranto. State *v.* Bradford, 32 Vt. 50. See the title Ultra Vires.

An Incident to Express Powers. — In M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, Marshall, C. J., said: "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. * * * No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."

Power of Nobles to Create. — Both before and for some time after the Norman Conquest, the nobles had the power of conferring corporate privileges within their respective demesnes. 1 Kyd on Corp. 42.

Unwarranted Incorporation — Instances. — In Robinson *v.* Groscot, Comb. 372, it was held that while the city of London might create a guild or fraternity, it had no power to create a corporation. See also Cuddon *v.* Eastwick, 1 Salk. 192.

b. In England — (1) *Power of the King.* — It was formerly asserted that in *England* the act of incorporation must be the immediate act of the king himself, and that he could not grant a license to another to create a corporation.[1] But it has long since been settled that he may grant a license to a subject to create a particular corporation, and that he may, by charter, also confer a general power to erect corporations indefinitely, the persons to whom the power is delegated being regarded as merely an instrument in his hands, on the principle that *qui facit per alium facit per se.*[2]

(2) *Power of Parliament.* — As in the *United States* corporations are created by the legislative branch of the government, so in *England* they are now usually created by Act of Parliament,[3] or in conformity to general laws passed by that body.[4] The consent of the sovereign is, of course, theoretically necessary.

c. In the United States — (1) *Power of Congress* — **In General.** — While the Constitution of the *United States* confers no direct power on Congress to create corporations, the power is nevertheless conceded to exist whenever the creation of a corporation is deemed an appropriate means to carry into effect any of the powers expressly conferred by the Constitution.[5]

State Control. — In the case of corporations created by Congress, or, as they are now usually called, national corporations, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see fit to permit.[6]

Similarly it has been held that the Pope had no power to create an ecclesiastical corporation. Adams's Case, 4 Coke 107*b*.

1. Power of the King. — 1 Kyd on Corp. 50; 1 Black. Com. 474; Year Book 2 Hen. VII. 13; Sutton's Hospital Case, 10 Coke 27; Viner's Abr., tit. Corporations, B, 1, 5. See also Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

2. Delegation of Power. — Sutton's Hospital Case, 10 Coke 33*b*; Viner's Abr., tit. Corporations, B, 2; 1 Black. Com. 474; 1 Kyd on Corporations 50. See *infra*, this section, *Delegation of Power*.

The Chancellor of the University of Oxford has power by charter to erect corporations, and has actually often exerted it in the erection of several matriculated companies now subsisting of tradesmen subservient to the students. 1 Bl. Com. 474.

3. Parliamentary Incorporation. — 1 Bl. Com. 473; 1 Roll. Abr. 512; Sutton's Hospital Case, 10 Coke 29; River Tone *v.* Ash, 10 B. & C. 349, 21 E. C. L. 97. See also Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549.

Confirmatory Acts. — The earlier instances of incorporation by Act of Parliament seem to have been mere confirmations of such corporate powers as had originally been granted by the king. Bonham's Case, 8 Coke 114.

But with the Growth of Parliamentary Power, certain bounds to the king's right to create a corporation by his sole charter became established, and it was held that the most important corporate franchises could be granted only by act of parliament, the royal assent to which, though a necessary ingredient as a matter of constitutional form, could not practically be withheld. The crown cannot, for instance, grant a charter conferring a monopoly of the power of imprisonment. 1 Kyd on Corp. 61.

4. General Laws — England.— The Companies Act, 25 and 26 Vict., c. 89, with the amendments thereto, is the principal English statute relating to the formation and regulation of corporations.

For a discussion of this and similar enactments, see Lindley's Law of Companies 2. See *infra*, this section, *Under General Laws*.

Object of Incorporation. — A statement in the memorandum of association of a company that the objects are to carry on any business that the company may think profitable, is not such a statement of objects as is required by the act. *In re* Crown Bank, 44 Ch. Div. 634.

Where a company organized under this statute puts in the forefront of its memorandum of association a special object as to which definite information can be obtained by intending subscribers for shares, and the subsequent clauses of the memorandum contain a list of the general objects, the reasonable mode of construing the memorandum in ordinary cases is to say that the object as stated is the paramount object of the company, and that the other objects are ancillary and subservient to that object. Reed *v.* Coolgardie Consol. Gold Mines, 76 L. T. 269.

5. National Corporations. — M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738; Thomson *v.* Union Pac. R. Co., 9 Wall. (U. S.) 579; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414.

For a Full Discussion of the Power of Congress to Create Corporations, and of their status when created, see the title National Corporations.

6. Exempt from State Control. — M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316; National Bank *v.* Com., 9 Wall. (U. S.) 353; Farmers,' etc., Nat. Bank *v.* Dearing, 91 U. S. 29. See also Kansas Indians, 5 Wall. (U. S.) 737; Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5, 1 Dill. (U. S.) 314. And see *infra*, this title, *Taxation of Corporations*; also the title Taxation (Corporate).

Within District of Columbia. — The District of Columbia being under its exclusive legislative control, Congress may grant within the District any charter which a state might grant within its jurisdiction.[1]

Such Corporations Are Foreign as regards the various states, and can only exercise their powers within them through comity, on the same terms as other foreign corporations.[2]

(2) *Power of State Legislatures* — (a) **In General.** — Subject to constitutional restrictions, there is an inherent power in the legislatures of the various states of the Union, as the depositaries of the sovereign legislative power, to create corporations, and no corporation can be created and exist as such in the absence of legislative sanction.[3]

1. **Power Within District of Columbia.** — Huntington *v.* National Sav. Bank, 96 U. S. 388; Williams *v.* Creswell, 51 Miss. 817; Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122. See also Stoutenburgh *v.* Hennick, 129 U. S. 141.

2. Daly *v.* National L. Ins. Co., 64 Ind. 1. See cases cited in note 1, *supra;* and see *infra*, this title, *Ordinary Incidents — Residence.* See also the title FOREIGN CORPORATIONS.

3. **State Legislatures May Create** — *United States.* — Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257.

Alabama. — Paschall *v.* Whitsett, 11 Ala. 472.

Georgia. — Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

Illinois. — Stowe *v.* Flagg, 72 Ill. 397.

Indiana. — Aurora *v.* West, 9 Ind. 74.

Maryland. — McKim *v.* Odom, 3 Bland (Md.) 407.

Massachusetts. — Hoadley *v.* Essex County, 105 Mass. 519.

Michigan. — Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549.

Missouri. — State *v.* Simonds, 3 Mo. 414.

Ohio. — Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

Vermont. — State *v.* Bradford, 32 Vt. 50.

Statement of the Rule. — In Murphy *v.* Farmers' Bank, 20 Pa. St. 415, Woodward, J., said: "The sovereignty of every state must be lodged somewhere. * * * In Pennsylvania, it resides in the whole mass of the people, and the three co-ordinate departments of government are the trustees appointed by the people for the exercise of so much of their sovereignty as they have not, by the bill of rights, denied them, nor by the constitution of the United States yielded to the general government The legislature of Pennsylvania may establish a corporation, that is, grant out a part of the sovereignty of the state, because, being a general trustee for the people, and not forbidden, they are qualified to do so."

Legislature May Disregard the Usual Rules. — "Corporations originating according to the rules of the common law must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred. And when one claims its origin from such a source, its rules must be regarded in deciding upon its legal existence. The legislature may, however, create a corporation, not only without conforming to such rules, but in disregard of them; and when a corporation is thus created, its existence, powers, capacities, and the mode of exercising them must depend upon the law of its creation. It was the pleasure of the legislature in this case to create a corporate body without requiring a conformity to the usual mode of organization known to the law." Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656.

Purpose Should Be Specified. — "The charter of a corporation should always specify the purpose for which the corporation is organized, and powers adapted to that purpose should be granted. If the corporation is to be a public one, powers adapted to the regulations of conduct and to public purposes should be given, with such incidental capacity to do business as may be essential to such an organization, and no more. It should never be allowed to engage in general business. If a charter authorizes the organization of a company to acquire and operate a railroad, the power to engage in agriculture should not be granted also. So, if a worshiping congregation should desire to purchase a lot of ground, and to build a church and a parsonage, and to employ a minister, the charter should authorize the corporation to do so, but should not confer upon such an organization powers adapted to municipal government, or to the purchase and sale of real and personal property without limit, nor should such corporations engage in general business." U. S. *v.* Church, 5 Utah 361.

Banking Corporations. — In Bell *v.* Nashville Bank, Peck (Tenn.) 269, the question arose as to whether the legislature could create a bank corporation. It was held that the legislature of *Tennessee*, like the legislatures of all other sovereign states, can do all things not prohibited by the constitution of the state or of the United States, and, among other things, might establish a banking corporation with a capacity to sue and be sued.

Commissioners Appointed by the Legislature. — The legislature may, in the charter granted to a corporation, appoint certain persons commissioners for the purpose of carrying out certain provisions of the charter. Litchfield Bank *v.* Church, 29 Conn. 137; Napier *v.* Poe, 12 Ga. 170; Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Tar River Nav. Co. *v.* Neal, 3 Hawks (10 N. Car.) 520.

Such commissioners are agents, and the act of incorporation is in the nature of a power of attorney. Napier *v.* Poe, 12 Ga. 170.

Duty of Commissioners. — In Litchfield Bank *v.* Church, 29 Conn. 137, the court, *per* Ellsworth, J., said: "And now that we are upon the conclusive effect of the commissioners' doings, we cannot avoid remarking that com-

missioners appointed for such a purpose are charged with a trust of no ordinary responsibility. The legislature most justly expects of them that they will bring to the discharge of this duty vigilance, firmness, and integrity. They are called to launch upon the community a moneyed corporation invested with the franchise of issuing banknotes, and they are bound to see, as far as it may be in their power, that the proceedings are in good faith, and the foundation of the bank real, and not formal merely, and illusory. They certify that the subscription is fairly and fully made up as required by law, and that the instalment is paid and applied, so that the bank can commence its business with the capital prescribed, and is worthy of credit as having received their sanction and approval. All this may properly be inferred and is inferred by the public from their doings, and if the necessary vigilance and firmness are wanting on their part, nothing is more likely to occur than fraudulent practices by unscrupulous speculators, and in the end consequent loss and damage to the uninitiated and confiding. We do not mean to intimate that the commissioners in this case could have discovered more of the character of the early proceedings of the corporation, or should have sifted the subscription more thoroughly than was done, but obviously, if the subscription is closely scanned, it presents some very weak points as the basis of a solid institution; and it was in fact a very bad basis if the defendant has spoken the truth in the notice of his defense. Certainly the bank itself has turned out to be a great fraud, and the management with regard to it a breach of law of no ordinary turpitude."

1. Prohibition of Special Acts. — School Dist. No. 56 *v.* Insurance Co., 103 U. S. 707; Low *v.* Marysville, 5 Cal. 214; San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, *overruling* California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398; San Luis Water Co. *v.* Estrada, 117 Cal. 168; Gilmore *v.* Norton, 10 Kan. 491; Clegg *v.* School Dist. No. 56, 8 Neb. 178. See the constitutions of the several states. See *infra*, this section, *Mode of Creation — Under General Laws.* And for a full discussion of constitutional prohibitions against special legislation, see the titles CONSTITUTIONAL LAW, vol. 6, p. 882; STATUTES.

California. — The California Const. of 1849, art. 4, § 31, providing that "corporations may be formed under general laws, but shall not be created by special act," applies to the formation or creation of corporations and to the powers directly conferred upon them by legislative enactment, and is not to be construed as prohibiting the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer the same. People *v.* Stanford, 77 Cal. 360; Santa Ana Water Co. *v.* San Buenaventura, 56 Fed. Rep. 339.

West Virginia. — Under the provisions of the constitution of West Virginia, art. 11, § 5, by which the legislature is prohibited from passing any special act incorporating or granting peculiar privileges to any joint-stock company or association not having in view the issuing of bills to circulate as money, or the construction of some work of internal improvement, it has been held that a company might be incorporated by special act for the purpose of constructing and maintaining a pipe line for the conveyance of petroleum, it being a work of internal improvement within the meaning of the constitutional provision. West Virginia Transp. Co. *v.* Volcanic Oil, etc., Co., 5 W. Va. 382.

2. Exercise of Legislative Discretion. — Constitution of *Alabama*, art. 14, § 1; Constitution of *Maine*, art. 4, § 14; Constitution of *New York*, art. 8, § 1; Constitution of *North Carolina*, art. 8, § 1; Constitution of *Wisconsin*, art. 11, § 1. See also the constitutions of the other states.

Where No General Law Exists. — Under the constitution of *Maryland*, art. 3, § 48, "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void."

3. Not Reviewable by the Courts. — Under a constitutional provision providing that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws," it has been held that if, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws, then the legislature has the power to create the corporation by special act, and the courts cannot review its action when that power has once been exercised. Mosier *v.* Hilton, 15 Barb. (N. Y.) 657; U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119; People *v.* Bowen, 21 N. Y. 517, *affirming* 30 Barb. (N. Y.)

(b) **Constitutional Limitations upon Legislative Power.** — In most of the states of the Union, provisions are incorporated in the constitutions with a view to limiting the legislative discretion as to the creation of corporations. These provisions are, in the main, similar, usually prohibiting the legislatures from creating corporations by special act or from granting special privileges, and providing for the enactment of general laws under which persons desiring to do so may associate themselves as corporate bodies.[1]

But Where a General Law Would Prove Ineffective for the purpose had in view, it is provided by the constitutions of some of the states that the legislature may exercise its discretion and pass a special act, if, in its judgment, it be necessary to the accomplishment of the end proposed.[2] The exercise of this discretion is not reviewable by the courts.[3]

Limitation Confined to Creation. — It seems that this limitation upon the power of the legislature is, unless it is otherwise expressly provided,[1] confined to the creation of corporations by special acts, and does not prevent the amendment, modification, or enlargement of the charters of corporations by such acts, provided the character of the original body is not thereby essentially changed.[2]

A Doctrine Contrary to the Above Statement has been maintained in *Ohio*, and with regard to municipal corporations in *Iowa*. As was said in the leading case in the former state: "Such a construction would leave a door wide open for the reintroduction of all the evils of special legislation which these restrictions and mandatory provisions of the constitution were obviously designed to guard against and prevent."[3]

Legalization of Improperly Formed Corporations. — In case of a constitutional provision prohibiting the legislature from creating corporations by special act, the legislature has been held to have no power to legalize by special act a corporation improperly formed under the general act.[4]

24. See also Johnson *v.* Joliet, etc., R. Co., 23 Ill. 207.

1. Altering or Amending by Special Act Forbidden. — The constitutions of several of the states forbid special acts extending, changing, altering, or amending, any charter or franchise already in force, except in the case of certain enumerated corporations, which are generally of a public character. Const. of *Colorado*, art. 15, § 2; Const. of *Illinois*, art. 11, § 1; Const. of *Missouri*, art. 12, § 2; Const. of *Nebraska*, art. 13, § 1. And see the constitutions of the other states.

2. Construction of Limitations. — Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157; Wiley *v.* Bluffton, 111 Ind. 152; Indianapolis *v.* Navin, (Ind. 1897) 47 N. E. Rep. 525; Cotton *v.* Mississippi, etc., Boom Co., 22 Minn. 372; St. Paul F. & M. Ins. Co. *v.* Allis, 24 Minn. 75; State *v.* Cape Girardeau, etc., R. Co., 48 Mo. 468; Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557; Atty.-Gen. *v.* North America L. Ins. Co., 82 N. Y. 172. See also Hazelett *v.* Butler University, 84 Ind. 230; Chenango Bank *v.* Brown, 26 N. Y. 467.

Inapplicable to Pre-existing Corporations. — In Jones *v.* Habersham, 107 U. S. 174, Mr. Justice Gray said that the words "corporate powers and privileges," as used in the constitution of *Georgia*, "signify the corporate franchise, the aggregate powers and privileges which constitute a corporation, not every separate power and privilege which may be conferred upon a corporate body;" that the object of the clause is "to take away from the legislature, and to vest in the courts, under its direction, for the future, the creation of private corporations for literary, religious, charitable, or other purposes, except those specially excepted, but not to prevent the legislature from amending the charters of corporations already existing, and modifying or enlarging their powers, either by repealing former restrictions or otherwise."

Illustrations. — In Matter of New York El. R. Co., 70 N. Y. 327, it was held that the constitutional provisions against incorporation by special act do not prohibit a private or local bill to amend the charter of private corporations by regulating powers, rights, privileges, and franchises which it previously possessed. Such a bill may not be passed to give to an existing corporation any new right to lay down railroad tracks or any new exclusive privileges or franchises, but it may be passed to regulate and control rights previously existing, or to give new privileges or franchises, provided they be not exclusive. A bill may be passed waiving a forfeiture of corporate rights. Such a bill would confer no new rights upon the corporation, but would simply be a surrender or waiver by the sovereign of its right to claim the forfeiture. A bill may be passed to extend the time within which corporate rights may be exercised. Such a bill would give no new substantial rights, but would simply extend the time within which rights previously granted could be exercised. So a bill may be passed giving a private railroad corporation the right to use a new or different motive power, provided the right be not exclusive.

In Wallace *v.* Loomis, 97 U. S. 146, the Supreme Court of the United States held that the provision in the constitution of *Alabama* which declares that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes," does not prohibit the legislature from passing a special act changing the name of an existing railroad corporation, and giving it power to purchase additional property. See also Wells *v.* Oregon R., etc., Co., 8 Sawy. (U. S.) 600.

3. Contrary View — *Ohio*. — Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; State *v.* Cincinnati, 20 Ohio St. 18.

Iowa. — *Ex p.* Pritz, 9 Iowa 30; Davis *v.* Woolnough, 9 Iowa 104; McGregor *v.* Baylies, 19 Iowa 43.

It seems that the only authority upon which the decision in *Ex p.* Pritz, 9 Iowa 30, is based is Thomas *v.* Clay County, 5 Ind. 4, which was subsequently *overruled* in Gentile *v.* State, 29 Ind. 409. And see State *v.* County Ct., 51 Mo. 83; Hall *v.* Bray, 51 Mo. 288.

4. Legalization of Defective Incorporation. — Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354; San Francisco *v.* Spring Valley Water-Works, 48 Cal. 493. *Compare* Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120, where it was held that an irregularity in the incorporation of a company under the general law could be cured by a legislative act. It may be noted, however, that these cases are not irreconcilable. The constitution of *Alabama* contains a provision

(3) *Power of Territorial Assemblies* — **In General.** — Having power to legislate for the territories, with no other restrictions than such as are imposed by the Federal Constitution, Congress may constitutionally establish territorial governments with legislative powers, incident to which is the power of creating corporations.[1]

Subject to Amendment or Repeal by Congress. — As regards the territories, Congress stands in much the same position as do the states with reference to municipal corporations, and consequently, charters granted by the territorial assemblies are at all times subject to amendment or repeal by that body.[2]

Congressional Limitation upon Power. — Under the general act relative to the government of the territories, the legislative assemblies are forbidden by Congress to grant private charters or special privileges, but they may, by general incorporation laws, permit persons to associate together as bodies corporate for various specified purposes.[3]

Effect of Admission to Statehood upon Territorial Corporations. — Upon the admission of a territory into the Union, corporations formed under the territorial government become state corporations.[4]

omitted in that of *California*, that "in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws," special acts of incorporation may be passed. Constitution of Alabama, art. 14, § 1.

1. Territorial Assemblies.—Riddick *v.* Amelin, 1 Mo. 5; Douglas *v.* State Bank, 1 Mo. 24; Williams *v.* Michigan Bank, 7 Wend (N. Y.) 539. See the title TERRITORIES.

2. Subject to Congressional Control. — In U. S. *v.* Church of Jesus Christ, etc., 5 Utah 361, it is said: "Territorial governments occupy towards Congress something of the same relation as municipalities — such as city governments — fill towards the state legislatures. A state legislature can repeal the charter of a municipal government and the ordinances passed under it; so Congress can repeal the organic act of a territory and all territorial enactments in pursuance of the organic act. Congress is the sovereign power to legislate for the territories, and all charters from territorial legislatures must be held to have been accepted with the knowledge that Congress possessed the authority to change or repeal the law creating them."

3. Restrictive Act. — Under the Rev. Stat. of the U. S., § 1889, it is provided that "the legislative assemblies of the several territories shall not grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, for the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable, or scientific association."

Reason of Prohibition Against Special Legislation. — In Wells *v.* Northern Pac. R. Co., 23 Fed. Rep. 469, Deady, J., said: "Everybody who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule, requiring corporations to be organized under a general law, is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation, that was the result of allowing parties to go before the legislature and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature, and the astuteness and diligence of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature, giving powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature."

Statute Construed — Mercantile Corporations. — In Carver Mercantile Co. *v.* Hulme, 7 Mont. 566, the question arose as to whether, under section 1889 of the Rev. Stat. of the U. S., a mercantile corporation could be created by a territory. It was held that it could, the court saying that "a fair construction of the Act of Congress leads to an opinion that the restrictions imposed by section 1889 were intended rather to prohibit the legislatures of the different territories from granting monopoly than to define for what purposes corporations might be formed under a general law for that purpose. The act itself manifests this intention by denying to the legislative assemblies of the territories the right or power to grant private charters or especial privileges." To the same effect is Bashford-Burmister Co. *v.* Agua Fria Copper Co., (Arizona 1894) 35 Pac. Rep. 983.

Inapplicable to Foreign Corporations. — Section 1889 of the Rev. Stat. of the United States does not apply to foreign corporations so as to prohibit their exercising their powers within the territories by reason of the fact that they have not been formed under general laws, or for the purposes specified in the Act of Congress. Wells *v.* Northern Pac. R. Co., 23 Fed. Rep. 469; Cowell *v.* Colorado Springs Co., 100 U. S. 55, *affirming* 3 Colo. 82. See also the title FOREIGN CORPORATIONS.

4. Effect of Statehood. — Vance *v.* Farmers', etc., Bank, 1 Blackf. (Ind.) 80; Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267.

In Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, Mr. Justice Field said:

d. DELEGATION OF POWER. — As previously stated, the king may delegate the power to create corporations.[1] So, too, may Parliament, since it is not restrained by constitutional limitations.[2] But in the *United States*, upon the principle *delegatus delegare non potest*, the legislatures may not delegate to others the authority to grant corporate franchises.[3]

This Disability on the Part of the Legislature to delegate the authority to create corporations does not extend to grants of power to municipal corporations,[4] or to incorporations under general laws, where some ministerial duty, such as the issuance of a certificate or charter, is to be performed by some designated officer before the incorporation becomes effectual.[5]

2. Mode of Creation — *a.* IN GENERAL — **Precise Form of Words Unnecessary.** — It is well settled that no particular form of words or expression is essential to the creation of a corporation. If the legislative intention to clothe an association of persons with rights, privileges, and powers to be enjoyed and exercised under a collective name, and for designated purposes, and in a corporate capacity, is clearly manifested, the association is by implication a corporation.[6]

b. BY PRESCRIPTION. — Undoubtedly in *England*, and, it seems, in the *United States*, corporations may exist by prescription, which presupposes

"The admission of Kansas as a state into the Union, and the consequent change of its form of government, in no respect affected the essential character of the corporations [created by the territorial legislature], or their powers or rights. They must, after that change, be considered as corporations of the state, as much so as if they had derived their existence from its legislation."

1. See *supra*, this section, *Power to Create — In England — Power of the King.*

2. 1 Morawetz on Corp., § 15.

3. Legislative Delegation of Power. — See Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Medical Inst. *v.* Patterson, 1 Den. (N. Y.) 61, *affirmed* in 5 Den. (N. Y.) 618. *Compare* Thomas *v.* Dakin, 22 Wend. (N. Y.) 9. See also the title CONSTITUTIONAL LAW, vol. 6, p. 882.

"One of the Settled Maxims in Constitutional Law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed." Cooley's Constitutional Limitations, c. 5, p. 116.

4. See the title MUNICIPAL CORPORATIONS.

5. See *infra*, this section, *Mode of Creation — Under General Laws.*

Conditional Grant of Franchise. — The principle that a state legislature cannot delegate its legislative power does not forbid it to grant a franchise dependent on the condition of obtaining consent from another body. For the legislature to create a corporation with power to lay a street railroad, subject to the condition of obtaining the assent of the city to the use of the street, does not involve the delegation of legislative power to the city. Philadelphia *v.* Lombard, etc., Pass. R. Co., 4 Brews. (Pa.) 14. See also the titles STATUTES; STREET RAILWAYS.

6. Precise Words Unnecessary. — Rex *v.* Amery, 1 T. R. 575; River Tone *v.* Ash, 10 B. & C. 349, 21 E. C. L. 97; Grangers' L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325; Mahony *v.* State Bank, 4 Ark. 620; Reed *v.* State Bank, 5 Ark. 193; Murphey *v.* State Bank, 7 Ark. 57; Underhill *v.* State Bank, 6 Ark. 135; Edgeworth *v.* Wood, 58 N. J. L. 463, 3 Am. & Eng. Corp. Cas. N. S. 299; Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320; Walsh *v.* New York, etc., Bridge, 96 N. Y. 427; Com. *v.* West Chester R. Co., 3 Grant's Cas. (Pa.) 200. See also Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489. But the legislative intent must be manifest. Shelton *v.* Banks, 10 Gray (Mass.) 401.

Constructive or Presumptive Assent. — If the words "found," "erect," "establish," or "incorporate" are wanting, it is immaterial. The assent of the government may be given constructively or presumptively without such words. Sutton's Hospital Case, 10 Coke 30*b*. To the same effect is People *v.* Wemple, 52 Hun (N. Y.) 434.

A Grant of Lands to Individuals by the Sovereign Authority, to be possessed and enjoyed by them in a corporate character, in itself confers a capacity to take and hold in a corporate character. North-Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

Creation by Implication.—In Thomas *v.* Dakin, 22 Wend. (N. Y.) 94, Cowen, J., in speaking of the creation of corporations by implication, said: "The principle of these and the like cases is, that words of the king granting that a body of men shall have the power to hold property or enjoy privileges amount, by the force of the phrase, by operation or implication of law, to the creation of a corporation. In other words, it is a virtual declaration that the grantees shall hold and transmit, not by succession to their heirs or distributees as natural persons, thus dividing and confounding the inheritance, but as a corporation aggregate, a single individual, in order that the estate may be kept entire. I need scarcely observe that the words of an Act of Parliament, or of our state legislature, have at least equal force with a royal grant. That this has been so understood judicially, see several instances in Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 325."

some earlier charter or grant of power which has been lost through the efflux of time. In the *United States* the cases have been confined to municipal corporations, but no reason is apparent why the same principles should not apply to private corporations.[1]

c. By Special Charter. — As has already been stated, the original method of creating corporations was by special charter, and this method of creation still obtains in those jurisdictions in which it is not forbidden by constitutional provisions.[2]

d. Under General Laws — (1) *In General.* — As has been previously stated, provisions have been incorporated into the constitutions of most of the states of the Union, and by Congress into the organic law of the territories, by which, to a great extent, special legislation for the purpose of erecting corporations is prohibited, and provision made for the passage of general laws under which incorporation may be obtained.[3]

Powers Fixed by the Statute. — Where power to organize corporations is conferred on a court or on an official by a general law, the powers, privileges, and immunities granted cannot be added to nor diminished, nor can the least change of any kind from the provisions of the law under which the corporation is organized be made in its charter.[4]

What Constitutes the Charter. — **In Alabama** it has been held that where a corporation is formed under a general law, the law itself becomes the charter, defines and enumerates the powers which are to be exercised, and the nature and extent of corporate franchises and privileges. The declaration of incorporation, the constitution and by-laws adopted for corporate government, do not form the charter or define or enumerate the corporate powers. These are the acts of the corporators. The charter is the grant from the sovereign power of the state, and by that source only can be varied or enlarged.[5]

In Nebraska and Michigan it has been held that the general laws and articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of the corporation.[6]

1. **Prescriptive Existence.** — 1 Kyd on Corporations, 40; 1 Bl. Com. 473; 2 Kent's Com. 277; River Tone *v.* Ash, 10 B. & C. 349, 21 E. C. L. 97; Crafts of Mercers, etc. *v.* Hart, 1 C. & P. 113, 11 E. C. L. 335; Kingston-upon-Hull *v.* Horner, 1 Cowp. 102; Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58; Dillingham *v.* Snow, 5 Mass. 547, 3 Mass. 276; Stockbridge *v.* West Stockbridge, 12 Mass. 400; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319. See also New-Boston *v.* Dunbarton, 15 N. H. 201; Hager's Town Turnpike Road Co. *v.* Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495. See the title Municipal Corporations.

2. See *supra*, this section, *Power to Create.*

3. See *supra*, this section, *Power to Create — In the United States.* And see the constitutions and codes of the several states.

Meaning of "Persons." — In Factors, etc., Ins. Co. *v.* New Harbor Protection Co., 37 La Ann. 233, it was held that corporations created under the general law of the state of *Louisiana* (La. Rev. Stat., § 683) have no power to create a corporation distinct and independent from themselves, and that the word "persons" found in the law was designed to mean natural persons, and not juridical persons.

4. **Statutory Powers Cannot Be Increased Nor Diminished.** — Case of Medical College, 3 Whart. (Pa.) 445; Com. *v.* Conover, 10 Phila. (Pa.) 55; *Ex p.* Burns, 1 Tenn. Ch. 83. See also *In re* American Electropathic Institute, 14 Phila. (Pa.) 128; Morristown *v.* Shelton, 1 Head (Tenn.) 24.

In Heck *v.* McEwen, 12 Lea (Tenn.) 97, the question arose as to whether a valid organization under a general law is rendered invalid by the fact that the order of the court does not recite or refer to all the provisions of the general law on the subject of the particular corporation, and does undertake to confer some powers not authorized by the general law. It was held that the organization of a corporation for a purpose provided for by law is good to the extent of the provisions of the law, neither vitiated by what may be treated as surplusage nor by what is beyond the power of the court to confer. The corporators are bound to know the law and to accept the organization subject to its limitations. It is not the organization, but the matter *ultra vires* of the incorporation, that is void. See the title Ultra Vires.

Unauthorized Provisions Void. — If unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void, but until the company is proceeded against for an abuse of its franchises, its rights as a corporation will not be affected by such unauthorized provisions. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546.

5. Grangers' L., etc., Ins. Co. *v.* Kamper, 75 Ala. 325.

6. Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Neb. 270; Abbott *v.* Omaha Smelting, etc., Co., 4 Neb. 416; Van Etten *v.* Eaton, 19 Mich. 18[illegible]

In Pennsylvania it has been held that the articles, conditions, and objects of an association incorporated under a general law constitute the charter of the corporation, and have the same force and effect as if specifically granted by a special legislative act.[1]

(2) *Constitutionality of Such Laws.* — These laws have rarely been called into question upon constitutional grounds, but where this has occurred they have uniformly been upheld, and it is now too late to question the power of the legislatures under the provisions of the constitutions of the various states to enact general laws under which corporations may be formed.[2]

Distinction Between Delegation of Power to Create and Power to Organize. — A distinction has been made, however, between the delegation of the power to organize corporations and the delegation of the power to create them, it being held that an act of the legislature which undertakes to delegate the power of creating corporations is unconstitutional and void; while an act which defines the rights, powers, and immunities of corporations, and leaves to the court or to public officials the duty of organizing them upon compliance with the provisions of the general law, is valid.[3]

A Ministerial Duty. — In granting incorporation under a general statute for that purpose, the courts do not act judicially. It is a ministerial function that they perform, and where the legislature has undertaken to clothe them with discretion in the matter such action has been held unconstitutional. To such an extent is the power of the courts ministerial, that a mandamus will lie against them to compel the granting of a charter.[4]

(3) *Purposes for Which Incorporation Is Allowed.* — The purposes for which corporations may be organized under general laws are dependent, of course, upon the provisions of these enactments, and necessarily vary considerably in the different jurisdictions.[5]

1. Society for Visitation of Sick *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139.

2. **Constitutionality.** — Falconer *v.* Campbell, 2 McLean (U. S.) 195; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266. See also Thomas *v.* Dakin, 22 Wend. (N. Y.) 9.

"That corporations may be organized under general laws is no longer a debatable question." Granby Min., etc., Co. *v.* Richards, 95 Mo. 106.

3. **Distinction Between Creation and Organization.** — *Ex p.* Burns, 1 Tenn. Ch. 83; State *v.* Armstrong, 3 Sneed (Tenn.) 634. In the latter case it was said that the power to grant charters of incorporation is vested by the constitution of *Tennessee*, art. 11, § 8, in the legislature alone, to be exercised as a high and responsible trust, and only in cases where it may be deemed expedient for the public good. For it is among the powers the exercise of which is expressly reserved to the legislature itself, and which cannot be delegated, and consequently an act of the legislature by which authority to grant incorporation is conferred upon the chancery courts is unconstitutional and void.

4. *Ex p.* Burns, 1 Tenn. Ch. 83. See also People *v.* Chicago Gas, etc., Co., 130 Ill. 268, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 192.

Mandamus to Compel Court to Act. — In Franklin Bridge Co. *v.* Wood, 14 Ga. 80, the Supreme Court of Georgia, in deciding that no legislative power was delegated to the courts by the general corporation laws of that state, said: "There is simply a ministerial act to be performed; no discretion is given to the courts. The duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association, and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made obligatory upon the courts; and should they refuse to discharge it, a mandamus would lie to coerce them. It is true, the legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way." See the title Mandamus. *Compare* Kayser *v.* Bremen, 16 Mo. 88, in which it was held, contrary to the evident trend of authority, that the power conferred upon the courts is judicial.

5. See generally the statutory enactments of the several states. And see *infra*, this section, *Contents of Articles*.

Illustrations — *Michigan.* — Under the Michigan statute (How. Stat. 4004), a corporation may be organized for the purpose of putting up, packing, and manufacturing for market Detroit river and lake ice, and for distributing and selling the same. Atty.-Gen. *v.* Lorman, 59 Mich. 157, 60 Am. Rep. 287.

Minnesota. — Under the statute of Minnesota (Laws 1870, c. 29) providing for the formation of corporations for the purposes "of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business," a corporation may be formed for buying and selling real estate and erecting buildings. Finnegan *v.* Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552.

In Brown *v.* Corbin, 40 Minn. 508, it was

Incorporation Against Public Policy. — Incorporation will not be granted under

held that the Gen. Stat. of Minn. 1866, c. 34, § 45, as amended by the Laws of 1873, c. 13, authorized, under the expression "or other lawful business," the formation of corporations for carrying on any kind of lawful business for pecuniary profit not elsewhere specially provided for, although not of the same kind as any of those previously enumerated in the section referred to. See also State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213.

Missouri. — Under art. 10, c. 42, Rev. Stat. 1889, a corporation may be formed for the purpose of encouraging debating, reading, and literature, and the enjoyment of rational and social amusements, and the playing of tenpins, chess and checkers, and other lawful games of the kind. State *v.* Lesueur, 99 Mo. 552.

Under the statute of Missouri (Rev. Stat. 1889, § 2771) which provides specifically for the incorporation of manufacturing and business companies, and further authorizes incorporation "for any other purpose intended for pecuniary profit or gain not otherwise specially provided for, and not inconsistent with the constitution and laws of this state," it was held that the general words following the particular and specific words were not confined to things of the same kind as those specially used, and that therefore, under this statute, a corporation for the purpose of issuing bonds to be paid for by the purchasers thereof in monthly instalments, and to be redeemed by said corporation, might be organized. State *v.* Corkins, 123 Mo. 56.

Nebraska. — Under the statute of Nebraska (Comp. Stat., c. 16, § 123), any number of persons may become incorporated for the transaction of any lawful business. York Park Bldg. Assoc. *v.* Barnes, 39 Neb. 834.

New York. — In People *v.* Gunn, 96 N. Y. 317, it was held that a medical college could not be incorporated under the general law (Laws 1848, c. 319, amended by Laws 1870, c. 51, and Laws 1872, c. 649), for the incorporation of benevolent, charitable, scientific, and missionary societies.

The New York Act of 1865, c. 368, amended by Laws of 1865, c. 668, which provides for the organization of corporations for social, gymnastic, æsthetic, musical, yachting, hunting, fishing, batting, or lawful sporting purposes, does not confer the power to organize a society for the purpose of instituting actions to recover penalties for a violation of the game laws. Ancient City Sportsman's Club *v.* Miller, 7 Lans. (N. Y.) 412.

Pennsylvania. — The Pennsylvania statute (Act of April 29, 1874) requires that the purposes for which a corporation is organized shall be lawful and not injurious to the community; and it has been held that where the purpose of the corporation is uncertain or doubtful, or where it may be perverted to improper or unworthy purposes injurious to the morals or to the public welfare, the application should be denied. Chinese Club, 1 Pa. Dist. Rep. 84. See, to the same effect, Lodge Duch Nove Doby No. 165, 3 Pa. Dist. Rep. 215; Central Democratic Assoc., 8 Pa. Co. Ct. Rep. 392; *Re* Nether Providence Assoc., 12 Pa. Co. Ct. Rep. 666; Jacksonian Club, 11 Pa. Co. Ct. Rep. 19; *Re* Ton-a-lu-ka Club, 12 Pa. Co. Ct. Rep. 26; *Re* Burger's Military Band Assoc., 19 Pa. Co. Ct. Rep. 651. For other cases in which this statute has been construed, see the following: *In re* Enterprise Mut. Beneficial Assoc., 10 Phila. (Pa.) 380; Mechanical Business Cases, 9 Pa. Co. Ct. Rep. 1; *In re* Richmond Retail Coal Co., 9 Pa. Co. Ct. Rep. 172; *Re* Newton Hamilton Oil, etc., Co., 10 Pa. Co. Ct. Rep. 452; Seneca Bridge Co., 11 Pa. Co. Ct. Rep. 337; Pennyslvania State Sportsmen's Assoc., 11 Pa. Co. Ct. Rep. 576, 1 Pa. Dist. Rep. 763; *Re* Germania Sangerbund, 12 Pa. Co. Ct. Rep. 89, 2 Pa. Dist. Rep. 73; Bohemian-Slavonian Benev. Soc., 12 Pa. Co. Ct. Rep. 552; Russian-American Guards, 13 Pa. Co. Ct. Rep. 148; Keystone Laundry Co., 18 Pa. Co. Ct. Rep. 444; Wagner *v.* Corcoran, 2 Pa. Dist. Rep. 440.

The Pennsylvania Act of June 2, 1883, supplementing the Act of April 29, 1874, authorizes the incorporation of pipe-line companies for the transportation of petroleum, and provides for the exercise of the right of eminent domain in taking lands and property for such purposes. Lehigh Valley Coal Co. *v.* U. S Pipe Line Co., 3 Pa. Dist. Rep. 70.

In Philadelphia Artisans' Institute, 8 Phila. (Pa.) 229, it was held that the Court of Common Pleas of Pennsylvania was authorized by law to grant charters of incorporation for the following purposes:

1. Associations for literary, charitable, or religious purposes, beneficial societies or associations, fire engine or hose companies. (Act of 13th of October, 1840. Purdon 196, plac. 11; P. L. 5.)

2. Associations for the promotion of science or agriculture, cemetery or burial associations, societies for the detection of thieves and the recovery of stolen property. Act of 20th of February, 1834. Purdon 197, plac. 15; P. L. 90.)

3. Musical societies and associations. (Act of 6th of April, 1859. Purdon 197, plac. 16; P. L. 377.)

4. Mutual savings fund, loan, or building associations. (Act of 12th of April, 1859. Purdon 129, plac. 1; P. L. 544.)

5. Associations for the purpose of insuring horses, cattle, and other live stock against loss by death, from disease or accident, or from being stolen; water, hook and ladder companies, building associations, musical clubs or associations, teachers' institutes or associations, hotel companies, skating parks, associations and clubs for the advancement of athletic sports, including baseball clubs and barge and fishing clubs, and fire insurance companies. (Act of 26th of March, 1867. Purdon 1456, plac. 3; P. L. 44.)

6. Saving fund associations, or societies for the accumulation of funds, and the distribution of the same among its members, without banking or discounting privileges. (Act of 12th of April, 1867. Purdon 1456, plac. 4; P. L. 70.)

Texas. — In the articles of incorporation it was stated that the purpose of the corporate organization was as follows: "This corporation is formed for the purpose of buying, sell-

general laws for a purpose which is regarded by the courts as being against public policy.[1]

Power of Secretary of State to Inquire into Object of Incorporation. — Where it is provided by a general incorporation law that the certificate shall have the written consent and approbation of a judge, and that such certificate shall be filed in the office of the secretary of state, such written consent has been held not to be binding upon the secretary of state, who may nevertheless inquire into the object of the proposed corporation, and, if he should see fit, refuse to file the certificate in his office.[2]

(4) *Residence of Corporators.* — In some of the states a very salutary provision is incorporated in the general laws, that a certain number of the incorporators shall be residents of the state granting incorporation.[3]

ing, and dealing in real estate, live stock, bonds, securities, and other properties of all kinds, on its own account and for commission in the United States and elsewhere." It was held that this statement of the corporate purpose was within the provisions of the Rev. Stat. of Texas, art. 566, tit. 20, which, after enumerating twenty-six special purposes for which corporations could be organized, among which the purposes stated in the articles of incorporation were not named, contained an additional subdivision which read as follows: "For any other purpose intended for mutual profit or benefit not otherwise specially provided for and not inconsistent with the constitution and laws of this state." National Bank *v.* Texas Invest. Co., 74 Tex. 421, *commenting* upon Texas, etc., Canal, etc., Co. *v.* County Ct., 45 Tex. 272, in which it was held that a corporation for the construction of a canal for purposes of navigation was not included in the 26th subdivision authorizing "the construction and maintenance of canals for the purpose of irrigation or manufacturing purposes," nor in the 27th subdivision set out above, the general clause being controlled by the subjects to which it relates and referring to objects of the character of those named in the act. See also Guadalupe, etc., Rivers Stock Assoc. *v.* West, 70 Tex. 391.

Wisconsin. — The statute of Wisconsin (Rev. Stat., § 1771) authorizes the formation of corporations for certain designated purposes, "or for any lawful business or purpose whatever except," etc. It was held that these general words extend only to things of a nature kindred to those specifically mentioned. State *v.* International Invest. Co., 88 Wis. 512, 43 Am. St. Rep. 920.

In Wisconsin Telephone Co. *v.* Oshkosh, 62 Wis. 32, it was held that, although not specifically mentioned in the act (Rev. Stat., § 1771), telephone companies might be incorporated with powers similar to those given to telegraph companies. See the title TELEGRAPHS AND TELEPHONES.

1. Public Policy. — Matter of Mutual Aid Assoc. of North America, etc., 15 Phila. (Pa.) 625; *In re* Helping-Hand Marriage Assoc., 15 Phila. (Pa.) 644.

Illustration — Prohibition Against Enlistment. — In *In re* Mulholland Benev. Soc., 10 Phila. (Pa.) 19, an application for a charter wherein it was provided that any member who enlisted in the regular army or navy should thereby forfeit his membership and all claims on the society, was refused as against public policy. The court said that a corporation which is a creature of the law ought not to proscribe its members for aiding the government which creates and protects it.

2. People *v.* Nelson, 3 Lans. (N. Y.) 394, 10 Abb. Pr. N. S. (N. Y.) 200, *reversed* 11 Abb. Pr. N. S. (N. Y.) 106, *affirmed* 46 N. Y. 477; People *v.* Rice, 68 Hun (N. Y.) 24.

3. Civ. Code of *California* (1897), § 285; Gen. Stat. of *Kansas* (1897), c. 66, § 9; Bates Annot. Stat. of *Ohio*, § 3236; Sanborn & Berryman Annot. Stat. of *Wisconsin*, § 1771.

In *Maryland* it is provided that "corporations may be formed * * * by any five or more persons, citizens of the United States and a majority of them citizens of this state; or, if unnaturalized, residents of the state; making oath that they *bona fide* intend to become citizens of the United States without unreasonable delay." Pub. Gen. Laws of Maryland, art. 23, § 14.

In *Pennsylvania*, under the provisions of the Act of April 29, 1874, it must appear from the petition for the intended charter, or by an affidavit added to it, that at least three of the signers of the articles of incorporation are citizens of the state. *In re* Enterprise Mut. Beneficial Assoc., 10 Phila. (Pa.) 380. See also Butchers' Beneficial Assoc., 35 Pa. St. 151.

Majority of Incorporators Should Be United States Citizens. — In Chinese Club, 1 Pa. Dist. Rep. 84, White, J., said: "Under the acts on the subject, three [of the incorporators] at least must be citizens of Pennsylvania. I think it is fairly to be implied that all, or a majority, at least, be citizens of the United States."

In Italian Mut. Beneficial Associations, 4 Pa. Dist. Rep. 357, a charter was refused when the names of the applicants indicated foreign birth and there was no evidence that any of the corporators had been naturalized. The court said: "We believe the legislature intended that the special privileges asked for should be conferred upon the consideration of full citizenship. When foreigners become *bona fide* citizens of the United States, they are entitled to all the rights, privileges, and benefits, under the government and laws, that accrue to our own citizens, including, where asked, that of aggregated corporate power. They also become liable to the performance of certain duties, amongst which is that of being required to contribute to the national defense in time of war, and to obey and support the laws in time

But Where the Statute Does Not So Require, citizenship on the part of the corporators is unnecessary.[1]

(5) *Usual Mode of Procedure* — (a) **In General.** — The preliminary steps necessary to be taken by persons seeking to become incorporated under general laws, such as preparing and filing the application, publishing notice of the contents of such application, obtaining stock subscriptions, and effecting an organization by the election of directors, are prescribed by the statutes of the several states, which, while necessarily differing in detail, are in the main very similar.[2]

(b) **By Whom Application to Be Made.** — Whether an application for a corporate charter under the general laws shall be made by an already existing association, or not, depends upon the wording of the statutes of the various states. Thus, under the *Pennsylvania* law, it has been held that the requirement that the names and residences of the directors chosen for the first year shall be given in the certificate plainly indicates that the application for incorporation is to be made by an existing association already organized, presenting its constitution for legal approval.[3] In *California*, on the other hand, under the provisions of its general corporation law, it has been held that such an application need not be made by an association already existing.[4]

Number of Persons Required to Make the Application. — Such statutes generally provide that the application shall be made by a certain number of persons.[5]

(c) **To Whom Application Addressed.** — According to the statutes of the various states, an application for incorporation must be addressed to various officers. Thus, in *Illinois* it is addressed to the secretary of state,[6] in *Tennessee* to the state,[7] while in *Delaware*, *Georgia*, *North Carolina*, and *Virginia* it is addressed to the court of the county, circuit, or corporation, or the judge thereof, in which the corporation expects to carry on the work for which it is promoted.[8]

(d) **Signing Articles.** — In a large majority of the states, in fact, in almost all of them, in order to form a corporation under the general laws, the promoters are required to make and sign a written charter, petition, certificate, agreement, or articles of incorporation, as in that particular state they may be denominated, which shall contain the declaration that they associate for the purpose of forming a corporation under the general laws.[9]

of peace. Until they have assumed these obligations, it is unwise, if not dangerous, to confer upon them, as exclusive national organizations, representing their native countries, extraordinary privileges." See also Russian-American Guards' Charter, 3 Pa. Dist. Rep. 673; Charter of Saint Ladislaus, etc., Assoc., 19 Pa. Co. Ct. Rep. 25.

1. **Citizenship Not Necessary Unless Required by Statute.** — Moxie Nerve Food Co. *v.* Baumbach, 32 Fed. Rep. 205; Humphreys *v.* Mooney, 5 Colo. 282.

2. See statutory enactments of the several states and territories.

In *Illinois*, in case of corporations for profit, a license to obtain stock subscriptions is first granted by the secretary of state, and, after complete organization, a certificate to that effect is obtained from him. Rev. Stat. of Illinois (1893), c. 32, § 2; Stowe *v.* Flagg, 72 Ill. 397.

3. Red Men's Mut. Relief Assoc., 10 Phila. (Pa.) 546; *In re* Gibbs's Petition, 3 Pittsb. (Pa.) 400.

4. Roman Catholic Orphan Asylum *v.* Abrams, 49 Cal. 455.

5. **Two or More Required** — *Washington*. — 1 Ballinger's Annot. Code and Stat. (1897), § 4251.

Three or More Required — *Alabama*. — Code (1886), § 1523.

Connecticut. — Gen. Stat. (1888), § 1907.

Illinois. — 1 Starr & Curt. Annot. Stat. (1896) c. 32, § 1.

New York. — Birdseye Rev. Stat., Codes, and Gen. Laws (2d ed.) 323.

North Carolina. — Code (1883), § 677.

Five or More Required — *California*. — Civ. Code (1897), § 285.

Pennsylvania. — 1 Pepper & Lewis Dig. 654.

Virginia. — Code (1887), § 1145.

No Certain Number Required — *Iowa*. — Code (1897), § 1607.

6. *Illinois*. — 1 Starr & Curt. Annot. Stat., c. 32, § 2.

7. *Tennessee*. — Code (1896), § 2025.

8. *Delaware*. — Laws of Delaware (1893), § 574.

Georgia. — Code (1895), § 2350.

North Carolina. — Code (1883), § 677.

Virginia. — Code (1887), § 1145.

9. **Application Must Be Signed by Incorporators.** — Code of *Alabama* (1886), § 1660; 1 Starr & Curt. Annot. Stat. of *Illinois*, c. 32, § 2; Birdseye Rev. Stat., Codes, and Gen. Laws of *New York* 323; Code of *North Carolina* (1883), § 677; Code of *Virginia* (1887), § 1145; Ballinger Annot. Codes and Stat. of *Washington* (1897),

(e) **Publication of Charter or of Notice of Application.** — It is frequently provided, under general corporation laws, that the charter itself, or a notice containing a specification of the objects of incorporation, shall be published a certain length of time before the charter becomes effective, or the application may be considered by the courts.[1]

Object of Publication. — The object of the requirement that a proposed charter shall be published, is evidently to give the public an opportunity of examining it, so that any one interested may have an opportunity to object; and even where it is merely directed that the proposed incorporation shall be advertised, it has been held that such a provision indicates clearly the intention of the legislature that the charter itself shall be open to inspection.[2]

(f) **Filing Articles.** — It is generally provided that the articles of incorporation or a copy thereof shall be filed with certain designated officials, to be recorded, and usually either the original or a copy thereof must be filed with the secretary of state.[3]

§ 4251. And for similar provisions, see the codes and statutes of the several states.

Louisiana. — Under La. Rev. Stat., § 677, which requires that incorporators "shall prepare and sign" an act either in an authentic or private form, it is not essential that the incorporators should each and all be able to sign their names. Seventh St. Colored M. E. Church *v.* Campbell, 48 La. Ann. 1543.

Maryland. — Under a general corporation law, which provided that any five or more persons who might desire to form a company for the purpose of carrying on any manufacturing business, might make, sign, and acknowledge, before some officer competent to take the acknowledgment of deeds, and record the same in the office of the clerk of the circuit court for the county, a certificate in writing, etc., it was held that where there were more than five incorporators, it was not necessary that all should sign and acknowledge the certificate, provided that five did so. Hughes *v.* Antietam Mfg. Co., 34 Md. 316.

1. Publication of Notice. — See the following statutes: Laws of *Delaware* (1893), p. 574; Code of *Iowa* (1897), § 1613; Code of *Mississippi* (1892), § 833; Code of *North Carolina* (1883), § 679; Pepper & Lewis Dig. of *Pennsylvania* 040; and the codes and statutes of the several states. See also Holmes *v.* Gilliland, 41 Barb. (N. Y.) 568; *In re* Enterprise Mut. Beneficial Assoc., 10 Phila. (Pa.) 380.

Iowa. — The publication of an abstract of the articles of incorporation containing all the requirements of the notice of incorporation provided for by statute, and stating that "the indebtedness of the company shall not exceed three hundred dollars at any one time," is a sufficient notice under the statute of Iowa. Thornton *v.* Balcom, 85 Iowa 198.

Kentucky. — Under the General Corporation Act of Kentucky, it is required, as a condition precedent to the validity of the acts of corporations purporting to be formed under it, that notice shall be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business, stating the name, general nature, amount of capital stock, whether private property is to be exempt from debts, etc., of the corporation. Heinig *v.* Adams, etc., Mfg. Co., 81 Ky. 300.

What Notice Should Specify. — In *Pennsylvania*, where the statute requires that notice of application for a charter must be published previous to such application, the notice should specify particularly the time and place of such intended application. *In re* Enterprise Mut. Beneficial Assoc., 10 Phila. (Pa.) 380; Parrish M. E. Church, 3 Luz. Leg. Reg. (Pa.) 128.

Lodgment for Inspection. — In *Pennsylvania*, pending the advertisement, the certificates of corporations not for profit must be lodged in the office of the court of common pleas for public inspection. Church of Holy Communion, 8 W. N. C. (Pa.) 357.

Insufficient Publication. — Where a corporation, instead of publishing the notice required by §§ 1062 and 1063 of the Rev. Code of *Iowa* 1888, published its articles of incorporation, and it did not appear from said articles when the corporation was to begin and terminate, nor where its principal place of business was to be, it was held that that was not a substantial compliance with the statute, and that the stockholders were liable for the corporate debts under § 1068 of the code. Clegg *v.* Hamilton, etc., County Grange Co., 61 Iowa 121.

2. Reason of Requirement. — *In re* Church of Holy Communion, 14 Phila. (Pa.) 121.

3. Articles Must Be Filed. — Civ. Code of *California* (1897), § 296; Laws of *Delaware* (1893), p. 574; Starr & Curt. Annot. Stat. of *Illinois*, c. 32, § 4; Code of *Tennessee* (1896), §§ 20, 26; Ballinger Codes and Stat. of *Washington* (1897), § 4251. And see generally the codes and statutes of the several states.

Filing a Prerequisite of Existence.—The signing of articles of association by parties proposing to form a manufacturing corporation does not create such corporation; the subscribers must also make, sign, and acknowledge the certificate of incorporation prescribed in section 1 of the act for the incorporation of manufacturing corporations, and must file the same in the recorder's office of the proper county and a duplicate thereof in the office of the secretary of state. Until these steps have been taken, the corporation has no legal existence. Indianapolis Furnace, etc., Co. *v.* Herkimer, 46 Ind. 142.

In Humphreys *v.* Mooney, 5 Colo. 282, it is held that the certificate of incorporation, under the general incorporation law of that state, must be filed to be complete.

Insufficient Filing. — In Bergeron *v.* Hobbs, (Wis. 1897) 71 N. W. Rep. 1056, it appeared

(6) *Contents of Articles* — (a) **Name and Place of Business.** — Most of the statutes require that the name and location of the principal place of business of the proposed corporation shall be stated specifically in the articles of incorporation.[1]

that a provision of the *Wisconsin* statute under which the defendants had attempted to incorporate themselves as an agricultural association required that the certificate of organization should be filed with other papers in the office of the register of deeds. The incorporators deposited the papers with the proper register, with instructions to record and return them, but the court held that this was not a sufficient "filing" to enable the corporation to come into legal being, and that the incorporators were consequently liable as partners.

Waiver by Statute. — The provisions of the Revised Code of *Alabama*, § 1756, relating to the organization of private corporations, which require that the declaration of articles of incorporation should be filed in the office of the secretary of state, and that the signatures of the subscribers should be acknowledged before an officer authorized to take the acknowledgment, have been held to have been imposed by the state in pursuance of its own policy, and especially for the benefit and protection of persons dealing with the corporation; and being conditions imposed by the state, they may be waived by the state, in the case of any particular corporation, by a statute expressly approving and ratifying its organization, without a compliance with said provisions. Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120.

Fee for Filing — *Ohio.* — Section 1484, Rev. Stat. *Ohio*, as amended Feb. 12, 1889 (86 Ohio Laws 33), requiring the payment of a fee to the secretary of state for the filing of articles of agreement of incorporation and also of consolidation, proportioned to the authorized capital stock of the company, is a valid law and applies to articles of agreement of consolidation between an Ohio company and a company or companies of another state, as well as to articles of consolidation between Ohio companies only. Ashley *v.* Ryan, 49 Ohio St. 504.

Virginia. — There is now no law in force that a charter granted under the provisions of § 1145 of the Code of Virginia shall be inoperative and ineffectual until the payment of the fees which are required of companies chartered by the general assembly. Combined Saw, etc., Co. *v.* Flournoy, 88 Va. 1029.

For Other Cases Construing Such Provisions see the following:

United States. — Young Reversible Lock-Nut Co. *v.* Young Lock-Nut Co., 72 Fed. Rep. 62.

California. — Martin *v.* Deetz, 102 Cal. 55, 41 Am. St. Rep. 151; California Sav., etc., Soc. *v.* Harris, 111 Cal. 133; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

Illinois. — Stowe *v.* Flagg, 72 Ill. 397; Bigelow *v.* Gregory, 73 Ill. 197; Loverin *v.* McLaughlin, 46 Ill. App. 373; Forest Glen Brick, etc., Co. *v.* Gade, 55 Ill. App. 181.

Kansas. — Hunt *v.* Kansas, etc., Bridge Co., 11 Kan. 412; Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Missouri. — Granby Min., etc., Co. *v.* Richards, 95 Mo. 110; Roll *v.* St. Louis, etc., Smelting, etc., Co., 52 Mo. App. 60; State *v.* American Medical College, 59 Mo. App. 264.

Nebraska. — Abbott *v.* Omaha Smelting, etc., Co., 4 Neb. 416; Capps *v.* Hastings Prospecting Co., 40 Neb. 470, 42 Am. St. Rep. 677.

New York. — Georgeson *v.* Caffrey, 71 Hun (N. Y.) 472.

Texas. — National Bank *v.* Texas Invest. Co., 74 Tex. 421.

Wisconsin. — Harrod *v.* Hamer, 32 Wis. 162; Badger Paper Co. *v.* Rose, 95 Wis. 145.

1. Code of *Alabama* (1886), § 1660; Laws of *Delaware* (1893), p. 574; Code of *Georgia* (1895), § 2350; Starr & Curt. Annot. Stat. of *Illinois*, c. 32, § 2; Code of *North Carolina* (1883), § 677; Stat. of *Vermont* (1894), § 3705. See also the codes and statutes of the various states. And see *In re* Deveaux, 54 Ga. 673; Stickle *v.* Liberty Cycle Co., (N. J. 1895) 32 Atl. Rep. 708; People *v.* Barker, 16 Misc. Rep. (N. Y. Supreme Ct.) 252; *In re* Philadelphia Artisans' Institute, 8 Phila. (Pa.) 229; Charter of Saint Ladislaus, etc., Assoc., 19 Pa. Co. Ct. Rep. 25.

The Code of *Mississippi* (1892), § 833, does not require that the name of the place of business be stated.

Statutes Construed — *California.* — By the statute of California (Wood's Dig., art. 481, § 2), the certificate of incorporation must state the following particulars: (1) the corporate name; (2) the object for which the corporation is formed; (3) the amount of its capital stock; (4) the term of its existence, not to exceed fifty years; (5) the number of shares into which the stock is divided; (6) the number of trustees and the names of those who are to manage the affairs of the corporation for the first three months; (7) the names of the city or town and county in which the principal place of business is to be located. Where, therefore, the certificate fails to show a substantial compliance with these requirements by omitting to set forth the name of the city or town and county in which the principal place of business is to be located, it does not establish the existence of a corporation. Harris *v.* McGregor, 29 Cal. 124.

But the Failure to Describe the Place of Business of the Corporation as the "Principal Place of Business" is a mere technical error which does not invalidate the charter. Matter of Spring Valley Water Works, 17 Cal. 132.

New York. — In Western Transp. Co. *v.* Scheu, 19 N. Y. 408, it was held, under the act for the incorporation of companies to navigate the lakes and rivers (chapter 232 of Acts of 1854), requiring the designation in their organic certificate of the city or town and county in which the principal office for managing the affairs of such company was to be situated, that the certificate was conclusive as to the location therein designated as that of the principal office of the company.

Pennsylvania. — In *Re* Enterprise Mut. Beneficial Assoc., 10 Phila. (Pa.) 380, the court said:

(b) **Purpose of the Corporation.** — The statutes generally require that the purpose of the corporation shall be stated in the application.[1]

(c) **Number and Names of Directors.** — In some states it is provided that the articles of incorporation shall state the number of directors;[2] and in some it is required that the names and residences of those who are appointed as directors for the first year shall be given.[3]

(d) **Manner of Carrying On Business.** — A certificate of incorporation setting forth that "the manner of carrying on the business of the association shall be such as it may from time to time prescribe, or which may be prescribed by the rules and regulations and by-laws of the association not inconsistent with the laws of the state," is not a sufficient compliance with a statutory requirement that the certificate shall show " the manner of carrying on the business of said association." [4]

(e) **Capital Stock and Number of Shares.** — In various states it is provided that the articles of incorporation shall state the amount of the capital stock, if any, and the number of shares into which it is divided.[5]

" In the paper before us, article iii. reads thus: ' The place where its office is to be located is in the city of Philadelphia.' The Act of Assembly [Act of April 29, 1874] requires ' the place or places where its business is to be transacted ' to be designated. The intended charter is defective, in that it specifies no ' place ' of business within the meaning of the act. An office may be located in one city, and the real ' place of business ' may be in another commonwealth. We must be satisfied upon this point that the Act of Assembly has been substantially followed, before we indorse and approve any charter."

1. Purpose Must Be Stated. — Code of *Alabama* (1886), § 1660; Civ. Code of *California* (1897), § 290; Code of *Georgia* (1895), § 2350; Starr & Curt. Annot. Stat. of *Illinois* (1896), c. 32, § 1; Gen. Stat. of *Kansas* (1897), § 5; Pub. Gen. Laws of *Maryland*, art. 23, § 42; Pepper & Lewis Dig. of *Pennsylvania* 940; Sanborn & Berryman Annot. Stat. of *Wisconsin*, § 1772. And see the codes and statutes of the several states for similar provisions. See also *supra*, this section, *Purposes for Which Incorporation Is Allowed*.

Construction — *Georgia*. — When the petition for incorporation does not set out in detail the purpose for which the corporate organization is sought, but the name which it is to have indicates the substance of the business, this is a sufficient compliance with the statute (Code of Ga., § 1676), which provides for the filing with the clerk of the Superior Court a petition specifying the objects of the association and the particular business proposed to be carried on. Van Pelt *v.* Home Bldg., etc., Assoc., 79 Ga. 439.

Pennsylvania. — " The Act of 1874 indicates the various purposes for which corporations may be formed and the skeleton of the organizations. It is not sufficient to state the purpose in the words of the statute. The act requires the judge ' to peruse and examine the instrument,' and ' if the same shall be found in proper form ' and within the purpose named in the first class, and shall ' appear lawful and not injurious to the community,' he ' shall indorse thereon these facts.' If it were sufficient to declare the purpose in the words of the act, and comply with the act in other respects, all the judge would have to do would be to certify that the instrument was in ' proper form and within the purpose named in the first class.' But when he is required to certify that the ' purpose is lawful and not injurious to the community,' it plainly implies that sufficient information must appear in the instrument from which he can find those facts. This can only appear by the articles of association, or something in the nature thereof, showing the actual purpose and the plan or means by which it is to be effected." *In re* McKees Rocks Volunteer Firemen's Relief Assoc., 6 Pa. Dist. Rep. 477.

For other cases construing such provisions, see the following: Atty.-Gen. *v.* Lorman, 59 Mich. 157, 60 Am. Rep. 287; *In re* Skandinaviska, 3 Pa. Dist. Rep. 235; Lodge Duch Nove Doby No. 165, 3 Pa. Dist. Rep. 215; Accountant's Assoc., 18 Pa. Co. Ct. Rep. 159, 5 Pa. Dist. Rep. 699.

2. Number of Directors. — Civ. Code of *California* (1897), § 290; Gen. Stat. of *Kansas* (1897), § 5; Pub. Gen. Stat. of *Maryland*, art. 23, § 42; Birdseye Rev. Stat., Codes, and Gen. Laws of *New York* 323; Pepper & Lewis *Pennsylvania* Dig. 940; Sanborn & Berryman Stat. of *Wisconsin*, § 1772.

3. Names of Directors for the First Year. — Civ. Code of *California* (1897), § 290; Gen. Stat. of *Kansas* (1897), § 5; Pub. Gen. Stat. of *Maryland*, art. 23, § 42; Stat. of *Minnesota* (1894), § 2594; Pepper & Lewis *Pennsylvania* Digest 940; Code of *Virginia* (1887), § 1145; Ballinger Anno. Codes and Stat. of *Washington*, § 4251. And see generally the codes and statutes of the several states.

Pennsylvania. — In Charter of Saint Ladislaus, etc., Assoc., 19 Pa. Co. Ct. Rep. 25, a charter was refused when the names of the directors for the first year were not given.

4. State *v.* Central Ohio Mut. Relief Assoc., 29 Ohio St. 399.

5. Capital Stock and Number of Shares. — Code of *Alabama* (1886), § 1660; Gen. Stat. *Kansas* (1897), § 5; 1 Starr & Curt. Annot. Stat. of *Illinois* (1896), c. 32, § 1; Pub. Gen. Stat. of *Maryland*, art. 23, § 42; Birdseye Rev. Stat., Codes, and Gen. Laws of *New York* 323; Stat. of *Vermont* (1894), § 3705; Sanborn & Berryman Anno. Stat. of *Wisconsin*, § 1772.

(f) **Names of Shareholders and Amounts Subscribed.** — In some states it is provided that the names of the shareholders of the proposed corporation and the amount of the capital stock subscribed for by each shall be stated in the articles of incorporation.[1]

Subscription to Stock by Incorporators or Directors. — Where it is not required by the general law that the incorporators or directors shall be subscribers to the stock of the association, it is not necessary that they shall have any interest in the company. They are all held to be mere instruments provided by law for the purpose of organization.[2]

(g) **Limitation of Indebtedness.** — In some states it is provided by statute that the maximum amount of indebtedness shall be stated in the articles of incorporation, and that such indebtedness shall not exceed a certain proportion of the capital stock.[3]

(h) **Effect of Introducing Matters Not Required.** — It has been said by the Supreme Court of *Alabama* that if more is introduced into the declaration, as the articles of incorporation are called in that state, than is required by law, it is mere surplusage, not adding to nor detracting from the force of the declaration.[4] In *Pennsylvania* the court refused to approve a charter which contained details of management which belonged properly to the by-laws of the corporation.[5]

(7) *Duration of Corporate Existence.* — The period for which a corporation may exist is limited by general statutes in many states.[6]

(8) *Extension of Corporate Existence.* — Provisions for the extension of the period of corporate existence are also found in the statutes of some of the states.[7]

For similar provisions, consult the codes and statutes of the several states.

One of the fundamental conditions upon which such a charter may be granted is that the application therefor shall state "the amount of capital to be employed by the persons making the application actually paid in." Hendrix *v.* Academy of Music, 73 Ga. 437.

Amount on Which Business Will Be Begun. — In some states the articles of incorporation must state the amount with which the corporation intends to commence business. Birdseye Rev. Stat., Codes, and Gen. Laws of New York 323; Gen. Stat. of South Carolina (1882), § 1376.

Amount Actually Paid In. — In the statutes of *Arkansas* and *Georgia* it is provided that the articles of incorporation shall state the amount actually paid in at the time that they are presented to the officers designated by the general act. Dig. Stat. of Arkansas (1894), § 1334; Code of Georgia (1895), § 2350.

1. Code of *Alabama*, § 1660; Stat. *Kentucky* (1894), § 539; Gen. Stat. of *New Jersey* 907; Pepper & Lewis Dig. of *Pennsylvania* 940. See the codes and statutes of the several states.

2. **Subscriptions by Incorporators or Directors.** — *In re* British Provident L., etc., Assoc., 5 Ch. Div. 306; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43.

3. Code of *Iowa* (1897), § 1611; Stat. of *Kentucky* (1894), § 539; Stat. of *Minnesota* (1894), § 2594; Comp. Stat. of *Nebraska* (1897), § 1831. And see generally the statutory enactments of the several states.

Iowa Statute Construed. — This provision of the statute of Iowa has been construed in the following cases: Sweney *v.* Talcott, 85 Iowa 103; Thornton *v.* Balcom, 85 Iowa 198; Park *v.* Zwart, 92 Iowa 37.

4. Granger's L. etc., Ins. Co. *v.* Kamper, 73 Ala. 325.

5. *In re* Stevedores' Beneficial Assoc., 14 Phila. (Pa.) 130.

6. **In Alabama,** the period is twenty years. Code of Ala. (1886), § 1664.

In California, the period is fifty years. Civ. Code of Cal. (1897), § 290.

In Georgia, the period is twenty years. Code of Ga. (1895), § 2350.

In Illinois, the period is ninety-nine years. 1 Starr & Curt. Annot. Stat. Ill. (1896), c. 32, § 1.

In Iowa, the period is generally twenty years. Corporations for the construction of any work of internal improvement, or for the transaction of the business of life insurance, may be formed to endure fifty years. Code of Iowa (1897), § 1618.

In Maryland, the period is forty years, except in the case of gaslight companies, when no limit is prescribed. Pub. Gen. Stat. Md., art. 23, § 42.

In Mississippi, the period is fifty years. Code of Miss. (1892), § 833.

In Washington, the period is fifty years. Ballinger's Annot. Codes and Stat. (1897), § 4251.

And see generally the codes and statutes of the several states.

For cases construing such provisions, see Marysville Invest. Co. *v.* Munson, 44 Kan. 491; Steadman *v.* Merchants', etc., Bank, 69 Tex. 50.

7. Code of *Iowa* (1897), § 1618; Stat. of *Minnesota* (1894), § 2596; Birdseye Rev. Stat., Codes, and Gen. Laws of *New York*, 659.

Reincorporation Does Not Extend Corporate Existence. — In People *v.* James, 5 N. Y. App. Div. 412, it was held that the intention of the act providing for the reincorporation of existing corporations (Laws of 1892, c. 691, § 4) was not to permit an existing corporation to accomplish the purpose of extending the cor-

c. De Facto Corporations. — It is true as a general rule that a corporation must have a full and complete organization in accordance with the law to which it owes its origin; but when an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, in pursuance of some charter or of some general law, their existence as a corporation cannot be inquired into collaterally. In a direct proceeding by the government, they may be ousted. The corporation exists *de facto*, and is subject to all the liabilities, duties, and responsibilities of a corporation *de jure*.[1]

f. Compliance with Statutory Requirements. — A broad distinction exists between those statutory requirements made necessary by general incorporation laws as prerequisites to the existence of corporate powers, and those acts required of individuals seeking incorporation but not made prerequisites to the exercise of such powers. Without a compliance with the requirements of the former class, there can be no corporation, either *de jure* or *de facto*, and any material omission in respect thereto may be taken advantage of collaterally in any form in which the incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government in a direct proceeding to forfeit the charter.[2]

Substantial Compliance Sufficient. — Even in regard to essential matters a substantial rather than a literal compliance with the requirements of the statute will suffice.[3]

porate life, altering and extending its business, and increasing the number of shares of its stock, which could not otherwise be accomplished except by complying with the provisions of other acts; but that the real theory of the reincorporation provided for by this act was to enable a corporation organized under former statutes to become a corporation under this new act with the same rights, privileges, and franchises as it originally had, and not to change or enlarge such rights, privileges, and franchises; and that if the corporation desired to make any such changes, it should do it under and pursuant to the provisions of the other acts expressly providing therefor.

Act No. 129, *Michigan* Laws of 1889, authorizing mining and manufacturing corporations whose corporate existence is about to terminate by limitation of law to direct its continuance for a period not exceeding thirty years, is a valid enactment. Seneca Mining Co. *v.* Osmun, 82 Mich. 573.

The words "limitation of law," as used in section 33 of *Michigan* Act No. 232, Laws of 1885, which authorizes any corporation organized or existing under the provisions of the act, whose corporate existence is about to terminate by limitation of law, at an annual meeting, or a special meeting called for that purpose, and held within one year immediately preceding the date of such termination, by a vote of two-thirds of its capital stock, to direct the continuance of its corporate existence for such further term, not exceeding thirty years, as may be expressed in a resolution for that purpose, only applied to the constitutional limitation of thirty years. Ovid Elevator Co. *v.* Secretary of State, 90 Mich. 466. See First Baptist Church *v.* Branham, 90 Cal. 24, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 197; Walton *v.* Oliver, 49 Kan. 112, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 197; Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. Rep. (N. Y. C. Pl.) 174, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 197; McVicker *v.* Cone, 21 Oregon 357, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 197; Ireland *v.* Globe Milling, etc., Co., (R. I. 1897) 38 Atl. Rep. 117, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 197, 199; Allen *v.* Long, 80 Tex. 266, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 197, 198.

1. Central Agricultural, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120; Bibb *v.* Hall, 101 Ala. 79, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 198; Andrews *v.* National Foundry, etc., Works, 77 Fed. Rep. 778, 46 U. S. App. 624, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 198, 199; Snider's Sons' Co. *v.* Troy, 91 Ala. 231, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 198; Chicago, etc., R. Co. *v.* Kentwood, 49 La. Ann. 933, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 198; Travaglini *v.* Societa Italiane, 5 Pa. Dist. Rep. 447, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 198. And see generally the title De Facto Corporations.

2. Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Jones *v.* Aspen Hardware Co., 21 Colo. 263; Abbott *v.* Omaha Smelting, etc., Co., 4 Neb. 416; Kleckner *v.* Turk, 45 Neb. 176.

A *de facto* corporation can never be recognized in violation of a positive law. Jones *v.* Aspen Hardware Co., 21 Colo. 263.

Where it is provided that a certificate of incorporation shall contain certain statements, which, however, are not required to be made as a condition precedent to the commencement or continuance of business by the corporation, the omission of one of such statements cannot, in the absence of fraud, be regarded as essential to the corporate existence in an action against the individual members upon a contract with the company. Humphreys *v.* Mooney, 5 Colo. 282.

3. Necessity of Compliance with Law — *California.* — Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Harris *v.* McGregor, 29 Cal. 124; People *v.* Selfridge, 52 Cal. 331.

3. **Acceptance of Charter** — *a.* IN GENERAL. — An indispensable requisite to the exercise of its franchises by a corporation is the acceptance by the incor-

Illinois. — Bigelow *v.* Gregory, 73 Ill. 197, *explaining* Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Gent *v.* Manufacturers', etc., Mut. Ins. Co., 107 Ill. 652, 8 Am. & Eng. Corp. Cas. 306.

Indiana. — Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404; New Eel River Draining Assoc. *v.* Durbin, 30 Ind. 173; McIntire *v.* McLain Ditching Assoc., 40 Ind. 104; Indianapolis Furnace, etc., Co. *v.* Herkimer, 46 Ind. 142; Reed *v.* Richmond St. R. Co., 50 Ind. 342. See also Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768.

Kansas. — McLennan *v.* Hopkins, 2 Kan. App. 260.

Louisiana. — Field *v.* Cooks, 16 La. Ann. 153; Williams *v.* Hewitt, 47 La. Ann. 1076.

Maine. — Richmond Factory Assoc. *v.* Clarke, 61 Me. 351.

Massachusetts. — Utley *v.* Union Tool Co., 11 Gray (Mass.) 139.

Michigan. — Doyle *v.* Mizner, 42 Mich. 332.

Nebraska. — Abbott *v.* Omaha Smelting, etc., Co., 4 Neb. 416.

New Hampshire. — Unity Ins. Co. *v.* Cram, 43 N. H. 636.

New York. — Childs *v.* Smith, 55 Barb. (N. Y.) 45.

Oregon. — Coyote, etc., Co. *v.* Ruble, 8 Oregon 284.

Pennsylvania. — *In re* Philadelphia Artisans' Institute, 8 Phila. (Pa.) 229.

See also the title DE FACTO CORPORATIONS.

Substantial Compliance. — In People *v.* Montecito Water Co., 97 Cal. 278, 33 Am. St. Rep. 172, the court said: "It was said in People *v.* Selfridge, 52 Cal. 331: 'The right to be a corporation is in itself a franchise; and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with.' Still, a substantial rather than a literal compliance will suffice. People *v.* Stockton, etc., R. Co., 45 Cal. 313, 13 Am. Rep. 178. Was there a substantial compliance in this case? Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court."

Fair and Substantial Compliance. — In Hughes *v.* Antietam Mfg. Co., 34 Md. 316, the court said: "The policy of the law, as plainly indicated by the several provisions of the General Corporation Act, is to encourage the formation of these and other like companies, in order that not only the subscribers, but the public, may share the advantages supposed to flow from combined capital and labor; and whilst the requirements of the law are to be fairly and substantially complied with, the rights and franchises of corporations and the interests of stockholders are not to be frittered away by technicalities, nor sacrificed by a strained construction of the statute." To the same effect is People *v.* Montecito Water Co., 97 Cal. 270, 33 Am. St. Rep. 172.

No Corporate Existence Until Statute Complied With. — In Gent *v.* Manufacturers', etc., Mut. Ins. Co., 107 Ill. 652, the court said: "That a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of contract or transact any business would seem to be self-evident. * * * A corporation, until organized, has no being, franchises, or faculties. Nor do those engaged in bringing it into being have any power to bind it by contract, unless so authorized by the charter. Until organized as authorized by the charter, there is not a corporation; nor does it possess franchises or faculties for it or others to exercise, until it acquires a complete existence." See also Loverin *v.* McLaughlin, 161 Ill. 417; Owen *v.* Shepard, 19 U. S. App. 336. See also the title PROMOTERS.

A corporation must have full and complete organization and existence as an entity and in accordance with the laws to which it owes its origin before it can assume its franchises or enter into any kind of contract or business. McVicker *v.* Cone, 21 Oregon 353, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 197.

Date of Corporate Existence. — Where a corporation is formed under a general law which prescribes conditions precedent which must be performed by the corporators, its existence as a corporation will only date from the time of the execution of all such conditions. In Hunt *v.* Kansas, etc., Bridge Co., 11 Kan. 412, it was held that, under the general corporation laws of *Kansas*, the existence of a corporation dates from the time of filing the charter, and the certificate of the secretary of state is evidence of the time of such filing. See also, to like effect, Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Stowe *v.* Flagg, 72 Ill. 397; Hart *v.* Salisbury, 55 Mo. 310; Richardson *v.* Pitts, 71 Mo. 128; Granby Min., etc., Co. *v.* Richards, 95 Mo. 110; State *v.* American Medical College, 59 Mo. App. 264; National Bank *v.* Texas Invest. Co., 74 Tex. 421; Bash *v.* Culver Gold Min. Co., 7 Wash. 122; Badger Paper Co. *v.* Rose, 95 Wis. 145.

Paying in Proportion of Capital Stock. — Where a general corporation law requires that a certain proportion of the capital stock shall be paid in before the incorporation shall take effect, this requirement is a condition precedent, and the mere payment by means of note or check is held to be insufficient. There must be an actual payment in money. Livesey *v.* Omaha Hotel Co., 5 Neb. 50; Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 246; Leighty *v.* Susquehanna, etc., Turnpike Co., 14 S. & R. (Pa.) 434; Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169. See also the title STOCKHOLDERS.

Filing Statutory Certificate. — A failure to file articles of incorporation is fatal to corporate existence. Gent *v.* Manufacturers', etc., Mut. Ins. Co., 107 Ill. 652; Loverin *v.* McLaughlin, 161 Ill. 417; Gade *v.* Forest Glen Brick, etc., Co., 165 Ill. 367; McLennan *v.* Hopkins, 2 Kan. App. 260; Guckert *v.* Hacke, 159 Pa. St. 303. See the title DE FACTO CORPORATIONS.

Irregular Compliance with Law — De Facto Corporation. — It is well settled that a substan-

porators of the charter granted them, for corporate powers of a private nature cannot be imposed without the consent of those proposed to be incorporated.[1]

Assent of Individual Corporators. — Although the fact that a charter has been applied for by certain persons raises a presumption after lapse of time and user that it has been accepted by them, nevertheless it is necessary, in order to bind each individual corporator, that he should signify his assent in some manner. The mere naming of a person in an act of incorporation does not necessarily prove his assent to, or acceptance of, the power conferred.[2]

But Where an Individual Corporator Signs a Call for a Meeting to be convened for the purpose of perfecting the organization of the corporation, he will be presumed to accept the charter, since the act of making such call must of necessity have been preceded by a determination to accept the charter.[3]

b. TIME OF ACCEPTANCE. — Where a charter of incorporation is granted

tial, though imperfect and irregular, compliance with the law in a *bona fide* attempt to incorporate, followed by a user of corporate rights, will create a *de facto* corporation whose existence cannot be collaterally questioned. McLennan *v.* Hopkins, 2 Kan. App. 260; Williams *v.* Hewitt, 47 La. Ann. 1076. See also the title DE FACTO CORPORATIONS.

1. Acceptance Generally — *England.* — Bagg's Case, Roll. Abr. 224; Rex *v.* Larwood, Comb. 315; Tobacco Pipe Makers Co. *v.* Woodroffe, 7 B. & C. 838, 14 E. C. L. 139. See also Rex. *v.* Askew, 4 Burr. 2186; Rutter *v.* Chapman, 8 M. & W. 116.

United States. — Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

Indiana. — State *v.* Dawson, 16 Ind. 40.

Maine. — Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34; Hudson *v.* Carman, 41 Me. 88; Richmond Factory Assoc. *v.* Clarke, 61 Me. 351.

Maryland. — State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 317; Smith *v.* Silver Valley Min. Co., 64 Md. 85, 54 Am. Rep. 760. See also Glymont Imp., etc., Co. *v.* Toler, 80 Md. 278.

Massachusetts. — Ellis *v.* Marshall, 2 Mass. 269, 3 Am. Dec. 49. See also Wright *v.* Tukey, 3 Cush. (Mass.) 290; Hampshire County *v.* Franklin County, 16 Mass. 76.

Michigan. — Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

New Jersey. — Little *v.* Bowers, 46 N. J. L. 300.

New York. — Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625; Green *v.* Seymour, 3 Sandf. Ch. (N. Y.) 285; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9.

Pennsylvania. — See Brown *v.* Fairmount Gold, etc., Min. Co., 10 Phila. (Pa.) 32.

South Carolina. — Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. Car.) 209.

Conditioned Until Acceptance. — In the case of private corporations, the act of creation is in the nature of a bargain between the government and private persons. The act must, therefore, be conditional, unless a previous assent be given by those who propose to be incorporated. The artificial being can never be considered as complete in its legal conformation until the charter is accepted in some form. Thomas *v.* Dakin, 22 Wend. (N. Y.) 9.

Corporations Created under a General Law — Application Equivalent to Acceptance. — "In this case, however, we are not dealing with a charter granted by a special act of the legislature, but one created under the general incorporation law; and this law provides, in the first place, that any five or more persons who may desire to form a corporation shall make, sign, seal, and acknowledge before some person competent to take the acknowledgment of deeds, a certificate in writing in which it shall be stated, etc. And then it provides that it shall be the duty of the persons executing the same to submit it to one of the judges of the judicial circuit within which the principal office shall be located, in order that he may determine whether the certificate is in conformity with the law, 'and if he shall so determine, he shall certify his said determination upon said certificate, which shall thereupon be recorded in the office of the clerk of the Circuit Court for the county in which the principal office of said corporation shall by the terms of the certificate be located.' And then it further provides 'that when the said certificate shall have been recorded, the persons who have signed and acknowledged the same, and their successors, shall, according to the objects, purposes, articles, conditions, and provisions in said instrument contained, become and be a body politic and corporate in fact and in law, by the name stated in such certificate.' So, upon compliance with these provisions, the persons who have signed and acknowledged the articles of incorporation thereby become a corporate body, by the name stated in the articles. It would be idle, under such circumstances, to require further proof that the corporators had accepted that which they had in express terms applied for, and to obtain which they had complied with all the requirements of the law." Glymont Imp., etc., Co. *v.* Toler, 80 Md. 278. To the same effect is Benbow *v.* Cook, 115 N. Car. 324, 44 Am. St. Rep. 454.

2. Individual Corporator Not Bound Without Consent. — In Ellis *v.* Marshall, 2 Mass. 269, 3 Am. Dec. 49, it was held that an act of the legislature incorporating certain persons named therein for the purpose of making a street, and subjecting the individuals to assessments by the corporation for the expense of making the street, did not bind a person named in the act who had not assented thereto. See also to like effect Coffin *v.* Collins, 17 Me. 440; Gleaves *v.* Brick Church Turnpike Co., 1 Sneed (Tenn.) 491.

3. Gleaves *v.* Brick Church Turnpike Co., 1 Sneed (Tenn.) 491.

by a special act, it must be accepted within a reasonable time, or else the act loses its legal effect.[1]

c. MANNER OF ACCEPTANCE. — The usual mode by which the acceptance of a charter is signified is by a vote of the corporators taken at a meeting duly convened for that purpose, in accordance with the provisions of the charter, if any be contained therein. That there should be a duly convened meeting is obvious, for the reason that otherwise no opportunity would be afforded for discussion and deliberation as to the expediency of acceptance.[2]

d. PLACE OF ACCEPTANCE — **State of Creation.** — Under the well-recognized rule of law that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created; that it exists by force of the law, and where that ceases to operate the corporation can have no existence; that it must dwell in the place of its creation, and cannot migrate to another sovereignty; and that it cannot do any corporate acts strictly so called outside of that sovereignty,[3] it follows that the acceptance of the corporate charter at a meeting in a sovereignty other than that by which the charter has been granted, is ineffective and void.[4]

e. PROOF OF ACCEPTANCE — (1) *In General.* — The acceptance of a charter, like any other controverted fact, is to be proved by the best evidence in the power of the party who relies upon it. The books of a corporation are the regular evidence of its acts, and so long as they are in existence and are obtainable, parol evidence is inadmissible to prove either the acceptance of the charter or what persons are members of the corporation.[5]

(2) *Presumption of Acceptance* — (a) **Lapse of Time and User.** — While, as has been stated, the records of a corporation are the best evidence of its acts, the acceptance of its charter may nevertheless be presumed, either from lapse of time or from the exercise of the rights and privileges granted. The fact of an application for corporate existence, together with the subsequent exercise of corporate powers, is evidence of the acceptance of a legislative grant. Proof of both of these is satisfactory in itself to prove such acceptance.[6]

1. Within Reasonable Time. — State *v.* Bull, 16 Conn. 179.

2. Mode of Acceptance. — "After a charter has been obtained by individuals from the legislature, the acceptance thereof, from the nature of the case, must be preliminary to the process of organization. And it is not unusual at a meeting of the corporators, called and held according to the provisions of the charter, to commence their action by the choice of a chairman and secretary of the meeting; and upon that to take a vote upon the question, whether they will accept the charter or not. If the vote upon this question is in the affirmative, an organization takes place by the election of permanent officers, and other acts important to carry into effect the objects of the company, and a record thereof made." Hudson *v.* Carman, 41 Me. 88.

Private Procurement of Signatures Insufficient. — In Shortz *v.* Unangst, 3 W. & S. (Pa.) 45, it was held that carrying the charter of incorporation of a religious society round among the members, and privately procuring their signatures, without any meeting or notice, did not constitute the assent of the society nor bind any not parties to it.

Reason of Above Rule. — See also Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450, where the reason for this rule is stated to be that such an expedient deprives those interested of the benefit of mutual discussion, and subjects them to the hazard of fraudulent misrepresentation and undue influence.

3. Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519. See the title FOREIGN CORPORATIONS.

4. Necessity of Organization in State of Creation. — Miller *v.* Ewer, 27 Me. 509, 46 Am. Dec. 619; Freeman *v.* Machias Water Power, etc., Co., 38 Me. 343; Smith *v.* Silver Valley Min. Co., 64 Md. 85, 54 Am. Rep. 760. See also Glymont Imp., etc., Co. *v.* Toler, 80 Md. 278. See also the title ULTRA VIRES.

5. Books of Corporation Best Evidence. — Hudson *v.* Carman, 41 Me. 88. To the same effect is Coffin *v.* Collins, 17 Me. 440. See also Owings *v.* Speed, 5 Wheat. (U. S.) 420.

6. Lapse of Time and User as Proof of Acceptance — *United States.* — U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64; Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. Rep. 433.

Alabama. — Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344.

Delaware. — Logan *v.* McAllister, 2 Del. Ch. 176.

Maine. — Trott *v.* Warren, 11 Me. 227; Copp *v.* Lamb, 12 Me. 312; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

Maryland. — Hager's-Town Turnpike Road Co. *v.* Creeger, 5 Har. & J. (Md.) 125, 9 Am. Dec. 495; Hammond *v.* Straus, 53 Md. 1.

So, Too, in Case of a Charter Granted to Persons Who Have Not Solicited It, although it is said to be *in fieri* until after acceptance, yet it is not indispensable to show a written instrument or even a vote acceding to the grant, for, unless the charter expressly prohibits it, every formality may be presumed from a continual exercise of corporate powers.[1]

(b) **Beneficial Charter.** — Where a grant of power is beneficial to a corporation an acceptance may be presumed. It is not essential to the taking effect of a charter that the acceptance should appear on the records of the corporation.[2]

(c) **Election of Officers.** — While merely presumptive evidence, nevertheless the election of officers in pursuance of a new, or the alteration of an old, charter, is very strong evidence of the acceptance by the incorporators of

Massachusetts. — Middlesex Husbandmen *v.* Davis, 3 Met. (Mass.) 133; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Farmers,' etc., Bank *v.* Jenks, 7 Met. (Mass.) 592; Russell *v.* Lellan, 14 Pick. (Mass.) 63; Congregational Soc. *v.* Curtis, 22 Pick. (Mass.) 320.

Minnesota. — St. Paul Div. No. 1, etc., *v.* Brown, 11 Minn. 356.

Missouri. — Hope Mut. F. Ins. Co. *v.* Beckmann, 47 Mo. 93; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557.

New Hampshire. — State *v.* Carr, 5 N. H. 367; Ameriscoggin Bridge *v.* Bragg, 11 N. H. 102.

New Jersey. — Little *v.* Bowers, 46 N. J. L. 300.

New York. — Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Demarest *v.* Flack, 16 Daly (N. Y.) 337, 128 N. Y. 205.

Tennessee. — Gleaves *v.* Brick Church Turnpike Co., 1 Sneed (Tenn.) 491.

See also *infra*, this section, *Amendment and Repeal — Acceptance of Amendments.*

Statement of Rule. — In McKay *v.* Beard, 20 S. Car. 156, McIver, J. said: "After a corporation, duly constituted by act of the legislature, which corporation is composed of only two persons, has entered upon the work for which the corporation was established, appointed an agent, expended large sums of money on such work, and done acts which it would not have been lawful to do but for the charter granted by the legislature, it is too late to say that such corporation had never accepted the charter, or been organized as such, even though it does not appear that there was ever any formal organization by a meeting of the corporators and an election of the usual officers."

Acts of Corporate Officers as Proof of Acceptance. — In U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, the court said that " in relation to the question of acceptance of a particular charter by an existing corporation, or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or vote of acceptance on the corporation books. It may be inferred from other facts which demonstrate that it must have been accepted."

Records Need Not Show Formal Acceptance. — It is not essential, in order that an act may take effect incorporating individuals as a manufacturing corporation, that the records of the corporation should show a formal acceptance of the act by the individuals incorporated. Russell *v.* M'Lennan, 14 Pick. (Mass.) 63.

Proof of Acceptance by Witness of User. — In Wilmington, etc., R. Co. *v.* Saunders, 3 Jones L. (48 N. Car.) 126, it was held that the acceptance of a charter, and the organization of a corporate body under such charter, may be proved by a witness who saw the alleged corporators in the use and exercise of the franchises and powers conferred by the act of incorporation.

Application a Presumed Acceptance. — In Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106, it is said that if a charter is granted after having been applied for, acceptance may be presumed from such previous application, and that it would seem, in such a case, that no acceptance would be required, since the consent of the grantees has been given in advance. To the same effect is Dorsey Harvester Revolving Rake Co. *v.* Marsh, 6 Fisher Pat. Cas. 387.

In Talladega Ins. Co. *v.* Landers, 43 Ala. 115, it was held that while the charter of a corporation must be accepted, nevertheless, in cases of private corporations created for individual benefit, the presumption is that they are created at the instance and on the request of the parties to be benefited thereby, and, consequently, are accepted by them, and that if they are found exercising the privileges granted it will be almost conclusive evidence of the fact of acceptance.

A Rebuttable Presumption. — In Newton *v.* Carbery, 5 Cranch (C. C.) 632, it was held that a charter granted to certain persons therein named is to be presumed *prima facie* to have been granted at their instance, and to have been accepted by them, but that such presumption is rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date.

1. Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450. See also cases cited *supra*, note 6, p. 658.

2. **Presumed Acceptance of Beneficial Powers.** — Taylor *v.* Newberne, 2 Jones Eq. (55 N. Car.) 141. See also Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344; Russell *v.* M'Lennan, 14 Pick. (Mass.) 63.

Burden upon Party Denying Acceptance. — In Astor *v.* New York Arcade R. Co., 48 Hun (N. Y.) 562, *affirmed* 113 N. Y. 93, it was held that where an act creating a corporation was enacted for the benefit of the corporation, it must be proved that it had refused to accept the proffered benefit, or else the presumption would be that it had accepted it.

the charter under which such election is held.[1]

(3) *Question for the Jury.* — In all cases where there is a controversy as to the acceptance of a charter, the question should be submitted to the jury.[2]

f. PARTIAL OR CONDITIONAL ACCEPTANCE NOT PERMISSIBLE. — When a charter is granted, whether it be one of creation or an amendment to the charter of a pre-existing corporation, it must be either accepted or rejected as offered and without condition, and in accepting the privileges conferred the grantees will be required to perform the conditions imposed.[3]

g. EFFECT OF ACCEPTANCE. — When an act of incorporation is first passed, it is optional with the corporators whether they will or will not take the benefit of it, but after they have made their election by executing the powers granted under the charter, then the duties imposed attach, from which the incorporators cannot be discharged otherwise than by a seizure of the franchise into the hands of the government, or by a repeal of the act with their assent.[4]

Acceptance of Special Act Does Not Destroy Previous Organization under General Law. — Where a corporation has been organized under the provisions of a general law, the fact that it subsequently accepts a special act of incorporation does not destroy the old organization so as to affect contracts made by it before such acceptance. Especially is this so where the special act recognizes the old

1. Election of Officers as Proof of Acceptance. — In Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450, Bell, J., said: "I concede there can scarcely be stronger evidence of acceptance than that furnished by an election of corporate officers in pursuance of a new, or the alteration of an old, charter. Rex *v.* Larwood, 1 Ld. Raym. 32; Newling *v.* Francis, 3 T. R. 189. Yet, like other corporate acts, it is but presumptive evidence of the prior assent of the company by a vote of its members at some supposed meeting, or, at least, of a deliberate waiver of a vote by all in the corporation having that right."

2. A Question of Fact. — Where a corporation had been formed and was doing business under a general law, and afterwards obtained a special charter with new and extended privileges, and the fact of acceptance was denied, and the proof thereof claimed to be insufficient, it was held that the question of acceptance should have been submitted to the jury. The court said: "To prove the fact of acceptance, it was only necessary to show, in connection with the act of incorporation itself, that the parties incorporated had actually used and exercised the powers and privileges conferred by the act, and if such user and exercise of privileges could only be referred to the act of incorporation, such user would fully justify the presumption that the act of incorporation had been accepted." Hammond *v.* Straus, 53 Md. 1.

3. Acceptance in Part. — Rex *v.* Amery, 1 T. R. 575; Lyons *v.* Orange, etc., R. Co., 32 Md. 18. See also Kenton County Ct. *v.* Bank Lick Turnpike Co., 10 Bush (Ky.) 529.

Reason of Rule. — In Rex *v.* Westwood, 7 Bing. 1, 20 E. C. L. 11, Tenterden, C. J., said: "There are, indeed, to be found some expressions of judges in former times importing that a corporation might accept part of a charter and reject the remainder; but of late times all judges have been of opinion that that is not open to a corporation; otherwise a corporation might reject the obligation which was imposed, and accept the benefit which was conferred upon them."

Distinction Between Conditions Precedent and Subsequent. — In Lyons *v.* Orange, etc., R. Co., 32 Md. 18, the court said: "However well settled this may be [the partial acceptance of a charter] in regard to subsequent conditions, to be performed after the organization of the company, and for a refusal to comply with which a party injured may have his remedy at law or in equity for a specific performance, it does not apply to conditions precedent, upon the strict performance of which the very existence and exercise of powers on the part of the corporation depend. And by conditions precedent we mean anything which, by the express provisions of the statute, is made a condition to be performed on the part of the corporators before and as a foundation of the exercise of powers and privileges under the charter. In such cases the organic life of the corporation depends upon a strict compliance with the conditions imposed, and until this is done there can be no such thing as an acceptance of the charter."

4. Effect of Acceptance. — Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86; Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169; Com. *v.* Worcester Turnpike Corp., 3 Pick. (Mass.) 327; Bushwick, etc., Bridge, etc., Co. *v.* Ebbets, 3 Edw. Ch. (N. Y.) 353. See also McGinty *v.* Athol Reservoir Co., 155 Mass. 183. See also the title DISSOLUTION OF CORPORATIONS.

In Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169, a duty was imposed on the defendants in these words: "The said proprietors shall erect, make, and forever maintain such dams, canals, and locks," etc. By accepting this charter, it was held that the obligation became express and absolute. "When the act of incorporation first passed," said Parsons, C. J., "it was optional with the proprietors whether they would or would not take the benefit of it, but after they had made their election by executing the powers granted and

organization as an existing corporation. The two together, so far as they are not inconsistent, constitute the charter of the company.[1]

h. Repeal of Charter Before Acceptance. — Until accepted, an act creating a corporation does not become such a contract as to be protected by the provision of the Constitution of the *United States* against the infringement of a contract by a state; consequently, either a constitutional provision adopted after the grant of a legislative charter, but before its acceptance, or an act of the legislature by which the privileges granted are withdrawn or repealed before acceptance by the incorporators, will be effective to dissipate the privileges granted.[2]

4. Proof of Incorporation — *a.* In Civil Cases — (1) *In General.* — Where it becomes necessary, in an action by or against a corporation, to prove its corporate existence, the usual mode of procedure is to prove its charter, certificate of incorporation, or articles of association, as the case may be, and acts of user thereunder of the powers and franchises granted by the state.[3]

Presumption in Favor of Regularity. — Where a corporation has gone into operation and rights have been acquired under it, every presumption should be made in favor of the legality of its existence.[4]

But the Exercise of Powers Which Might Be Exercised by an Unincorporated Company will not raise a presumption of incorporation.[5]

Proof by Reputation and Lapse of Time. — As a corollary to the proposition that corporations may exist by prescription[6] it necessarily follows that the incorporation of an association claiming to be a corporation may be proved by reputation, or by long user of the corporate franchise without objection, or by legislative grants necessarily implying a corporation.[7]

claiming the toll, then the duties imposed * * * to make the canals, etc., attached."

1. In Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173, a corporation which had been organized under the general corporation laws of the state subsequently received a charter from the legislature, but, before organizing and electing officers under the legislative charter, it executed a mortgage under its original organization. It was held that the acceptance of the new act did not destroy the old organization, and that, consequently, the mortgage was valid.

2. Repeal Before Acceptance. — State *v.* Dawson, 16 Ind. 40. See also Aspinwall *v.* Daviss County, 22 How. (U. S.) 364; Little *v.* Bowers, 46 N. J. L. 300. See *infra*, this section, *Amendment and Repeal — Right to Amend or Repeal — When Contractual Relation Arises.*

3. See cases *passim*, this section.

As to the Proof of De Facto Corporate Existence, see the title De Facto Corporations.

Proof of Substantial Compliance with Statute, When Essential. — An association of individuals claiming exemption from liability as partners on the ground that they have been incorporated must show compliance with the substantial requisites of the incorporation laws. Williams *v.* Hewitt, 47 La. Ann. 1076; Guckert *v.* Hacke, 159 Pa. St. 303. See also the title Stockholders.

4. Presumption in Favor of Legality. — Dunning *v.* New Albany, etc., R. Co., 2 Ind. 437; Hager's-Town Turnpike Road Co. *v.* Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495; Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350; Keene *v.* Van Reuth, 48 Md. 184.

The presumption of regularity extends to the proceedings in the organization of corporations. So the performance of corporate functions raises a presumption of due incorporation. Packard *v.* Old Colony R. Co., 168 Mass. 92.

5. Clark *v.* Jones, 87 Ala. 474, Cunyus *v.* Guenther, 96 Ala. 564; Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58; Abbott *v.* Omaha Smelting, etc., Co., 4 Neb. 416. See Owen *v.* Shepard, 19 U. S. App. 336; Bash *v.* Culver Gold Min. Co., 7 Wash. 122.

6. See *supra*, this section, *Mode of Creation — By Prescription.*

7. Presumption from Lapse of Time. — Crafts of Mercers, etc., *v.* Hart, 1 C. & P. 113, 11 E. C. L. 335, was an action brought by the Company of Mercers to prove that the company was and always had been a corporation. A series of books containing admission of freemen and other acts of the company, commencing in the reign of Henry VI., and down to the trial, taken from a chest which had always been in the custody of the clerk of the company, were admitted as presumptive evidence of due incorporation.

See also Douthitt *v.* Stinson, 63 Mo. 268, in which it is said that there are probably in the original thirteen states many ancient grants or charters in the colonial days which could not be produced now, and the production of which would be dispensed with on the principle of Crafts of Mercers, etc. *v.* Hart, 1 C. & P. 113, 11 E. C. L. 335, and secondary evidence be admitted. The court held, however, that in *Missouri*, in 1839, when there was no general statute on the subject of corporations, a private corporation could not be called into existence except by special act of the legislature.

"**The Rules of Presumptive Evidence** apply to

Legislative Recognition of Corporate Existence.—An act of the legislature recognizing the existence of a corporation sufficiently establishes its existence, at least for the purpose of the exercise of the functions recognized in the legislative act.[1] Where, however, corporations can be created only by general laws, an act recognizing the existence of a particular corporation cannot operate to give the organization validity.[2]

(2) *Corporations Created by Special Charter*—(a) **In General.**—To prove the due incorporation and existence of a corporation formed by special charter, proof of the charter and of acts of user is sufficient.[3]

corporations as well as individuals, and a charter may be presumed from the long exercise of corporate rights." Sasser *v.* State, 13 Ohio 453.

In Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, it was held that if the possession and title of proprietors of common lands have been acquiesced in for fifty years from their incorporation by proceedings apparently regular, by all interested in their organization, or property, it is not competent for a stranger to question the legality of their organization on the ground that the incorporators were not proprietors in common. The court, *per* Knowlton, J., said: "It has been held that, in an action brought to protect the property of a corporation in possession from the acts of tort-feasors, it is enough to show a corporation *de facto*. Its legal origin is presumed from its continued existence. Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 322; Manchester Bank *v.* Allen, 11 Vt. 307. In Maine, under a statute almost identical with that which we are considering, it was held that, after forty years, it was not competent for a stranger, or the individual proprietors, or their heirs or assigns, to attack the validity of the organization of a corporation on the ground that the persons who originally claimed title as tenants in common had not in fact a title. Copp *v.* Lamb, 12 Me. 312; Dolloff *v.* Hardy 26 Me. 552; Brackett *v.* Persons Unknown, 53 Me. 228."

General Reputation Is Sufficient Evidence of User Prima Facie.—Consequently, in an action brought by certain persons claiming to be a corporation incorporated under the laws of the state of Connecticut upon a promissory note made by the defendants, payable to the corporation, it was held that general reputation that the plaintiffs were conducting business as a corporation, coupled with the fact that the note mentioned in the complaint was payable to the plaintiffs, was sufficient evidence of the existence of the corporation to prevent a dismissal. Holmes *v.* Gilliland, 41 Barb. (N. Y.) 568.

Municipal Corporations.—See Dillingham *v.* Snow, 5 Mass. 547, 3 Mass. 276; Stockbridge *v.* West Stockbridge, 12 Mass. 390; New-Boston *v.* Dunbarton, 12 N. H. 409; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319. See also the title MUNICIPAL CORPORATIONS.

1. Legislative Recognition of a Corporation.—A legislative act reciting that a corporation trustee had lost its right, and authorizing the purchase for the state of its property, is a recognition of its existence as a corporation capable of contracting. McIntire Poor School *v.* Zanesville Canal, etc., Co., 9 Ohio 203, 34 Am. Dec. 436.

A royal charter granting lands to a society recognizes or confers a corporate capacity to take and hold lands, and this, with the statute of the state reciting that the society is a corporation holding lands, is sufficient *prima facie* to prove a corporate existence and powers. Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 480. See also Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386.

In Williams *v.* Union Bank, 2 Humph. (Tenn.) 339, it was held that repeated recognitions by the legislature in various public laws of a company as a legally existing corporation was, so far as third persons were concerned, conclusive evidence of such legal existence, against which no evidence of the non-fulfilment of the conditions upon which such legal existence was made dependent by the charter could be heard in a collateral manner.

In Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304, it was held that where a municipal corporation has been recognized by enactments of the general assembly, all inquiry into the original organization of the corporation is precluded, and, further, that in such cases, after long-continued use of corporate powers and acquiescence of the public in them, the law will indulge in a presumption in support of their legal existence. See also People *v.* Farnham, 35 Ill. 562.

A resolution of the general assembly, authorizing part of a society to meet, choose officers, levy taxes, and repair their meeting-house, would give them a right to sue for the destruction of such meeting-house after they had repaired it. Tilden *v.* Metcalf, 2 Day (Conn.) 259.

2. Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354. See *supra*, this section, *Mode of Creation—Under General Laws.*

3. Proof of Charter and User—*Arkansas.*—Gaines *v.* Mississippi Bank, 12 Ark. 769.

Illinois.—Mendota *v.* Thompson, 20 Ill. 197; Marsh *v.* Astoria Lodge No. 112, 27 Ill. 421; Ramsey *v.* Peoria M. & F. Ins. Co., 55 Ill. 311.

Indiana.—Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275.

Maine.—Trott *v.* Warren, 11 Me. 227; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; Came *v.* Brigham, 39 Me. 35.

Massachusetts.—Worcester Medical Inst. *v.* Harding, 11 Cush. (Mass.) 285; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Com. *v.* Bakeman, 105 Mass. 53; Provident Sav. Inst. *v.* Burnham, 128 Mass. 458.

Michigan.—Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Way *v.* Billings, 2 Mich. 307.

(b) **Proof of Charter** — *aa.* In General. — The act by or under which a corporation is chartered may be proved, like any other statute, under special enactment, by copies officially printed or by properly authenticated copies.[1]

Conditional and Unconditional Charters. — A distinction must here be noted, however, between the amount of proof required to establish corporate existence in case of conditional charters on the one hand and unconditional charters on the other. In either case the charter itself must be proved, but in the former this alone is not sufficient. All preliminary steps required by the statute, such as opening books, subscription to and distribution of stock, the choice of directors, and by them of a president, secretary, and other officers, must be proved.[2] In the latter case, where the corporation is created *co instanti* by the act itself, its existence is sufficiently established by proof of the charter alone;[3] and where the charter itself is public this also may be dispensed with.[4]

Mississippi. — Henderson *v.* Mississippi Union Bank, 6 Smed. & M. (Miss.) 314.

Missouri. — Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285.

New Hampshire. — State *v.* Carr, 5 N. H. 367.

New York. — Utica Ins. Co. *v.* Tilman, 1 Wend. (N. Y.) 555; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539; Fire Department *v.* Kip, 10 Wend. (N. Y.) 266; U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194; McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392; People *v.* Beigler, Hill & D. Supp. (N. Y.) 133; Jones *v.* Dana, 24 Barb. (N. Y.) 395; Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Toledo Bank *v.* International Bank, 21 N. Y. 542.

North Carolina. — Tar River Nav. Co. *v.* Neal, 3 Hawks (10 N. Car.) 520; Buncombe Turnpike Co. *v.* M'Carson, 1 Dev. & B. L. (18 N. Car.) 306; Wilmington, etc., R. Co. *v.* Saunders, 3 Jones L. (48 N. Car.) 126.

Vermont. — Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315; Manchester Bank *v.* Allen, 11 Vt. 302.

Virginia. — Grays *v.* Lynchburg, etc., Turnpike Co., 4 Rand. (Va.) 578.

Proof that all steps preliminary to complete organization have been taken, and that too by written evidence, would produce not only great public inconvenience, but, owing to those omissions to record facts with which all public bodies are chargeable, would be impossible. As a general principle, it is sufficient to produce the charter and then prove acts done under and in conformity with it. Mendota *v.* Thompson, 20 Ill. 197.

Formal Acceptance of Charter Unnecessary. — The legal existence of a corporation capable of performing corporate acts may be inferred from the grant of its charter, and that the persons named in it, or they and others associated with them, have held meetings, chosen officers, adopted by-laws, and performed other corporate acts, without a production of a legal record of the first meeting or a formal acceptance of the charter. Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78. See also Trott *v.* Warren, 11 Me. 227; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656. And see *supra*, this section, *Acceptance of Charter — Presumption of Acceptance — Lapse of Time and User.*

1. U. S. *v.* Johns, 4 Dall. (U. S.) 412; State *v.* Carr, 5 N. H. 367; U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314. See also Com. *v.* Carroll, 145 Mass. 403. See the titles Documentary Evidence; Foreign Corporations; Statutes.

Charter Cannot Be Proved by Parol. — Proof of incorporation must be made by an authenticated copy of the charter of the corporation or of its certificate of incorporation. It cannot be proved by parol. Gauthier Decorating Co. *v.* Ham, 3 Colo. App. 559. See also Nicoll *v.* Clark, 13 Misc. Rep. (N. Y. C. Pl.) 128.

2. Conditions Precedent Must Be Proved. — Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204; Agnew *v.* Gettysburg Bank, 2 Har. & G. (Md.) 478; Frederick Female Seminary *v.* State, 9 Gill (Md.) 399; Lord *v.* Essex Bldg. Assoc. No. 4, 37 Md. 325; Fire Department *v.* Kip, 10 Wend. (N. Y.) 266; Auburn Bank *v.* Aikin, 18 Johns. (N. Y.) 137; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194; Southold *v.* Horton, 6 Hill (N. Y.) 501.

3. Unconditional Charters. — Mahony *v.* State Bank, 4 Ark. 620; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557; Fire Department *v.* Kip, 10 Wend. (N. Y.) 266; Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158.

The production of the charter and proof of acts of user under it are sufficient to establish corporate existence where the charter confers corporate powers *in præsenti* and unconditional, and does not make the right to their exercise dependent upon anything to be done *in futuro*. In such cases no proof of organization under the charter is necessary. Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

Special Act Ratifying Incorporation. — A special act of the legislature which ratifies and confirms the organization of a corporation originally effected under its act of incorporation, and which expressly declares the company to be a legal corporation, is competent evidence of the existence of the corporation. Boykin *v.* State, 96 Ala. 16.

4. Where the Statute Creating Corporations Is Public the courts will take judicial notice of it, and consequently the corporate charter need not be proved as in other cases. McKiel *v.* Real Estate Bank, 4 Ark. 592; Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204; Towson *v.* Havre de Grace Bank, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; State *v.* Greenwell, 4 Gill & J. (Md.) 407.

bb. JUDICIAL NOTICE — **Private and Public Acts.** — Under the well-established principle of law that courts cannot take judicial notice of acts of a private or special character unless at the time of its passage the act is declared by the legislature to be public, or unless a general statute exists requiring the courts to notice all legislative acts,[1] private acts creating corporations must be proved like any other controverted fact, if not within the scope of either of the above-mentioned exceptions.[2]

But Where the Charter of a Corporation Is a Public Law which judicial tribunals are bound to notice *ex officio* it is not necessary to give it in evidence.[3]

Private Corporations Charged with Public Interests. — A private corporation may have charge of an interest of so public a concern as to render its charter public.[4]

General Corporation Laws. — General corporation laws are public acts, and are consequently to be judicially noticed without being proved in the ordinary mode.[5]

Notice of Charter and Notice of Existence Distinguished. — There is a well-defined distinction between judicial notice of a corporate charter and judicial notice of the existence of a corporation. As has been heretofore stated,[6] acceptance of a charter is necessary to corporate existence, except in the case of public corporations;[7] and consequently judicial notice cannot be taken of the existence of a private corporation, unless under special statutory provisions.[8]

1. See the titles JUDICIAL NOTICE; STATUTES.

2. **Private Acts.** — Agnew *v.* Gettysburg Bank, 2 Har. & G. (Md.) 478; Haven *v.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512; Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68.

Where a Clause in an Act of Incorporation Declares the Act to Be a Public Act, its contents need not be pleaded nor shown to the court, but the courts will take notice of them as they do of other public statutes. Brookville Ins. Co. *v.* Records, 5 Blackf. (Ind.) 170. See also White Water Valley Canal Co. *v.* Boden, 8 Blackf. (Ind.) 130.

Statutory Provisions. — In *Georgia*, under the first section of "An Act to regulate the admission of evidence in certain cases," T. R. R. Cobb's Dig. 272, bank charters are public acts, and it is made the duty of courts to take judicial notice thereof as in case of other public laws. Davis *v.* Fulton Bank, 31 Ga. 69; Terry *v.* Merchants', etc., Bank, 66 Ga. 177; Ga. Code, 1895, § 5210.

Under *Massachusetts* Pub. Stat. 1882, p. 992, § 68, "all acts of incorporation shall be deemed public acts, and as such may be declared on and given in evidence." See Boynton *v.* Middlesex Mut. F. Ins. Co., 4 Met. (Mass.) 215.

Territorial Corporation Recognized in State Constitution. — In Vance *v.* Farmers', etc., Bank, 1 Blackf. (Ind.) 80, it was held that where a corporation at the commencement of the state government was recognized by the constitution as an existing corporate body according to the charter granted by the territorial legislature, such charter must be noticed by the courts as a public statute.

3. **Private Charters Public Laws.** — Whittington *v.* Farmers' Bank, 5 Har. & J. (Md.) 489. *Compare* Washington *v.* Finley, 10 Ark. 423; Gaines *v.* Mississippi Bank, 12 Ark. 772; Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204; Agnew *v.* Gettysburg Bank, 2 Har. & G. (Md.) 478.

4. **Where Public Interests Are Involved.** — State *v.* Vincennes University, 5 Ind. 77. See also, to like effect, White Water Valley Canal Co. *v.* Boden, 8 Blackf. (Ind.) 130; Hankins *v.* Lawrence, 8 Blackf. (Ind.) 266; Russell *v.* Branham, 8 Blackf. (Ind.) 277; Towson *v.* Havre de Grace Bank, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; State *v.* Greenwell, 4 Gill & J. (Md.) 407.

State Banks. — In McKiel *v.* Real Estate Bank, 4 Ark. 592, it was held that in a suit by the bank it was not necessary to prove its corporate existence under the general issue; that the bank being a public corporation the court was bound judicially to take notice of its existence. See also, to like effect, Mahony *v.* State Bank, 4 Ark. 622; Underhill *v.* State Bank, 6 Ark. 135; Murphey *v.* State Bank, 7 Ark. 57; Pickett *v.* R. E. Bank, 8 Ark. 224; Ferguson *v.* State Bank, 8 Ark. 416; Conway B. *v.* State Bank, 13 Ark. 48.

Railroad Corporation. — A similar holding has been made with regard to a railroad corporation. Hammett *v.* Little Rock, etc., R. Co., 20 Ark. 204.

5. **General Corporation Laws.** — Ewing *v.* Robeson, 15 Ind. 26; Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482.

6. See *supra*, this section, *Acceptance of Charter*.

7. See the title MUNICIPAL CORPORATIONS.

8. **Statutory Provision for Judicial Notice of Existence — Indiana.** — Under the Indiana Act of June 12, 1852 (1 Rev. Stat., p. 257), authorizing the organization of associations for the purpose of constructing levees and drains, the existence of such corporation must be judicially taken notice of by the courts of the county or counties in which the articles of association are recorded. It has been held under this statute that the question of the due organization of such a corporation becomes one

(c) **Proof of User.** — As has been stated, the second step necessary in the proof of corporate existence is to prove user of the powers and franchises granted by the constating act or by the general law under which the corporation is organized. To accomplish this any appropriate method of proof may be resorted to.[1]

Corporate Books, Records, etc. — Proof of user is often made by the production of the corporate books and records, or of written instruments executed by the association in its corporate capacity.[2]

Parol Evidence to the effect that the corporation has assumed to act as such under color of right, that is, that it is a corporation *de facto*, is also admissible.[3]

of law, to be decided by the court, like the question as to the time when given public laws take effect; further, that upon appeal the higher courts will presume that the action of the lower court in the determination of this question was correct. Anderson *v.* Kerns Draining Co., 14 Ind. 199; Herod *v.* Rodman, 16 Ind. 241; Eel River Draining Assoc. *v.* Topp, 16 Ind. 242; Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407.

1. Proof of User Generally. — "The proof of user must necessarily consist of evidence of the acts of the corporation, showing that they are doing business under their charter. Any acts tending to show this are admissible for that purpose, as keeping open an office, having officers acting in the name and as the agents of the company, etc. The receiving of applications and issuing policies of insurance — in other words, doing the very business, and in the very manner, pointed out by the statute, and in the name of the corporation — would be direct evidence of user." Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

Acts and Admissions. — A corporation may be proved by an exemplification or admission of the act of incorporation, and acts of user under it; and the acts and admissions of a party, such as serving as president of the corporation, and giving a note to it in its corporate name, are *prima facie* evidence of user. Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 534. See *infra*, this section, *Effect of Estoppel upon Proof of Incorporation.*

Contract in Suit as Proof of User. — In an action by a private corporation upon a promissory note, the charter being produced and the note in suit, the latter is sufficient to establish user under the charter. Ramsey *v.* Peoria M. & F. Ins. Co., 55 Ill. 311. But see *infra*, this section, *Effect of Estoppel upon Proof of Incorporation.*

Opening Office for Business. — In Utica Ins. Co. *v.* Tilman, 1 Wend. (N. Y.) 555, proof that shortly after the passage of the act incorporating the company and at all times thereafter the company had an office in Utica, where the business of insurance had been carried on in its name, and that the affairs of the company had been managed by directors who had been chosen for that purpose from time to time, was held to be sufficient evidence of user under its charter.

Statute Construed—Michigan. — Where, in a suit against a company, the evidence given to prove the claim amounts at the same time to evidence that the defendant was doing business in the name by which it was sued, and there is no countervailing evidence, this is sufficient proof of the corporate existence of the defendant under the Laws of Michigan, 1871, p. 176, providing that evidence that a company is doing business under a certain name shall be *prima facie* proof of its due incorporation and existence pursuant to law, and of its name. Lake Superior Bldg. Co. *v.* Thompson, 32 Mich. 293. See generally the title De Facto Corporations.

2. Books and Records as Proof of User — *Alabama.* — Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

Illinois. — Ryder *v.* Alton, etc., R. Co., 13 Ill. 516; Ramsey *v.* Peoria M. & F. Ins. Co., 55 Ill. 311.

Indiana. — Vawter *v.* Franklin College, 53 Ind. 88.

Massachusetts. — Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Provident Sav. Inst. *v.* Burnham, 128 Mass. 458.

Missouri. — Foster *v.* White Cloud City Co., 32 Mo. 505.

New York. — Highland Turnpike Co. *v.* M'Kean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194; McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392. See also Bill *v.* Fourth Great Western Turnpike Co., 14 Johns. (N. Y.) 416.

North Carolina. — Buncombe Turnpike Co. *v.* M'Carson, 1 Dev. & B. L. (18 N. Car.) 306.

Vermont. — Reynolds *v.* Myers, 51 Vt. 444.

Virginia. — Grays *v.* Lynchburgh, etc., Turnpike Co., 4 Rand. (Va.) 578; Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

West Virginia. — Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

3. Proof of User from De Facto Existence — *Alabama.* — Lucas *v.* Georgia Bank, 2 Stew. (Ala.) 147.

California. — Lakeside Ditch Co. *v.* Crane, 80 Cal. 181.

Indiana. — Dunning *v.* New Albany, etc., R. Co., 2 Ind. 437; Judah *v.* American Live Stock Ins. Co., 4 Ind. 333; Tipton F. Co. *v.* Barnheisel, 92 Ind. 88.

Michigan. — Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Minnesota. — St. Paul F. & M. Ins. Co. *v.* Allis, 24 Minn. 75; Finnegan *v.* Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552.

Missouri. — Farmers', etc., Bank *v.* Williamson, 61 Mo. 259; Crenshaw *v.* Ullman, 113 Mo. 633.

Nebraska. — Abbott *v.* Omaha Smelting, etc., Co., 4 Neb. 416.

(3) *Corporations Organized under General Laws*—(a) **Generally.** — As in the case of a corporation created by special statute, whose existence is proved by the production of its charter and proof of acts of user under it, so in the case of a corporation formed under the provisions of a general corporation law, proof of the articles of association, filed in accordance with the provisions of the law, and of user thereunder, is sufficient *prima facie* to establish it as a body corporate in fact as well as in name.[1]

(b) **Articles of Association and Certificate.** — In some of the states statutes have been enacted providing that a copy of the articles of association filed in pursuance of the several statutes and certified by the proper officer, or in some cases a certificate from such officer that the articles have been filed in accordance with law, shall be *prima facie* evidence of due incorporation in all collateral proceedings.[2]

New York. — All Saints Church *v.* Lovett, 1 Hall (N. Y.) 191; Whitford *v.* Laidler, 94 N. Y. 145, 46 Am. Rep. 131; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75; Benesch *v.* John Hancock Mut. L. Ins. Co., (C. Pl.) 11 N. Y. Supp. 348.

Vermont. — Stone *v.* Congregational Soc., 14 Vt. 86.

See the title De Facto Corporations.

But the fact of incorporation cannot be proved by parol when material and not collaterally in issue. Maddock *v.* Root, 72 Hun (N. Y.) 98; Nicoll *v.* Clark, 13 Misc. Rep. (N. Y. C. Pl.) 128.

1. Proof of Corporate Existence under General Laws. — Marsh *v.* Astoria Lodge No. 112, 27 Ill. 421; Ewing *v.* Robeson, 15 Ind. 26; Dooley *v.* Cheshire Glass Co., 15 Gray (Mass.) 494; Eaton *v.* Aspinwall, 19 N. Y. 119, *affirming* 6 Duer (N. Y.) 176, 13 How. Pr. (N. Y.) 184; Toledo Bank *v.* International Bank, 21 N. Y. 542; Leonardsville Bank *v.* Willard, 25 N. Y. 574; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75.

Utah. — Where title is traced through corporations which are not parties to the record, and with which defendant has no privity, proof of their existence as corporations *de facto* by their articles of incorporation duly made is sufficient *prima facie*. Tarpey *v.* Deseret Salt Co., 5 Utah 494.

Acts of User under Colorable Organization. — Under general acts for the formation of corporations, if the papers filed by which the corporation is sought to be created are colorable, but so defective that in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person. Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75. See also Dannebroge Gold Quartz Min. Co. *v.* Allment, 26 Cal. 286, in which the certificate was admitted in evidence to prove corporate existence, though defective owing to the failure of one of the corporators to duly acknowledge it. And see the title De Facto Corporations; also *supra*, this title, *Corporations Created by Special Charter—Proof of User.*

Subscription Paper Need Not Be Shown. — Where a company has been organized and received its charter it is not necessary to produce the stock subscription paper in order to prove organization. Fey *v.* Peoria Watch Co., 32 Ill. App. 618.

2. See for examples, Civ. Code of *California*, § 297; Laws of *New York*, 1852, c. 228; Act of *Pennsylvania*, Apr. 7, 1849; Gen. Stat. of *Washington*, § 1497; Marshall *v.* Macon County Sav. Bank, 108 N. Car. 639.

California. — In California, under the Civil Code, § 297, a copy of the certified copy of the articles of incorporation on file in the office of the secretary of state is admissible in evidence in proof of its corporate existence in an action in which the corporation is plaintiff. Fresno Canal, etc., Co. *v.* Warner, 72 Cal. 379. See also Dannebroge Gold Quartz Min. Co. *v.* Allment, 26 Cal. 286.

Want of Conformity to Statutory Requirements. — But a document purporting to be a certificate of incorporation, which is legally defective for want of conformity to statutory requirements, is not proof of a corporation *in esse*. McCallion *v.* Hibernia Sav., etc., Soc., 70 Cal. 163.

Illinois. — The evidence required by the statute of Illinois to prove the existence of a corporation is the certificate of the secretary of state of the complete organization of the corporation, making a part thereof a copy of all papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and the seal of state, and in addition to this, proof that such copy had been recorded in the office of the recorder of deeds of the county where the principal office of the company is located. Owen *v.* Shepard, 19 U. S. App. 336.

Maryland—Corporation Formed in West Virginia. — Where the certificate of incorporation disclosed no error upon its face, and was authenticated in such manner as was declared by the statute under which it was made should be sufficient evidence of the existence of the corporation, it was held that proof *aliunde* was inadmissible to impeach the corporate existence. Laflin, etc., Powder Co. *v.* Sinsheimer, 46 Md. 315, 24 Am. Rep. 522, *construing* Code West. Va., c. 54, § 10, the corporation having been formed under the provisions of the *West Virginia* statute.

Minnesota. — In Brown *v.* Corbin, 40 Minn. 508, the due incorporation of a company was shown by the introduction in evidence of a certified copy of the articles of association filed in the office of the secretary of state, and also by the record of the articles in the office of the register of deeds of the county where the principal place of business of the corporation was

Certificate of Commissioners. — Where commissioners have been specially deputed by the legislature to superintend the subscription to a corporation and decide and certify to the subscribers when the requisite amount of stock has been taken, and by whom, in order that the stockholders may make choice of directors and enter upon the appropriate business of the institution, the commissioners' certificate is conclusive of the due performance of the acts there recited.[1]

Certificate of Comptroller of Currency. — In the case of national banks the certificate of the comptroller of the currency to the effect that the requirements of law have been duly complied with, and that the corporation is organized to do business, is competent evidence of the existence of the corporation.[2]

(c) **Letters Patent.** — Where a general law is in existence authorizing the creation of a corporation by letters patent to be issued by a public officer upon the preliminary performance of certain things by the persons to be incorporated, and letters patent are duly issued reciting the performance of the required conditions and investing the corporation with the franchises of a body politic, they import conformity to the prerequisitions of the law authorizing their allowance, and are to be taken as *prima facie* evidence that they were regularly granted.[3]

to be situated. See the Laws of Minn. 1881, Ex. Sess., c. 62; 1885, c. 156; 1887, c. 132.

In New Jersey the recording and filing of the certificate of incorporation are not made conditions precedent to the legal existence of the corporation; they are merely the necessary evidence of such existence, and when produced prove the legal existence of the corporation "from the time of commencement fixed in said certificate." Vanneman *v.* Young, 52 N. J. L. 403.

Pennsylvania. — In Pennsylvania, under the Act of April 7, 1849, the legal proof of the existence of a corporation formed under the general manufacturing law of that year is prescribed to be a certificate of certain things, made out as required, recorded in the proper county, with a certified copy of the certificate filed in the office of the secretary of the commonwealth, indorsed by him, and then retained by the company. Cochran *v.* Arnold, 58 Pa. St. 399, *overruling* Paterson *v.* Arnold, 45 Pa. St. 410.

In Washington it is provided by statute that a copy of any certificate of incorporation of a domestic corporation certified by the secretary of state (or county auditor) shall be received in the courts as *prima facie* evidence of the facts therein stated, that is, generally, of the formation of a company. General Statutes of Washington, § 1497. See Knapp *v.* Strand, 4 Wash. 686.

Wyoming. — For the construction of a similar statute in Wyoming, see Edelhoff *v.* State, (Wyoming 1894) 36 Pac. Rep. 627.

Massachusetts — Conclusive Evidence. — By the provisions of the Massachusetts Acts of 1870, § 11, c. 224 (Mass. Pub. Stat. 1882, p. 574, § 21), a certificate of incorporation in the form provided by the statute, issued by the secretary of the commonwealth, is made conclusive evidence of the existence of the corporation. See Telephone Cases, 126 U. S. 571.

1. Litchfield Bank *v.* Church, 29 Conn. 137; Tar River Nav. Co. *v.* Neal, 3 Hawks (10 N. Car.) 520. *Compare* Bill *v.* Fourth Great Western Turnpike Co., 14 Johns. (N. Y.) 416.

2. **Certificate Admissible in Evidence.** — Mix *v.* National Bank, 91 Ill. 20, 33 Am. Rep. 44; Tapley *v.* Martin, 116 Mass. 275, relating to competency in state courts. See also Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234.

Effect of Certificate. — But there is not entire uniformity among decisions as to the effect of such certificate. Some of the cases appear to hold merely that it makes out a *prima facie* case in favor of the existence of the corporation when supplemented by other evidence of like import. U. S. Rev. Stat., § 5169; Mix *v.* National Bank, 91 Ill. 20, 33 Am. Rep. 44; Merchants' Nat. Bank *v.* Glendon Co., 120 Mass. 97; Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234; Rock Island First Nat. Bank *v.* Loyhed, 28 Minn. 396; Merchants' Exch. Nat. Bank *v.* Cardozo, 35 N. Y. Super. Ct. 162.

Yet other rulings, perhaps more authoritative, including a decision of the United States Supreme Court, record the certificate of the comptroller as conclusive as to the completeness of the organization of a national bank. Casey *v.* Galli, 94 U. S. 673; Thatcher *v.* West River Nat. Bank, 19 Mich. 196; National Bank *v.* Phoenix Warehousing Co., 6 Hun (N. Y.) 71.

For a Full Treatment of This Subject, reference is made to the title NATIONAL BANKS.

3. **Letters Patent.** — In a suit by a corporation, where its existence as such was denied by the answer, it exhibited letters patent issued under the great seal of the state of Pennsylvania, signed by the governor and countersigned by the secretary of state. The court, in holding this sufficient *prima facie* evidence of the existence of the corporation, said: "That the governor had authority to cause these letters to be issued is indisputable, and if they do not warrant a presumption that they were rightfully issued, and, therefore, that what the law prescribes as necessary to be done to that end had been done, it is difficult to perceive what significance they have. * * * It has been held, and is settled law, that patents granted by a state or the general government are to be taken as *prima facie* evidence that they were regularly granted, and that they import con-

(d) **Acts of User.** — The same evidence of acts of user is effectual in the case of a corporation formed under general laws as in the case of a corporation created by special act.[1]

(4) *Effect of Estoppel upon Proof of Incorporation.* — A person who contracts with a corporation, whether it be by a subscription to its stock or by promissory note, bond, mortgage, or other form of contract, is, in a suit upon such contract, estopped to deny the existence of the corporation;[2] and similarly, where a body of persons hold themselves out as a corporation and contract as such, they will be estopped to deny their corporate character.[3]

b. IN CRIMINAL CASES. — Where it becomes necessary in a criminal case, other than one against the corporation itself, to prove corporate existence, evidence of an existence *de facto* is usually sufficient, and this may be proved by parol. Strict proof as to the organization of the corporation under its charter is not required.[4]

formity to the prerequisitions of the laws authorizing their allowance. Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. (U. S.) 458; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 797." Dorsey Harvester Revolving-Rake Co. *v.* Marsh, 6 Fisher Pat. Cas. 387.

1. See *supra*, this section, *Corporations Created by Special Charter — Proof of User.* See also the title DE FACTO CORPORATIONS.

2. Estoppel. — Andes *v.* Ely, 158 U. S. 312; Close *v.* Glenwood Cemetery, 107 U. S. 466; Andrews *v.* National Foundry, etc., Works, 77 Fed. Rep. 774; Snider's Sons' Co. *v.* Troy, 91 Ala. 224, 24 Am. St. Rep. 887, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 198; Shasta Bank *v.* Boyd, 99 Cal. 604; Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190; Hickox, etc., Pub. Co. *v.* Dawes Mfg. Co., 64 Ill. App. 630; Hause *v.* Mannheimer, (Minn. 1897) 69 N. W. Rep. 810; Bradley *v.* Reppell, 133 Mo. 545, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 198.

For a Full Treatment of This Subject, see the titles DE FACTO CORPORATIONS; ESTOPPEL; ULTRA VIRES.

3. McCullough *v.* Talladega Ins. Co., 46 Ala. 376; Beal *v.* Bass, 86 Me. 325; Dooley *v.* Cheshire Glass Co., 15 Gray (Mass.) 494; Ten Eyck *v.* Pontiac, etc., R. Co., 74 Mich. 226, 16 Am. St. Rep. 633; Scheufler *v.* Grand Lodge, etc., 45 Minn. 256. See for a full treatment the titles referred to in the last note.

Appearance Is Admission of Corporate Existence. — If a corporation appears to a suit, it cannot deny its own existence, and such appearance is conclusive evidence of its legal existence for the purposes of a pending case. Gauthier Decorating Co. *v.* Ham, 3 Colo. App. 559, *citing* Missouri River, etc., R. Co. *v.* Shirley, 20 Kan. 660; Seaton *v.* Chicago, etc., R. Co., 55 Mo. 416.

4. De Facto Existence Sufficient — Parol Evidence — *England.* — Reg. *v.* Langton, 2 Q. B. Div. 296.

United States. — U. S. *v.* Amedy, 11 Wheat. (U. S.) 392.

California. — People *v.* Frank, 28 Cal. 507; People *v.* Hughes, 29 Cal. 257; People *v.* Ah Sam, 41 Cal. 645; People *v.* Barric, 49 Cal. 342.

Georgia. — State *v.* Calvin, R. M. Charlt. (Ga.) 151.

Indiana. — Smith *v.* State, 28 Ind. 321.

Kansas. — State *v.* Thompson, 23 Kan. 338, 33 Am. Rep. 165.

Nebraska. — Braithwaite *v.* State, 28 Neb. 832.

New York. — People *v.* Chadwick, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 163; Johnson *v.* People, 4 Den. (N. Y.) 364; People *v.* Caryl, 12 Wend. (N. Y.) 547, 3 Park. Cr. Rep. (N. Y.) 326; People *v.* Davis, 21 Wend. (N. Y.) 309; People *v.* Stearns, 21 Wend. (N. Y.) 409.

Ohio. — Sasser *v.* State, 13 Ohio 453; Reed *v.* State, 15 Ohio 217; Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121; Burke *v.* State, 34 Ohio St. 79.

Rhode Island. — State *v.* Habib, 18 R. I. 558.

Wyoming. — Edelhoff *v.* State, (Wyoming 1894) 36 Pac. Rep. 627.

Proof of Charter and User. — Proof of a statute chartering a corporation under a particular name, and of the subsequent public exercise of the franchise for many years by an association under that name, will warrant the finding of the actual existence of the corporation and of its management and ownership of property which it employs in exercising the franchise. Com. *v.* Bakeman, 105 Mass. 53.

Illustration. — In White *v.* State, 69 Ind. 273, an association of persons under the corporate name of the "Trustees of," etc., had for nearly twenty-five years assumed to act and had acted as a corporation, and it was held that an alleged want of corporate existence could not be shown collaterally, in a prosecution for a trespass committed on lands held in the corporate name, and be made an available defense. The court said: "They own and are in possession of the land described in the indictment, and owned and possessed the same under their corporate name long before and at the time of the commission of the trespass for which the appellant is prosecuted, and that is sufficient for the purposes of this case."

Statute Construed — Missouri. — Under the provisions of the Missouri statute that "if on the trial or other proceeding in a criminal case the existence, constitution, or powers of any banking company or corporation shall become material or be in any way drawn in question, it shall not be necessary to produce a certified copy of the charter or act of incorporation, but the same may be proved by general reputation, or by the printed statute book of the state, government, or country by which such corporation was created" (Wagner's Stat., p. 1104, § 22), it has been held that on an indictment

5. Amendment and Repeal — *a.* RIGHT TO AMEND OR REPEAL — (1) *In General* — **Charter an Inviolable Contract.** — Since the decision delivered in the Dartmouth College Case,[1] it has uniformly been held that, under the *United States* Constitution, the charter of a private corporation is a contract between the state granting it and the incorporators, which may not, subsequently, be infringed in any manner. While this decision has often been gravely questioned with much force and ability, it has nevertheless been so uniformly upheld by the Supreme Court of the United States and so often followed by the courts of the various states, that it would now be worse than useless to call its correctness into question.[2]

against an agent of an express company for embezzlement, parol evidence is admissible to show the incorporation of the company. State *v.* Cheek, 63 Mo. 364.

Contra. — In *Rhode Island* it has been held that it is necessary upon the trial of an indictment for forgery on a corporation for the state to prove the organization of the company under its act of incorporation, in order to show that it has been defrauded as alleged. State *v.* Murphy, 17 R. I. 698.

Similarly, in Jones *v.* State, 5 Sneed (Tenn.) 346, it was held, under the provisions of Tenn. Act of 1829, c. 23, §§ 31-70, that where an indictment for passing counterfeit banknotes alleged the existence in another state of the banking corporation whose bills were counterfeited, it was necessary, upon the trial, to produce in evidence an authenticated copy of the charter of said bank, or a book purporting to be the public statutes of said state in which said charter was printed.

General Reputation of Corporate Existence. — Where the crime of embezzlement is charged to have been committed against a corporation, evidence of general reputation of the corporate existence of the injured party is sufficient. Fleener *v.* State, 58 Ark. 98; Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121.

1. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

2. Charter as a Contract — *United States.* — Providence Bank *v.* Billings, 4 Pet. (U. S.) 514; Society, etc., *v.* New Haven, 8 Wheat. (U. S.) 464; Planters' Bank *v.* Sharp, 6 How. (U. S.) 301; Vincennes University *v.* Indiana, 14 How. (U. S.) 268; Piqua Branch of Ohio State Bank *v.* Knoop, 16 How. (U. S.) 369; Dodge *v.* Woolsey, 18 How. (U. S.) 331; Mechanics', etc., Bank *v.* Debolt, 18 How. (U. S.) 380, *reversing* 1 Ohio St. 592; Binghamton Bridge, 3 Wall. (U. S.) 51; Home of Friendless *v.* Rouse, 8 Wall. (U. S.) 430; Pennsylvania College Cases, 13 Wall. (U. S.) 190; Wilmington, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 264; Delaware Railroad Tax, 18 Wall. (U. S.) 206; Greenwood *v.* Union Freight R. Co., 105 U. S. 13; New Orleans Gas Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650; New Orleans Water-Works Co. *v.* Rivers, 115 U. S. 674; Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, *affirming* 110 N. Car. 137; Allen *v.* McKeen, 1 Sumn. (U. S.) 276; Sala *v.* New Orleans, 2 Woods (U. S.) 188; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222; Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.) 436; Hawthorne *v.* Calef, 2 Wall. (U. S.) 10.

Alabama. — State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30. See also Logwood *v.* Planters', etc., Bank, Minor (Ala.) 23.

Arkansas. — St. Louis, etc., R. Co. *v.* Loftin, 30 Ark. 693.

Colorado. — County Com'rs *v.* Colorado Seminary, 12 Colo. 497. See also People *v.* Jobs, 7 Colo. 475; Brown *v.* Denver, 7 Colo. 305.

Connecticut. — Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 27 Am. Dec. 700; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Washington Bridge Co. *v.* State, 18 Conn. 53; Lothrop *v.* Stedman, 42 Conn. 583.

Delaware. — Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506.

Georgia. — Young *v.* Harrison, 6 Ga. 130; Central R., etc., Co. *v.* State, 54 Ga. 401.

Illinois. — People *v.* Marshall, 6 Ill. 672; Bank of Republic *v.* Hamilton County, 21 Ill. 53; Bruffett *v.* Great Western R. Co., 25 Ill. 353; Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537; Bakewell *v.* Board of Education, (Ill. 1893) 33 N. E. Rep. 186; Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 140. See also Bush *v.* Shipman, 5 Ill. 186.

Indiana. — Aurora, etc., Turnpike Co. *v.* Holthouse, 7 Ind. 59; Edwards *v.* Jagers, 19 Ind. 407.

Iowa. — See Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, 20 Am. Rep. 592.

Kentucky. — Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; Maysville Turnpike Road Co. *v.* How, 14 B. Mon. (Ky.) 342; Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642; Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.) 592, 96 Am. Dec. 259; Hamilton *v.* Keith, 5 Bush (Ky.) 458; Covington *v.* Covington, etc., Bridge Co., 10 Bush (Ky.) 69; Fry *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 314. See also Gregory *v.* Shelby College, 2 Metc. (Ky.) 589.

Louisiana. — Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453; Montpelier Academy *v.* George, 14 La. 395, 33 Am. Dec. 585.

Maine. — Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34; Bowdoinham *v.* Richmond, 6 Me. 112, 19 Am. Dec. 197; Richardson *v.* Brown, 6 Me. 355; New Gloucester School Fund *v.* Bradbury, 11 Me. 118, 26 Am. Dec. 515; State *v.* Noyes, 47 Me. 189; Yarmouth *v.* School Funds, 1 Am. L. Reg. 596.

Maryland. — Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Norris *v.* Abingdon Academy, 7 Gill & J. (Md.) 7; State University *v.* Williams, 9 Gill & J. (Md.) 365; St. John's College *v.* State, 15 Md. 330; Sheriff *v.* Lowndes, 16 Md. 357; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263.

Prohibition Extends to Constitutions. — The prohibition in the Constitution of the

Massachusetts. — Wales *v.* Stetson, 2 Mass. 143; King *v.* Dedham Bank, 15 Mass. 447, 8 Am. Dec. 112; Nichols *v.* Bertram, 3 Pick. (Mass.) 342; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344; Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106. See also Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339.

Michigan. — State Bank *v.* Hastings, 1 Dougl. (Mich.) 225; Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140; People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285; Flint, etc., Plank Road Co. *v.* Woodhull, 25 Mich. 99, 12 Am. Rep. 233.

Minnesota. — McRoberts *v.* Washburne, 10 Minn. 23.

Mississippi. — Payne *v.* Baldwin, 3 Smed. & M. (Miss.) 661; Commercial Bank *v.* State, 6 Smed. & M. (Miss.) 599; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517. See also Aberdeen Female Academy *v.* Aberdeen, 13 Smed. & M. (Miss.) 645.

Missouri. — Sloan *v.* Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; State *v.* Greer, 78 Mo. 188.

Montana. — Territory *v.* Virginia Road Co., 2 Mont. 96.

New Hampshire. — Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Ashuelot R. Co. *v.* Elliot, 58 N. H. 451.

New Jersey. — Society, etc., *v.* Morris Canal, etc., Co., 1 N. J. Eq. 157; Passaic, etc., Bridges *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 706.

New York. — McLaren *v.* Pennington, 1 Paige (N. Y.) 102; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351; Benson *v.* New York, 10 Barb. (N. Y.) 223.

North Carolina. — State Bank *v.* Cape Fear Bank, 13 Ired. L. (35 N. Car.) 75; Atty.-Gen. *v.* Charlotte Bank, 4 Jones Eq. (57 N. Car.) 287. See also Mills *v.* Williams, 11 Ired. L. (33 N. Car.) 558; Den *v.* Foy, 1 Murph. (5 N. Car.) 58; Wilmington, etc., R. Co. *v.* Alsbrook, 110 N. Car. 137, *affirmed* 146 U. S. 279; State *v.* Richmond, etc., R. Co., 73 N. Car. 527, 21 Am. Rep. 473.

Ohio. — State *v.* Commercial Bank, 7 Ohio, pt. 1, 125; State *v.* Moore, 5 Ohio St. 444; Ross County Bank *v.* Lewis, 5 Ohio St. 449. *Compare* Mechanics', etc., Branch of State Bank *v.* Debolt, 1 Ohio St. 592, *reversed* 18 How. (U. S.) 380; Toledo Bank *v.* Toledo, 1 Ohio St. 623.

Pennsylvania. — State Bank *v.* Com., 19 Pa. St. 151; Brown *v.* Hummel, 6 Pa. St. 86; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; Hays *v.* Com., 82 Pa. St. 518; Com. *v.* Erie, etc., Transp. Co., 107 Pa. St. 112; Com. *v.* U. S. Bank, 2 Ashm. (Pa.) 349; Second, etc., St. Pass. R. Co. *v.* Green, etc., St. Pass. R. Co., 3 Phila. (Pa.) 430; Brown *v.* Fairmount Gold, etc., Min. Co., 10 Phila. (Pa.) 32; Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 P. & W. (Pa.) 184. See also Gray *v.* Monongahela Nav. Co., 2 W. & S. (Pa.) 156, 37 Am. Dec. 500.

South Carolina. — State *v.* Hayward, 3 Rich. L. (S. Car.) 389.

Tennessee. — White's Creek Turnpike Co. *v.* Davidson County, 3 Tenn. Ch. 397.

Texas. — Houston, etc., R. Co. *v.* Texas, etc., R. Co., 70 Tex. 649.

Vermont. — Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Caledonia County Grammar School *v.* Burt, 11 Vt. 632.

Virginia. — Old Dominion Bank *v.* McVeigh, 20 Gratt. (Va.) 457.

See also generally, upon this subject, the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; TAXATION (CORPORATE).

Consideration of the Contract. — "Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified; and the grant of the franchise on that account can no more be resumed by the legislature, or its benefits diminished or impaired without the assent of the corporators, than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted." Pennsylvania College Cases, 13 Wall. (U. S.) 190.

Distinction Between Powers Secured by Contract and Those That Are Mere Endowments of Existence. — In Bank of Republic *v.* Hamilton County, 21 Ill. 53, *cited* and *approved* in Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755, Caton, C. J., said: "The trouble has been in considering what the legislature may and may not do with corporations of its own creation, that we have too much lost sight of the distinction between those powers which are secured to them by contract and those which are mere endowments of existence. The former are their property, of which they cannot be deprived without just compensation; the latter are elements of existence, imparted to them by the law of their being, and are held by them like the natural rights of the natural person, subject to be controlled and modified by the legislature, the same as it may control and modify the natural endowments of the natural person. It may not be easy at all times to distinguish between those rights which are secured by the contract contained in their charter, and those powers which are conferred upon them as capacities or elements of their being. Indeed, the judicial mind has not, to any great extent, been led to inquire into this distinction, but it has been mostly occupied in defending and maintaining those rights which are secured by what is called this legislative contract, and it has required all the weight of the judicial department of the government to protect these rights against the encroachments which have been sometimes attempted by the strong arm of the legislature. While we must be unyielding in resistance to such encroachments whenever attempted, we must not forget that these artificial beings must be subject to government and subordinate to legislation, precisely the same as an individual or natural person."

United States against the passage of laws impairing the obligation of contracts, applies to the constitution as well as the laws of each state.[1]

(2) *When Contractual Relation Arises.* — Until fully accepted by the corporators, the legislature has power to amend or repeal an act of incorporation; the mere passage of the act not constituting a contract.[2]

(3) *Power of Parliament to Amend or Repeal.* — In *England*, the power of Parliament is unrestrained, and no previous Parliament can inviolably bind its successors by its acts. Consequently, a charter of incorporation granted either by the sovereign or by Parliament, is subject to alteration, amendment, or repeal by a subsequent or the same Parliament. It may be added, however, that, in the few cases which have arisen in which a subsequent Parliament projected an alteration or amendment in the charters of previously incorporated companies, the proposition to do so has been met with general disapproval, and has been in some cases defeated. Although paramount in its rights, and boundless in its operation, the Parliament of Great Britain has always respected vested rights.[3]

b. RESERVED RIGHT TO AMEND OR REPEAL — (1) *In General.* — As has been stated above, the charter of a private corporation is a contract between the state and the corporators which may not be infringed. But, in order to protect themselves from the consequences which would arise from granting privileges and franchises over which they would have no subsequent control, most, if not all, of the states have adopted the suggestion thrown out by Mr. Justice Story in the Dartmouth College Case,[4] and have provided, either in their constitutions, by general laws, or most frequently in the charter itself, for the reservation of power to themselves to amend, alter, or repeal charters at will.[5]

1. New Orleans Gas Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

2. Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Mississippi Soc. of Arts, etc., *v.* Musgrove, 44 Miss. 820, 7 Am. Rep. 723. See also Chincleclamouche Lumber, etc., Co. *v.* Com., 100 Pa. St. 438. And see *supra*, this title, *Acceptance of Charter*.

3. **Power of Parliament.** — 1 Bl. Com. 484; Sawyer's Arg. *Quo Warranto* 13; 2 Kyd on Corp. 446; 1 Hallam's Const. Hist. of England, 94 *et seq.* See also Bracton L. 4 fol. 228; Bonham's Case, 8 Coke 114; London *v.* Wood, 12 Mod. 687; Day *v.* Savadge, Hob. 85. And see State University *v.* Williams, 9 Gill & J. (Md.) 408.

Illustration. — "When, in 1783, a bill was introduced for the purpose of remodeling the charter of the East India Company, it was opposed by Mr. Pitt and Lord Thurlow, not only as a dangerous violation of the charter of the company, but as a total subversion of the law and constitution of the country. In the nervous language of the latter, it was 'an atrocious violation of private property, which cut every Englishman to the bone.'" Angell & Ames on Corporations 834.

4. **Suggested Remedy of Mr. Justice Story.** — In Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, Mr. Justice Story said: "In my judgment, it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons without its assent, is a violation of the obligations of that charter. If the legislature means to claim such an authority it must be reserved in the grant."

In Albany, etc., R. Co. *v.* Brownell, 24 N. Y. 345, *overruling* Miller *v.* New York, etc., R. Co., 21 Barb. (N. Y.) 515, it is said that "the difficulties which arose out of the rule that the grant of corporate power for individual emolument created a contract between the corporators and the state, led to" the custom of reserving a power to the legislature in all charters of incorporation to amend, alter, or repeal them at will."

5. **Reservation of Right.** — See cases *infra*, this section. See also generally the following cases:

United States. — Sherman *v.* Smith, 1 Black (U. S.) 587; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460.

Arkansas. — St. Louis, etc., R. Co. *v.* Ryan, 56 Ark. 245.

California. — McGowan *v.* McDonald, 111 Cal. 57.

Illinois. — Illinois Cent. R. Co. *v.* People, 95 Ill. 313, 1 Am. & Eng. R. Cas. 188.

Iowa. — Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, 20 Am. Rep. 592.

Kentucky. — Deposit Bank *v.* Daviess County, (Ky. 1897) 39 S. W. Rep. 1030.

Maine. — Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; State *v.* Maine Cent. R. Co., 66 Me. 488.

Maryland. — Sprigg *v.* Western Tel. Co., 46 Md. 67; Jackson *v.* Walsh, 75 Md. 304.

Massachusetts. — Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103.

Subsequent Change of Constitution or Statutes — Where There Is No Reservation. — A charter granted without the reserved right to alter or repeal is not affected by subsequent changes in the statutes or constitutions of the states.[1]

Where There Is a Reservation. — Whether or not an enactment of the legislature shall operate as a repeal or alteration of a charter where the power is reserved to alter or repeal, is a question of legislative intent. Repeals by implication are not favored, and the act will not be held to repeal the charter unless there is an express intention to do so, or a necessary implication to that effect arising from the enactment.[2]

Where Two Irrepealable Charters Are Consolidated a new company is thereby formed which becomes subject to any power of amendment existing in the legislature at the date of the consolidation.[3]

(2) *Constitutional Reservation.* — In many of the states of the Union there are incorporated in their constitutions provisions with regard to a reservation to the state of a power to amend, alter, or repeal the charters of corporations. In the main, these provisions are that all charters granted by the state shall be subject to amendment or repeal.[4]

Michigan. — Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140.

Minnesota. — Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241.

Missouri. — Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

New Hampshire. — Ashuelot R. Co. *v.* Elliot, 58 N. H. 451.

New Jersey. — State *v.* Newark, 35 N. J. L. 157; State *v.* Railroad Taxation Com'r, 37 N. J. L. 228.

Pennsylvania. — Union Imp. Co. *v.* Com., 69 Pa. St. 140.

Rhode Island. — Gardner *v.* Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238.

Virginia. — Yeaton *v.* Old Dominion Bank, 21 Gratt. (Va.) 593.

Wisconsin. — West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257.

And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

No Irrepealable Contract can result from provisions in a charter, which are made in terms subject to be altered, amended, or repealed at the pleasure of the power granting them, any more than a contract in any other manner entered into, which contains an express provision that it shall be subject to be abrogated or altered at the pleasure of one of the parties, can be considered as an irrepealable contract. State *v.* Miller, 30 N. J. L. 368, *affirmed* 31 N. J. L. 521. See also State *v.* Railroad Taxation Com'r, 37 N. J. L. 228.

1. Subsequent Legislation. — Dodge *v.* Woolsey, 18 How. (U. S.) 331; Mechanics', etc., Bank *v.* Thomas, 18 How. (U. S.) 384; Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.) 436; Franklin Branch Bank *v.* Ohio, 1 Black (U. S.) 474; Henry County *v.* Nicolay, 95 U. S. 619; New Orleans Gas Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650; New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674.

2. Bibb *v.* Hall, 101 Ala. 79; Mechanics', etc., Bank *v.* Bridges, 30 N. J. L. 112; State *v.* Railroad Taxation Com'r, 37 N. J. L. 228. See also Rex *v.* Northleach, etc., Roads, 5 B. & Ad. 978, 27 E. C. L. 250; Daw *v.* Metropolitan Board of Works, 12 C. B. N. S. 161, 104 E. C. L. 161; Great Cent. Gas Consumers' Co. *v.* Clarke, 13 C. B. N. S. 838, 106 E. C. L. 838; Conservators *v.* Hall, L. R. 3 C. P. 415; Donworth *v.* Coolbaugh, 5 Iowa 300; United Hebrew Benev. Assoc. *v.* Benshimol, 130 Mass. 325; Freehold Mut. Loan Assoc. *v.* Brown, 29 N. J. Eq. 121; Industrial School Dist. *v.* Whitehead, 13 N. J. Eq. 290. And see the title STATUTES.

3. Consolidation of Corporations. — Shields *v.* Ohio, 95 U. S. 319; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359. See also the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 818.

4. Constitutional Reservation of Power. — Const. of *Alabama*, art. 14, § 1; Const. of *Arkansas*, art. 12, § 6; Const. of *Colorado*, art. 15, § 3; Const. of *Delaware*, art. 2, § 17; Const. of *Maine*, art. 4, § 14; Const. of *Maryland*, art. 3, § 47; Const. of *New York*, art. 8, § 1; Const. of *Pennsylvania*, art. 16, § 10; Const. of *Texas*, art. 1, § 17.

Repeal of General Corporation Laws. — And it is provided in some states that general laws for the creation of corporations may be amended or repealed. Const. of *Alabama*, art. 14, § 1; Const. of *Arkansas*, art. 12, § 6; Const. of *California*, art. 12, § 1; Const. of *Maryland*, art. 3, § 47; Const. of *New York*, art. 8, § 1; Const. of *Oregon*, art. 11, § 2; Const. of *Tennessee*, art. 11, § 8; Const. of *Wisconsin*, art. 11, § 1. See generally the constitutions of the several states, and the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

Arkansas Constitutional Provision Construed. — In St. Louis, etc., R. Co. *v.* Paul, (Ark. 1897) 40 S. W. Rep. 705, it was held that under art. 12, § 6 of the constitution of Arkansas, providing for the alteration or amendment of the charters of corporations, the legislature of that state had the power to enact the following statute: "Whenever any corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge, with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages of such servant or employee then earned at the contract rate without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and if the same be not paid on such

Reservation Need Not Be Contained in Charter. — It seems almost superfluous to add that, in view of the fact that the constitution is the supreme and controlling law, if it contains a reservation of power to the legislature to alter, amend, or repeal every charter granted to a private corporation, there is no necessity for such a reservation to be made in the charter itself.[1]

(3) *Reservation under General Laws.* — In many of the states the power to amend, alter, or repeal the charters of corporations is reserved by statute.[2]

(4) *Reservation in Charter* — **In General.** — In those states in which incorporation, then as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid, provided such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time."

Limitation upon Reservation. — In *Iowa* laws creating corporations can only be altered and repealed by a two-thirds vote of those present of each house of the legislature. Const. of Iowa, art. 8, § 12.

While in *Michigan* a two-thirds vote of each house elected is required. Const. of Michigan, art. 15, § 8; Atty.-Gen. *v.* Joy, 55 Mich. 94.

Protection of Vested Rights. — In the constitutions of some of the states it is provided that the charters of private corporations cannot be altered or repealed so as to destroy vested rights. Const. of *Oregon*, art. 11, § 2; Const. of *Tennessee*, art. 11, § 8. And see the constitutional provisions of the several states.

Corporators Protected. — And it is sometimes provided that a private charter must not be so altered or repealed as to work injustice to the corporators. Const. of *Alabama*, art. 14, § 10; Const. of *Colorado*, art. 15, § 3; Const. of *Pennsylvania*, art. 16, § 10; Chincleclamouche Lumber, etc., Co. *v.* Com., 100 Pa. St. 438. And see the constitutions of the several states.

Constitutional Provisions as to Existing Corporation.—In *Alabama*, *Arkansas*, *Colorado*, *Georgia*, *Louisiana*, *Missouri*, *Pennsylvania*, and *Texas*, it is provided by their several constitutions that no general or special law for the benefit of corporations existing at the time of the adoption of the constitution shall be passed, except on condition that such corporation shall thereafter hold its charter subject to the provisions of the constitution. See 1 Stimson's Am. Stat. Law, § 444. See also Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352; Pennsylvania R. Co. *v.* Miller, 132 U. S. 75.

1. State *v.* Northern Cent. R. Co., 44 Md. 131. See also Delaware R. Co. *v.* Tharp, 5 Harr. (Del.) 454.

2. **Reservation under General Laws** — *United States.* — Miller *v.* State, 15 Wall. (U. S.) 478; Holyoke Co. *v.* Lyman, 15 Wall. (U. S.) 500; Mowrey *v.* Indianapolis, etc., R. Co., 4 Biss. (U. S.) 78; Shields *v.* Ohio, 95 U. S. 319; Hoge *v.* Richmond, etc., R. Co., 99 U. S. 348; Greenwood *v.* Union Freight R. Co., 105 U. S. 13; Close *v.* Glenwood Cemetery, 107 U. S. 466; Spring Valley Water Works *v.* Schottler, 110 U. S. 347.

Iowa. — Sioux City St. R. Co. *v.* Sioux City, 78 Iowa 367, 742, 138 U. S. 98.

Kentucky. — Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.) 592, 96 Am. Dec. 259.

Maine. — Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

Massachusetts. — Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424; Crease *v.* Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61.

Missouri. — Granby Min., etc., Co. *v.* Richards, 95 Mo. 106.

New Jersey. — State *v.* Person, 32 N. J. L. 134; State *v.* Railroad Taxation Com'r, 37 N. J. L. 228.

New York. — Schenectady, etc., Plank-road Co. *v.* Thatcher, 11 N. Y. 102; Suydam *v.* Moore, 8 Barb. (N. Y.) 358.

Pennsylvania. — Allen *v.* Buchanan, 9 Phila. (Pa.) 283; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; Com. *v.* Fayette County R. Co., 55 Pa. St. 452.

Rhode Island. — State *v.* Brown, etc., Mfg. Co., 18 R. I. 16.

See also Pennsylvania College Cases, 13 Wall. (U. S.) 190. And see the title IMPAIRMENT OF OBLIGATIONS OF CONTRACTS.

Illustrations. — The state of New York established a general banking law containing a provision that members of an association organized under it should not be individually liable for its debts, unless by their own agreement, but reserved to the state the right to repeal or change the law. Afterwards an amendment to the state constitution, and an act of the legislature, declared that the shareholders of all banks which should continue to issue notes after a certain time must be individually responsible. The Supreme Court of the United States held that the stockholders of a bank organized under the general banking law, before the amendment of the constitution, were liable for the debts of the association in their individual capacity; and that the fact that the stockholders had declared in their articles of association that they would not be individually bound for the debts of the concern would not affect their liability. Sherman *v.* Smith, 1 Black (U. S.) 587. See also Matter of Lee's Bank, 21 N. Y. 9.

In Massachusetts General Hospital *v.* State Mut. L. Assur. Co., 4 Gray (Mass.) 227, it was held that under its general reserved power the legislature might vary the measure and enlarge the proportion of the profits which a mutual life insurance company was required by the terms of its charter to pay to a charitable institution.

Not a Reservation of Judicial Powers. — A reservation by the legislature of the right to repeal an act of incorporation for a violation of the charter or other default, is not unconstitutional on the ground of being a reservation of judicial powers, for an inquiry by the legislature into the affairs or defaults of a corporation with a view to continue or discontinue it, is not a judicial act. Crease *v.* Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61. See the title DISSOLUTION OF CORPORATIONS.

tion by special charter is allowed, the power often being confined to special classes, or in cases where the object had in view cannot be accomplished otherwise,[1] it is the general practice to insert in such charter a provision reserving to the state the power under discussion.[2]

Reservation Not a Mere Power. — The reservation of the rights of alteration and repeal in the charter of a corporation has none of the characteristics of a mere power, which, when once exercised, is exhausted. Its effect is on the legislative grant itself, to prevent its becoming, what it otherwise might become, a contract with the state. An act containing such provision confers a mere privilege, subject at any time to be withdrawn or modified at the will of the legislature.[3]

Reservation of Right in Amended Charter. — Where a corporation existing under a charter which reserves no right of alteration, amendment, or repeal, subsequently accepts an amendment to its charter, by which such right is reserved, the legislature has authority afterwards to alter and amend such amended charter; since, by the acceptance of the additional privileges and powers on the terms prescribed, the company surrenders the inviolability of its contract to the discretion of the legislature.[4]

Reserved Power to Annul upon Certain Terms and Conditions. — When a power to annul a charter is reserved upon certain terms or conditions, there can be no objection to its exercise, provided the case contemplated has arisen.[5]

1. 1 Stimson's Am. St. Law, § 441 *et seq.*

2. **Reservation in Charter** — *Connecticut.* — Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149, 17 Conn. 79, *affirmed* 10 How. (U. S.) 511; English *v.* New Haven, etc., Co., 32 Conn. 240.

Iowa. — Miners' Bank *v.* U. S., 1 Greene (Iowa) 553, 1 Morr. (Iowa) 482.

Maryland. — Sprigg *v.* Western Tel. Co., 46 Md. 67.

Massachusetts. — Wales *v.* Stetson, 2 Mass. 143.

Minnesota. — Perrin *v.* Oliver, 1 Minn. 202.

New Hampshire. — Ashuelot R. Co. *v.* Elliot, 58 N. H. 451.

New York. — Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Northern R. Co. *v.* Miller, 10 Barb. (N. Y.) 260; White *v.* Syracuse, etc., R. Co., 14 Barb. (N. Y.) 559; Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457; McLaren *v.* Pennington, 1 Paige (N. Y.) 102; Joslyn *v.* Pacific Mail Steamship Co., 12 Abb. Pr. N. S. (N. Y. C. Pl.) 329.

Ohio. — State *v.* Granville Alexandrian Soc., 11 Ohio 1.

Rhode Island. — Gardner *v.* Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238.

Tennessee. — Ferguson *v.* Miners', etc., Bank, 3 Sneed (Tenn.) 609.

Virginia. — Anderson *v.* Com., 18 Gratt. (Va.) 295; Robinson *v.* Gardiner, 18 Gratt. (Va.) 509.

See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

Power to Repeal Includes Power to Amend. — A reserved legislative power to repeal a charter includes the subordinate power to modify it in order that the ends had in view in the creation of the original may be fulfilled. County Judge *v.* Shelby R. Co., 5 Bush (Ky.) 225.

Reservation by Implication. — A provision in a charter that it shall not be altered in any other manner than by act of the legislature is equivalent to an express reservation to the state to make alterations in it. Pennsylvania College Cases, 13 Wall. (U. S.) 190.

Effect upon Subscriber of Reservation in Charter. — It is competent for the state, having the power to grant or withhold a charter, to annex such condition to the grant or to make such reservation as it pleases. The directors, trustees, or other managing agents, by whatever name they may be called, by accepting the charter become bound by this condition or reservation, and every individual who subscribes to the stock of the company thereby makes himself a party to the contract, subject to the conditions and reservations of the charter. In effect, he stipulates, at the time he subscribes, that the legislature may alter or repeal the law, and thus change the obligation of his subscription, or defeat it altogether. Consequently, where the charter of a railroad corporation contains a clause authorizing the legislature to repeal or alter it, the alteration of the charter by the legislature, made on the application of the directors, without consulting the stock subscribers, does not absolve the latter from their subscription. Northern R. Co. *v.* Miller, 10 Barb. (N. Y.) 260.

3. State *v.* Railroad Taxation Com'r, 37 N. J. L. 228.

4. Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379.

5. **Reserved Power to Annul.** — Com. *v.* Bonsall, 3 Whart. (Pa.) 559. See also, to like effect, Curran *v.* Arkansas, 15 How. (U. S.) 313; Erie, etc., R. Co. *v.* Casey, 1 Grant's Cas. (Pa.) 274. And see the title DISSOLUTION OF CORPORATIONS.

In the Case of Charters Granted for a Certain Term of Years, in which there is a reservation of power on the part of the legislature to amend or repeal upon the occurrence of certain conditions, the legislature is to judge as to whether such condition has occurred, and if, in its opinion, after investigation, the charter should be repealed, the corporation cannot complain of such repeal as a violation of the

Construction of Provisions for Amendment at Desire of Corporation. — Where a charter contains a provision that an amendment may be made to the act of incorporation, if at any time the corporation should desire it, it has been held that the most reasonable construction of such a clause is, that it simply contemplates amendments that may facilitate the objects had in view under the original charter, and not such as would, in effect, create a new company for a different undertaking.[1]

(5) *Extent of Reserved Power.* — It is exceedingly difficult, if not impossible, to define the extreme limit of the exercise of the power reserved to the legislature to amend or repeal charters. It may be safely stated, however, that the legislature has authority to make any alteration or amendment in a charter granted subject to such reserved power, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which it may deem proper to secure either that object or other public or private rights.[2]

Amendments Auxiliary to Original Design. — Whatever conflict there may be in the decided cases as to what constitutes a fundamental change in a charter, they are all agreed that the mere grant of additional powers auxiliary to the original

obligation of its contract with the state. Miners' Bank *v.* U. S., 1 Greene (Iowa) 553; Crease *v.* Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; State *v.* Miller, 30 N. J. L. 368; Erie, etc., Co. *v.* Casey, 26 Pa. St. 301. *Compare* Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

1. Booe *v.* Junction R. Co., 10 Ind. 93.

2. Extent of Exercise of Power. — In Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446, *affirmed* 15 Wall. (U. S.) 500, Mr. Justice Gray, in speaking of the power reserved by the legislature to amend, alter, or repeal at its pleasure acts of incorporation, said: "The extent of the power reserved by such an enactment has been the subject of some diversity of judicial opinion, and a definition of its extreme limit is not necessary to this case. It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights."

Power Not Unlimited. — In Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457, it is said that the extent to which the reserved power of the legislature to amend or repeal may be exercised has never been distinctly adjudged, but that it need not be claimed to be without limit, or that it may be capriciously or wantonly exercised. That it may be exercised in all cases and to any extent to carry out the original purposes of the incorporation, and to secure the due administration of justice in regard to the rights of the creditors of the corporation, and the proper disposition of its assets, may, however, be safely affirmed.

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases." Shields *v.* Ohio, 95 U. S. 319.

Fundamental Character May Not Be Changed. — In Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336, it is said that it may be admitted that, under the reserved power to alter and repeal, the legislature would have no right to change the fundamental character of the corporation and convert it into a different legal being, without absolving those who did not choose to be bound. See also Schenectady, etc., Plank-road Co. *v.* Thatcher, 11 N. Y. 102.

Object Cannot Be Changed. — The right to amend the charter may be expressly reserved; but that right does not confer the power of taking from the corporators the control of the corporate property, or to change the object of the charter by taking from those having a right to select their officers under the charter, that right, and placing it in the hands of stockholders who, by reason of the increased power conferred by the amendment, are enabled to control the corporation. Orr *v.* Bracken County, 81 Ky. 593.

Cannot Be Deprived of Property. — "The reserved right to amend the charter of a corporation will not authorize the legislature to add requirements that would be inconsistent with constitutional provisions, as by depriving it of its property without due process of law." Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140. To the same effect are Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 21 Am. St. Rep. 135; Miller *v.* New York, etc., R. Co., 21 Barb. (N. Y.) 513.

For other cases in which this question is discussed, see Miller *v.* State, 15 Wall. (U. S.) 498; Maine Cent., etc., Co. *v.* Maine, 96 U. S. 510; Sinking Fund Cases, 99 U. S. 700; County Judge *v.* Shelby R. Co., 5 Bush (Ky.) 225; Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Dow *v.* Northern R. Co., (N. H. 1887) 36 Atl. Rep. 510; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Poughkeepsie, etc., Plank Road Co. *v.* Griffin, 21 Barb. (N. Y.) 454, 24 N. Y. 150; Stevens *v.*

design is not liable to the objection of a violation of contract in contravention of the Constitution of the *United States*.[1]

c. AMENDMENT OR REPEAL UNDER POLICE POWER — **In General.** — The provision of the *United States* Constitution against the impairment of the obligation of contracts on the part of the state, does not extend so far as to prevent a state from making any reasonable regulation in the exercise of its police power. Corporations are no more exempt from the exercise of this power than individuals, and where the state sees fit to make valid and reasonable alterations and amendments, or, in certain cases, to repeal the charter of a corporation where it is necessary for the public safety or the public morals of the people, the corporation cannot be heard to complain. The exercise of this authority must, however, be reasonable, but the courts will be loath to review any action of the legislature taken in this regard.[2]

Rutland, etc., R. Co., 1 Am. L. Reg. 154. See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

1. Grant of Auxiliary Powers. — Sprigg *v.* Western Tel. Co., 46 Md. 67; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171; Curry *v.* Scott, 54 Pa. St. 270. See also Clearwater *v.* Meredith, 1 Wall. (U. S.) 25; Pennsylvania College Cases, 13 Wall. (U. S.) 190; Winter *v.* Muscogee R. Co., 11 Ga. 438.

Extension of Time for Completion of Road. — In Agricultural Branch R. Co. *v.* Winchester, 13 Allen (Mass.) 29, it was held that subscriptions to the capital stock of a railroad company will not be defeated by a subsequent amendment of the charter extending the time for the completion of the road. See also, to like effect, Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 35 Am. Rep. 536.

Statute Construed. — The clause in the 50th section of the General Plank Road Act of *Michigan* of 1851, which provided that any subsequent alteration or amendment of the act should not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in the amendatory act, was held to be inserted solely for the protection of the companies formed under the act, and not to prevent the legislature by general amendment from removing any restrictions or releasing or diminishing any obligation or burden imposed upon such companies by the general act. People *v.* Grand Blanc, etc., Plank Road Co., 10 Mich. 400.

2. Right to Amend or Repeal under Police Power. — For a full discussion of the right of a state to amend or repeal a charter under its police power, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; POLICE POWER. And see generally the following cases:

United States. — Boston Beer Co. *v.* Massachusetts, 97 U. S. 25; Butchers' Union Slaughter-House, etc., Landing Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746; New Orleans Gas Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650; St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574.

Illinois. — Galena, etc., Union R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471; Bank of Republic *v.* Hamilton County, 21 Ill. 53; Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 140; Galena, etc., R. Co. *v.* Appleby, 28 Ill. 283; Toledo, etc., R. Co. *v.* Deacon, 63 Ill. 91; Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71.

Indiana. — New Albany, etc., R. Co. *v.* Tilton, 12 Ind. 3, 74 Am. Dec. 195; Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84.

Kansas. — Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573.

Maine. — Norris *v.* Androscoggin R. Co., 39 Me. 273; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Veazie *v.* Mayo, 45 Me. 560.

Massachusetts. — Lyman *v.* Boston, etc., R. Corp., 4 Cush. (Mass.) 288; Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424; Fitchburg R. Co. *v.* Grand Junction R., etc., Co., 4 Allen (Mass.) 198; Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555; Brown *v.* Penobscot Bank, 8 Mass. 445.

Missouri. — Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

New York. — Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345, *overruling* Miller *v.* New York, etc., R. Co., 21 Barb. (N. Y.) 513.

Ohio. — Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Tennessee. — Louisville, etc., R. Co. *v.* Burke, 6 Coldw. (Tenn.) 45.

Vermont. — Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140.

Police Power Defined and Qualified. — In State *v.* Addington, 12 Mo. App. 214, *affirmed* 77 Mo. 110, the following propositions as to the police power of the states are laid down: "(1) The police power of a state can only be exercised with reference to some subject apparently connected with the public welfare. (2) When exercised with reference to such subjects, the limits of its exercise are in a very large measure, in the sound discretion of the legislature. (3) This discretion, however, is not absolute and unrestrained. The power cannot be exercised capriciously, so as to strike down the right of liberty or property when no real or apparent public benefit will be promoted thereby."

In Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, Mr. Justice Bradley said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by

Repayment of Consideration. — Where, under its police power, a state repeals the charter of a corporation, good faith will require that any money consideration for the grant of the charter of incorporation shall be refunded.[1]

d. SERVICE OF PROCESS — STATUTES ENFORCING OBLIGATIONS, AND ACTS MERELY AFFECTING THE REMEDY — **Service of Process.** — The regulation of the forms of administering justice by the courts being an incident of sovereignty, the surrender of that power is never to be presumed ; and consequently, unless it shall clearly appear to have been the intention of the legislature to limit its power of bringing the corporation before its judicial tribunals, to the mode provided in its charter, any subsequent legislation with regard to the mode in which process shall be served upon it is not invalid as an impairment of its contract with the state.[2]

Enforcement of Obligations. — So far as regards the enforcement of obligations, corporations, like individuals, are subject to the control of the legislature.[3]

Acts Affecting the Remedy. — Legislative acts which merely affect the remedy do not impair the obligation of a contract.[4]

any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex ;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." See also Boyd *v.* Alabama, 94 U. S. 645.

Corporations Subject as Individuals. — In Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153, the court said: " The authority of the legislature over the property, or the use of the property, of a corporation, is not lost because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting, or prohibiting the sale of a particular kind of property for the general benefit, apply as well to the property of corporations like the claimant as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike subject to them." See also, to like effect, Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 140; Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, 20 Am. Rep. 592; State *v.* Noyes, 47 Me. 189; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

Illustration of Invalid Exercise of Power. — In People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285, it was held that where, by the charter of a plank road company, the convenience and safety of travel were expressly contracted and amply provided for, and penalties for a breach of the obligation fixed which, if enforced, would amply satisfy every requirement of safety and convenience, a subsequent act imposing an entire forfeiture of the franchises of the company for a neglect to keep in repair any portion of the road could not be held valid as a proper exercise of the police power of the state. See the title POLICE POWER.

1. See Hirn *v.* State, 1 Ohio St. 15.

2. Cairo, etc., R. Co. *v.* Hecht, 95 U. S. 168, *affirming* 29 Ark. 661. See also the title SERVICE OF PROCESS.

3. Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755. See also Bank of Republic *v.* Hamilton County, 21 Ill. 53; Brown *v.* Penobscot Bank, 8 Mass. 445. And see the title CONTRACTS, *ante*, p. 88.

Enforcement of Obligations. — The principle that the legislature has no power to infringe either the express or implied privileges of a corporation cannot be construed to limit the general powers of legislation, where such legislation merely regulates the existing rights and duties of corporations, or provides new modes of enforcing acknowledged obligations. Boston, etc., R. Co. *v.* State, 32 N. H. 215.

4. **Acts Affecting Remedy.** — Internal Imp. Board *v.* Scearce, 2 Duv. (Ky.) 576; Haynes *v.* Carter, 9 La. Ann. 265; Com. *v.* Farmers', etc., Bank, 21 Pick. (Mass.) 542, 32 Am. Dec. 290; Cummings *v.* Maxwell, 45 Me. 190; McCrea *v.* Port Royal R. Co., 3 S. Car. 381. See also Howard *v.* Kentucky, etc., Mut. Ins. Co., 13 B. Mon. (Ky.) 282; and see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

" The Forms of Administering Justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable so as to bind subsequent legislatures." Columbia Bank *v.* Okely, 4 Wheat. (U.S.) 235.

In Young *v.* Alexandria Bank, 4 Cranch (U. S.) 384, Chief Justice Marshall said: " There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate."

In Furtherance of the Due Administration of Justice, the legislature has power to enact laws changing, modifying, repealing, or adding to the remedies against existing corporations, for the enforcement of rights against them, or the redress of wrongs attributable to them. Black on Constitutional Prohibitions, § 28. See also *Ex p.* North-east, etc., Alabama R. Co., 37 Ala. 679; South-Western R. Co. *v.* Paulk, 24 Ga. 356; Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755; Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. (Ky.) 165; Gowen *v.* Penobscot R. Co., 44 Me. 140; Portland, etc.,

c. CHARTER CLAUSE AFFECTING TAXATION. — It has frequently been decided by the Supreme Court of the United States that a charter agreement, for a consideration received or expressed to be received from a corporation with certain property rights or franchises, that such corporation shall be exempt from taxation, or only be taxed at a certain rate, is a contract protected under the tenth clause of the first article of the Constitution of the *United States;* and this decision is now generally acquiesced in by the state courts,[1] though frequent and vigorous protests have been made by these tribunals against this view.[2]

f. EXERCISE OF RIGHT OF EMINENT DOMAIN. — The charter of a private corporation, though a contract between the state and the corporators, is, like all private rights, subject to the right of eminent domain in the state. Franchises of corporations, like other contracts or property, are subject to

R. Co. *v.* Grand Trunk R. Co., 63 Me. 90; Peters *v.* St. Louis, etc., R. Co., 23 Mo. 107; Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546; Sanders *v.* Hillsborough Ins. Co., 44 N. H. 238; Union Canal Co. *v.* Gilfillin, 93 Pa. St. 97; Branin *v.* Connecticut, etc., Rivers R. Co., 31 Vt. 214.

Illustrations. — In Gowen *v.* Penobscot R. Co., 44 Me. 140, the legislature divested itself in the charter of incorporation from imposing "any other or further duties, liabilities, or obligations," and it was held that it might, nevertheless, provide a remedy more effectually to compel a performance of the duties and liabilities of such corporation, and the mode, time when, and court where such remedy should be enforced. See also Veazie *v.* Mayo, 45 Me. 560.

Provisions in the charter of a railroad company regulating the manner of taking land for the use of the road are not in the nature of a contract, but may be altered by subsequent legislation. Mississippi R. Co. *v.* McDonald, 12 Heisk. (Tenn.) 54. See also the titles EMINENT DOMAIN; RAILROADS.

Alteration of Summary Remedy Against Defaulting Stockholders. — A summary remedy against defaulting stockholders, given to a corporation by the act of its incorporation, is no part of its corporate franchises, and may be altered or modified by the legislature at pleasure. *Exp.* North-east, etc., Alabama R. Co., 37 Ala. 679.

1. Regarded as Contracts — *United States.* — New Jersey *v.* Wilson, 7 Cranch (U. S.) 164; Gordon *v.* Appeal Tax Ct., 3 How. (U. S.) 133; Piqua Branch of Ohio State Bank *v.* Knoop, 16 How. (U. S.) 369; Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416; Dodge *v.* Woolsey, 18 How. (U. S.) 331; Mechanics', etc., Bank *v.* Thomas, 18 How. (U. S.) 384; McGee *v.* Mathis, 4 Wall. (U. S.) 143; Home of Friendless *v.* Rouse, 8 Wall. (U. S.) 439; Wilmington, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 264; Raleigh, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 269; Humphrey *v.* Pegues, 16 Wall. (U. S.) 244; Pacific R. Co. *v.* Maguire, 20 Wall. (U. S.) 36; New Jersey *v.* Yard, 95 U. S. 104; Farrington *v.* Tennessee, 95 U. S. 679; Northwestern University *v.* People, 99 U. S. 309; New Orleans *v.* Houston, 119 U. S. 265.

Alabama. — Mobile, etc., R. Co. *v.* Kennerly, 74 Ala. 566.

Georgia. — Western, etc., R. Co. *v.* State, 54 Ga. 428.

Illinois. — Illinois Cent. R. Co. *v.* McLean County, 17 Ill. 291.

Kentucky. — Franklin County Ct. *v.* Deposit Bank, 87 Ky. 370; Louisville, etc., R. Co. *v.* Com., 10 Bush (Ky.) 43.

Maryland. — Washington County *v.* Franklin R. Co., 34 Md. 159; State *v.* Baltimore etc., R. Co., 48 Md. 50.

Massachusetts. — Wales *v.* Stetson, 2 Mass 143.

Minnesota. — First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297.

Mississippi. — O'Donnell *v.* Bailey, 24 Miss. 386.

Missouri. — St. Joseph *v.* Hannibal, etc., R. Co., 39 Mo. 476; Mechanics' Bank *v.* Kansas City, 73 Mo. 555.

Montana. — Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 17 Am. & Eng. R. Cas. 364.

New Jersey. — Mount Pleasant Cemetery *v.* Newark, 50 N. J. L. 66; Singer Mfg. Co. *v.* Heppenheimer, 58 N. J. L. 633.

Tennessee. — State *v.* Union, etc., Bank, 35 Cent. L. J. 169; Union Bank *v.* State, 9 Yerg. (Tenn.) 490.

For a full discussion of this subject, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; TAXATION (CORPORATE).

2. Protest of State Courts — *Connecticut.* — Brainard *v.* Colchester, 31 Conn. 407.

Michigan. — East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82.

New Hampshire. — Piscataqua Bridge *v.* New-Hampshire Bridge, 7 N. H. 35; Brewster *v.* Hough, 10 N. H. 138; Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

Ohio. — Mechanics', etc., Branch of State Bank *v.* Debolt, 1 Ohio St. 591, *overruled* in 18 How. (U. S.) 380; Toledo Bank *v.* Toledo, 1 Ohio St. 622; Knoup *v.* Piqua Branch of State Bank, 1 Ohio St. 603; Milan, etc., Plank-road Co. *v.* Husted, 3 Ohio St. 578.

Pennsylvania. — Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664.

Vermont. — Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140.

Wisconsin. — West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

See also the dissenting opinion of Mr. Justice Miller in Washington University *v.* Rouse, 8 Wall. (U. S.) 439, in which the Chief Justice and Mr. Justice Field concurred. And see Raleigh, etc., R. Co. *v.* Reid, 64 N. Car. 155.

appropriation under this power, and with no further restrictions than apply in all cases.[1]

g. ACCEPTANCE OF AMENDMENTS — (1) *Necessity For* — (a) **When There Is No Reservation.** — The charter of a private corporation being a contract between the state and the corporators, and between the corporators themselves, and, therefore, constitutionally protected from impairment against the will of the corporators, it is not questioned that when there is no express reservation of the power to amend in favor of the state, an amendment, to become binding and effectual, must be accepted by the corporation.[2] This general rule is subject to an exception in favor of the power of the state to amend a charter in the exercise of its police power,[3] or the power of eminent domain.[4]

(b) **When There Is a Reservation.** — When the right to alter, amend, or repeal a charter has been expressly reserved, it has been said that it is immaterial whether the consent of the corporation to an amendment has been given or not.[5]

Right of Corporation to Refuse Amendment. — But it has also been said that even though there is a reserved right of amendment, the corporation cannot be forced to accept an amendment of its charter. The corporation cannot conduct its operation in defiance of the legislative power, and if it does not accept the proposed amendment must discontinue its operations as a corporate body; but the amendment cannot be enforced upon the corporation without its consent.[6]

1. West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507; Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 14 Am. & Eng. Corp. Cas. 417. And see generally the titles EMINENT DOMAIN; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

2. Amendment Must Be Accepted. — Mower *v.* Staples, 32 Minn. 284; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450. See *supra*, this section, *Right to Amend or Repeal — In General.* And see *supra*, this section, *Acceptance of Charter.*

Acceptance of Act Extending Charter. — In Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34, the court, *per* Mellen, C. J., said: "We apprehend that the same principle of law applies to an act continuing a charter beyond its original term as to the act which granted the charter; that is, in both cases the grant or chartered powers must be accepted; because a charter and the extension of it are, till so accepted, inoperative; but when accepted, they become contracts. Nor do we perceive that, on this principle, it is of importance whether the extending act is passed before or after the expiration of the original charter. Acceptance is necessary, in both cases."

Acceptance of New Charter Before Expiration of Original Charter. — It has been held that a corporation already in being, and acting under either a former charter or prescriptive usage, which accepts a new charter before the expiration of the old, may still act under the former, or partly under the one and partly under the other. In this respect there is a vast difference between an original charter granted to a new corporation and a new charter granted to an old corporation. In the former case the charter must be accepted *in toto*, or not at all; but in the latter the corporation may act partly under the new and partly under the old charter. Woodford *v.* Union Bank, 3 Coldw. (Tenn.) 488. See also Rex *v.* Cambridge, 3 Burr. 1656; Rex *v.* Pasmore, 3 T. R. 246.

Acceptance of Amendment to an Irrepealable Charter. — An Act of Assembly amending an irrepealable charter is void only when it attempts to vary the contract without the consent of the other party thereto. But, like any other contract, an irrepealable charter may be altered by the agreement of both parties to it. Hence a legislative enactment that would, without acceptance, be invalid becomes, when accepted by the corporation, perfectly valid and binding, the act and acceptance constituting a new contract. Jackson *v.* Walsh, 75 Md. 304; State University *v.* Williams, 9 Gill & J. (Md.) 416; Ehrenzeller *v.* Union Canal Co., 1 Rawle (Pa.) 181. See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

3. See *supra*, this section, *Amendment or Repeal under Police Power.*

4. See *supra*, this section, *Exercise of the Right of Eminent Domain.*

5. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Hyatt *v.* Whipple, 37 Barb. (N. Y.) 595. See also Durfee *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 230. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

6. Sage *v.* Dillard, 15 B. Mon. (Ky.) 340.

Statement of Doctrine. — "The power of the legislature 'to repeal, alter, or modify the charter of any bank at its pleasure' must be held to be limited to this extent. It may certainly repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a contract, and therefore, in order to complete the creation of such corporations, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force

(2) *Mode of Acceptance.* — To make valid as the act of the corporation an act altering a charter, it should be passed at a meeting of the corporators duly convened for that purpose, after notice to all the members. The most ample opportunity should be afforded for deliberation upon the proposed alteration nor can a minority be deprived of this right by the arbitrary will of the majority.[1]

(3) *By Whom Accepted* — (a) **In General.** — The general rule is that an amendment to a charter must be accepted by the members of the corporation.[2] But it has been held that the board of directors may accept an amendment.[3]

(b) **Acceptance by Majority of Stockholders** — *aa.* AUXILIARY AMENDMENTS. — It is generally agreed that amendments to a charter which are not radical or fundamental but are merely auxiliary to the purposes of the corporation, may be accepted by a majority of the stockholders with the effect of binding all the stockholders whether assenting or not.[4]

and effect of an executed contract, it must be accepted. * * * These well-settled principles are everywhere recognized as applicable to the original charters of incorporation; and upon principle and authority they apply with equal force to any amendment or modification of the charter as well as to the original charter. Though the legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification than it could have forced upon them the acceptance of the original charter without their consent. Under the reservation they can repeal or destroy the charter, without any consent on the part of the corporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter. The power reserved by the legislature gives the right, certainly, to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party. These principles grow out of the nature of charters or acts of incorporation, which are regarded in the nature of contracts. The amendment or modification must be made by the parties to the contract, the legislature on the one hand and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance. The reservation of the right to alter, amend, or repeal the act by which the corporation is created, may be prudent and salutary; but it seems to be a necessary implication, that if the legislature should undertake to make what in their opinion is a legitimate alteration or amendment, the corporation has the power to reject or accept it, whatever may be the consequences. One consequence undoubtedly is, that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body. But such amendment or modification cannot be forced upon the corporation without its consent." Christian, J., in Yeaton *v.* Old Dominion Bank, 21 Gratt. (Va.) 593.

1. Brown *v.* Fairmount Gold, etc., Min. Co 10 Phila. (Pa.) 32; Com. *v.* Cullen, 13 Pa. St 133, 53 Am. Dec. 450. See the title STOCKHOLDERS.

2. **Acceptance by the Corporation.** — Brown *v.* Fairmount Gold, etc., Min. Co., 10 Phila. (Pa.) 32. See also Com. *v.* Cullen. 13 Pa. St. 133. 53 Am. Dec. 450, in which it was held that where the whole body of stockholders or other persons in interest compose a corporation, the right of assenting to any proposed change in the charter resides in them, though ordinarily represented by the board of directors charged with the exercise of the corporate powers. These, in their capacity as managers, have no authority either to call for, or assent to, a change of corporate constitutions, except by the agreement of a majority of the corporators.

And see, for a full discussion of this question, the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCKHOLDERS.

3. **Acceptance by Directors.** — Illinois River R. Co. *v.* Zimmer, 20 Ill. 654, *per* Caton, C. J. See also Banet *v.* Alton, etc., R. Co., 13 Ill. 505; Sprague *v.* Illinois River R. Co., 19 Ill 174.

Fraudulent Acceptance. — If the act of acceptance of an amendment to a charter by the board of directors or other controlling power is prompted by sinister motives, and not with a single eye to the general good of the company, it becomes fraudulent, and for that reason void, and may, as such, be repudiated by the corporators or shareholders. Illinois River R. Co. *v.* Zimmer, 20 Ill. 654.

4. **Majority May Adopt Auxiliary Amendments** — *Alabama.* — State *v.* Mobile, 24 Ala. 701.

Georgia. — Wilson *v.* Wills Valley R. Co., 33 Ga. 470.

Iowa. — Peoria, etc., R. Co. *v.* Preston, 13 Iowa 115.

Kentucky. — Fry *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 322.

Louisiana. — State *v.* Accommodation Bank, 26 La. Ann. 288.

Maine. — Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34; Bucksport, etc., R. Co. *v.* Buck, 68 Me. 81.

Maryland. — Taggart *v.* Western Maryland R. Co., 24 Md. 564, 89 Am. Dec. 760; Sprigg *v.* Western Tel. Co., 46 Md. 67.

Massachusetts. — Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; Agricultural Branch R. Co. *v.* Winchester, 13 Allen (Mass.) 29.

bb. Fundamental Amendments. — But when the amendments are fundamental, radical, or vital, the acceptance must then be unanimous.[1]

Michigan. — Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

New York. — Poughkeepsie, etc., Plank Road Co. *v.* Griffin, 24 N. Y. 150.

Pennsylvania. — Irvin *v.* Susquehanna, etc., Turnpike Co., 2 P. & W. (Pa.) 466, 23 Am. Dec. 53; Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.) 364; Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339; Curry *v.* Scott, 54 Pa. St. 270.

Tennessee. — Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488; Greenville, etc., Narrow Gauge R. Co. *v.* Johnson, 8 Baxt. (Tenn.) 332.

See also the titles Impairment of Obligation of Contracts; Stock; Stockholders.

Implied Assent of Stockholders. — "The principle upon which these cases appear to go is that alterations, or, as they are sometimes called, amendments, which do not change the nature, purpose, or character of a corporation or its enterprise, but which are designed to enable the corporation to conduct its authorized business with greater facility, more beneficially, or more wisely, are auxiliary to the original object, and that, therefore, when one becomes a stockholder, he impliedly assents that such alteration or general amendment may be made." Mower *v.* Staples, 32 Minn. 284. *Citing* Mowrey *v.* Indianapolis, etc., R. Co., 4 Biss. (U. S.) 78; Clearwater *v.* Meredith, 1 Wall. (U. S.) 25; Nugent *v.* Putnam County, 19 Wall. (U. S.) 241; Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463; New Haven, etc., R. Co. *v.* Chapman, 38 Conn. 56; Martin *v.* Pensacola, etc., R. Co., 8 Fla. 382; Winter *v.* Muscogee R. Co., 11 Ga. 438; Banet *v.* Alton, etc., R. Co., 13 Ill. 504; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; Curry *v.* Scott, 54 Pa. St. 270; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 546; Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 16.

What Are Auxiliary Amendments. — "With reference to what are auxiliary amendments, the cases seem in hopeless conflict. There are cases going so far as to hold that any alteration, no matter how immaterial, which in any way affects the contract between the corporation and its stockholders, is to be regarded as fundamental. The case of Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 185, 90 Am. Dec. 617, is a leading case for this doctrine. * * * But the weight of authority seems to sustain a more moderate and reasonable view, and to support the doctrine that if the amendment does not change the character of the business, and simply authorizes its reasonable extension upon the lines of the original project, a majority of the corporators, and in some instances the directors alone, may accept and conclude all the stockholders by their action." Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167. See also Mower *v.* Staples, 32 Minn. 284.

Meaning of Majority. — By a majority of the stockholders is understood a majority *per capita* when the right to vote is *per capita*, and a majority of the stock where, as in the present instance, each share of stock is entitled to one vote. Mower *v.* Staples, 32 Minn. 284.

Tennessee Statute and Construction. — By Stat. Tenn., Act of 1875, p. 237, it is enacted as follows: "The right is reserved to repeal, annul, or modify this charter. If it is repealed, or if the amendments proposed, being not merely auxiliary, but fundamental, are rejected by a vote representing more than half of the stock, the corporation shall continue to exist for the purpose of winding up its affairs, but not to enter upon any new business. If the amendments or modifications, being fundamental, are accepted by the corporation as aforesaid in a general meeting to be called for that purpose, any minor, married woman, or other person under disability, or any stockholder not agreeing to the acceptance of the modification, shall cease to be a shareholder, and the corporation shall be liable to pay said withdrawing stockholders the par value of their stock, if it is worth so much; if not, then so much as may be its real value in the market on the day of the withdrawal of said stockholders as aforesaid; provided, that the claims of all creditors are to be paid in preference to said withdrawing stockholders." In construing this provision Lurton, C. J., said: "It is to be observed that the state does not by this act undertake to arbitrarily impose a fundamental alteration, and require the corporation to continue in business under the amendment. It does, however, demand that the corporation shall accept the amendment, however radical it may be, or continue its existence only for the purpose of winding up its business. In other words, the state says to every corporation to be organized under this law: 'I reserve the right to repeal or amend this charter at any time. If the amendment I shall propose is vital and fundamental, it shall be submitted to the action of the stockholders. If a majority assent to it, and adopt it, then the corporation may continue in business. If there be any who are incapable of consenting, or any unwilling to accept, then all such shareholders shall cease to be shareholders, and the corporation shall be liable for the market value of all such shares. But if the amendment be unacceptable to a majority, then you shall exist only for the purpose of winding up your business, and shall have no power to enter upon any new contracts.' * * * Whether the act is to be construed as arbitrarily imposing amendments not fundamental, or as requiring their acceptance by a majority of the corporation, or by the directors, as is admissible upon some of the authorities, it is not necessary for us to determine." Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167.

1. Majority Cannot Accept Fundamental Amendments. — State *v.* Accommodation Bank, 26 La. Ann. 288; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517; Kean *v.* Johnson, 9 N. J. Eq. 407; Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 546. *Compare* Durfee *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 230; Hale *v.*

(4) *Proof of Acceptance* — **By Acts and Omissions.** — The acceptance of an amendment by a corporation may be inferred from such acts or omissions as would raise a similar presumption in the case of natural persons, and when the amendment is beneficial very little is required to found a presumption of acceptance.[1]

Cheshire R. Co., 161 Mass. 443. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

The legislature cannot empower corporations, by the consent of any number of shareholders less than the whole, to alter fundamentally the character of the enterprise and compel dissentients to engage in it. Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

Contract Between Corporation and Corporators Protected. — The contract subsisting between the members of a corporate body and a corporation is as much within the protection of the constitution as that between the state and the corporation; consequently, the legislature has no right or power to confer authority upon the stockholders of a corporation owning more than half of the stock of the company to accept amendments to the charter under which they act. New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

Effect upon Stock Subscriptions. — Dissenting stockholders who have not paid their stock subscriptions are relieved from liability therefor when the charter of the corporation has been fundamentally amended, although a majority of the stockholders have agreed to the amendment.

United States. — Ashton *v.* Burbank, 2 Dill. (U. S.) 435; Nugent *v.* Putnam County, 19 Wall. (U. S.) 241.

Arkansas. — Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463.

Georgia. — Winter *v.* Muscogee R. Co., 11 Ga. 438.

Illinois. — Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

Indiana. — Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; McCray *v.* Junction R. Co., 9 Ind. 358; Booe *v.* Junction R. Co., 10 Ind. 93; Shelbyville, etc., Turnpike Co. *v.* Barnes, 42 Ind. 498.

Michigan. — Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

Mississippi. — Hester *v.* Memphis, etc., R. Co., 32 Miss. 378.

New Hampshire. — Union Locks, etc. *v.* Towne, 1 N. H. 44, 8 Am. Dec. 32.

New York. — Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354.

North Carolina. — North Carolina R. Co. *v.* Leach, 4 Jones L. (49 N. Car.) 340; Thompson *v.* Guion, 5 Jones Eq. (58 N. Car.) 113; Charlotte First Nat. Bank *v.* Charlotte, 85 N. Car. 433.

Ohio. — Marietta, etc., R. Co. *v.* Elliott, 10 Ohio St. 57.

Pennsylvania. — Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 P. & W. (Pa.) 184; Manheim, etc., Plank Road Co. *v.* Arndt, 31 Pa. St. 317.

Wisconsin. — Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13.

See also Kean *v.* Johnson, 9 N. J. Eq. 407. And see the titles STOCK; STOCKHOLDERS.

Injunction Against Consolidation. — A single stockholder may have an injunction against the other corporators to prohibit any fundamental change in the original purpose of the act of incorporation, such as the consolidation of one railroad with another, though the proposed change be authorized by an act of the legislature. Clearwater *v.* Meredith, 1 Wall. (U. S.) 25; Mowrey *v.* Indianapolis, etc., R. Co., 4 Biss. (U. S.) 78; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545. *Compare* State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405; Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685. And see the titles INJUNCTIONS; STOCK; STOCKHOLDERS.

The legislature may, when necessity requires it, grant authority to consolidate existing connecting railroad routes, if they provide a just compensation for the shares of such stockholders as dissent. Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

1. Proof of Acceptance. — State *v.* Montgomery Light Co., 102 Ala. 594; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654; Bangor, etc., R. Co. *v.* Smith, 47 Me. 34; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450. See *supra*, this section, *Acceptance of Charter*.

Statement of Rule. — The general rule as to the acceptance of amendments to charters is, that acts of user under an amendment to a corporate charter for which no authority can be found except in such amendment, and which amendment is supposed in good faith to be beneficial to the corporation, are evidence of an acceptance of such amendment by the corporation, and make it the law of the corporation and binding upon all its members. Illinois River R. Co. *v.* Zimmer, 20 Ill. 654. See also, to like effect, Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135.

Illustrations. — In Lincoln, etc., Bank *v.* Richardson, 1 Me. 79, 10 Am. Dec. 34, the defendant, a stockholder, was sued by the bank on a stock note. The action was not brought till the bank had expired, but its existence had been revived and continued by an act amendatory of the charter. It was admitted on both sides that the amendment was inoperative till it was accepted by the corporation, and there was no evidence of such acceptance except the bringing of the action. It was held that this was sufficient evidence of the acceptance of the amendatory charter.

The General Incorporation Act of 1852 of the state of *Ohio* (S. & C. 281, § 24), authorized "any railroad company organized in pursuance of law," to "lease or purchase any part or all of any railroad constructed by any other company," in cases where the roads were connected or continuous. And § 71 of the same act provided that "all companies now incorporated within this state, and actually doing business, may accept any of the provisions of this act, and when so accepted, and a certified copy of their acceptance filed with the secretary of state, that portion of their charters inconsistent with the provisions of this act is hereby repealed." It was held that leasing

Parol Evidence of Acceptance. — Unless the charter forbids it, parol evidence may be introduced to show the vote or assent to an act amendatory of the original charter of a corporation.[1]

h. MANNER OF ALTERING OR AMENDING — (1) *By Special Act.* — It is not questioned that alterations or amendments to charters which are desired by the corporators may be made by the legislative department of the government, except in those jurisdictions where the exercise of this power is prohibited by constitutional provisions.[2]

(2) *Under General Laws.* — And in some jurisdictions amendments or alterations to charters may be made under the provisions of general laws enacted for that purpose.[3]

another railroad after the passage of this act was sufficient evidence of the acceptance of its provisions by a railroad, although a certificate of acceptance was not filed with the secretary of state. Cincinnati, etc., R. Co. *v.* Cole, 29 Ohio St. 126, 23 Am. Rep. 729.

1. Covington *v.* Covington, etc., Bridge Co., 10 Bush (Ky.) 69.

2. See *supra*, this section, *Power to Create — Power of State Legislatures — Constitutional Limitations Upon Legislative Power.*

3. **Alabama.** — In State *v.* Montgomery Light Co., 102 Ala. 594, it was held that the Act of December 12, 1888, of the General Assembly of Alabama, authorizing corporations to alter and amend their charters, and providing the manner of doing so, was not unconstitutional and void *per se* because its terms appeared to be such as if enforced might impair the obligation of the contract between the state and the shareholders as a corporation, for the reason that it would be competent for the shareholders to waive the protection of the constitution and by their assent to or acceptance of the provisions of the act, render it valid though otherwise it would be invalid.

California. — By the Civ. Code of Cal. 1897, § 362, it is provided that " any corporation may amend its articles of association or certificate of incorporation by a majority vote of its board of directors or trustees, and by a vote or written assent of the stockholders representing at least two-thirds of the subscribed capital stock of such corporation." Bowie *v.* Grand Lodge, etc., 99 Cal. 392.

Iowa. — By the Code of Iowa 1897, § 1615, it is provided that " changes in any of the provisions of the articles may be made at any annual meeting of the stockholders, or special meeting called for that purpose, and they shall be valid only when recorded, approved, and published as the original articles are required to be. Such changes, however, need only be signed and acknowledged by such officers of the corporation as may be designated to perform such act by the stockholders." See Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694.

Minnesota. — By Stat. Minn. 1894, § 2595, it is provided that a corporation formed under the general law of that state may, by a resolution duly passed at any regular meeting of the directors, modify or change its articles of incorporation in certain respects; that no such new or amended articles of incorporation shall be operative or valid to alter, modify or change the original articles of incorporation, until the same shall be filed, published, and recorded in the same manner and with like formalities that the original articles of incorporation are required to be filed, published, and recorded; and that when so adopted the said amended articles of incorporation shall be substituted for and take the place of the original articles of incorporation so amended. Mercantile Statement Co. *v.* Kneal, 51 Minn. 263.

Missouri. —Under § 2826 of the Rev. Stat. Mo., an educational society chartered under the laws of that state may add to or change its charter without destroying its identity, and such alteration of the charter can as well be effected by the substitution of a new charter which is germane, as by the adoption of mere amendments. Grand River College *v.* Robertson, 67 Mo. App. 329.

Ohio. —The Rev. Stat. of Ohio, § 3238*a*, permit any corporation incorporated under the general corporation laws to " amend its articles of incorporation so as to change its corporate name, or the place where it is to be located, or where its principal business is to be transacted, so as to modify, enlarge, or diminish the objects or purposes for which it is formed; or so as to add thereto anything omitted from, or which might lawfully have been provided for in such articles originally; provided, however, that nothing in this supplementary section contained shall authorize a corporation, by amendment, to increase or diminish the amount of its capital stock; nor shall any corporation, by amendment, change substantially the original purposes of its organization." State *v.* Taylor, 55 Ohio St. 61.

Pennsylvania. — Act of April 17, 1876, supplementing the Act of April 29, 1874, of the state of Pennsylvania, provides that the amendments to the charter of a corporation which are desired by the corporators, shall be exhibited to the " Court of Common Pleas of the proper county * * * when, if said court shall be of opinion such alterations are or will be lawful and beneficial, and do not conflict with the requirements of the statute to which this is a supplement or of the constitution, it shall be the duty of said court to direct notice to be given * * * and after decree made * * * the same shall be deemed and taken to be a part of the charter of the said corporation." German Evangelical Lutheran Church's Petition, 6 Pa. Dist. Rep. 412.

In the case of St. Mary's Church, 7 S. & R. (Pa.) 517, it was held that under the Act of March 18, 1821, of the General Assembly of *Pennsylvania*, providing for the amendment of the charters of literary, charitable, and religious associations, amendments proposed by a

VI. ORDINARY INCIDENTS — 1. In General. — The ordinary incidents to a corporation are: to have perpetual succession, and the power of electing or otherwise providing members in the place of those removed by death or otherwise;[1] to sue and be sued;[2] to grant and receive and to purchase and hold lands and chattels;[3] to have a name by which it may be known and designated in the transaction of business;[4] to have a common seal;[5] to make by-laws for the government of the corporation;[6] and the power to remove its officers,[7] and sometimes members.[8] A corporation must also be regarded as having a residence in some particular jurisdiction, and this residence is entirely distinct from the personal residence of its members and officers.[9]

2. Perpetual Succession. — When it is said that one of the distinguishing features of a corporation is the capacity of perpetual succession,[10] this must be understood to mean a potential, not an actual perpetuity; a capacity, as contradistinguished from partnerships and other voluntary associations, to continue in existence indefinitely, up to the period of its constitutional or statutory limitation, in spite of the withdrawal or death of any of its members.[11]

corporation are not to be considered as the act of the corporation, merely because they are offered under the corporate seal; the court may inquire by what authority it is affixed; that where the trustees of a corporation consist of three clerical and eight lay members, if one of the clerical members be excluded from the board by a resolution of the lay members, without authority, resolutions for alterations of fundamental articles of the charter, in the absence of such member, are unlawful; and that in corporations where there are different classes, the majority of each class must consent before the charter can be altered, if there be no provision in the charter respecting alterations.

And see generally the statutory enactments of the several states.

1. Enumeration of Incidents of Corporations. — Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Falconer *v.* Campbell, 2 McLean (U. S.) 195; Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157; People *v.* Watertown, 1 Hill (N. Y.) 616; Niagara County *v.* People, 7 Hill (N. Y.) 504. See *infra*, this section, *Perpetual Succession*.

2. Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Falconer *v.* Campbell, 2 McLean (U. S.) 195; Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157; Sutton's Hospital Case, 10 Coke 23; Freligh *v.* Saugerties, 70 Hun (N. Y.) 592, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 188, 189. See *infra*, this title, *Actions By and Against Corporations*.

3. Sutton's Hospital Case, 10 Coke 23; Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157; Thompson *v.* Waters, 25 Mich. 214; Niagara County *v.* People, 7 Hill (N. Y.) 504. See *infra*, this title, *Powers of Corporations*.

4. Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; People *v.* Watertown, 1 Hill (N. Y.) 616. See *infra*, this section, *Name*.

5. Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157; People *v.* Watertown, 1 Hill (N. Y.) 616. See *infra*, this section, *Seal*.

6. Falconer *v.* Campbell, 2 McLean (U. S.) 195; Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157. See *infra*, this section, *By-Laws*.

7. See the title AMOTION, vol. 2, p. 316.

8. Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157. And see the title DISFRANCHISEMENT.

9. Perry *v.* Round Lake Camp-Meeting Assoc., 22 Hun (N. Y.) 293. And see *infra*, this section, *Residence*.

10. 2 Bl. Com. 37; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 578; Mahony *v.* State Bank, 4 Ark. 620; Fuller *v.* Academic School, 6 Conn. 532; State *v.* Stormont, 24 Kan. 686; Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9.

11. "Perpetual Succession" Means "Continuous Succession." — People *v.* Watertown, 1 Hill (N. Y.) 616. See also Niagara County *v.* People, 7 Hill (N. Y.) 504. See *supra*, this title, *Creation and Organization — Duration of Corporate Existence*. And see the title DISSOLUTION OF CORPORATIONS.

Corporations Are Not Immortal. — Chancellor Kent, in his Commentaries, says: "It is sometimes said that a corporation is an immortal as well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal that it is well known that most of the private corporations recently created by statute are limited in duration to a few years. There are many corporate bodies that are without limitation, and consequently capable of continuing so long as a succession of individual members of the corporation remains and can be kept up." 2 Kent's Com. 267.

Duration Not Defined by These Words. — Where there is a general law limiting the duration of corporations, special creative acts must be construed with reference thereto, unless a contrary intention is clearly shown. Thus the words "perpetual succession," in the absence of anything further, will be construed to mean continuous succession, so long as the corporation continues to exist, and not as defining its duration. State *v.* Payne, 129 Mo. 468, *overruling* Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526, *reaffirming* Scanlan *v.* Crawshaw, 5 Mo. App. 337. To the same effect are Fairchild *v.* Hunt, 5 Mo. App. 583; State *v.* Hannibal, etc., Gravel Road Co., 138

3. Name — *a.* In General — Essentiality of Corporate Name. — It is essential that a corporation shall have a name by which it may sue or be sued and perform all legal acts. A corporation is recognized by law as having an existence as an artificial person distinct from the members who compose it. It is important that this separate existence should be identified by a name. The identity of a corporate name is also the principal means of effecting that perpetuity of succession which is one of the most important purposes of incorporation.[1]

b. Mode of Acquisition — (1) *In General.* — It is usually the case that the name of a corporation is stated in its charter, but if this is not done the right to adopt a name may be implied.[2]

(2) *By Usage.* — If a corporation has no certain name given it by the act creating it, it may nevertheless obtain a name by reputation from its business and from being always known by that name; and an old corporation may acquire a new name by reputation and usage.[3]

Mo. 332; State *v.* Lesueur, (Mo. 1897) 41 S. W. Rep. 904.

1. Necessity for Name. — 6 Vin. Abr., title Corporations, p. 262; 2 Bac. Abr., title Corporations (C.); 2 Kent's Com. 292; Norris *v.* Staps, Hob. 211; Smith *v.* Central Plank Road Co., 30 Ala. 650; Glass *v.* Tipton, etc., Turnpike Co., 32 Ind. 376; North Carolina Institute *v.* Norwood, Busb. Eq. (45 N. Car.) 65; Ryan *v.* Martin, 91 N. Car. 464. And see generally the title Name.

"According to the case of Marriott *v.* Mascall, Anderson 206, a corporation is a body politic consisting of material bodies which, joined together, must have a name to do things which concern the corporation, or else it is no corporation; and in Rolle's Abr., Corporations, 512, *citing* the Sutton's Hospital Case, 10 Coke 28, it is laid down that the name of a corporation is as a proper name or a name of baptism. A name, therefore, is essential to a corporation." River Tone *v.* Ash, 10 B. & C. 349, 21 E. C. L. 97.

Name Expressed or Implied. — In Anonymous, 1 Salk. 191, 3 Salk. 102, by the name of the College of Physicians *v.* Salmon, Holt, C. J., said: "My Lord Coke says that a corporation must have a name, but that must be understood to be either expressed in the patent or implied in the nature of the thing; as if the king should incorporate the inhabitants of Dale with power to choose a mayor annually, though no name be given, yet it is a good corporation by the name of mayor and commonalty." See also, to like effect, Sutton's Hospital Case, 10 Coke 29 *b*; Pits *v.* James, Hob. 122.

Means of Effecting Perpetuity. — In Reg. *v.* Joint Stock Companies, 10 Q. B. 839, 59 E. C. L. 839, Denman, C. J., in speaking of the power of a corporation to change its name, said: "The identity of name is the principal means for effecting that perpetuity of succession, with members frequently changing, which is an important purpose of incorporation. 2 Bac. Abr. 255, tit. Corporations (C.) 1 (7th ed.) And though the king, by his prerogative, might incorporate by a new name, and the newly named corporation might retain former rights, and sometimes its former name also, Reg. *v.* Ipswich, 2 Ld. Raym. 1239; Mellor *v.* Spateman, 1 Saund. 339, 344, and Mellor *v.* Walker, 2 Saund. 2; it never appears to be such an act as the corporation could do for itself, but required the same power as created a corporation."

Must Have Name in Order to Sue. — Corporations must not only be authorized by the legislature, but a name must be given to them; and it is in that name they must sue or be sued, and do all their legal acts, although a slight alteration in this name is not important. Bridgeford *v.* Hall, 18 La. Ann. 211.

Judicial Notice of Corporate Name. — It has been held that unless created by and named in a public legislative act, a court will not take judicial cognizance of the name of a corporation any more than it will take cognizance of the name of an individual. Johnson *v.* Indianapolis, 16 Ind. 227. See also Holloway *v.* Memphis, etc., R. Co., 23 Tex. 465, 76 Am. Dec. 68. *Compare* Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171.

In Georgia it has been held that the courts of that state will take judicial notice of the names of all companies chartered by the legislature of that state. Jackson *v.* State, 72 Ga. 28. And see generally the title Judicial Notice.

2. How Acquired. — Knight *v.* Wells, 1 Ld. Raym. 80.

Name in Charter Not Indispensable. — In Smith *v.* Central Plank-Road Co., 30 Ala. 650, Walker, J., said: "It is contended that the bestowment of a name by the charter of a corporation is indispensable to its creation, and that the plaintiff has no corporate existence because no name is provided in the statute. Names are necessary to the existence of corporations. It is 'the very being of the constitution,' 'the knot of their combination, without which they could not do their corporate acts; for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name.' 2 Bac. Abr., Corporation (C). But the authorities clearly show that although the name is usually given by the charter, it is not indispensable that it should be so given."

Michigan — Banking Associations. — Under the Michigan act entitled "An Act to organize and regulate banking associations," the corporators are permitted to designate by what name the corporation shall be known. Falconer *v.* Campbell, 2 McLean (U. S.) 195.

3. Acquisition by Usage. — Dutch West-India Co. *v.* Moses, 1 Stra. 612; Pits *v.* James, Hob.

(3) *By Prescription and Grant.* — It has been held that a corporation may have two names, the one by prescription and the other by grant, or both by prescription, but not two by grant.[1]

c. CHANGE OF NAME — HOW EFFECTED — (1) *In General.* — A change of the name of a corporation is effected generally like any other amendment to its charter, though, as has been seen above, a new name may be acquired from reputation and long-continued usage. At the present day, provision is usually made in the general incorporation laws, under which charter amendments may be obtained.[2]

(2) *By Special Act.* — Even in those states which do not allow the creation of corporations by special act, it seems that a change of name may be granted in this manner, it being held that this does not amount to the creation of a new corporation, since, under the new name, all its original rights, privileges, and liabilities remain intact.[3]

122; South School Dist *v.* Blakeslee, 13 Conn. 227; Society, etc., *v.* Young, 2 N. H. 310; Alexander *v.* Berney, 28 N. J. Eq. 90. See also Smith *v.* Central Plank Road Co., 30 Ala. 650.

"When a corporation has existed through a period of time past under a given corporate name, the fact of its having done so, and of such being its corporate name during that period, is as irrevocable as is any other past event. What is past cannot be recalled or changed, even by legislative omnipotence." Sykes *v.* People, 132 Ill. 32.

1. Knight *v.* Wells, 1 Ld. Raym. 80.

2. District from Which Name Taken Abolished. — The name of a corporation consisted in part of the name of a certain district which was subsequently abolished by statute. It was held that the name of the corporation was not changed thereby. Hughes *v.* Mutual F. Ins. Co., 9 U. C. Q. B. 387. See also Huddersfield Corp. *v.* Ravensthorpe Urban Dist. Council, (1897) 1 Ch. 652, 66 L. J. Ch. N. S. 286, 76 L. T. 377.

Statutes Construed — *England.* — In England it is held, under section 13 of the Companies' Act of 1862, that a new certificate of incorporation is necessary to complete a change of name by a company; it is not enough that the change has been sanctioned by a special resolution of the company and approved by the board of trade. Shackleford *v.* Dangerfield, L. R. 3 C. P. 407.

Illinois. — Under the provisions of the Annot. Stat. of Illinois, 1896, c. 32, § 68, with regard to changing the name of a corporation, it has been held that a certificate filed in pursuance of the act was sufficient where it appeared from it that at a special meeting of the stockholders held at the office of the company, and called in pursuance of the statute, over two-thirds of the stock of the company being represented, a resolution was passed unanimously to change the name of the company, and the new name so adopted was given. Anthony *v.* International Bank, 93 Ill. 225.

New York. — In New York it has been held, under the Laws of 1870, c. 322, § 3, that it is only when the court is satisfied that there is no reasonable objection to the proposed change in a corporate name, that it is empowered to make an order authorizing the alteration. Matter of U. S. Mercantile Reporting, etc., Assoc., (Supreme Ct.) 22 N. Y. St. Rep. 494.

Pennsylvania. — In Pennsylvania the court will not change the name of a corporation unless good reason is shown, and it is not a sufficient reason that the new name proposed for a bank will enable it to do more business. Bank of America, 2 Pa. Co. Ct. Rep. 97.

Under the Corporation Amendment Act of June 15, 1883, the courts have no power to change the name of a corporation of the second class. It must be done under the provisions of the act. *In re* Wetherill Casting Co., 5 Pa. Co. Ct. Rep. 337. *Compare* Excelsior Oil Co., 3 Pa. Co. Ct. Rep. 184; *In re* Martin Co., 1 Pa. Co. Ct. Rep. 62.

Connecticut. — It has been held that the name of a voluntary corporation constituted under the laws of that state, but without special legislative act of incorporation and without an established name, may change its name at will without altering its identity, the name of such a corporation being arbitrary. Trinity Church *v.* Hall, 22 Conn. 125.

For Other Statutory Provisions prescribing the mode in which corporations may change their names, see the codes and statutes of the several states. And see *supra*, this title, *Right to Amend or Repeal;* and *supra*, this section, *Mode of Acquisition — By Usage;* and generally the title NAME.

3. Name Changed by Special Act — *United States.* — In Wells *v.* Oregon R., etc., Co., 5 Sawy. (U. S.) 600, 15 Fed. Rep. 561, it is held that section 1889 of the Revised Statutes of the United States, forbidding the legislature of a territory to grant private charters or special privileges, but permitting the formation of corporations under general acts, does not prohibit a territorial legislature from naming or changing the name of an existing corporation, since such act is not a charter creating a corporation or one conferring a special privilege within the meaning of the section. "To name a corporation is not to create it, any more than to name a person is to create it. Nor does it confer on it a special privilege. The privilege of having a name is not thereby monopolized or exhausted, but may be enjoyed by every corporation that has wit enough to devise one, upon the same terms."

Alabama. — The provision in the constitution of Alabama, which declares that "cor-

(3) *Unauthorized Change.* — An attempt to change a corporate name in a manner not authorized by law cannot be held to have the effect of avoiding its charter, but will rather leave the corporation as originally organized.[1]

(4) *Rejection of Amended Name.* — A corporation may reject an act amending its name, and contract validly under its original name. Thus it has been held that where, after the passage of an act by which a corporation was permitted to change its name, it never conducted its business in the new name, but always in the original one, and that it conducted it according to the plans of the original act of incorporation, issued its policies and stock and drew its checks up to the close of its business under its original name, through its own use of such name exclusively it, so to speak, regained its original name, and could be lawfully sued and proceeded against under it.[2]

(5) *Effect of Change.* — Where the name of a corporation is changed after its creation, but without altering its powers, such change of name will not affect contracts made between it and third persons. The identity of the corporation may be shown.[3]

d. PLURALITY OF NAMES. — A corporation, like a natural person, may be known and designated by several names, although it can have but one corpo-

porations may be formed under general laws, but shall not be created by special act, except for municipal purposes," does not prohibit the legislature from passing a special act changing the name of an existing railroad corporation, and giving it power to purchase additional property. Wallace *v.* Loomis, 97 U. S. 146.

California. — In Pacific Bank *v.* De Ro, 37 Cal. 538, the Supreme Court of California, while leaning strongly to the view that a change in the name of a corporation by special legislative act is not the creation of a corporation in the sense of the constitutional provision that " corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes," found it unnecessary to decide the point directly.

Michigan. — An act enabling a railway company to take a new name and to extend its road is not an act renewing or extending its charter or creating a new corporation within the prohibition contained in the constitution of Michigan, art. 15, § 1. Atty.-Gen. *v.* Joy, 55 Mich. 94.

And see *supra*, this title, *Right to Amend or Repeal.*

1. Effect of Unauthorized Change. — O'Donnell *v.* Johns, 76 Tex. 362.

2. Retention of Original Name. — Alexander *v.* Berney, 28 N. J. Eq. 90. See also Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660.

3. Effect of Change of Name. — Colchester *v.* Seaber, 3 Burr. 1866; Haddock's Case, 1 Ld. Raym. 435; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1; Lomb *v.* Pioneer Sav., etc., Co., 106 Ala. 591, 671; Trinity Church *v.* Hall, 22 Conn. 125; Rosenthal *v.* Madison, etc., Plank-road Co., 10 Ind. 358; Fort Wayne *v.* Jackson, 7 Blackf. (Ind.) 36; Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211; McCloskey *v.* Doherty, 97 Ky. 300; Episcopal Charitable Soc. *v.* Episcopal Church, 1 Pick. (Mass.) 372; Dean *v.* La Motte Lead Co., 59 Mo. 523; Delaware, etc., R. Co. *v.* Irick, 23 N. J. L. 321; *In re* First Presb. Church, 111 Pa. St. 156; Northumberland County Bank *v.* Eyer, 60 Pa. St. 436. See also Longley *v.* Longley Stage Line Co., 23 Me. 39. And see the titles MUNICIPAL CORPORATIONS; NAME; RELIGIOUS SOCIETIES.

Where a Corporation Changes Its Name, neither the corporation itself, nor any member of it, nor any person dealing with it under the old name, can take advantage of the fact that the name has been changed in order to avoid contracts or obligations. Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457; City Nat. Bank *v.* Phelps, 16 Hun (N. Y.) 158.

Promissory Notes. — Where, by special act, the name of a corporation is changed, and, under its new name, it is made the successor of all the liabilities, choses in action, and assets of the former corporation, it may maintain an action on a promissory note executed to it by its old name, without such notes being indorsed. Northwestern College *v.* Schwagler, 37 Iowa 577. See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65.

Effect upon Subscription to Stock. — The change of the name of a corporation by the legislature to which a municipal corporation has made a subscription of stock, does not effect a loss of identity upon the corporation subscribed to, and it may recover the amount of the subscription by suit. Com. *v.* Pittsburgh, 41 Pa. St. 278. See the titles STOCK; STOCKHOLDERS.

Execution Issued under Old Name. — In Water Lot Co. *v.* Brunswick Bank, 53 Ga. 30, a motion was made by the defendants to quash executions issued under a judgment previously obtained, on the ground that since the rendition of the judgment, the name of the corporation had been changed by an act of legislature; it was held that this did not affect the rights of the corporation, especially as it had not been made to appear that the corporators assented to the change. See the title EXECUTIONS, ENCYC. OF PL. AND PR., vol. 8, p. 303.

As to the Name by Which a Corporation Shall Sue or Be Sued, whether its original name in which a contract has been made, or a subsequently acquired name, or a name acquired by usage, see the title CORPORATIONS, ENCYC. OF PL. AND PR., vol. 5, p. 52. See also the titles

rate designation. It has long been settled that it is not necessary, in order that a corporation may be bound by its contracts, that they shall be made in its exact corporate name. If it appears from the allegations and proof that the obligation sued upon was intended to be the obligation of the corporation sued, a recovery will not be defeated by reason of a misnomer alone.[1]

Distinction Between Prescriptive and Chartered Corporations. — At common law, a distinction seems to have been taken between corporations existing by prescription and those created by charter. In the former case it has been held that a corporation may have several names, but if it is created by charter it can have but one name.[2]

c. MISNOMER — (1) *In General.* — The general rule is that the misnomer of a corporation has the same effect as the misnomer of an individual, and when the true name is necessarily to be collected from the instrument in which such misnomer occurs, or is shown by proper averments, a grant by deed to a corporation, or a contract with it, will not be invalidated thereby.[3]

AMENDMENTS, ENCYC. OF PL. AND PR., vol. 1, p. 458; and NAME, in this work.

1. Plurality of Names. — Clement *v.* Lathrop, 18 Fed. Rep. 885, 5 Am. & Eng. Corp. Cas. 563; Minot *v.* Curtis, 7 Mass. 441. See also Medway Cotton Manufactory *v.* Adams, 10 Mass. 360; Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280. See *infra*, this section, *Misnomer*.

Adoption of Name Other than Corporate Name. — A corporation may adopt, for the purpose of signing its notes, the name of a mercantile firm, its general agents, so as to bind the corporation by notes so signed; and such adoption may be inferred from corporate acts, or from the acts and statements of the agents, and the silent acquiescence of the corporation, no vote appearing on its record to limit the powers of its agents in this respect. Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59.

2. Anonymous, 3 Salk. 102. See also Hard. 405.

3. Misnomer Generally — *England.* — 2 Kent's Commentaries 292; Eastham *v.* Blackburn R. Co., 25 Eng. L. & Eq. 498.

Canada. — Pigott *v.* Thompson, 3 B. & P. 147; King's College *v.* Roe, Chamb. Rep. 111; Ruitz *v.* Roman Catholic Episcopal Corp., 30 U. C. Q. B. 269.

United States. — Clement *v.* Lathrop, 18 Fed. Rep. 885, 5 Am. & Eng. Corp. Cas. 563.

Alabama. — Douglass *v.* Branch Bank, 19 Ala. 659.

Arkansas. — Bower *v.* State Bank, 5 Ark. 234.

Illinois. — Northwestern Distilling Co. *v.* Brant, 69 Ill. 658.

Indiana. — Glass *v.* Tipton, etc., Turnpike Co., 32 Ind. 376; Hasselman *v.* Japanese Development Co., 2 Ind. App. 180.

Kentucky. — Kentucky Seminary *v.* Wallace, 15 B. Mon. (Ky.) 35.

Louisiana. — Bridgeford *v.* Hall, 18 La. Ann. 211.

Massachusetts. — Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59.

Michigan. — Thatcher *v.* West River Nat. Bank, 19 Mich. 196.

New Jersey. — Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427; Woolwich *v.* Forrest. 2 N. J. L. 107; Middletown *v.* M'Cormick, 3 N. J. L. 92.

New York. — Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238; 7 Am. Dec. 459; All Saints Church *v.* Lovett, 1 Hall (N. Y.) 191; Hammond *v.* Shepard, 29 How. Pr. (N. Y. Supreme Ct.) 188; People *v.* Runkle, 9 Johns. (N. Y.) 147; Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. (N. Y.) 23; Brockway *v.* Allen, 17 Wend. (N. Y.) 40.

North Carolina. — Asheville Div. No. 15 *v.* Aston, 92 N. Car. 578.

Ohio. — Canal Fund *v.* Perry, 5 Ohio 56; Milford, etc., Turnpike Co. *v.* Brush, 10 Ohio 111, 36 Am. Dec. 78.

Pennsylvania. — Berks, etc., Turnpike-road *v.* Myers, 6 S. & R. (Pa.) 12, 9 Am. Dec. 402.

West Virginia. — Marmet *v.* Archibald, 37 W. Va. 778.

Wisconsin. — Woodrough *v.* Witte, 89 Wis. 537, *citing* 4 AM. AND ENG. ENCYC. OF LAW 204.

For a Full Discussion of this subject see the title NAME.

"**The General Rule** to be collected from the cases is, that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument or is shown by proper averments, will not invalidate a grant by or to a corporation or a contract with it; and the modern cases show an increased liberality on this subject." 2 Kent's Com. 292.

In Brock Dist. Council *v.* Bowen, 7 U. C. Q. B. 471, the plaintiffs, by the name of the "Council of the District of Brock," declared in debt on a bond. The declaration stated that the defendants acknowledged themselves to be held and firmly bound to the said plaintiffs. The bond, when produced at the trial, was found to be given to the municipal council of the Brock district. The bond was not set out on oyer, and it was held that such a variance was not fatal. See also Trent, etc., Road Co. *v.* Marshall, 10 U. C. C. P. 329; Whitby Tp. *v.* Harrison, 18 U. C. Q. B. 603; Bruce County *v.* Cromar, 22 U. C. Q. B. 321.

Transposition of Words. — In Chadsey *v.* McCreery, 27 Ill. 253, the words constituting the name of a corporation were transposed. It was held, however, that such a transposition would not defeat an action upon a note given to the corporation where it was evident that that corporation was intended.

(2) *In Grants to or by Corporations.* — As in the case of grants to natural persons a description which designates the person is sufficient, so in grants and obligations to or from a corporation, if it be named and described in such way as to identify and distinguish it, in the common understanding of men, from all others, the grant will be good.[1]

(3) *In Devises or Legacies.* — In case of a devise or legacy to a corporation, the description by name is sufficient if there be enough to show that there is such an artificial being, and to distinguish it from all others, though there is a variance in the words and syllables used.[2]

(4) *In Tax Assessments.* — It has been held that the misnomer of a corporation in a tax assessment against it will not invalidate such assessment.[3]

(5) *In Assessment of Damages.* — If in the assessment of damages to a corporation there is a variance from the corporate name, but sufficient appears to show clearly what corporation is intended, this will do.[4]

(6) *In Actions.* — If a corporation sues or is sued by a name varying only in words or syllables from the true name, the misnomer must be pleaded in abatement.[5] But if in an action against the corporation the name be mistaken in substance, or there is such a variation that a different and distinct entity is indicated, the action cannot be regarded as against the corporation.[6]

f. EXCLUSIVE USE OF NAME. — A corporation, like an individual, may acquire a property right to the use of a name as a trade-mark, or as incidental to the good will of its business, and if it has acquired such a right it will of course be protected in its enjoyment to the same extent as an individual would be. It cannot be deprived of this right by the assumption of its name by a subsequently created corporation, and it is immaterial whether such sub-

1. Grants to or from Corporations. — Grand Junction R. Co. *v.* Midland R. Co., 7 Ont. App. 681; Northwestern Distilling Co. *v.* Brant, 69 Ill. 658; Coulter *v.* Western Theological Seminary, 29 Md. 69; Newport Mechanics' Mfg. Co. *v.* Starbird, 10 N. H. 123, 34 Am. Dec. 145; New York African Soc. *v.* Varick, 13 Johns. (N. Y.) 38. See also Doe *v.* Miller, 1 B. & Ald. 699; Smith *v.* Central Plank-road Co., 30 Ala. 650; Blass *v.* Tipton, etc., Turnpike Co., 32 Ind. 376. *Compare* Ministerial, etc., Fund *v.* Parks, 10 Me. 441; Upper Alloways Creek Tp. *v.* String, 10 N. J. L. 323; Riddle *v.* Philadelphia, etc., R. Co., 1 Pittsb. (Pa.) 158; Ballard *v.* Carmichael, (Tex. 1891) 17 S. W. Rep. 395, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 204. And see the titles MUNICIPAL CORPORATIONS; NAME.

Illustration. — A deed from an individual to a corporation will be good and pass the titles to the lands, if it clearly appears from the deed itself what corporation was intended, although a mistake or omission in the corporate name may have occurred; and this rule is not changed by the fact that, at the time of executing the deed, the grantor was ignorant that the grantee was a body corporate. Asheville Div. No. 15 *v.* Aston, 92 N. Car. 578.

2. Misnomer in Devises and Legacies. — Bac. Abr., title Corporations; Oxford University's Case, 10 Coke 57; Counden *v.* Clerke, Hob. 32; Foster *v.* Walter, Cro. Eliz. 106; Vansant *v.* Roberts, 3 Md. 119; First Parish *v.* Cole, 3 Pick. (Mass.) 232; St. Louis Hospital Assoc. *v.* Williams, 19 Mo. 609; Ryan *v.* Martin, 91 N. Car. 464; North Carolina Institute *v.* Norwood, Busb. Eq. (45 N. Car.) 65. See also County Ct. *v.* Griswold, 58 Mo. 175; Carder *v.* Fayette County, 16 Ohio St. 353.

Illustrations. — In North Carolina Institute *v.* Norwood, Busb. Eq. (45 N. Car.) 65, a testator bequeathed six thousand dollars to the "Deaf and Dumb Institution," and no persons of that corporate name could be found, but persons were found by the corporate name of "President and Directors of the North Carolina Institute for the Education of the Deaf and Dumb," who were popularly known by the former name. This was held to be a case of latent ambiguity, and the latter institution, being identified by extrinsic evidence as the legatee intended, was held to be entitled to the bequest.

In General Lying-In Hospital *v.* Knight, 11 Eng. L. & Eq. 191, a bequest of £500 to "the Westminster Asylum for Pregnant Women," was held, upon extrinsic evidence, and from the context of the will, without any inquiry, a gift to "the General Lying-In Hospital."

As to Legacies and Devises to corporations, where a misnomer or mistake occurs in the name of the beneficiary, see the titles CHARITIES, vol. 5, p. 893; LEGACIES AND DEVISES; RELIGIOUS SOCIETIES.

3. Tax Assessments. — Souhegan Nail, etc., Factory *v.* McConihe, 7 N. H. 309. See also the title TAXATION (CORPORATE).

4. Assessment of Damages. — Peirce *v.* Somersworth, 10 N. H. 369.

5. In Actions. — Wilson *v.* Baker, 52 Iowa 423; Burnham *v.* Savings Bank, 5 N. H. 446. And see the title ABATEMENT IN PLEADING, ENCYC. OF PL. AND PR., vol. 1, p. 12.

6. Gilbert *v.* Nantucket Bank, 5 Mass. 97; Utica Bank *v.* Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526; Southern Pac. Co. *v.* Block, 84 Tex. 21; Southern Pac. Co. *v.* Burns, (Tex. Civ. App. (1893) 23 S. W. Rep. 288. See also

sequent corporation selects its name through the act of incorporators organized under general laws, or whether the name is selected for it in a special legislative act. This general rule, however, is subject to the limitation that even a corporation in its corporate name cannot so monopolize the name of a common article as to prevent another corporation from employing the same words as a part of its name.[1]

4. Seal — *a.* IN GENERAL. — As has been previously stated, one of the incidents of a corporation which are tacitly annexed at the time of its creation is to have and use a seal, which it may alter, change, or renew at pleasure.[2]

b. WHAT CONSTITUTES — (1) *At Common Law* — **Impression upon Wax, etc.** — A corporate seal at common law was held to be an impression upon wax, wafer, or some other tenacious substance.[3]

Impression upon Paper Itself. — Later authorities hold, however, that an impression upon "any substance capable of receiving and retaining the impression," such as the paper itself, is sufficient.[4]

Langhorne *v.* Richmond City, R. Co., 91 Va. 366, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 204.

1. Right to Corporate Name. — Merchant Banking Co. *v.* Merchants' Joint Stock Bank, 9 Ch. Div. 560; Goodyear's India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 21 Fed. Rep. 276; Newby *v.* Oregon Cent. R. Co., Deady (U. S.) 609; Clark Thread Co. *v.* Armitage, 74 Fed. Rep. 926; Holmes *v.* Holmes Mfg., etc., Co., 37 Conn. 278, 9 Am. Rep. 324; Drummond Tobacco Co. *v.* Randle, 114 Ill. 412; Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, *affirming* 51 Ill. App. 231; Boston Rubber Shoe Co. *v.* Boston Rubber Co., 149 Mass. 436; Plant Seed Co. *v.* Michel Plant, etc., Co., 37 Mo. App. 313, *affirming* 23 Mo. App. 579; Matter of Manhattan Dispensary, 43 Hun (N. Y.) 640, 7 N. Y. St. Rep. 871; Hygeia Water Ice Co. *v.* New York Hygeia Ice Co., 140 N. Y. 94, *affirming* (Supreme Ct.) 19 N. Y. Supp. 602.

And for a Full Treatment of this subject, see the title TRADE-MARKS.

2. Right to Use of Seal. — Co. Litt. 250*a*; Comyns's Dig., Franchise, F. 13; Sutton's Hospital Case, 10 Coke 30*b*; 1 Kyd on Corporations 259. See also Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173; Kansas City *v.* Hannibal, etc., R. Co., 77 Mo. 180; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 36; City Council *v.* Moorhead, 2 Rich. L. (S. Car.) 430; Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159. And see the title SEALS.

"It Is an Inseparable Incident of Every Corporation, that they may have a common seal, and make, alter, and renew the same at pleasure." Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212.

Statute — New Mexico. — The scroll or private seal of the chief engineer of a railroad corporation of the territory of New Mexico, affixed to a grading contract, is not the seal of the company, and its contract is not a specialty under the Compiled Laws of New Mexico, §§ 2623, 2624, relating to corporations, which provide that the government board of directors alone can alter the common seal of the company and adopt a new one. Saxton *v.* Texas, etc., R. Co., 4 N. Mex. 201.

3. Seal at Common Law. — 3 Inst. 169; Perry *v.* Price, 1 Mo. 645; Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227; Farmers', etc., Bank *v.* Haight, 3 Hill (N. Y.) 493.

"According to Lord Coke a seal is wax with an impression, because wax without an impression is not a seal. *Sigillum est cera impressa, quia cera sine impressione non est sigillum.*" Corrigan *v.* Trenton Delaware Falls Co., 5 N. J. Eq. 52. See also Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529.

For a Full Discussion as to What Will Constitute a Valid Corporate Seal, both at common law and under statutory provisions, reference is made to the title SEALS.

4. Impression upon Paper. — Reg. *v.* St. Paul, 7 Q. B. 232, 53 E. C. L. 232; Follett *v.* Rose, 3 McLean (U. S.) 332; Pillow *v.* Roberts, 13 How. (U. S.) 472; Pierce *v.* Indseth, 106 U. S. 546; Woodman *v.* York, etc., R. Co., 50 Me. 549; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309, *affirmed* 15 N. Y. 9. See the title SEALS.

Sugden, in his work on Powers, said: "It is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient." 1 Sugden on Powers, 282.

Impression the Essence of the Seal. — "According to Lord Coke, a seal is wax with an impression, because wax without an impression is not a seal. *Sigillum est cera impressa, quia cera sine impressione non est sigillum.* It is clear that by this definition the impression makes the seal. It is true that if this definition is strictly taken, there must not only be an impression, but that impression must be made on wax. But the impression is the *sine qua non* of Lord Coke's seal; the wax is only auxiliary; it adheres to the paper and receives the impression, and is the material which annexes the impression to the instrument. But we have long since grown out of the substance or essence of Lord Coke's definition, the impression; the question is, are we yet fast in the wax? We have said by long practice, that both these were not necessary. With which of them would Lord Coke have been the better satisfied? Clearly, with the impression; nay, he would not have dispensed with that at all. What proportion of the seals used on private papers nowadays

Printed Seals. — As to whether a seal printed upon the contract of a corporation before its execution can be regarded as the seal of the corporation, there has been some contrariety of opinion in the few cases bearing upon the question. The better view, and that more in conformity to reason, would seem to be, that as a corporation may, in the absence of express prohibition, alter its seal at pleasure, such printed seal should be regarded as adopted by the corporation *pro hac vice;* and especially would this be so where the imprint is made by direction of the corporate officers, with a view to the signing and delivering of the contract.[1]

(2) *Under Statutory Provisions.* — Under the statutes of some of the states provision is made that corporate seals may be impressed upon the paper itself without the use of wax or other like substance; while in others it has been held that statutory provisions allowing the use of scrolls or other devices by way of seal apply equally to corporations as to individuals.[2]

would fall within his definition? A wafer placed at the end of the name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal; and by the same rule or reasoning, or absence of reasoning, a drop of sealing-wax dropped in proper position in relation to the name, and without impression, or bit of paper upon it, would be a seal; provided the writing called for a seal. Lord Coke's definition has been entirely departed from, and the mere wax or wafer, put on to receive the seal, is recognized as the seal. How can it be said that the impression, the essence of the definition, appearing on the paper, is no seal, because it is impressed without wax?" Corrigan *v.* Trenton Delaware Falls Co., 5 N. J. Eq. 52.

Use of a Scroll as a Seal. — In Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514, it was held that in the absence of evidence to the contrary, a scroll or rectangle containing the word "seal" was to be deemed the proper and common seal of the corporation. Shiras, J., speaking for the court, said: "Whether an instrument is under seal or not, is a question for the court upon inspection. Whether a mark or character shall be held to be a seal, depends upon the intention of the executant as shown by the paper." See also Hacker's Appeal, 121 Pa. St. 192, *commenting* upon Duncan *v.* Duncan, 1 Watts (Pa.) 322.

But Hendee *v.* Pinkerton, 14 Allen (Mass.) 381, the court said: "The line must be drawn somewhere, and we are satisfied to draw it so as to exclude written or printed scrawls, scrolls, or devices; but so as to include an actual and permanent impression, upon the substance of the paper, of the common seal of a corporation." See also Bates *v.* Boston, etc., R. Co., 10 Allen (Mass.) 251; Allen *v.* Sullivan R. Co., 32 N. H. 446.

Peculiar Device by Way of Seal. — Corporations, like individuals, may use a seal with a peculiar device, if they have adopted such, or they may adopt for the occasion a seal of any device, or a paper and wafer without any mark. Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

1. Adoption of Printed Seals. — In Royal Bank *v.* Grand Junction R., etc., Co., 100 Mass. 444, 97 Am. Dec. 115, an impression of the seal of a corporation indented without any intervening substance upon the surface of a printed bond, otherwise valid as a corporate obligation and purporting to bear the corporate seal by the corporation affixed, which was so impressed by the printer by direction of the officers of the corporation after the bond was printed, and when preparing it to be signed and issued, was held to render the bond valid as an obligation under seal.

So, too, in Woodman *v.* York, etc., R. Co., 50 Me. 549, where the directors of a corporation had by vote authorized the treasurer to procure "a seal for the company bearing the title of the corporation with the year of its charter," and scrip issued by the corporation duly authorized and signed bore a printed impression of a seal with the title and date inscribed, and contained the words, "in testimony of which," "the seal of said company," etc., is "hereunto affixed;" such scrip was held to be under the corporate seal, and that an action of covenant broken might be maintained thereon. This latter case, however, was decided under the Rev. Stat. Me. 1841, c. 76, § 1, which provided that all corporations capable of having a common seal might alter such seal at pleasure; and on this ground it is to be distinguished from the case of Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529, in which it was held that a printed impression of a seal is not a seal, and that a contract of insurance having thereon such an impression is not therefore a sealed instrument. *Compare* Bates *v.* Boston, etc., R. Co., 10 Allen (Mass.) 251, in which it was held that a *fac simile* of a seal of a corporation, printed upon blank forms of applications, purporting to be executed by the corporation at the same time when the blank is printed, and by the same agency, is not a seal at common law; and that such forms will not, when executed by the corporation, be regarded as contracts under seal, although the language of them calls for a seal. To the same effect are Hendee *v.* Pinkerton, 14 Allen (Mass.) 381; Dean *v.* American Legion of Honor, 156 Mass. 435; McCarthy *v.* Metropolitan L. Ins. Co., 162 Mass. 254.

2. By the Code of Georgia (1895, § 5), it is provided that a "seal shall include impressions on the paper itself, as well as impressions on wax or wafers." And it has been decided that the same rule applies to the seal of a corporation as to that of an individual. Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173.

The Kentucky Act of 1797, 1 Stat. Law 326,

(3) *Adoption.* — If a seal is necessary to a corporate contract, and authority is shown from the corporation to attach its seal thereto, it is by no means indispensable that use should be made of the ordinary common seal of the corporation. Any other seal would have the same effect if adopted by the corporation, and this is ordinarily established by showing authority to execute a contract on behalf of the company under seal, and the fact of attaching some seal to the name of the corporation with the intent to seal on its behalf.[1]

A Fortiori, Where a Corporation Has No Common Seal it may adopt and use one *pro hac vice*.[2]

Effect of Private Seal of Agent. — But while a corporation may alter its seal at pleasure, and may adopt as its own the private seal of an individual if it chooses to do so, nevertheless when so adopted it must be used as the seal of the corporation; if it be affixed as the seal of the individual it cannot be treated as that of the corporation, and a declaration in the instrument that it is so affixed is conclusive of its character and effect.[3]

(4) *Effect of Repetition.* — Where two or more persons execute an instrument on behalf of a corporation, each signing his name and affixing the corporate seal opposite his signature, the repetition of the seal will not invalidate the instrument, although such repetition is clearly unnecessary.[4]

providing that "any instrument to which the person making the same shall affix a scroll by way of seal shall be adjudged and holden to be of the same force and obligation as if it were actually sealed," has been held to apply to corporations, as well as to individuals. Reynolds *v.* Glasgow Academy, 6 Dana (Ky.) 37.

Cross-reference. — See the provisions upon this subject to be found in the codes and statutes of the several states, and see the title SEALS.

1. Common Seal Not Indispensable — *United States.* — Eureka Co. *v.* Bailey Co., 11 Wall. (U. S.) 491.

California. — Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150; Gashwiler *v.* Willis, 33 Cal. 11, 91 Am. Dec. 607.

Georgia. — Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173.

Illinois. — Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35. See also Danville Seminary *v.* Mott, 136 Ill. 289.

Kentucky. — Reynolds *v.* Glasgow Academy, 6 Dana (Ky.) 37.

Maine. — Porter *v.* Androscoggin, etc., R. Co., 37 Me. 349.

Massachusetts. — Mill Dam Foundry *v.* Hovey, 21 Pick. (Mass.) 417; Stebbins *v.* Merritt, 10 Cush. (Mass.) 27.

Mississippi. — Deberry *v.* Holly Springs, 35 Miss. 385.

Missouri. — Kansas City *v.* Hannibal, etc., R. Co., 77 Mo. 180.

New Hampshire. — Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

North Carolina. — Taylor *v.* Heggie, 83 N. Car. 244.

Pennsylvania. — Crossman *v.* Hilltown Turnpike Co., 3 Grant's Cas. (Pa.) 225.

Vermont. — Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

See the title SEALS.

2. Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212; South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35; Taylor *v.* Heggie, 83 N. Car. 244; Western Female Seminary *v.* Blair, 1 Disney (Ohio) 370; Crossman *v.* Hilltown Turnpike Co., 3 Grant's Cas. (Pa.) 225· St. Phillip's Church *v.* Zion Presb. Church, 23 S. Car. 297. See also Blood *v.* La Serena Land, etc., Co., 113 Cal. 221; Deberry *v.* Holly Springs, 35 Miss. 385. And see cases cited in note preceding.

3. Effect of Unadopted Private Seal. — State *v.* Allis, 18 Ark. 269; Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150; Mitchell *v.* St. Andrews' Bay Land Co., 4 Fla. 200; Brinley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Damon *v.* Granby, 2 Pick. (Mass.) 345; Lincoln *v.* Crandell, 21 Wend. (N. Y.) 101; Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Hatch *v.* Barr, 1 Ohio 390. *Compare* Hopkins *v.* Mehaffy, 11 S. & R. (Pa.) 126.

4. Plurality of Seals. — Jackson *v.* Walsh, 3 Johns. (N. Y.) 226. See also Decker *v.* Freeman, 3 Me. 340; Wiley *v.* Board of Education, 11 Minn. 371; Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

Illustration Scrolls by Way of Seals. — In Reynolds *v.* Glasgow Academy, 6 Dana (Ky.) 37, the trustees of the academy executed a deed in the name of the corporation, and attached separate scrolls to the name of each trustee, and it was held that this would not invalidate it as the deed of the corporation. The court said: "If the scroll used was intended to be the seal of the corporation, its repetition cannot detract from the validity of the deed. And as several individuals conveying as such might adopt a single seal, or separate seals for each, and the deed would be good, so all the corporators might use a single corporate seal, or attach the corporate seal to each name signed to the instrument; and as the trustees in this case deemed it necessary for each trustee to sign his name, it may have been deemed equally necessary for each to attach the corporate seal."

Common Seal Not Necessarily That Commonly Used. — In an action of covenant against a corporation the seal to the instrument upon which suit is brought must be proved to be the

c. USE OF SEAL. — It was the doctrine of the common law that the contracts of a corporation were not valid unless its corporate seal was affixed thereto by a duly authorized agent; but this rule has been greatly modified, and in many jurisdictions it has been entirely abrogated.[1]

d. BY WHOM AFFIXED. — The seal of a corporation must be affixed by an officer or agent duly authorized to do so, and as the secretary of a corporation is usually the custodian of its common seal, it is generally affixed by him.[2]

e. AUTHORITY TO AFFIX. — The affixing of the corporate seal requires an express authorization, but this authority need not be given under the corporate seal, nor need it be conferred by a formal vote of the corporation or board of directors;[3] and if a corporation ratifies the unauthorized act of its agent in affixing the corporate seal, the ratification is equivalent to a previous authority as in the case of natural persons.[4]

f. EFFECT OF AFFIXING. — As a general proposition it may be said that the seal of a corporation, when affixed to any legal contract or deed by proper authority, is not distinguishable in its legal effect from that of an individual. It affords the highest evidence of the deliberate assent of the party to the deed or contract thus executed.[5]

g. PROOF OF SEAL. — The seal of a corporation, whether foreign or domestic, should be proved by a witness having knowledge of it. It is not, however, required to be proved in the same manner as the seal of an individual, that is, by producing a witness who saw the seal affixed to the identical instrument; but where a deed purports to be under the seal of a corporation it will be sufficient to show that the seal is the official seal of the corporate body.[6]

seal of the corporation, but the common seal is not necessarily that which is commonly used. It is called the common seal, because it binds all the corporators alike. It may be, however, that the corporation has no seal exclusively its own, and it may adopt the seal of another or an ink impression. Still such adoption or impression must be proved. It is not, however, indispensable to such proof that a resolution of the corporate officers should be produced, designating as their own a particular seal or impression. Crossman *v.* Hilltown Turnpike Co., 3 Grant's Cas. (Pa.) 225.

1. B. S. Green Co. *v.* Blodgett, 159 Ill. 174, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 242; Winterfield *v.* Cream Brewing Co., (Wis. 1897) 71 N. W. Rep. 101, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 242. See *infra*, this title, *Powers with Respect to Contracts;* and the title SEALS.

2. See *infra*, this title, *Powers of Corporations — Employment of Agents and Servants;* and the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

3. See Ballard *v.* Carmichael, (Tex. 1891) 17 S. W. Rep. 395, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 238. See the titles AGENCY, vol. 1, p. 952; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

4. See the titles AGENCY, vol. 1, p. 1211; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

5. See the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 124; CONSIDERATION, vol. 6, p. 762; MUNICIPAL SECURITIES; RAILROAD SECURITIES; SEALS.

6. **How Proved** — *England.* — Moises *v.* Thornton, 8 T. R. 303; Chadwick *v.* Bunning, R. & M. 306, 21 E. C. L. 447; Doe *v.* Chambers, 4 Ad. & El. 410, 31 E. C. L. 99.

New Hampshire. — Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

New Jersey. — Raub *v.* Blairstown Creamery Assoc., 56 N. J. L. 262; Osborne *v.* Tunis, 25 N. J. L. 633; Vaughn *v.* Hankinson, 35 N. J. L. 79; Den *v.* Vreelandt, 7 N. J. L. 352, 11 Am. Dec. 551.

New York. — Jackson *v.* Pratt, 10 Johns. (N. Y.) 381; Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257.

Pennsylvania. — Foster *v.* Shaw, 7 S. & R. (Pa.) 156; Leazure *v.* Hillegas, 7 S. & R. (Pa.) 315; Farmers', etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303; Chew *v.* Keck, 4 Rawle (Pa.) 163; Crossman *v.* Hilltown Turnpike Co., 3 Grant's Cas. (Pa.) 225.

South Carolina. — See City Council *v.* Moorhead, 2 Rich. L. (S. Car.) 430.

Tennessee. — Darnell *v.* Dickens, 4 Yerg. (Tenn.) 7.

West Virginia. — Crumlish *v.* Shenandoah Valley R. Co., 32 W. Va. 244.

See also the title SEALS.

Person Affixing as a Subscribing Witness. — In Bowers *v.* Hechtman, 45 Minn. 238, the court said: "The secretary, who attested the execution of the instrument and affixed the corporate seal to it, was not a mere subscribing witness as respondent assumes. He, as much or more than the vice-president, executed the instrument in behalf of the corporation. In fact, the officer or agent who, in behalf of the corporation, affixes the common seal to an instrument, is, in the absence of any statutory provision, deemed the party executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal,

Where a Corporation Has No Common Seal and adopts one for the occasion, that, too, must be proved to be its seal.[1]

Presumption as to Genuineness — Proof of Officer's Signature. — A corporate seal will be presumed genuine, and to have been affixed under proper authority, until the presumption is rebutted, in all cases where the signature of the officer of the corporation executing the instrument is proved.[2]

5. By-Laws. — Every corporation aggregate has the right to enact by-laws for the government of the corporate body. These by-laws must not be inconsistent with its charter or the purposes and objects of its creation, and they must not be repugnant to the common law or to the laws of the land, constitutional and statutory.[3]

6. Residence. — The residence of a corporation is in the sovereignty by which it was created. It must dwell in the place of its creation and cannot migrate to another sovereignty. But its residence in one sovereignty creates no insuperable objection to its power of contracting in another, and by the policy or comity of other sovereignties it can exercise its franchises extra-territorially, it being for the local sovereign to prescribe the terms and conditions upon which its presence by its agents and the conducting of its affairs shall be permitted.[4]

Citizenship of National Corporations. — In case of a corporation created by Act of Congress it will be considered a domestic corporation in each state in which it may do business.[5]

Congressional Incorporation in the District of Columbia. — A distinction must be drawn, however, between national corporations and those created by an Act of Con-

and that it was affixed by authority of the board of directors." To the same effect is Lovett *v.* Steam Saw-mill Assoc., 6 Paige (N. Y.) 54.

Effect of Absence of Proof.— Where a seal has been attached to an instrument, but there is no evidence whether it is the seal of the president or the corporation, it is held that the court cannot say upon inspection that it is the corporate seal, with any more propriety than it can say that the signature of the president is genuine upon a like inspection. The seal cannot prove itself. Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257.

1. Proof of Adopted Seal. — Farmers', etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303. See *supra*, this section, *Adoption*.

2. Proof of Officers' Signatures — *England.* — *In re* Barned's Banking Co., L. R. 3 Ch. 105.

Illinois. — Phillips *v.* Coffee, 17 Ill. 154, 63 Am. Dec. 357.

Iowa. — Blackshire *v.* Iowa Homestead Co., 39 Iowa 624; Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 110.

Maryland. — Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305.

Massachusetts. — Mill Dam Foundery *v.* Hovey, 21 Pick. (Mass.) 417; Stebbins *v.* Merritt, 10 Cush. (Mass.) 27.

New Hampshire. — Flint *v.* Clinton Co., 12 N. H. 430; Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

New York. — Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207; Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 95.

North Carolina. — Clark *v.* Hodge, 116 N. Car. 761; Benbow *v.* Cook, 115 N. Car. 324.

South Carolina. — City Council *v.* Moorhead, 2 Rich. L. (S. Car.) 430; Josey *v.* Wilmington, etc., R. Co., 12 Rich. L. (S. Car.) 134.

Vermont. — Middlebury Bank *v.* Rutland etc., R. Co., 30 Vt. 159.

See the title SEALS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Proof of the signatures of the officers of a corporation to a release purporting to have been executed by the corporation is *prima facie* evidence of the execution and seal. Josey *v.* Wilmington, etc., R. Co., 12 Rich. L. (S. Car.) 134.

3. Power to Make By-Laws. — Wells *v.* Black, 117 Cal. 157; Vercoutere *v.* Golden State Land Co., 116 Cal. 410; Burden *v.* Burden, 8 N. Y. App. Div. 160; Ireland *v.* Globe Milling, etc., Co., (R. I. 1895) 32 Atl. Rep. 921; Tempel *v.* Dodge, 89 Tex. 68.

For a Full Discussion see the title BY-LAWS, vol. 5, p. 86.

4. Corporate Residence. — Augusta Bank *v.* Earle, 13 Pet. (U. S.) 588; Lafayette Ins. Co *v.* French, 18 How. (U. S.) 404; St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.) 423; American, etc., Christian Union *v.* Yount, 101 U. S. 352; Wright *v.* Bundy, 11 Ind. 398; Thompson *v.* Waters, 25 Mich. 214; Glaize *v.* South Carolina R. Co., 1 Strobh. L. (S. Car.) 70. And see generally the title FOREIGN CORPORATIONS.

5. Com. *v.* Texas, etc., R. Co., 98 Pa. St. 90. See the title NATIONAL CORPORATIONS.

In New York a domestic corporation has been defined to be a corporation created by or under the laws of the state, or located in the state and created by or under the laws of the United States, or by or pursuant to the laws in force in the colony of New York before the 19th day of April, 1775. Every other corporation is a foreign corporation. See Diossy's Code of Civil Procedure, § 3343. See also Market Nat. Bank *v.* Pacific Nat. Bank, 64 How. Pr. (N. Y. Supreme Ct.) 1, *affirming* 93 N. Y. 648.

gress as the local legislature of the District of Columbia. These as regards the states and territories of the Union are foreign.[1]

VII. Powers of Corporations — 1. Corporate Powers in General — *a.* Scope of Treatment. — It is the purpose, in dealing with the powers of corporations in this article, to treat only of the things which, as corporate bodies, they are authorized to do. It is also the purpose to treat only generally of corporate powers. The powers of particular corporations will be shown only in so far as they establish and illustrate the principles applicable to corporations generally.[2] In other parts of the work are treated the effect of consolidation, and the powers of the new corporation thereby formed;[3] the powers of officers and agents of corporations;[4] the powers of a majority of the stockholders;[5] and the effect of contracts and transactions which are *ultra vires*, together with the rights and liabilities arising therefrom.[6]

b. "Powers" Defined. — The term "power," as applied to corporations, does not mean their ability to act through their officers and agents, but rather their right or authority to act. It is possible for a corporation to do an act which is beyond its powers as the term is here used. Such an act is said to be *ultra vires*. An act within its powers, or *intra vires*, is an act which it may lawfully do under its charter.[7]

c. Powers Measured by Charter — (1) *In General.* — The powers of a corporation, like its corporate existence, are derived from the legislature, and are not, as in the case of a partnership, co-extensive with the powers of the individuals who compose it. Its charter, therefore, is the measure of its powers, and it can lawfully exercise such powers only as are expressly or impliedly conferred by that instrument.[8]

1. **District of Columbia.** — Daly *v.* National L. Ins. Co., 64 Ind. 1; Williams *v.* Creswell, 51 Miss. 817; Hadley *v.* Freedman's Sav., etc., Co. 2 Tenn. Ch. 122. See also *supra*, this title, *National Corporations;* and the title Foreign Corporations.

2. See such titles as Banks and Banking, vol. 3, p. 787; Insurance; Municipal Corporations; National Banks; Railroads; Religious Societies; Savings Banks; Turnpikes, etc.

3. See the title Consolidation of Corporations, vol. 6, p. 800.

4. See the title Officers and Agents of Private Corporations.

5. See the titles Stock; Stockholders.

6. See the title Ultra Vires.

7. See the title Ultra Vires.

8. **General Rule as to Corporate Power** — *England.* — Ashbury Railway Carriage, etc., Co. *v.* Riche, L. R. 7 H. L. 653, 44 L. J. Exch. 185, 33 L. T. 451, *reversing* L. R. 9 Exch. 224; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775; Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113; Wenlock *v.* River Dee Co., L. R. 10 App. 354, 54 L. J. Q. B. 577, 53 L. T. 62, 49 J. P. 773; Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331; Taylor *v.* Chichester, etc., R. Co., L. R. 2 Exch. 356, 36 L. J. Exch. 201, 16 L. T. 703, 16 W. R. 147; Copper Miners' Co. *v.* Fox, 16 Q. B. 229, 71 E. C. L. 229, 15 Jur. 703, 20 L. J. Q. B. 174; Ernest *v.* Nicholls, 6 H. L. Cas. 401, 3 Jur. N. S. 919; Bagshaw *v.* Eastern Union R. Co., 7 Hare 114; South Yorkshire R., etc., Co *v.* Great Northern R. Co., 9 Exch. 55; Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 117 E. C. L. 588; Atty.-Gen. *v.* Great Northern R. Co., 6 Jur. N. S. 1006, 1 Drew & S. 154; Grimes *v.* Harrison, 26 Beav. 435, 5 Jur. N. S. 528, 28 L. J. Ch. 823, 33 L. T. O. S. 115; Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137, 6 Ry. Cas. 790, 20 L. J. Exch. 193; Munt *v.* Shrewsbury, etc., R. Co., 3 Eng. Law & Eq. 144.

Canada. — Lyman *v.* Upper Canada Bank, 8 U. C. Q. B. 354; Great Western R. Co. *v.* Preston, etc., R. Co., 17 U. C. Q. B. 477; Charlebois *v.* Delap, 26 Can. Sup. Ct. Rep. 221; Walmsley *v.* Rent Guarantee Co., 29 Grant's Ch. (U. C.) 484.

United States. — Huntington *v.* National Sav. Bank, 96 U. S. 388; Thomas *v.* West Jersey R. Co., 101 U. S. 71; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 24 Am. & Eng. R. Cas. 58; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1, 5 Ry. & Corp. L. J. 364; Cass *v.* Manchester Iron, etc., Co., 9 Fed. Rep. 640; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. Rep. 356, 47 Am. & Eng. Corp. Cas. 242; Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. Rep. 797; Beaty *v.* Knowler, 4 Pet. (U. S.) 171, *affirming* Knowles *v.* Beaty, 1 McLean (U. S.) 41; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 587; Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64; Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127.

Alabama. — Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558; Grand Lodge *v.* Waddill, 36 Ala. 313; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353, 25 Am. & Eng. R. Cas. 25; Chewacla Lime Works *v.* Dismukes, 87 Ala. 344, 28 Am. & Eng. Corp. Cas. 20;

Simmons *v.* Troy Iron Works, 92 Ala. 427; State *v.* Stebbins, 1 Stew. (Ala.) 299.

Arkansas. — Mississippi, etc., R. Co. *v.* Camden, 23 Ark. 300.

California. — Vandall *v.* South San Francisco Dock Co., 40 Cal. 83.

Connecticut. — New York Firemen's Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100; Hood *v.* New York, etc., R. Co., 22 Conn. 17; Occum Co. *v.* Sprague Mfg. Co., 34 Conn. 541; Farrell *v.* Winchester Ave. R. Co., 61 Conn. 127.

Florida. — State *v.* Florida Cent. R. Co., 15 Fla. 690.

Georgia. — Central R. Co. *v.* Collins, 40 Ga. 582; Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Harriman *v.* First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117; Singleton *v.* Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Reynolds *v.* Simpson, 74 Ga. 454.

Illinois. — Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Illinois Conference Female College *v.* Cooper, 25 Ill. 148; Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124; Rockhold *v.* Canton Masonic Mut. Benev. Soc., 129 Ill. 440; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319; McCrory *v.* Chambers, 48 Ill. App. 445; Durkee *v.* People, 53 Ill. App. 396; Betts *v.* Menard, 1 Ill. 395.

Indiana. — Ohio Ins. Co. *v.* Nunnemacher, 15 Ind. 294; Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 108; Leonard *v.* American Ins. Co., 97 Ind. 299; Wright *v.* Hughes, 119 Ind. 324, 12 Am. St. Rep. 412.

Iowa. — Lucas *v.* White Line Transfer Co., 70 Iowa 541, 59 Am. Rep. 449; Bathe *v.* Decatur County Agricultural Soc., 73 Iowa 11, 5 Am. St. Rep. 651.

Kansas. — Kansas Ins. Co. *v.* Craft, 18 Kan. 283; Getty *v.* Barnes Milling Co., 40 Kan. 281.

Kentucky. — U. S. Bank *v.* Norvell, 2 A. K. Marsh. (Ky.) 101; Kentucky Masonic Mut. L. Ins. Co. *v.* Miller, 13 Bush (Ky.) 489; Thweatt *v.* Hopkinsville Bank, 81 Ky. 1.

Louisiana. — New Orleans, etc., Steamship Co. *v.* Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90. *Compare* Graham *v.* Hendricks, 22 La. Ann. 523.

Maine. — Bangor Boom Corp. *v.* Whiting, 29 Me. 123; Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256; Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9.

Maryland. — Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50; Maryland Hospital *v.* Foreman, 29 Md. 524; Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355; Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 318; Abbott *v.* Baltimore, etc., Steam Packet Co., 1 Md. Ch. 542; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 380.

Massachusetts. — Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543; Atty.-Gen. *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 32.

Michigan. — People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575; Orr *v.* Lacey, 2 Dougl. (Mich.) 230; Atty.-Gen. *v.* Oakland County Bank, Walk. (Mich.) 90.

Minnesota. — Rochester Ins. Co. *v.* Martin, 13 Minn. 59.

Mississippi. — Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 148; Mobile, etc., R. Co. *v.* Franks, 41 Miss. 494; Gaines *v.* Coates, 51 Miss. 335.

Missouri. — Blair *v.* Perpetual Ins. Co., 10 Mo. 565, 47 Am. Dec. 129; Louisville Bank *v.* Young, 37 Mo. 406; Matthews *v.* Skinker, 62 Mo. 329, 21 Am. Rep. 425; Bowman Dairy Co. *v.* Mooney, 41 Mo. App. 665.

Nebraska. — State *v.* Atchison, etc., R. Co., 24 Neb. 161, 8 Am. St. Rep. 164.

Nevada. — See Whitman Gold, etc., Min. Co. *v.* Baker, 3 Nev. 391; Georg *v.* Nevada Central R. Co., 22 Nev. 228.

New Hampshire. — South Newmarket Methodist Seminary *v.* Peaslee, 15 N. H. 330; Downing *v.* Mount Washington Road Co., 40 N. H. 230; Greeley *v.* Nashua Sav. Bank, 63 N. H. 145.

New Jersey. — Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542; Jersey City Gaslight Co. *v.* Consumers' Gas Co., 40 N. J. Eq. 432; Stockton *v.* Central R. Co., 50 N. J. Eq. 65, 51 Am. & Eng. R. Cas. 1; National Trust Co. *v.* Miller, 33 N. J. Eq. 155; Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133; Watson *v.* Acquackanonck Water Co., 3 N. J. L. 195; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Rabe *v.* Dunlap, 51 N. J. Eq. 40, 40 Am. & Eng. Corp. Cas. 220.

New York. — Alexander *v.* Cauldwell, 83 N. Y. 480; Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14, 20 Am. & Eng. R. Cas. 637; Jemison *v.* Citizen's Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482; People *v.* Campbell, 144 N. Y. 166; New York Firemen's Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; Beatty *v.* Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; People *v.* Geneva College, 5 Wend. (N. Y.) 211; Brisay *v.* Star Corp., 13 Misc. Rep. (N. Y. Supreme Ct.) 349; Whitney Arms Co. *v.* Barlow, 38 N. Y. Super. Ct. 554.

North Carolina. — Wiswall *v.* Greenville, etc., Plank Road Co., 3 Jones Eq. (56 N. Car.) 183.

Ohio. — Bonham *v.* Taylor, 10 Ohio 108; State *v.* Washington Social Library Co., 11 Ohio 96; Bartholomew *v.* Bentley, 1 Ohio St. 37; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601.

Oregon. — Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oregon 527.

Pennsylvania. — Hughes *v.* Farmers' Hay, etc., Assoc., 20 Pa. St. 327; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Fowler *v.* Scully, 72 Pa. St. 456, 13 Am. Rep. 699; Diligent F. Co. *v.* Com., 75 Pa. St. 291; Allentown First Nat. Bank *v.* Hoch, 89 Pa. St. 324, 33 Am. Rep. 769; Merchants' Bank *v.* Shouse, 102 Pa. St. 488; Com. *v.* Northeastern El. R. Co., 161 Pa. St. 409, 34 W. N. C. (Pa.) 267; McMasters *v.* Reed, 1 Grant's Cas. (Pa.) 36.

Tennessee. — Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167; Mallory *v.* Hanaur Oil Works, 86 Tenn. 598, 20 Am. & Eng. Corp. Cas. 478; Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337; Greeneville, etc., Narrow Gauge R. Co. *v.* Johnson, 8 Baxt. (Tenn.) 335; Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 19, 53 Am. Dec. 742; Memphis *v.* Memphis City Bank, 91 Tenn. 574.

This rule applies to every kind of corporation.[1]

Distinguished from Powers of Natural Person. — There is this difference, it has been said, between the powers of a corporation and the powers of a natural person. The latter can do anything not forbidden by law. The former can do only what is expressly or impliedly authorized by its charter.[2]

In the United States the rule is well settled as stated above, that is, that a corporation has such powers only as are expressly or impliedly granted. It is not right to say, as has been contended by some, that it has the power to do all acts not expressly or impliedly prohibited.[3]

In England the rule is differently stated. In some of the cases the dictum is in accord with that of the cases in the United States.[4] But in the later cases it is said that a corporation has, not such powers as are conferred by the charter, but such powers as the charter does not expressly or impliedly pro-

Texas. — Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 35 Am. & Eng. R. Cas. 94; Fort Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169; Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306; Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143; Northside R. Co. *v.* Worthington, 88 Tex. 562, (Tex. Civ. App. 1894) 27 S. W. Rep. 746.

Vermont. — Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545; Wiley *v.* Brattleboro First Nat. Bank, 47 Vt. 546.

Washington. — Biles *v.* Tacoma, etc., R. Co., 5 Wash. 514.

West Virginia. — Pennsylvania Lightning Rod Co. *v.* Board of Education, 20 W. Va. 360.

Wisconsin. — Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 7 Wis. 59; Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669; Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575; Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, 19 Am. Rep. 781; Dietrich *v.* Madison Relief Assoc., 45 Wis. 79; Kennan *v.* Rundle, 81 Wis. 212; Janesville Bridge Co. *v.* Stoughton, 1 Pin. (Wis.) 667; Cedar Lake Hotel Co. *v.* Cedar Creek Hydraulic Co., 79 Wis. 297.

1. Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692.

2. "An individual," said Hosmer, C. J., in New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100, "has an absolute right freely to use, enjoy, and dispose of all his acquisitions, without any control or domination, save only by the laws of the land. But the civil rights of a corporation (for it has no natural rights) are widely different. The law of its nature, or its birthright, in the most comprehensive sense, is such, and such only, as its charter confers." See also Shields *v.* Ohio, 95 U. S. 319; Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558; Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

3. **Statements of the Rule in United States.** — "It may be safely assumed," said Chief Justice Taney, in Augusta Bank *v.* Earle, 13 Pet. (U. S.) 587, "that a corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents and in such manner as the charter authorizes."

In Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, Chief Justice Marshall said: "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers." See also Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636, *per* Chief Justice Marshall.

And in Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 48, Justice Gray, after a review of the cases, said: "The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental."

In Thomas *v.* West Jersey R. Co., 101 U. S. 71, which is a leading case in the federal courts, the decision turned upon the power of the company, under its corporate authority, to make a lease. The lessees insisted that a corporation may, as at common law, do any act which is not either expressly or impliedly prohibited by its charter, although, where the act is unauthorized, a shareholder may enjoin its execution, and the state may, by proper process, forfeit the charter. To this the court replied: "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." See also Mallory *v.* Hanaur Oil Works, 86 Tenn. 598, 20 Am. & Eng. Corp. Cas. 481; State *v.* Florida Cent. R. Co., 15 Fla. 690.

4. **Earlier Statements of Rule in England.** — Thus in Colman *v.* Eastern Counties R. Co., 10 Beav. 1, it was said that it was properly admitted that railway companies have no right to enter into new trades or businesses "not pointed out by their Acts."

hibit.[1] It is further said, however, that all powers not expressly or impliedly granted are impliedly prohibited. So that, after all, the rule in England, as in the United States, is that the charter of a corporation is the measure of its powers.[2]

(2) *Effect of Consent of Stockholders or Members.* — The consent or acquiescence of all the stockholders or members can give a corporation no right to engage in acts or transactions foreign to the objects for which it was created, or render such acts or transactions any the less *ultra vires*.[3]

(3) *Effect of By-Laws.* — And it follows that the powers of a corporation cannot be enlarged or extended by by-laws beyond the scope authorized by its charter.[4] Nor, on the other hand, can a by-law detract from the powers of the corporation. It can merely affect the management of its business and control its officers and agents.[5]

(4) *Effect of Benefit to Corporation.* — It is also well settled that the mere fact that a particular business or transaction will be beneficial to the corporation and greatly increase its profits, and that there is nothing wrong or injurious to the public in the business or transaction, does not give the corporation authority to engage therein, if it is beyond the objects for which it was created.[6]

(5) *Express Prohibition or Limitation.* — Of course, a corporation cannot lawfully do acts that are expressly prohibited by its charter or by statute.[7]

And in East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775, it was said to be clear that the defendants had a limited authority only, and were a corporation only for the purpose of making and maintaining the railway sanctioned by the Act, and that their funds could "only be applied for the purposes directed and provided for by the statute."

1. Later Statements of Rule in England. — Thus in South Yorkshire R., etc., Co. *v.* Great Northern R. Co., 9 Exch. 84, Mr. Baron Parke said: "Where a corporation is created by an Act of Parliament for particular purposes, with special powers, * * * their deed, though under their corporate seal, * * * does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the legislature meant that such a deed should not be made."

And in Scottish North Eastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 382, it was said that there can be no doubt that a corporation is fully capable of binding itself by any contract, except when the statutes by which it is created or regulated, expressly or by necessary implication, prohibit such contract. See also Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 117 E. C. L. 588; Taylor *v.* Chichester, etc., R. Co., L. R. 2 Exch. 384; Bateman *v.* Ashton-under-Lyne, 3 H. & N. 323.

2. Rules Practically the Same. — In Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113, Lord Cranworth said, in commenting on South Yorkshire R., etc., Co. *v.* Great Northern R. Co., 9 Exch. 75: "I think this is the more correct way of enunciating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because, by necessary inference, the legislature must be considered to have intended that no such contracts should be entered into."

3. Consent of Stockholders. — East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775; Ashbury Railway Carriage, etc., Co. *v.* Riche, L. R. 7 H. L. 653, 44 L. J. Exch. 185, 33 L. T. 451, *reversing* L. R. 9 Exch. 224; Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Charlebois *v.* Delap, 26 Can. Sup. Ct. Rep. 221; Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. Rep. 797; Cherokee Iron Co. *v.* Jones, 52 Ga. 276; National Trust Co. *v.* Miller, 33 N. J. Eq. 155; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5.

4. Effect of By-Laws. — Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256; Traders, etc., Ins. Co. *v.* Brown, 142 Mass. 403; State *v.* Utter, 34 N. J. L. 489. See the title By-Laws, vol. 5, p. 86.

5. Thus in Kelly *v.* Mobile Bldg, etc., Assoc., 64 Ala. 501, it was held that a loan by a corporation in violation of its by-laws was not for that reason *ultra vires*. "By-laws of a corporation," it was said, "are not enforced by avoiding contracts made in violation of them."

6. Enterprise Beneficial to Corporation. — Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Atty.-Gen. *v.* Great Northern R. Co., 6 Jur. N. S. 1006, 1 Drew & S. 154; Munt *v.* Shrewsbury, etc., R. Co., 3 Eng. Law and Eq. 144; Tomkinson *v.* South Eastern R. Co., 35 Ch. Div. 675; Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. Rep. 797; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441; Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543; Georg Nevada Central R. Co., 22 Nev. 228. See the numerous illustrations in the following pages.

7. Acts Expressly Prohibited. — Root *v.* Goddard, 3 McLean (U. S.) 102; Weed *v.* Snow, 3

In such cases, the only difficulty is in determining whether the particular act is prohibited,[1] and the effect of a violation of the prohibition.[2]

d. How Powers Are Conferred by Charter — (1) *In General.* — Before dealing with particular powers, as the power to take and convey property, the power to contract, etc., it is necessary to understand how powers are conferred upon a corporation by its charter. They may be conferred either in express terms or by implication.

(2) *Powers Expressly Conferred.* — In so far as an express grant of power is concerned, the only difficulty is in construing the charter to ascertain the intention of the legislature, and sometimes in determining whether the grant violates any constitutional provision, in which case, of course, it would be void. The general rules for the construction of charters are given on subsequent pages, with decisions illustrating them.[3]

(3) *Implied Powers* — (a) **In General.** — Whenever a corporation is created, there are certain powers which attach to it as an incident to corporate existence, and many other powers are implied because of the powers expressly granted.

(b) **Powers Incident to Corporate Existence.** — The powers which are incident to corporate existence, and which are always implied in the absence of express restrictions, are: first, the power to have perpetual succession;[4] second, the power to sue and be sued, and to grant and receive by the corporate name;[5] third, the power to purchase and hold land and chattels;[6] fourth, the power to have a common seal;[7] fifth, the power to make by-laws for the government of the corporation;[8] and, sixth, the power of disfranchisement or removal of members.[9]

(c) **Powers Implied from Those Expressly Conferred** — *aa.* In General. — In addition to these powers, sometimes called incidental powers, it is a well-settled principle of corporation law, that corporations, in the absence of express restrictions, have the implied power to do all acts that may be necessary to enable them to exercise the powers expressly conferred, and accomplish the objects for which they were created.[10]

McLean (U. S.) 265; Hayden *v.* Davis, 3 McLean (U. S.) 276; Root *v.* Wallace, 4 McLean (U. S.) 8; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1.

1. See *infra*, this title, cases cited in treating of particular powers.

2. See the title Ultra Vires.

3. See *infra*, this section, *Construction of Charter.*

4. See *supra*, this title, *Ordinary Incidents — Perpetual Succession.*

5. See *supra*, this title, *Ordinary Incidents — Name.*

6. See *infra*, this section, *Power to Take and Hold Property.*

7. See *supra*, this title, *Ordinary Incidents — Seal.*

8. See *supra*, this title, *Ordinary Incidents — By-Laws.* And see the title By-Laws, vol. 5, p. 86.

9. See the title Disfranchisement. This power, however, does not attach to modern joint-stock corporations.

10. **Rule as to Implied Powers** — *England.* — Atty.-Gen. *v.* Great Eastern R. Co., L. R. 5 App. 473, 49 L. J. Ch. 545, 42 L. T. 810, 28 W. R. 769; Flanagan *v.* Great Western R. Co., L. R. 7 Eq. 116; Simpson *v.* Westminster Palace Hotel Co., 8 H. L. Cas. 712, 6 Jur. N. S. 985; London Financial Assoc. *v.* Kelk, 26 Ch. Div. 107, 53 L. J. Ch. 1025, 50 L. T. 492; Forrest *v.* Manchester, etc., R. Co., 30 Beav. 40.

Canada. — McDonald *v.* Upper Canada Min. Co., 15 Grant's Ch. (U. C.) 179; Atty.-Gen. *v.* Grand Trunk R. Co., 16 L. C. Rep. 91.

United States. — Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 385; Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 44 Am. & Eng. Corp. Cas. 604; Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514; McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262.

Alabama. — Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 73.

California. — Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 621; Vandall *v.* South San Francisco Dock Co., 40 Cal. 83.

Colorado. — Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Connecticut. — Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 51.

Georgia. — Reynolds *v.* Simpson, 74 Ga. 454.

Illinois. — Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42; Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234; B. S. Green Co. *v.* Blodgett, 159 Ill. 169; Hawkes Glass Beveling, etc., Co. *v.* Bohn Mfg. Co., 40 Ill. App. 649; National Brewing Co. *v.* Ahlgren, 63 Ill. App. 475; Keeley Brewing Co. *v.* Emrick, 64 Ill. App. 247.

Indiana. — Peru Bridge Co. *v.* Hendricks,

bb. Relation Between Act and Authorized Objects. — The act, in order that the power to do it may be implied, must tend directly and immediately, and not slightly or remotely, to accomplish the object for which the corporation was created.[1]

18 Ind. 11; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536.

Iowa. — Home Ins. Co. *v.* North Western Packet Co., 32 Iowa 223, 7 Am. Rep. 183.

Kansas. — Whetstone *v.* Ottawa University, 13 Kan. 320; Fulton *v.* Sterling Land, etc., Co., 47 Kan. 621.

Kentucky. — Louisville, etc., R. Co. *v.* St. Rose Literary Soc., 91 Ky. 395.

Louisiana. — New Orleans, etc., R. Co. *v.* Second Municipality, 1 La. Ann. 128; Knight *v.* Carrollton R. Co., 9 La. Ann. 284; Bridgeford *v.* Hall, 18 La. Ann. 211; Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970.

Maryland. — Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476; Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

Massachusetts. — Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326; Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315.

Mississippi. — Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143; Norwood *v.* Andrews, 71 Miss. 641.

Missouri. — Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305; Welsh *v.* Ferd Heim Brewing Co., 47 Mo. App. 608; Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514; Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212.

Nevada. — Sutro Tunnel Co. *v.* Segregated Belcher Min. Co., 19 Nev. 121.

New Hampshire. — Smith *v.* Nashua, etc., R. Co., 27 N. H. 94, 59 Am. Dec. 364.

New Jersey. — Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 370, 22 Am. Dec. 526; Leggett *v.* New-Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Armstrong *v.* Pennsylvania R. Co., 38 N. J. L. 1; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 46 Am. & Eng. R. Cas. 76; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 11 Ry. & Corp. L. J. 97, 35 Am. & Eng. Corp. Cas. 388. See State *v.* Hancock, 35 N. J. L. 537.

New York. — Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; Hope Mut. Ins. Co. *v.* Perkins, 2 Abb. App. Dec. (N. Y.) 383; Wehrhane *v.* Nashville, etc., R. Co., (Supreme Ct.) 4 N. Y. St. Rep. 541; Leavitt *v.* Blatchford, 5 Barb. (N. Y.) 9; Moss *v.* Averell, 10 N. Y. 455; McCraith *v.* National Mohawk Valley Bank, 104 N. Y. 414; Snow, Church & Co. *v.* Hall, 19 Misc. Rep. (N. Y.) 655, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 216.

North Carolina. — Gruber *v.* Washington, etc., R. Co., 92 N. Car. 1.

Ohio. — White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601.

Oregon. — Kelly *v.* People's Transp. Co., 3 Oregon 189.

Pennsylvania. — McMasters *v.* Reed, 1 Grant's Cas. (Pa.) 48; Ingham *v.* Reform Club, 12 Phila. (Pa.) 264, 4 W. N. C. (Pa.) 33; Watts's Appeal, 78 Pa. St. 370; Malone *v.* Lancaster Gas Light, etc., Co., 182 Pa. St. 309.

Tennessee. — Searight *v.* Payne, 6 Lea (Tenn.) 283; Union Bank *v.* Jacobs, 6 Humph. (Tenn.) 515.

Texas. — Indianola *v.* Gulf, etc., R. Co., 56 Tex. 594; Northside R. Co. *v.* Worthington, 88 Tex. 562.

Vermont. — Dauchy *v.* Brown, 24 Vt. 197; Shawmut Bank *v.* Plattsburgh, etc., R. Co., 31 Vt. 491.

Wisconsin. — Clark *v.* Farrington, 11 Wis. 306; Wendel *v.* State, 62 Wis. 304; Winterfield *v.* Cream Brewing Co., (Wis. 1897) 71 N. W. Rep. 101, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 242.

Statements of the Rule. — "While a corporation has no powers except those which are conferred by its charter, it is not requisite that those powers should be expressly granted, but it possesses impliedly and incidentally all such powers as are necessary for the purpose of carrying into effect those which are expressly granted. The creation of a corporation for a specified purpose implies a power to use the means necessary to effect that purpose." Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 63.

"We know of no rule or principle," said Bigelow, C. J., "by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created." Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 334.

Power to Contract. — Thus it is not necessary that the charter, whether it is of special legislative enactment, or derived from general statutory provisions, shall expressly confer the power of making contracts. "The capacity to contract is an incidental corporate power, and if the special act of incorporation or the general statutory law is silent as to the contracts into which a corporation may enter, it has the power to make all such contracts as are necessary and proper to enable it to accomplish the purposes of its creation." Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 77. See *infra*, this section, *Powers with Respect to Contracts.*

1. **"An Incidental Power** is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it." People *v.* Chicago Gas Trust Co., 130 Ill. 283, 17 Am. St Rep. 319. And see Vandall *v.* South San Francisco Dock Co., 40 Cal. 83; Hood *v.* New York, etc., R. Co., 22 Conn. 16, Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 45, 28 Am. Rep. 9; Buffett *v.* Troy, etc., R. Co., 40 N. Y. 176.

cc. Whether Act Must Be Absolutely Necessary. — But when it is said that a corporation has the implied power to do all acts that may be necessary in order to accomplish its objects, absolute necessity is not intended. It may do all acts that are reasonably necessary, — that is, that are proper and convenient as tending directly to accomplish such objects.[1]

dd. Whether Act Must Be Usual. — Nor is it necessary that the act be usual if it meets the above requirement.[2]

ee. Express Prohibition. — The rule that a grant of corporate powers is a grant of the necessary incidents to the enjoyment of those powers does not apply so as to embrace incidental powers which are expressly excepted or forbidden.[3]

c. Mode of Exercising Corporate Powers — (1) *Express Charter Requirements.* — The powers of a corporation are measured by its charter, not only as to the things which it may lawfully do, but also as to the mode in which it may do them. If the charter requires the powers conferred to be exercised in a particular manner, or by particular officers or agents, and the provision is not merely directory,[4] it can only exercise them in the mode pointed out.[5]

(2) *In the Absence of Express Requirements.* — On the other hand, if the charter of a corporation prescribes no mode for the exercise of its powers, it is for the corporation to adopt such mode as, in the judgment of its stockholders or officers, will best accomplish the purpose contemplated.[6]

f. Time of Commencing Business and Exercising Powers — (1) *In General.* — In the absence of charter or statutory restrictions, a corporation

1. Rule as to Necessity for Act. — State *v.* Hancock, 35 N. J. L. 537; Crawford *v.* Longstreet, 43 N. J. L. 325; Central Gold Min. Co. *v.* Platt, 3 Daly (N. Y.) 263; Malone *v.* Lancaster Gas Light, etc., Co., 182 Pa. St. 309; Northside R. Co. *v.* Worthington, 88 Tex. 562; Madison, etc., Plank-road Co. *v.* Watertown, etc., Plank-road Co., 5 Wis. 173; Clark *v.* Farrington, 11 Wis. 306.

Statements of Rule. — "The word 'necessary,' in this use," said the New Jersey court, 'is so far from being contradistinguished from the word 'convenient,' that the former term comprehends much that in strictness is embraced in the latter term. Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptation of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted has always been deemed a necessary one. * * * In short, the term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter." State *v.* Hancock, 35 N. J. L. 545.

The rule is thus stated by Church, J., in Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475: "In this country all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny to them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation."

2. Madison, etc., Plank-road Co. *v.* Watertown, etc., Plank-road Co., 5 Wis. 173; Clark *v.* Farrington, 11 Wis. 306.

Illustration. — Thus it is not usual for a railroad company, in issuing its stock to raise money for the construction of its road, to take notes secured by real estate mortgages in payment. And yet it has been held that such power exists, as tending directly to accomplish the object for which it was created, namely the construction of its road. Clark *v.* Farrington, 11 Wis. 306.

3. Plummer *v.* Penobscot Lumbering Assoc., 67 Me. 363.

4. See *infra*, this section, *Construction of Charter*.

5. U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64; Fridley *v.* Bowen, 87 Ill. 151; Beatty *v.* Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; Hosack *v.* College of Physicians, etc., 5 Wend. (N. Y.) 547; Bartholomew *v.* Bentley, 1 Ohio St. 37; Talmadge *v.* North American, etc., Transp. Co., 3 Head (Tenn.) 337; Pennsylvania Lightning Rod Co. *v.* Board of Education, 20 W. Va. 360. See *infra*, this section, *Powers with Respect to Contracts*.

6. Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448. See *infra*, this section, *Powers with Respect to Contracts*.

may commence business and execute the powers conferred upon it, as soon as it acquires corporate existence, but it cannot do so in violation of express restrictions.[1]

(2) *Conditions Precedent.* — If the charter prescribes conditions precedent to the right to exercise the powers conferred, they must be complied with.[2]

(3) *Limitation as to Time of Exercising Powers.* — And, as a general rule, when a power is given to a corporation, and a time fixed within which it shall be exercised, it must be exercised within that time or it is gone.[3]

g. PLACE OF DOING BUSINESS AND EXERCISING POWERS — (1) *Within the State.* — A corporation cannot locate and carry on its business, or exercise the powers conferred upon it, at one place when its charter requires it to do so at another.[4] In the absence of express restrictions, however, it may conduct its business and exercise its powers at any place in the state.[5]

(2) *Without the State.* — And it may, through its duly authorized agents, carry on business and make contracts outside the state, if not prohibited by its charter,[6] provided the other state or country permits it to do so.[7]

h. ABANDONMENT OF ENTERPRISE — (1) *Strictly Private Corporations.* — There is nothing to prevent a strictly private corporation from abandoning altogether or in part the enterprise for which it was created, if all the stockholders consent, for the public have no interest in the continuation of its business.[8]

(2) *Quasi-Public Corporations.* — But it is otherwise with *quasi*-public corporations, like railroad companies, etc. The charter is granted to them in contemplation of the supposed benefit to the public from the completion of the entire work authorized, and they have no power to abandon it in part.[9]

1. McCormick *v.* Market Nat. Bank, 61 Ill. App. 33, *affirmed* in 162 Ill. 100.

2. Conditions Precedent to Exercise of Powers. — Bonham *v.* Taylor, 10 Ohio 108; Medill *v.* Collier, 16 Ohio St. 599. See Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768.

Thus if the charter of a bridge company requires that it shall post at each end of the bridge a board showing the rates of toll, as a condition precedent to the right to demand toll, it must perform the condition before any right to demand toll can be acquired. Bonham *v.* Taylor, 10 Ohio 108. And see Middle Bridge *v.* Brooks, 13 Me. 391, 29 Am. Dec. 510.

A National Bank is prohibited by the National Bank Act from transacting any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence business, and certain conditions must be complied with before the comptroller issues his certificate. Until authorized by the comptroller, therefore, a national bank cannot lease offices or do any other business not incidental and not necessarily preliminary to its organization. McCormick *v.* Market Nat. Bank, 165 U. S. 538, *affirming* 162 Ill. 100, which *affirmed* 61 Ill. App. 33. See the title NATIONAL BANKS.

Conditions Not Implied. — Where the charter of a corporation expresses the conditions upon which it is granted, no other conditions can be implied. Cheraw, etc., R. Co. *v.* White, 10 S. Car. 155.

3. Williamsport *v.* Kent, 14 Ind. 309.

4. Place of Doing Business. — People *v.* Protestant Deaconesses Inst., 71 Ill. 229; Atty.-Gen. *v.* Oakland County Bank, Walk. (Mich.) 90; People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282; Underwood *v.* Waldron, 12 Mich. 73; People *v.* Geneva College, 5 Wend. (N. Y.) 211.

Isolated Transactions. — A charter or statutory provision that a corporation shall conduct its business or operations at a particular place has reference to its general business, and does not apply to isolated transactions.

Thus in Potter *v.* Ithaca Bank, 5 Hill (N. Y.) 490, it was held that the provision in the charter of a bank, that its operations of discount and deposit should be carried on at a certain village and not elsewhere, applied only to the regular business operations of the bank, and did not prohibit the discount of a note at another place for the purpose of securing a demand due the bank. See also Suydam *v.* Morris Canal, etc., Co., 6 Hill (N. Y.) 217.

5. City Bank *v.* Beach, 1 Blatchf. (U. S.) 425; Ashley Wire Co. *v.* Illinois Steel Co., 60 Ill. App. 179; Stickle *v.* Liberty Cycle Co., (N. J. 1895) 32 Atl. Rep. 708; Potter *v.* Ithaca Bank, 5 Hill (N. Y.) 490.

6. Stickle *v.* Liberty Cycle Co., (N. J. 1895) 32 Atl. Rep. 708.

7. See the title FOREIGN CORPORATIONS.

Stockholders' and Directors' Meetings. — As to the place of holding stockholders' and directors' meetings, and the power to hold them outside the state, see the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCK; STOCKHOLDERS.

8. See *infra*, this section, *Power to Alienate Property — Alienation of Entire Property.* As to dissent of stockholders, see the titles STOCK; STOCKHOLDERS.

9. In Cohen *v.* Wilkinson, 1 Macn. & G. 481, 12 Beav. 125, 18 L. J. Ch. 378, 13 Jur. 641, a

i. PRESUMPTION AS TO POWERS. — The maxim *omnia acta rite esse præsumuntur* applies when questions arise as to whether a corporation has exceeded its powers. If, under some circumstances, the particular act may have been authorized and the circumstances under which it was done do not appear, it will be presumed to have been authorized, and the burden of showing the contrary is on the one who claims that the act was unauthorized.[1]

j. PROVINCE OF COURT AND JURY AS TO POWERS — **Questions for the Court.** — The construction of charters and statutes, in order to determine what powers are thereby conferred on a corporation, is for the court; and if on such construction it appears that a particular act or transaction is clearly foreign to the business for which the corporation was created, it is for the court to declare the act or transaction *ultra vires*, without submitting the question of power to the jury at all.[2]

Questions for the Jury. — But when the question is whether, in view of the nature of the business of a particular corporation, and the circumstances under which, and the purpose for which, the particular act was done, the act was authorized by its charter, and the court cannot say as a matter of law that the act was not authorized, the question is for the jury as one of fact.[3]

2. Business of Corporations in General — *a.* SCOPE OF TREATMENT. — The power of corporations to take and hold property, real and personal, and to enter into contracts, is treated at length in subsequent sections. Before going into those questions it will be well to ascertain in a general way what business corporations may engage in, bearing in mind that the charter of a corporation is the measure of its powers.

b. BUSINESS MUST BE AUTHORIZED BY CHARTER — (1) *In General.* —

railroad company authorized to make a line of fifty-six miles resolved on making only four miles of it and abandoning the rest. It was held that the resolution was illegal. See *infra*, this section, *Power to Alienate Property.*

1. Presumption of Power — *England.* — Scottish North Eastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 382.

United States. — Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258.

Alabama. — Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 73.

California. — Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620.

Georgia. — White *v.* Barlow, 72 Ga. 887; Mitchell *v.* Rome R. Co., 17 Ga. 574.

Illinois. — McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

Indiana. — Sparks *v.* State Bank, 7 Blackf. (Ind.) 469; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359.

Iowa. — Wardner, etc., Co. *v.* Jack, 82 Iowa 435.

Michigan. — Harrison Wire Co. *v.* Moore, 55 Mich. 610.

Minnesota. — Baker *v.* Northwestern Guaranty Loan Co., 36 Minn. 185.

Missouri. — Roussin *v.* St. Louis Perpetual Ins. Co., 15 Mo. 244; Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91.

Nebraska. — Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44; Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548, 41 Am. & Eng. Corp. Cas. 87.

New Jersey. — Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542.

New York. — New York Firemen Ins. Co. *v.* Sturges, 2 Cow. (N. Y.) 664; Feeny *v.* People's F. Ins. Co., 2 Robt. (N. Y.) 599; McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392; Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466; *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540; Hope Mut. L. Ins. Co. *v.* Taylor, 2 Robt. (N. Y.) 278; Alward *v.* Holmes, 10 Abb. N. Cas. (Buffalo Super. Ct.) 96; Beers *v.* Phœnix Glass Co., 14 Barb. (N. Y.) 358; Chautauqua County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347; DeGraff *v.* American Linen Thread Co., 21 N. Y. 127.

Oregon. — Fink *v.* Canyon Road Co., 5 Oregon 301.

For Other Decisions see *infra*, this section, *Power to Take and Hold Property — Power to Alienate Property; Powers with Respect to Contracts.*

2. Tennessee River Transp. Co. *v.* Kavanaugh, 93 Ala. 324.

3. Question for Jury. — In Tennessee River Transp. Co. *v.* Kavanaugh, 93 Ala. 324, it was held that the question as to whether a corporation, authorized by its charter "to build or purchase steamboats, and ply the same from one to another town or city in this state or beyond the lines of the state, receive and carry freight and passengers, issue bills of lading in the corporate name, make all contracts for the purchase of supplies for said steamboats, and in general to do and perform all acts connected with the running of steamboats or packet-lines," acted within the limits of its functions and power in hiring or purchasing a barge for the transportation of wood, was a question of fact for the jury to determine in view of evidence showing the nature of the business of the corporation and the practice and customs of trade, as it could not be assumed as a matter of law that the transaction was *ultra vires*. See also Reynolds *v.* Simpson, 74 Ga. 454; Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

From this rule and the other rules heretofore stated, it necessarily follows that a corporation authorized to engage in a particular business only, has no power to engage in an entirely different business, and so it has repeatedly been held.[1] It is only in the application of this rule that difficulties are apt to arise. It is therefore necessary to show its application to particular corporations.

(2) *Application of Rule* — (a) **Banking Corporations.** — Banking companies cannot engage in buying or selling bonds or stocks as broker or agent, or dealing in merchandise, or in any business other than that of banking.[2]

(b) **Banking by Other than Banking Corporations.** — On the other hand, no corporation that is not authorized by its charter can engage in the business of banking, or exercise banking privileges.[3]

(c) **Insurance Corporations.** — On the same principle, insurance companies, authorized by their charters to insure against particular risks only, or to insure certain property only, cannot lawfully engage in insuring other property or against other risks.[4] Nor can they engage in any other business than that of insurance.[5]

(d) **Railroad, Steamboat, and Turnpike Corporations, etc.** — So it is with corporations authorized to build and operate a railroad or turnpike along a certain route, or between certain points, or to operate a steamboat line between certain points. They cannot build or operate along a different route or beyond those points.[6] Nor can they engage in any other business than that authorized by their charter.[7]

1. Lyde *v.* Eastern Bengal R. Co., 36 Beav. 13; Chewacla Lime Works *v.* Dismukes, 87 Ala. 344, 28 Am. & Eng. Corp. Cas. 20; Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Downing *v.* Mount Washington Road Co., 40 N. H. 230; People *v.* Campbell, 144 N. Y. 166; State *v.* Southwestern Transp., etc., Co., 23 Ohio St. 166; Brush Electric Light Co. *v.* Jones Bros. Electric Co., 23 Cinc. Wkly. L. Bul. 329; Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167. See also Safety Insulated Wire, etc., Co. *v.* Baltimore, (C. C. A.) 74 Fed. Rep. 363. And see other cases cited *infra* in this connection.

2. **Banking Companies.** — Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482.

Thus a National Bank cannot engage in the business of buying or selling bonds and stocks as broker or agent. Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Allentown First Nat. Bank *v.* Hoch, 89 Pa. St. 324, 33 Am. Rep. 769. And see Charlotte First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122. See the titles BANKS AND BANKING, vol. 3, p. 787; NATIONAL BANKS.

3. **Banking by Other than Banking Companies.** — Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105; State *v.* Stebbins, 1 Stew. (Ala.) 299; People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; State *v.* Washington Social Library Co., 11 Ohio 96; Memphis *v.* Memphis City Bank, 91 Tenn. 574. See New York State L. & T. Co. *v.* Helmer, 77 N. Y. 64. And see the titles BANKS AND BANKING, vol. 3, p. 787; NATIONAL BANKS.

What Constitutes Banking. — It has been said that a prohibition against exercising the privilege of banking goes to the business and occupation of banking, and not to any one or more of the acts in detail; and that a corporation, therefore, not authorized to engage in banking, may borrow or loan money and be a depositary of money, buy and sell exchange, and be the drawer or holder of any kind of commercial paper, provided that it be not in the business and pursuit of banking. Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742. See the title BANKS AND BANKING, vol. 3, p. 787.

4. **Character of Insurance.** — Natusch *v.* Irving, Gow on Partnership App. 398, 2 Coop. C. C. 358; Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256; Rochester Ins. Co. *v.* Martin, 13 Minn. 59; Knapp *v.* North Wales Mut. Live-Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119; Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167. And see *In re* Phœnix L. Assur. Co., 2 Johns. & H. 441, 31 L. J. Ch. 749; Walker *v.* Giddings, 103 Mich. 344. See also the title INSURANCE.

Accident Insurance. — A corporation authorized to insure against accidents "in traveling" cannot insure generally against any and all accidental injury. Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167. See the title ACCIDENT INSURANCE, vol. 1, p. 284.

5. **Engaging in Different Business.** — Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Memphis *v.* Memphis City Bank, 91 Tenn. 574.

6. North-Eastern R. Co. *v.* Payne, 8 Rich L. (S. Car.) 177; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545. And see McRoberts *v.* Southern Minnesota R. Co., 18 Minn. 108; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205; Stevens *v.* Erie R. Co., 21 N. J. Eq. 259.

7. **Engaging in Different Business.** — Att'y-Gen. *v.* Great Northern R. Co., 6 Jur. N. S. 1006, 1 Drew & S. 154; People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; Downing *v.* Mount Washington Road Co., 40 N. H. 230.

(e) **Manufacturing and Trading Corporations.** — This rule applies with full force to corporations organized for the purpose of manufacturing or dealing in goods, or goods of a particular kind. They can ordinarily engage in no other business.[1] Nor, as a rule, can they manufacture or sell other goods than those authorized by their charter.[2]

(f) **Other Illustrations.** — The rule has been applied to various other corporations besides those mentioned above. It applies to all.[3]

Dealing or Speculating in Property. — A carrier, as a railroad or steamship company, cannot purchase grain for the purpose of carrying it to market and selling it again, or engage in dealing in any other property on speculation. Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, 19 Am. Rep. 781; Atty.-Gen. *v.* Great Northern R. Co., 6 Jur. N. S. 1006, 1 Drew & S. 154.

Running of Steamboats by Railroad Companies. — A corporation formed for the purpose of constructing, maintaining, and operating a railway only cannot engage in the business of running a line of steamers in connection with the railway, but beyond its terminus, however much such an enterprise may increase the business of the road and add to its profits. Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441; The Maverick, 1 Sprague (U. S.) 23; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353, 25 Am. & Eng. R. Cas. 25; Colman *v.* Eastern Counties R. Co., 10 Beav. 1. *Compare* South Wales R. Co. *v.* Redmond, 10 C. B. N. S. 675, 100 E. C. L. 675. See the title RAILROADS.

It is otherwise where the running of a steamboat is necessary to carry on its business. See *infra*, this section, *Business Incidental to Principal Business*.

Running of Stage, etc., Line by Turnpike Company. — A charter giving authority to make and keep in repair a road, to take tolls of passengers and for carriages, to build and own toll houses, and to take land for the road, does not authorize the corporation to establish stage and transportation lines. Nor is this within authority to erect and maintain, lease and dispose of, any buildings found convenient for the accommodation of their business and of the horses, carriages, and travelers passing over their road. Downing *v.* Mount Washington Road Co., 40 N. H. 230. See also Wiswall *v.* Greenville, etc., Plank-road Co., 3 Jones Eq. (56 N Car.) 183.

A Steamship Company, authorized to establish and conduct a line of boats between certain points for the conveyance of passengers and transportation of merchandise and other articles, cannot lawfully engage in breaking ice and towing vessels through the track thus broken, the vessels being bound for a point not on the company's authorized route. Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248.

1. Manufacturing and Trading Corporations — General Rule. — Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105; Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 8 Am. & Eng. Corp. Cas. 220; Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oregon 527.

Lumber Companies. — A corporation for "manufacturing and selling lumber" cannot engage in the construction of buildings. Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oregon 527.

A Newspaper Company cannot engage in life insurance, as by offering to pay a certain sum to the heirs of any person killed on whose body a coupon cut from its paper is found. Brisay *v.* Star Co., 13 Misc. Rep. (N. Y. Supreme Ct.) 349.

Buying and Selling by Manufacturing Company. — A corporation created for the purpose of manufacturing carriages may buy excelsior and other materials for use in the manufacture, but it cannot engage in buying and selling such materials on speculation. Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 8 Am. & Eng. Corp. Cas. 220.

And a contract by a manufacturing company to buy oil for the purpose of resale is *ultra vires*. Bosshardt, etc., Co. *v.* Crescent Oil Co., 171 Pa. St. 109.

2. Copper Miners' Co. *v.* Fox, 16 Q. B. 229, 71 E. C. L. 229, 15 Jur. 703, 20 L. J. Q. B. 174; Chewacla Lime Works *v.* Dismukes, 87 Ala. 344; Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Slater Woollen Co. *v.* Lamb, 143 Mass. 420. And see Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Illustrations. — A corporation organized for the manufacture of gold and silver ware has no power to purchase and sell goods of the same general character as those manufactured by it, but of cheaper grade, which it cannot advantageously manufacture. People *v.* Campbell, 144 N. Y. 166.

A corporation created to manufacture "fire-arms and other implements of war" cannot engage in the business of manufacturing and selling locks. See Whitney Arms Co. *v.* Barlow, 38 N. Y. Super. Ct. 554, *reversed* on other grounds in 63 N. Y. 62, 20 Am. Rep. 504.

A corporation authorized by its charter "to buy and sell dairy products" has no power to engage in selling other products, as oysters. Bowman Dairy Co. *v.* Mooney, 41 Mo. App. 665.

A corporation for the purpose of "manufacturing, repairing, buying, selling, and operating machinery of all kinds, and all such other business pertaining or belonging to machine shops or foundries," has no right to engage in the business of manufacturing, buying, and selling ice. Simmons *v.* Troy Iron Works, 92 Ala. 427.

A corporation for the purpose of conversion and sale of "agricultural products" cannot purchase flour, unless there is some act or circumstance rendering the purchase necessary for the protection and interest of the milling business. Getty *v.* Barnes Milling Co., 40 Kan. 281.

3. A Corporation for Booming Lumber has no right to engage in the business of driving lumber. Bangor Boom Corp. *v.* Whiting, 29 Me. 123.

c. Business Incidental to Principal Business — (1) *In General.* — The rule that a corporation cannot engage in a different business from that authorized by its charter does not prevent a corporation from engaging in any business which is incidental to the carrying on of its principal business.[1]

(2) *Application of Rule* — (a) **Mining Corporations.** — Thus mining companies may engage in transportation for the purpose of carrying their product to the smelter or market.[2]

(b) **Railroad Corporations.** — And railroad companies may engage in running steamboats, or in maintaining hotels and refreshment houses, or in carrying goods to and from depots, etc., when such business is necessary to the operation of their railroads.[3]

(c) **Manufacturing and Trading Corporations.** — So it is with manufacturing and trading companies. It has been held that a manufacturing company may, in proper cases, keep a supply store for the convenience of its employees.[4] And, generally, manufacturing and trading companies may engage in any business that is reasonably necessary or proper in carrying on their main business.[5]

An Agricultural Society organized to further the interests of agriculture, to improve and encourage the breeding of fine stock, to hold exhibitions of agricultural products and stock, to hold and give annual fairs, and to do and perform everything necessary and incident thereto, has no authority to employ hackmen to convey people in their own conveyances to and from the fair grounds. Bathe *v.* Decatur County Agricultural Soc., 73 Iowa 11, 5 Am. St. Rep. 651.

Transporting and Supplying Natural Gas. — A corporation with power to engage in "any work or works, public or private, which may tend or be designed to improve, increase, facilitate, or develop trade," has the power to engage in the business of producing, transporting, and supplying natural gas. Carothers *v.* Philadelphia Co., 118 Pa. St. 468.

1. Business Incidental to Principal Business — *England.* — Flanagan *v.* Great Western R. Co., L. R. 7 Eq. 116; Forrest *v.* Manchester, etc., R. Co., 30 Beav. 40.

Canada. — Atty.-Gen. *v.* Grand Trunk R. Co., 16 L. C. Rep. 91.

United States. — Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514.

California. — Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

Georgia. — Reynolds *v.* Simpson, 74 Ga. 454.

Massachusetts. — Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326.

Missouri. — Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305; Welsh *v.* Ferd Heim Brewing Co., 47 Mo. App. 608.

Pennsylvania. — Malone *v.* Lancaster Gas Light, etc., Co., 182 Pa. St. 309.

Tennessee. — Searight *v.* Payne, 6 Lea, (Tenn.) 283.

Vermont. — Shawmut Bank *v.* Plattsburgh, etc., R. Co., 31 Vt. 491; Dauchy *v.* Brown, 24 Vt. 197.

2. Transportation by Mining Company. — In Moss *v.* Averell, 10 N. Y. 455, it was held that a corporation created for the purpose of raising and smelting lead ore, had power to purchase smelting works, and assume a contract entered into by their vendors providing means for the transportation of their ores, when smelted, to market.

And in Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305, it was held that a corporation created for the purpose of mining and transporting coal, had the power to purchase and use a steamboat for the purpose of conveying its coal to market.

3. Running Steamboats. — Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98; Shawmut Bank *v.* Plattsburgh, etc., R. Co., 31 Vt. 491. See South Wales R. Co. *v.* Redmond, 19 C. B. N. S. 675, 100 E. C. L. 675.

Railroad companies have the right to own and control steamboats for the purpose of transporting their freight and passengers across navigable waters on the line, and constituting a part of their routes, and those lying at the end of their roads, separating them from the ostensible and substantial termini of their routes. Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

But a railroad company cannot ordinarily engage in running steamboats beyond the terminus of its road. See *supra*, this section, *Business Must Be Authorized by Charter.*

Refreshment Houses. — A railroad company may establish and maintain refreshment houses along its line for the accommodation of its passengers. Flanagan *v.* Great Western R. Co., L. R. 7 Eq. 116.

Hotels. — In Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514, it was held that a railroad company in Florida could lease and run a summer hotel at the terminus of its road on a beach distant from any town.

Carrying to and from Depot. — A railroad company may engage in the express business to the extent of carrying goods shipped or to be shipped over its road from or to its depot. Camblos *v.* Philadelphia, etc., R. Co., 4 Brews. (Pa.) 563.

Or it may employ particular carters or expressmen to do this work for it. Atty.-Gen. *v.* Grand Trunk R. Co., 16 L. C. Rep. 91.

4. Supply Store. — A corporation organized to operate an iron furnace may keep a supply store where such a store is necessary in carrying on the business of an iron furnace. Searight *v.* Payne, 6 Lea (Tenn.) 283. See also Chester Glass Co. *v.* Dewey, 16 Mass. 94, 8 Am. Dec. 128; Dauchy *v.* Brown, 24 Vt. 197.

5. Keeping of Retail Store by Manufacturing Company. — Where a corporation is created for

(d) **Improvement of Lands.** — A corporation owning land with the power to improve and sell the same may do anything that is reasonably necessary or proper to improve it and enhance its value.[1]

(e) **Employment of Idle Property.** — And a corporation may sometimes engage in a business not strictly within its main business, if necessary to prevent its property from remaining unemployed when not needed in its business.[2]

3. Construction of Charter — *a.* WHAT CONSTITUTES CHARTER — (1) *Corporations Created by Special Act.* — Corporations, as has been shown, are either created by a special act of the legislature, or formed under general laws.

manufacturing purposes — as for manufacturing cotton or wool — there is no impropriety in connecting with its ordinary business the business of a retail store, as a convenience or necessity. Dauchy *v.* Brown, 24 Vt. 197.

Keeping of Saloon by Brewing Company. — It has been held in several cases that it is not *ultra vires* for a corporation authorized to manufacture and sell beer to take a lease of premises to be used as a beer saloon, for the purpose of increasing the sale of its beer. Welsh *v.* Ferd Heim Brewing Co., 47 Mo. App. 608; National Brewing Co. *v.* Ahlgren, 63 Ill. App. 475; Keeley Brewing Co. *v.* Emrick, 64 Ill. App. 247. And see Heims Brewing Co. *v.* Flannery, 38 Ill. App. 95, *affirmed* 137 Ill. 309.

In Welsh *v.* Ferd Heim Brewing Co., 47 Mo. App. 608, it was held that a brewing corporation having power, under its charter, to manufacture and sell beer, and to lease real estate proper to carry on the business, had power to lease a saloon with a view of letting the premises to another to sell its beer, as well as to keep a regular saloon, where whiskey was also sold.

Gas Companies. — A corporation organized for the purpose of "manufacturing and supplying illuminating and heating gas" may not only supply the gas itself, but may also incidentally deal in such patented appliances and conveniences as will induce new customers to use gas, or old ones to use more. Malone *v.* Lancaster Gas Light, etc., Co., 182 Pa. St. 309.

Character of Goods Sold. — A corporation authorized "to bevel, silver, and work in glass," has the implied power to buy and sell plain glass in connection with the ornamental glass, for the purpose of facilitating such business. Hawkes Glass Beveling, etc., Co. *v.* Bohn Mfg. Co., 40 Ill. App. 649.

And a contract by a company incorporated "for the purpose of manufacturing and selling glass," to purchase glass ware to supply their customers while repairing their works, was held not to be *ultra vires*. Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315.

1. Improvement of Land. — In Watts's Appeal, 78 Pa. St. 370, a land company's purpose, as stated in its charter, was to sell a large tract of land, but it was authorized *inter alia* "to aid in the development of the minerals and other materials," and also "to promote the clearing and settlement of the country." The directors, among other things, built sawmills and a hotel. It was held that their acts were not *ultra vires*. Gordon, J., said: "We know of no other material upon these lands more abundant or more obviously requiring development than the timber. * * * Neither can we conceive of anything better calculated to develop this kind of material than sawmills. So we regard a hotel of some kind in so large a territory of wild lands, as not only a convenience adding greatly to the settlement of the country, but a necessity."

And, in Fulton *v.* Sterling Land, etc., Co., 47 Kan. 621, it was held that a corporation having power under its charter to "buy, own, and sell real and personal property, and to improve the same," has power to build a college on land purchased by it, or to do anything else the direct and proximate tendency of which would be to improve the property of the corporation by enhancing its value or rendering it more desirable and salable. And see Whetstone *v.* Ottawa University, 13 Kan. 320.

So in Louisville, etc., R. Co. *v.* St. Rose Literary Soc., 91 Ky. 395, it was held that an incorporated literary institution, which by its charter had power to contract, and buy and sell real and personal property for the purpose of "sustaining and carrying on said institution of learning, and not otherwise," and which, under the power thus conferred, owned and operated a large and valuable farm, had by fair implication the power to do anything reasonably calculated to add to the value of its property or to the value of the large industry thus created, and, therefore, that a subscription by the corporation to aid in building a railroad which was highly beneficial to the institution in various ways, and added largely to the value of its property, was not *ultra vires*.

See also *infra*, this section, *Powers with Respect to Contracts — Subscriptions to Other Enterprises*.

2. Employment of Idle Property. — In Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326, it was held that the contract of a ferry company to charter one of its boats for temporary use in another business was valid. Bigelow, C. J., said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold." And see Forrest *v.* Manchester, etc., R. Co., 30 Beav. 40.

When a corporation is created by a special act, that act is its charter and determines its powers.[1]

(2) *Corporations Formed under General Laws.* — When a corporation is formed under general laws, as is now generally the case, its charter consists of the statute or statutes under which it is formed, and which define its powers, together with the instruments required by such statute or statutes to be executed and filed by the corporators, called in some jurisdictions constating instruments, and in others the articles of association.[2]

(3) *By-laws.* — As has been seen, the powers of a corporation cannot be enlarged or lessened by its by-laws. They are no part of its charter.[3]

(4) *Amendment of Charter.* — An authorized amendment is as much a part of the charter as if incorporated in the original grant.[4] The right to amend is elsewhere treated.[5]

(5) *Recognition of Power by Legislature.* — And if there is no constitutional provision in the way, a recognition by the legislature of a particular power as existing in a corporation is generally sufficient to confer that power, and make the confirmatory statute a part of the charter.[6]

b. RULES FOR CONSTRUING CHARTERS — (1) *Strict Construction in Favor of Public* — (a) **In General.** — It has often been said that the charter of a corporation is to be construed most strictly against the corporation and in favor of the public, in order to determine what powers have been conferred, and in a sense this is true.[7] But the statement needs qualification.

1. Conferring Privileges of Another Corporation by Reference. — A provision in a statute creating a corporation, that it shall have the like powers and privileges as are accorded by law to another corporation, confers upon the former all the powers and privileges granted to the latter, without any further specification. Mechanics', etc., Bank *v.* Rowly, 2 La. Ann. 372. And see Humphrey *v.* Pegues, 16 Wall. (U. S.) 244; Tennessee *v.* Whitworth, 117 U. S. 139. *Compare* Bowling Green, etc., R. Co., *v.* Warren County Ct., 10 Bush (Ky.) 711.

Consolidated Corporations. — Where a new corporation is formed out of two existing corporations, these latter thereafter ceasing to exist, the law forming the new corporation governs and controls its corporate functions and rights. Cheraw, etc., R. Co. *v.* Anson, 88 N. Car. 519. See the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

2. General Laws. — Grangers', etc., Ins. Co. *v.* Kamper, 73 Ala. 325; Spring Valley Water Works *v.* Schottler, 62 Cal. 110; Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319; State *v.* Central Iowa R. Co., 71 Iowa 410, 60 Am. Rep. 806; Taggart *v.* Perkins, 73 Mich. 303; Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Neb. 279, 48 Am. & Eng. Corp. Cas. 428; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217.

Effect of Instruments Executed by Corporators. — The charter does not consist alone of the instruments made and filed by the corporators, but of them taken in connection with the law under which the incorporation was effected, and these instruments cannot give greater powers than are authorized by the statute. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319.

Conflict Between Instrument and General Law. — It follows that where the articles of association of a corporation conflict with the statute under which it was organized, the statute must prevail. Republican Mountain Silver Mines *v.* Brown, 58 Fed. Rep. 644, 19 U. S. App. 203.

Charters Granted by Court. — Corporations whose charters are granted by the court, under the laws for the formation of corporations, can have no greater powers than are conferred by the general statute upon the subject; and the action of the court in such case only furnishes evidence of organization. Greenville, etc., R. Co. *v.* Johnson, 8 Baxt. (Tenn.) 332.

3. See *supra*, this section, *Corporate Powers in General;* and see the title BY-LAWS, vol. 5, p. 86.

4. Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175; Mulloy *v.* Nashville, etc., R. Co., 8 Lea (Tenn.) 427.

5. As to the Power to Amend, and as to what constitutes an amendment, see *supra*, this title, *Right to Amend or Repeal.* And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

6. Legislative Recognition. — In Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 501, it was held that a recognition by the crown of the existence of a certain corporation, and of its capacity to take and hold lands, would confer upon it power to take lands, even if it had not previously existed. See also Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162, where legislative recognition and confirmation of a conveyance by a corporation of its franchises and property was held to validate the same.

7. General Rule as to Construing Charters — *England.* — Scales *v.* Pickering, 1 M. & P. 105, 4 Bing. 448; Eversfield *v.* Mid-Sussex R. Co., 5 Jur. N. S. 776, 3 De G. & J. 286; Parker *v.* Great Western R. Co., 7 M. & G. 288, 49 E. C. L. 288; Stockton, etc., R. Co. *v.* Barrett, 11 Cl. & F. 590; Leeds, etc., Canal Co. *v.* Hustler, 1 B. & C. 424, 8 E. C. L. 181; Stourbridge Canal *v.* Wheeley, 2 B. & Ad. 792, 22 E. C. L. 185.

United States. — Moran *v.* Miami County, 2

(b) **Exemption from Taxation.** — The rule has frequently been applied when a corporation has claimed exemption from taxation.[1]

(c) **Exclusiveness of Grant.** — And, though some of the older cases are to the contrary,[2] it is now well settled that in determining whether a charter grants exclusive rights and powers, the charter is to be construed strictly against the corporation and in favor of the public, and that such a grant cannot be implied.[3]

Black (U. S.) 722; Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172; Beaty *v.* Knowler, 4 Pet. (U. S.) 152; Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; St. Clair County Turnpike Co. *v.* Illinois, 96 U. S. 63; Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358; Ross-Meehan Brake Shoe Foundry Co. *v.* Southern Malleable Iron Co., 72 Fed. Rep 957; Parrott *v.* Lawrence, 2 Dill. (U. S.) 332; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1; Citizens' St. R. Co. *v.* Jones, 34 Fed. Rep. 579.

Alabama. — Grand Lodge *v.* Waddill, 36 Ala. 318.

California. — Spring Valley Water Works *v.* San Francisco, 52 Cal. 111; Bartram *v.* Central Turnpike Co., 25 Cal. 283.

Colorado. — Central, etc., Road Co. *v.* People, 5 Colo. 39.

Connecticut. — Hooker *v.* New-Haven, etc., Co., 15 Conn. 321.

Florida. — Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145.

Georgia. — Singleton *v.* Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Macon *v.* Macon, etc., R. Co., 7 Ga. 221.

Illinois. — St. Clair County Turnpike Co. *v.* People, 82 Ill. 174; St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208.

Iowa. — Miners' Bank *v.* U. S., 1 Greene (Iowa) 553.

Kentucky. — Maddox *v.* Graham, 2 Metc. (Ky.) 73.

Louisiana. — New Orleans, etc., R. Co. *v.* New Orleans, 34 La. Ann. 429.

Maryland. — Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

Massachusetts. — Atty.-Gen. *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361.

Missouri. — State *v.* Payne, 129 Mo. 468; St. Louis *v.* Missouri R. Co., 13 Mo. App. 524.

Nevada. — Lake *v.* Virginia, etc., R. Co., 7 Nev. 294.

New Hampshire. — De Lancey *v.* Rockingham Farmers' Mut. F. Ins. Co., 52 N. H. 581.

New Jersey. — Weil *v.* Ricord, 24 N. J. Eq. 169; Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419; Pennsylvania R. Co. *v.* National R. Co., 23 N. J. Eq. 441; Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547; Water Com'rs *v.* Hudson, 13 N. J. Eq. 420; Camden, etc., R., etc., Co. *v.* Briggs, 22 N. J. L. 623; Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 474; Greenwich Tp. *v.* Easton, etc., R. Co., 24 N. J. Eq. 217; Jersey City Gaslight Co. *v.* Consumers' Gas Co., 40 N. J. Eq. 427.

New York. — Auburn, etc., Plank-road Co. *v.* Douglass, 9 N. Y. 444.

North Carolina. — McAden *v.* Jenkins, 64 N. Car. 796.

Ohio. — Currier *v.* Marietta, etc., R. Co., 11 Ohio St. 228.

Pennsylvania. — Dugan *v.* Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 356, 67 Am. Dec. 471; Sunbury Steam Ferry, etc., Co. *v.* Heim, 4 Penny (Pa.) 325; Stormfeltz *v.* Manor Turnpike Co., 13 Pa. St. 555; Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9; Packer *v.* Sunbury, etc., R. Co., 19 Pa. St. 211.

Tennessee. — Citizens' R. Co. *v.* Africa, (Tenn. 1897) 42 S. W. Rep. 485; Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337.

Texas. — East Line, etc., R Co. *v.* Rushing, 69 Tex. 306.

Statements of the Rule. — In Stourbridge Canal *v.* Wheeley, 2 B. & Ad. 792, 22 E. C. L. 185, it was said of a canal company: "The canal having been made under an Act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."

In Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St 22, it was said "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference."

An Act Creating a Corporation with the Powers and Privileges of Another Corporation formerly created, by reference, without setting them forth, should be construed strictly against the corporation where the rights of others are affected. Bowling Green, etc., R. Co. *v.* Warren County Ct., 10 Bush (Ky.) 711. *Compare* Humphrey *v.* Pegues, 16 Wall. (U. S.) 244; Tennessee *v.* Whitworth, 117 U. S. 139.

1. Exemption from Taxation. — Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.) 436; Delaware R. Tax, 18 Wall. (U. S.) 206; Philadelphia, etc., R. Co. *v.* Maryland, 10 How. (U. S.) 376; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176; Wilmington, etc., R. Co. *v.* Reid, 64 N. Car. 226; Baltimore, etc., R. Co. *v.* Marshall County, 3 W. Va. 319. And see the title EXEMPTIONS (TAXATION).

2. Grant of Exclusive Rights. — See Croton Turnpike Road *v.* Ryder, 1 Johns. Ch. (N. Y.) 611; Newburgh, etc., Turnpike Road *v.* Miller, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274.

3. *United States.* — Stein *v.* Bienville Water Supply Co., 141 U. S. 67; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420.

(d) **Provision Otherwise in Derogation of Common Right.** — The same is true whenever a corporation claims any other power that is in derogation of common right or infringes in any way upon the rights of the public or of particular individuals.[1]

(e) **Provision in Derogation of Common Law.** — A provision in derogation of common law is always to be strictly construed.[2]

(f) **When Strict Construction Not Required.** — The rule that the charter of a corporation is to be strictly construed is generally found in cases in which the corporation is seeking to enlarge or extend those powers as against public or private rights, as in the cases mentioned above. It is not to be applied when the corporation or corporators are seeking to evade liability by giving a narrow meaning to words.[3]

(2) *Operation of General Laws* — (a) **In General.** — Corporations are subject to the restraints of the general laws and police regulations, though not expressly mentioned, whenever they are within the reason of them. Such laws are to be read into their charters, and they cannot conduct their business in disregard of them any more than an individual may, unless expressly and constitutionally exempted from their operation.[4] And, though the legislature

Alabama. — Birmingham, etc., St. R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615.

California. — Bartram *v.* Central Turnpike Co., 25 Cal. 283.

Connecticut. — Burritt *v.* New Haven, 42 Conn. 202; Hooker *v.* New-Haven, etc.,Co., 15 Conn. 312.

Georgia. — Georgia R. Co. *v.* Smith, 70 Ga. 694; McLeod *v.* Burroughs, 9 Ga. 213.

Indiana. — Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369; Crawfordsville, etc., Turnpike Co. *v.* Smith, 89 Ind. 290.

Kentucky. — Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175.

Maine. — Rockland Water Co. *v.* Camden, etc., Water Co., 80 Me. 544.

Mississippi. — Gaines *v.* Coates, 51 Miss. 335.

Nevada. — Lake *v.* Virginia, etc., R. Co., 7 Nev. 294.

New Jersey. — Passaic River, etc., Bridges *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81.

New York. — Auburn, etc., Plank-road Co. *v.* Douglass, 9 N. Y. 444; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625; Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 26 N. Y. St. Rep. 364; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. (N. Y.) 547; Cayuga Bridge Co. *v.* Magee, 2 Paige (N. Y.) 116; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554.

Ohio. — State *v.* Hamilton, 47 Ohio St. 52.

Tennessee. — Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. (Tenn.) 314.

Vermont. — White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

Virginia. — Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 43, 36 Am. Dec. 374.

Wisconsin. — Janesville Bridge Co. *v.* Stoughton, 1 Pin. (Wis.) 667.

1. *United States.* — Providence Bank *v.* Billings, 4 Pet. (U. S.) 514.

Alabama. — Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

Georgia. — Pike County *v.* Griffin, etc., Plank Road Co., 9 Ga. 475; Alabama G. S. R. Co. *v.* Gilbert, 71 Ga. 591.

Illinois. — Snell *v.* Buresh, 123 Ill. 151.

Indiana. — Eward *v.* Lawrenceburgh, etc., R. Co., 7 Ind. 711.

Massachusetts. — Coolidge *v.* Williams, 4 Mass. 145.

New York. — Auburn, etc., Plank-road Co. *v.* Douglass, 9 N. Y. 444; New York, etc. R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385.

Vermont. — Farnsworth *v.* Goodhue, 48 Vt 209.

Illustrations. — A corporation is not authorized to appropriate private property to public uses without the consent of the owner, unless it appears, either by the express words of the act of incorporation or by necessary implication therefrom, that the legislature intended to confer such authority upon the corporation. Thacher *v.* Dartmouth Bridge Co., 18 Pick. (Mass.) 501.

An act to incorporate a dock company cannot be construed, by mere implication, to take away the rights of the adjoining shore owner to the water in front of him; and a power to enlarge and extend its wharf, though given by express words, must be construed so as to authorize such extension in front of lands of the company only. Keyport, etc., Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 13, *affirmed* 18 N. J. Eq. 511.

2. Moyer *v.* Pennsylvania Slate Co., 71 Pa. St. 293.

3. **When Strict Construction Not Required.** — Gaff *v.* Flesher, 33 Ohio St. 114.

The rule that a charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation becomes insolvent. Chicago, etc., R. Co. *v.* Union Pac. R. Co., 47 Fed. Rep. 22, *followed* in Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 53. See the title ULTRA VIRES.

4. **Subject to General Laws and Police Regulations** — *Alabama.* — Granger's L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325.

Illinois. — See Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560.

may exempt them from the operation of such laws, subject to constitutional restrictions,[1] an intention to do so is not to be implied unless such intent is clear.[2]

(b) **Prohibition Against Banking.** — Thus corporations are subject to statutes prohibiting the exercising of banking privileges without express authority.[3]

(c) **Usury Laws.** — They are also subject to the laws against usury, and a charter will not be so construed as to exempt them unless the intention of the legislature to do so is clear.[4]

(d) **Nuisances.** — The same is true of the law, common or statute, relating to nuisances. A corporation cannot so conduct its business as to create or maintain what at common law or by statute would be a public or private nuisance if created or maintained by a natural person, unless it clearly appears that the legislature intended to grant such power.[5]

(e) **Criminal Acts.** — General words in a charter are not to be taken as authorizing the corporation to do acts which by the general law are indictable.[6]

(3) *Intention of Legislature to Govern.* — The above rules apply only in case of ambiguity or doubt. It is a well-settled principle that abstract rules of construction are not to be allowed to defeat the real intention of the legislature, the discovery of which is, after all, the cardinal purpose of all statutory construction.[7] It is the rule of construction that the intent, and not the letter,

Louisiana. — State *v.* New Orleans Gas Light, etc., Co., 2 Rob. (La.) 529; Mabire *v.* Canal Bank, 11 La. 83, 30 Am. Dec. 710.

Maine. — See Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579.

Massachusetts. — French *v.* Connecticut River Lumber Co., 145 Mass. 261.

New Hampshire. — Worcester, etc., R. Co. *v.* Nashua, 63 N. H. 596.

New York. — Talmage *v.* Pell, 7 N. Y. 340; Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308.

North Carolina. — State Bank *v.* Cape Fear Bank, 13 Ired. L. (35 N. Car.) 75.

Virginia. — Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. (Va.) 83; Knights of Pythias *v.* Weller, 93 Va. 605.

1. Conflict Between Charter and General Laws. — A special charter, in so far as it conflicts with existing general laws, is a repeal of the latter *pro tanto*, if the legislature has the power to grant the same. Howland *v.* Myer, 3 N. Y. 290; Wood *v.* Wellington, 30 N. Y. 218.

The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case. State *v.* Stoll, 17 Wall. (U. S.) 436.

2. That one corporation has purchased the property and most of the capital stock of another corporation, does not necessarily authorize the purchasing corporation to do that which, under a special act, the other corporation was authorized to do, but which the general law prohibits. French *v.* Connecticut River Lumber Co., 145 Mass. 261.

3. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243. See the title BANKS AND BANKING.

4. Usury Laws. — Philadelphia Loan Co. *v.* Towner, 13 Conn. 249.

Thus a charter which granted to an incorporated company the power to contract without limit for commissions, in addition to the lawful interests, was held not to enable the corporation to take usury under the name of commissions. Johnson *v.* Griffin Banking, etc., Co., 55 Ga. 691. See also Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308; National Bank *v.* Continental L. Ins. Co., 41 Ohio St. 1. And see *infra*, this section, *Powers with Respect to Contracts — Loaning Money.*

5. Nuisance. — Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Snell *v.* Buresh, 123 Ill. 151; Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53. See *infra*, this title, *Liability for Torts.*

Illustrations. — The charter of a corporation, authorizing it to manufacture all kinds of lumber in a certain town, and for that purpose to construct, maintain, and repair upon its own lands all suitable buildings, does not exempt the corporation from a statute for the protection of the public, requiring engines to be licensed and declaring an unlicensed engine a common nuisance. Burbank *v.* Bethel Steam Mill Co., 75 Me. 373.

An act of the legislature, authorizing a corporation to erect and maintain a dam on its own land, across a river, confers upon the corporation no right to overflow the lands of another riparian proprietor without his consent. Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53; Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 110; Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 160, 82 Am. Dec. 201; State *v.* Moffett, 1 Greene (Iowa) 247; Renwick *v.* Morris, 7 Hill (N. Y.) 575.

6. Criminal Acts. — Thus a charter giving a corporation "the right and power to sell and dispose of any real or personal property placed in their hands for sale, in any mode or manner the corporation shall deem best," does not authorize it to sell by means of a lottery, when the general law makes it indictable to conduct a lottery. State *v.* Krebs, 64 N. Car. 604. See *infra*, this title, *Liability to Indictment.*

7. Legislative Intent Controlling — *United*

of the charter constitutes the law.[1]

General Words in a charter or in the memorandum or articles of association are to be regarded as auxiliary only to the primary objects of the corporation.[2]

(4) *Construction to Be Reasonable.* — In all cases the construction of a charter must be reasonable.[3] And it may no doubt safely be said that in construing the charters of modern business corporations, the tendency is towards a more liberal construction than formerly.[4]

(5) *Words to Be Given Their Ordinary Meaning.* — The words used by the legislature in a statute are to be given their natural and ordinary meaning, unless a contrary intent clearly appears; and this rule, of course, applies to corporate charters.[5]

(6) *Different Meaning by Usage or Custom.* — When, however, a word has by usage or custom acquired a meaning different from its natural meaning,

States. — Chesapeake, etc., Canal Co. *v.* Key, 3 Cranch (C. C.) 599; Moran *v.* Miami County, 2 Black (U. S.) 722.

Connecticut. — Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 221; Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 190.

Louisiana. — New Orleans, etc., R. Co. *v.* New Orleans, 34 La. Ann. 443.

Nevada. — State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155.

New Hampshire. — Burke *v.* Concord R. Co., 61 N. H. 192.

New Jersey. — Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419.

New York. — White *v.* Syracuse, etc., R. Co., 14 Barb. (N. Y.) 559.

Ohio. — Straus *v.* Eagle Ins. Co., 5 Ohio St. 60; National Bank *v.* Continental L. Ins. Co., 41 Ohio St. 1.

Occurrences in Legislature. — It has been held that the courts, in construing an act of incorporation, will not look to what occurred when it was on its passage through the legislature. State Bank *v.* Com., 19 Pa. St. 144. See the title STATUTES.

1. Union Nat. Bank *v.* Matthews, 98 U. S. 626.

2. *In re* German Date Coffee Co., 20 Ch. Div. 169, 51 L. J. Ch. 564, 46 L. T. 327, 30 W. R. 717; Lusk *v.* Lewis, 32 Miss. 297.

3. **Reasonable Construction**—*England.*— Atty.-Gen. *v.* Great Eastern R. Co., L. R. 5 App. 473, 49 L. J. Ch. 545, 42 L. T. 810, 28 W. R. 769.

United States. — Jacksonville, etc., R., etc., Co. *v.* Hoaper, 160 U. S. 514; Farnum *v.* Blackstone Canal Corp., 1 Sumn. (U. S.) 46.

Alabama. — Talladega Ins. Co. *v.* Landers, 43 Ala. 115.

Connecticut. — Straits Turnpike Co. *v.* Hoadley, 11 Conn. 464; Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 185; Kellogg *v.* Union Co., 12 Conn. 18; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454.

Louisiana. — McIntosh *v.* Merchants, etc., Ins. Co., 9 La. Ann. 403.

Maryland. — Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

New Hampshire. — Lebanon *v.* Olcott, 1 N. H. 339; Downing *v.* Mount Washington Road Co., 40 N. H. 230; Burke *v.* Concord R. Co., 61 N. H. 160.

New Jersey. — State *v.* Passaic Turnpike Co., 27 N. J. L. 217; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217.

Wisconsin. — Clark *v.* Farrington, 11 Wis. 306.

Statements of the Rule. — "It is a rule of construction, that all grants from the state, and grants of franchises and exemptions in charters, must be construed strictly, and most strongly in favor of the public and against the grant. The object is to protect the public against improvident grants, and grants made by implication, without clear intention. And such grant will not be sustained by doubtful words. Ambiguity in such grant vitiates it. But this rule is qualified by another, that such grant and the statute making it must receive a reasonable construction, and not be so construed as to defeat the intention of the legislature, and that the ambiguity must be such as is not removed by the settled rules of construction." Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 401.

"If there is any implication in the matter," said the *Florida* court, speaking of the construction of a charter, "it seems to me also that this necessarily involves construction, not indeed the liberal and broad construction to be given to a remedial statute, or the strict construction to be given to a penal statute, but a construction consistent with and following a reasonable view of the general scope and purpose of the legislative grant, viewed in the light of surrounding circumstances." State *v.* Florida Cent. R. Co., 15 Fla. 699.

Unreasonable Tolls. — A charter conferring on a plank-road company authority to charge tolls does not give the right to charge unreasonable tolls. Powell *v.* Sammons, 31 Ala. 552.

4. Wheeler *v.* Everett Land Co., 14 Wash. 630; National Bank *v.* Continental L. Ins. Co., 41 Ohio St. 1.

5. Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526; Riker *v.* Leo, 133 N. Y. 519, 44 N. Y. St. Rep. 63.

Illustration. — In Fairchild *v.* Masonic Hall Assoc., 71 Mo. 526, a private corporation had been invested by its charter with "perpetual succession." It was held that these terms in their natural and ordinary acceptation signify indefinite duration, and not merely continuous or interrupted succession for a limited time, and as in this instance they were unrestricted by other terms, the ordinary signification must prevail, and the corporation be held invested with the right to exist forever; and it was so held, notwithstanding a general statute limit-

such meaning should be given.[1]

(7) *Examination of Whole Law.* — Special charters and general incorporation laws are, like other legislative acts, within the rule that in construing a statute the whole act must be looked into, and all its parts harmonized, if possible.[2]

(8) *Construction So as to Uphold Act.* — Every act of incorporation must be construed in such a manner, if possible, as not to exceed the sovereignty of the state granting it, or the constitutional powers of the legislature.[3]

(9) *Public Policy.* — And in construing a charter, a purpose to disregard sound policy must not be attributed to the legislature except upon the most cogent evidence.[4]

(10) *Provisos and Exceptions.* — Provisos and exceptions in a charter should be so construed as not to defeat the grant, if such a construction is possible.[5] But if there is no doubt as to the meaning, they must stand, even though they destroy or render nugatory all the powers granted.[6]

(11) *Limitation of General Terms by Preceding Special Terms.* — If a charter, in defining the powers of the corporation, enumerates certain things which it may do by words of particular and specific meaning, and such enumeration is followed by general words, the general words are not to be taken in their widest sense, but are restricted to things of the same general kind as

ing the existence of all corporations to a period of twenty years.

1. Dexter Lime-Rock Co. *v.* Dexter, 6 R. I. 353. In this case it was held that if the term "Dexter Ledge of Lime Rock," used in a charter as descriptive of the corporate property, had acquired a settled definite meaning in the community, as including certain lime-rock of definite extent, and excluding all other, such lime-rock only would be deemed to be intended by the charter, whatever might have been the general expectation of the corporators; and that parol evidence was admissible to prove that the term had acquired such meaning. But if the petitioners for the act of incorporation used the term, and expressly, or by plain implication, defined its extent in their petition, such definition might be resorted to, to explain the meaning of the term in the charter.

2. Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589; State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155; Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419; Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242.

Statements of the Rule. — As was said by Caton, J., in speaking of a railroad charter: "In seeking for the intention of the legislature as expressed in any portion of a law it is eminently proper to look into the whole law, as one portion may frequently be designed to extend, qualify, or limit another portion." Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 23, 58 Am. Dec. 589.

"The act of incorporation," said the *Ohio* court, "like any other statute, should be construed in such manner as will best answer the intention of the legislature, and all its parts should, if possible, be made subservient to, and in harmony with, the leading purposes and objects intended to be accomplished, and for which the corporation is created. To effect this, the whole must be considered and construed together, with direct reference to those purposes and objects, and all its minor and incidental provisions be so used as to promote them. To dissect it into parts, and seize upon isolated expressions upon which to ingraft independent powers, not in harmony with or necessary to attain the main design, is, in almost every case, to defeat the intention of the general assembly." Straus *v.* Eagle Ins. Co., 5 Ohio St. 61.

One clause of a charter is not to be construed in so large a sense as to silence other clauses, where, without violence to the language, a construction can be given which will make all harmonize. McIntosh *v.* Merchants', etc., Ins. Co., 9 La. Ann. 403.

3. **Upholding Act.** — Citizens' St. R. Co. *v.* Jones, 34 Fed. Rep. 579; Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

An act of incorporation ought not to be deemed to authorize any act to be done which would exceed the jurisdictional power of the state, or interfere with the rights of other states, as to construct a canal or raise a dam in another state. Farnum *v.* Blackstone Canal Corp., 1 Sumn. (U. S.) 46. See also Miller *v.* Ewer, 27 Me. 509.

4. Jersey City Gaslight Co. *v.* Consumers' Gas Co., 40 N. J. Eq. 427. In this case it was held that a charter would not be construed as creating a monopoly by granting exclusive privileges, except upon the most cogent evidence that the legislature so intended. See also *supra*, this section, *Strict Construction in Favor of Public.*

5. **Provisos and Exceptions.** — Talladega Ins. Co. *v.* Landers, 43 Ala. 115; Lebanon *v.* Olcott, 1 N. H. 343; Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Whitaker *v.* Delaware, etc., Canal Co., 87 Pa. St. 34; West Branch Boom Co. *v.* Pennsylvania Joint Lumber, etc., Co., 121 Pa. St. 159, 6 Am. St. Rep. 769.

6. Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337. And see Dugan *v.* Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464.

those enumerated, unless a contrary intent on the part of the legislature is clear.[1]

(12) *Enumeration of Powers as an Exclusion of Others.* — When a charter expressly confers certain powers upon a corporation, enumerating them, such enumeration impliedly excludes all others than those enumerated, and such powers as may be reasonably necessary or proper in order to carry them into execution.[2]

(13) *Directory Provisions.* — Not every provision in a charter or act of incorporation is to be regarded as mandatory. Some are merely directory. Whether they are the one or the other, must depend on the nature and object of each provision, and the apparent legislative intention. Provisions merely directory to the officers of the corporation do not affect the powers of the corporation.[3] Illustrations will be found in other parts of this article.[4]

4. Power to Take and Hold Property — *a.* REAL PROPERTY — (1) *Capacity in General.* — It is well settled that a corporation had the capacity at common law, as a distinct legal person, to take and hold title to real property for any purpose not inconsistent with the objects of its creation;[5] and this capacity exists in corporations created by the legislatures in the United States, in the absence of express restrictions in their charter or in some statute. The power need not be expressly conferred, but is implied as an incident to corporate existence.[6]

1. Ashbury Railway Carriage, etc., Co. *v.* Riche, L. R. 7 H. L. 653. In this case the charter of a corporation authorized it to carry on the business "of mechanical engineers and general contractors." It was held that the words "general contractors" were not to be taken in their widest sense, but only as allowing such contracts as were usually made by mechanical engineers, the general words being restricted by the words preceding them. In the same case where the charter authorized the corporation to purchase, lease, work, and sell "mines, minerals, land, and buildings," it was held that the words "land and buildings" were restricted in their meaning by the words preceding them to such land and buildings as should be acquired for the purpose of purchasing, leasing, working, and selling mines and minerals. See also, as supporting this rule of construction, State *v.* International Invest. Co., 88 Wis. 512.

Legislative Intent Governs. — This, like other rules for the construction of statutes, must yield to the evident intention of the legislature to the contrary. See State *v.* Corkins, 123 Mo. 56; Wells *v.* Northern Pac. R. Co., 23 Fed. Rep. 469; National Bank *v.* Texas Invest. Co., 74 Tex. 421; York Park Bldg. Assoc. *v.* Barnes, 39 Neb. 834; Brown *v.* Corbin, 40 Minn. 508. See the title STATUTES.

2. Ashbury Railway Carriage, etc., Co. *v.* Riche, L. R. 7 H. L. 653; Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172; Case *v.* Kelly, 133 U. S. 21; Thomas *v.* West Jersey R. Co., 101 U. S. 71; New-York Fireman Ins. Co. *v.* Ely, 5 Conn. 572, 13 Am. Dec. 100; State *v.* Atchison, etc., R. Co., 24 Neb. 143, 8 Am. St. Rep. 164; Talmage *v.* Pell, 7 N. Y. 328; Andes Ins. Co. *v.* McCoy, 6 Am. L. Rec. (Ohio) 486. See the title STATUTES.

Applications of the Rule. — In Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172, where the charter of a canal company, in granting the power to take tolls from vessels passing through the canal, enumerated certain commodities as those for which toll could be collected, it was held that no other tolls could be collected, and that as nothing was said about tolls for passengers on vessels, the company had no power to demand toll from passengers or from vessels on account of passengers on board.

So, if the charter of a corporation expressly declares that it may hold lands for certain purposes, enumerating them, it impliedly excludes all other purposes. Case *v.* Kelly, 133 U. S. 21.

And if a charter declares that the corporation may loan money on certain securities, enumerating them, this is an implied exclusion of the right to loan on any other securities. Life, etc., Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31. See *infra*, this section, *Powers with Respect to Contracts — Taking and Enforcing Securities.* And see the title STATUTES.

3. **Directory Provisions.** — U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64; Bates *v.* State Bank, 2 Ala. 451; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448; Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 19 Am. St. Rep. 134; Middle Bridge *v.* Brooks, 13 Me. 391, 29 Am. Dec. 510; Bank of Northern Liberties *v.* Cresson, 12 S. & R. (Pa.) 306.

4. See *infra*, this section, *Powers with Respect to Contracts.*

For a Full Discussion of statutory construction generally, see the title STATUTES.

5. **General Rule as to Capacity to Take and Hold Property.** — Co. Litt. 44*a*, 300*b*; Sutton's Hospital Case, 10 Coke 30*b*; 1 Bl. Com. 478.

6. *United States.* — New York Dry Dock *v.* Hicks, 5 McLean (U. S.) 111; Blackburn *v.* Selma, etc., R. Co., 2 Flipp. (U. S.) 525.

California. — People *v.* La Rue, 67 Cal. 526.

Georgia. — American Mortg. Co. *v.* Tennille, 87 Ga. 28; Christ Church *v.* Savannah, 82 Ga. 656.

(2) *Title Acquired.* — The fact that the duration of a corporation is limited to a certain number of years, as is now generally the case, does not render it incapable of taking title in fee. It cannot hold lands beyond the period of its existence, but it may take the fee and convey the same.[1]

(3) *Joint Tenancy.* — From the nature of a corporation it is incapable of

Kentucky. — Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

Massachusetts. — Sutton *v.* Cole, 3 Pick. (Mass.) 232.

Michigan. — State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575; Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243; State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

New York. — Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121, *affirming* 12 Barb. (N. Y.) 460.

North Carolina. — Rives *v.* Dudley, 3 Jones Eq. (56 N. Car.) 126, 67 Am. Dec. 231; Asheville Div. No. 15 *v.* Aston, 92 N. Car. 578, 16 Am. & Eng. Corp. Cas. 94; Mallett *v.* Simpson 94 N. Car. 37, 55 Am. Rep. 594.

Oregon. — Kelly *v.* People's Transp. Co., 3 Oregon 189.

Pennsylvania. — Leazure *v.* Hillegas, 7 S. & R. (Pa.) 313.

Vermont. — Page *v.* Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

Virginia. — Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

Statements of the Rule. — "No doctrine of the common law," said Chief Justice Robertson, in Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 119, 33 Am. Dec. 481, "is more clearly and undeniably established than that which concedes to corporations an inherent or resulting right to acquire and hold title to land by contract, except so far only as they may be restricted by the objects of their creation, or the limitations of their charters." *Citing* Co. Litt. 44*a*, 300*b*; Sutton's Hospital Case, 10 Coke 30*b*; Dyer *a.* pl. 70; Com. Dig., tit. Franchise, 11, 15, 16, 17; Kyd on Corp. 76; 2 Kent Com. 277; State, etc., Bank *v.* Poitiaux, 3 Rand. (Va.) 141, 15 Am. Dec. 706.

And it was said by the *Michigan* court: "Among the powers or capacities incident to a corporation at the common law, without any special mention in their charter, was that of taking, holding, and conveying lands; and these incidents still remain even in this country, where charters are granted only by the legislature; subject only to such restrictions as the legislature has seen fit to impose, by express provision or tacit implication. The act of incorporation in effect gives to the corporation substantially the powers and faculties of a natural person, except as they are in some way restrained by the act of incorporation, or some other law of the state creating it." Thompson *v.* Waters, 25 Mich. 227, 12 Am. Rep. 243.

Alienage of Stockholder. — Since a corporation and its stockholders are separate and distinct persons in the law, it follows that the alienage of one or more stockholders does not affect the power of the corporation to hold land. Princeton Min. Co. *v.* Butte First Nat. Bank, 7 Mont. 530.

Foreign Corporations. — As to the power of foreign corporations to acquire and hold real property, see the title FOREIGN CORPORATIONS.

1. The Title Acquired — *New Hampshire.* — Wilcox *v.* Wheeler, 47 N. H. 488.

New York. — Nicoll *v.* New York, etc., R. Co., 12 N. Y. 128, *affirming* 12 Barb. (N. Y.) 460; People *v.* Mauran, 5 Den. (N. Y.) 389; Yates *v.* Van De Bogert, 56 N. Y. 526; People *v.* O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y. Supreme Ct.) 107; Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

North Carolina. — Rives *v.* Dudley, 3 Jones Eq. (56 N. Car.) 126, 67 Am. Dec. 231; Asheville Div. No. 15 *v.* Aston, 92 N. Car. 578, 16 Am. & Eng. Corp. Cas. 94; Mallett *v.* Simpson, 94 N. Car. 37, 55 Am. Rep. 594; Wilson *v.* Leary, 120 N. Car. 90.

Oregon. — Kelly *v.* People's Transp. Co., 3 Oregon 189.

Pennsylvania. — Union Canal Co. *v.* Young, 1 Whart. (Pa.) 425, 30 Am. Dec. 212.

Vermont. — Page *v.* Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

Statements of the Rule. — "It is erroneous," said Judge Parker, in Nicoll *v.* New York, etc., R. Co., 12 N. Y. 129, "to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized. It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient."

"Corporations," said Chancellor Kent, "have a fee simple for the purpose of alienation, but they have only a determinable fee for the purposes of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter.' 2 Kent's Com. 282.

This rule, as regards reverter to the original grantor or his heirs, does not apply to modern business corporations. A court of equity, on expiration of the charter of a corporation owning property, would distribute the property among creditors or stockholders. Wilson *v.* Leary, 120 N. Car. 90. See the title DISSOLUTION OF CORPORATIONS.

When Authorized to Acquire Fee. — Where a corporation is empowered, by its charter, to acquire real estate by deed or gift, without limitation in point of estate, it has a right to acquire a title in fee simple. State *v.* Brown, 27 N. J. L. 13 (*reversed* on other points, in 27 N. J. L. 648); Heath *v.* Barmore, 50 N. Y. 302; Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. Cas. (N. Y. Supreme Ct.) 107.

taking and holding lands in joint tenancy either with another corporation or with a natural person.[1]

Reason for the Rule. — The reasons are that the four unities — that is, the unity of interest, the unity of title, the unity of time, and the unity of possession — which are essential to a joint tenancy, cannot exist, and that there could be no reciprocity of survivorship.[2]

(4) *Tenancy in Common.* — There is nothing, however, to prevent a corporation from taking and holding land as tenant in common with another, since for this estate only unity of possession is necessary.[3]

(5) *Acquisition of Title by Adverse Possession.* — A corporation may acquire title to land by disseisin and exclusive adverse possession, and it can make no difference that it did not authorize such disseisin and occupation by deed.[4]

(6) *Express Grant of Power.* — Generally, the power to acquire real estate for particular purposes, or generally for the purposes of their business, is conferred upon corporations in express terms, and in such cases there is not so much difficulty in ascertaining their power, as in cases where the power is to be implied.[5]

(7) *When the Power to Purchase Will Be Implied* — (a) **In General.** — The implied power of a corporation to purchase real property in any particular case depends upon the nature of the corporation and the purpose for which the property is acquired. In the absence of express restrictions it has the power to purchase and hold real property whenever it is reasonably necessary or convenient to enable it to accomplish the objects for which it was created.[6]

1. As Joint Tenant. — Co. Litt. 296; Bennet *v.* Holbech, 2 Saund. 319; De Witt *v.* San Francisco, 2 Cal. 289; Telfair *v.* Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637.

2. Reason for the Rule. — "For the creation of a joint tenancy," said Wells, J., in De Witt *v.* San Francisco, 2 Cal. 297, "four unities are required, namely: unity of interest, unity of title, unity of time, unity of possession. But the distinguishing incident is a right of survivorship. Two corporations cannot hold as joint tenants, because two of the essential unities are wanting, namely: of the same capacity and title. Nor can they hold as joint tenants, for another reason: being each perpetual, there can be no survivorship between them; and this, as we have just seen, is the distinguishing incident of this estate. Nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity of survivorship between them." See the title JOINT TENANTS AND TENANTS IN COMMON.

3. As Tenant in Common. — Co. Litt. 296; De Witt *v.* San Francisco, 2 Cal. 289; Telfair *v.* Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; Estell *v.* University of South, 12 Lea (Tenn.) 476. See the title JOINT TENANTS AND TENANTS IN COMMON.

4. Title by Adverse Possession. — Rehoboth *v.* Catholic Cong. Church, 23 Pick. (Mass.) 139. In this case, as against a claim of title by adverse possession by a corporation, it was contended that a corporation aggregate could not commit a disseisin unless the entry were authorized by its deed, but it was held otherwise. "This was undoubtedly the ancient doctrine as to corporations," it was said, "but a more liberal doctrine has long since prevailed; and as the law now is, corporations may be bound by implication from corporate acts, without a vote or deed." And see Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

5. Grant of Power to Sell as Grant of Power to Purchase. — An express grant to a corporation of power to sell property to another corporation or to any corporation of a particular class, confers upon the latter, by necessary implication, the power to purchase and hold the property. Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351

Quantity of Land. — Where power is granted to purchase land for a particular purpose, the quantity necessary to be acquired is in the discretion of the directors. Thus, it was held that a charter authorizing a corporation to purchase land to construct a canal did not limit the corporation to the purchase of land enough for the thread of the canal, but gave a reasonable discretion as to quantity. Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

6. Implied Power to Purchase — General Rule — *Canada.* — La Campagnie de Villas du Cap Gibraltar *v.* Hughes, 11 Can. Sup. Ct. Rep. 537.

California. — People *v.* La Rue, 67 Cal. 526.

Illinois. — Brown *v.* Hogg, 14 Ill. 219.

Massachusetts. — Old Colony R. Corp. *v.* Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Richardson *v.* Massachusetts Charitable Mechanic Assoc., 131 Mass. 174.

Michigan. — State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

New York. — Moss *v.* Rossie Lead Min. Co., 5 Hill (N. Y.) 137; Moss *v.* McCullough, 7 Barb. (N. Y.) 279; Seymour *v.* Spring Forest Cemetery Assoc., (Supreme Ct.) 19 N. Y. Supp. 94; Moss *v.* Averell, 10 N. Y. 449; Steinway *v.* Steinway, 17 Misc. Rep. (N. Y. Supreme Ct.) 43.

Ohio. — Overmyer *v.* Williams, 15 Ohio 26.

Oregon. — Kelly *v.* People's Transp. Co., 3 Oregon 189.

South Dakota. — Gilbert *v.* Hole, 2 S. Dak. 164.

Absolute Necessity Not Required. — The property need not be absolutely necessary. It is sufficient if it be convenient and proper under the circumstances, and not inconsistent with the legitimate purposes of the corporation.[1] No more definite rule can be laid down.

(b) **Premises for Carrying On Business.** — Whenever the conduct of the business of a corporation renders it necessary or expedient for it to own land and buildings, it may purchase and hold them for the purpose, and it need not acquire them by lease.[2]

(c) **Protection and Enjoyment of Necessary Property.** — And a corporation, though it may have all the real property that is absolutely necessary, may purchase additional property or interests therein, if reasonably necessary or convenient, in order to preserve, protect, and enjoy the same.[3]

Virginia. — State, etc., Bank *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

Illustrations — Railroad Companies. — A general grant of power to construct a railroad, confers by necessary implication the power to hold land necessary for the purpose. Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 361.

And it may purchase any land that may be reasonably necessary or convenient to enable it to carry on its business; as land for depots, stations, car and engine houses, repairing shops, water tanks, houses for switch and bridge tenders, coal and wood yards, etc. Pfaff *v.* Terre Haute, etc., R. Co., 108 Ind. 144; State *v.* Mansfield, 23 N. J. L. 510.

Or for sidings, turnouts, extra tracks, etc. See Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Matter of New York Cent., etc., R. Co., 67 Barb. (N. Y.) 426; Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390.

Or for stock yards for cattle transported over the road. See New York Cent., etc., R. Co. *v.* Metropolitan Gas-Light Co., 63 N. Y. 326.

Or dumping grounds for waste earth in constructing its road or works. See Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345.

Or lands for procurement of materials necessary for the construction of its road. Overmyer *v.* Williams, 15 Ohio 26. See also Mallett *v.* Simpson, 94 N. Car. 37, 55 Am. Rep. 594.

It has also been said that a railroad company may purchase land for the purpose of having gravel dug therefrom, and transported at a certain freight over its road, to be delivered to and used by a third party. Old Colony R. Corp. *v.* Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394. "The purchase of the land," it was said, "seems to have been made as a means of promoting the purposes of their incorporation, the increasing of their business in transportation upon their railroad, and not as an object of trade or speculation in lands."

1. See Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 5 Wis. 173; Clark *v.* Farrington, 11 Wis. 306. See *supra*, this section, *Corporate Powers in General — Powers Implied from Those Expressly Conferred*.

"What Is Necessary and Convenient," said Judge Upton, in Kelly *v.* People's Transp. Co., 3 Oregon 193, "must, of course, depend on the nature of the business and the circumstances under which it is carried on. In all cases of uncertainty it is evident the corporation, as purchaser, must judge in the first instance for itself whether the property is necessary and convenient; there is no tribunal to which it can resort to test the question in advance. After the property is purchased, it may be still a disputed question of fact whether it is or not convenient and necessary, and it may remain doubtful until judicial determination. It would certainly be a very harsh rule that would, in all cases of an error in judgment as to the necessity of the purchase, hold the purchase absolutely void."

2. **Business House.** — See Leggett *v.* New-Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

In Richardson *v.* Massachusetts Charitable Mechanic Assoc., 131 Mass. 174, the charter of a corporation authorized it to purchase and hold "in fee simple or otherwise" real and personal estate to a certain amount, and provided that it might appropriate its funds to charitable purposes, and that its annual income should be employed, among other purposes, "to promote inventions and improvements in the mechanic arts, by granting premiums for said inventions and improvements." The manner in which these objects should be carried out was not specified. It was held that the corporation might purchase land and erect a permanent building thereon in which to hold exhibitions and the meetings of the corporation.

Manufacturing Companies. — In Steinway *v.* Steinway, 17 Misc. Rep. (N. Y. Supreme Ct.) 43, it was held that a manufacturing corporation could purchase land for the purpose of erecting its factories and residences for employees.

3. **Corporations Owning Toll Bridge.** — Thus it has been held that a corporation owning a toll bridge may purchase and take from the owner of land adjoining the bridge a conveyance of the right to control all passage over the land for the purpose of avoiding paying toll on the bridge. Claremont Bridge *v.* Royce, 42 Vt. 730.

Banking Companies. — And in State, etc., Bank *v.* Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706, it was held that a banking company, authorized to acquire such real estate as might be necessary for its immediate accommodation, did not exceed its powers in buying more land than was absolutely necessary for the erection of a banking house, building fire-proof houses on the vacant land so as to secure the bank against the danger of fire, and selling them to third persons.

(d) **Taking Property in Payment of Debts.** — In the absence of express restrictions a corporation may always take a conveyance of real property in payment of a debt due to it.[1]

(e) **Purchase at Execution or Foreclosure Sale.** — And it may, to protect itself from loss, purchase at a sale on an execution in its favor, or under foreclosure of a mortgage to it.[2]

(8) *When the Power to Purchase Will Not Be Implied* — (a) **In General.** — As has already been stated, the power of a corporation to purchase real property is limited by the objects of its creation. Even when there are no express restrictions it cannot purchase for a purpose foreign to those objects.[3]

(b) **Corporations Created to Deal in Land.** — When a corporation is created for the purpose of dealing in real estate its power to purchase the same is unlimited.[4]

(c) **Corporations Not Created to Deal in Land.** — But when a corporation is not organized to deal in land, as in the case of railroad companies, banking companies, insurance companies, religious and educational corporations, etc., the purchase of land not needed in its business, for the mere purpose of holding and selling it again, is *ultra vires*.[5] Nor can such a corporation purchase for any other purpose that does not tend directly to carry out its own legitimate objects.[6]

1. See Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

This is almost invariably expressly made an exception in statutes restricting the power of corporations to take and hold land. See *infra*, this title, *Express Prohibition or Limitation*.

2. Brown *v.* Hogg, 14 Ill. 219.

3. **When Power to Purchase Not Implied** — *England.*— Bostock *v.* North Staffordshire R. Co., 4 El. & Bl. 798, 82 E. C. L. 798, 24 L. J. Q. B. 225, 1 Jur. N. S. 921.

United States. — Case *v.* Kelly, 133 U. S. 21, *affirming* 13 Am. & Eng. R. Cas. 70.

California. — Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517.

Connecticut. — See Occum Co. *v.* A. & W. Sprague Mfg. Co., 34 Conn. 529; Boston, etc., Air Line R. Co. *v.* Coffin, 50 Conn. 150.

Indiana. — Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

Massachusetts. — Sutton *v.* Cole, 3 Pick. (Mass.) 232.

Michigan. — State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575; Chapman *v.* Colby, 47 Mich. 51.

Missouri. — Pacific R. Co. *v.* Seely, 45 Mo. 220, 100 Am. Dec. 369.

New Jersey. — State *v.* Newark, 25 N. J. L. 315, 26 N. J. L. 519; State *v.* Mansfield, 23 N. J. L. 510.

Tennessee. — See Crutcher *v.* Nashville Bridge Co., 8 Humph. (Tenn.) 403.

Wisconsin. — Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575; Clark *v.* Farrington, 11 Wis. 306.

4. "Ordinarily, a corporation may only purchase and hold so much real estate as may be necessary to the transaction of its business, but if organized, as in this state it may be, for the specific purpose of purchasing, holding, and selling land, its power in that direction is not limited." Market St. R. Co. *v.* Hellman, 109 Cal. 590.

5. **Railroad Companies.** — A railroad company, for example, cannot purchase land not needed for the construction of its road, to hold or sell again on speculation. Case *v.* Kelly, 133 U. S. 21, *affirming* 13 Am. & Eng. R. Cas. 70; Land *v.* Coffman, 50 Mo. 243; Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369; Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575. And see Taber *v.* Cincinnati, etc., R. Co., 15 Ind. 459.

Nor has it the power to purchase and permanently hold surplus lands not needed for the construction or operation of its road, though it may thereby be enabled to purchase the right of way through such land at less than it could otherwise be obtained for. Boston, etc., Air Line R. Co. *v.* Coffin, 50 Conn. 150.

Banking Companies. — So a bank can only purchase and hold such real estate as is necessary to enable it to carry on its business of banking. Thweatt *v.* Hopkinsville Bank, 81 Ky. 1, 4 Ky. L. Rep. 557.

A banking corporation, given the power by its charter to take and hold lands for the convenient transaction of its business and to secure debts, but for no other purpose, a power which would be implied if not expressly conferred, has no right to purchase lands for the purpose of selling them again. State Bank *v.* Niles, Walk. (Mich.) 99; 1 Dougl. (Mich.) 401, 41 Am. Dec. 575.

6. **Railroad Companies.** — Thus a railroad company cannot purchase or acquire land for dwelling-houses for employees, for car or locomotive factories, coal mines, etc. See State *v.* Mansfield, 23 N. J. L. 510; Eldridge *v.* Smith, 34 Vt. 484.

Nor can it, without an express grant of power, purchase mineral interests in lands, since such property is neither necessary nor proper for carrying out the purposes of the corporation. Wilks *v.* Georgia Pac. R. Co., 79 Ala. 181

Turnpike Companies. — A corporation organized for the purpose of constructing and maintaining a turnpike road can only purchase such land as is reasonably necessary for the construction and maintenance of the road. Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517.

Purchase to Procure Monopoly.—A corporation authorized to engage in the general distilling

(9) *Purchase of Works and Property of Another Corporation.* — A corporation created for the purpose of constructing certain works may, when there is nothing in its charter to show a contrary intention on the part of the legislature, purchase the works and property of another like corporation already constructed, if the latter has the power to sell the same,[1] but it cannot do so if the charter expressly or impliedly requires it to construct its own works; nor, of course, can it purchase when the other corporation has no power to sell.[2]

(10) *Purchase to Procure Monopoly.* — It is not only *ultra vires*, but also contrary to public policy, for a corporation authorized to engage in a particular business and own property necessary for that business, to purchase the property of all persons engaged in the same business, so as to establish a monopoly.[3]

(11) *Amount of Property.* — In the absence of express charter or statutory limitation, there is no limit upon the amount or value of the property which a corporation may acquire and hold, other than the limitation imposed by the rule that it cannot acquire property for a purpose foreign to the objects for which it was created. The amount or value of its property is not limited by the amount of its capital stock.[4]

(12) *Power to Acquire Public Lands* — **In General.** — Corporations having the power under their charters to purchase and hold lands without limit may acquire public lands, state or federal, provided the government does not exclude them.[5] The question seldom arises. When it does arise it turns on the construction of the statutes disposing of the public domain.[6]

Homestead Entries. — The Acts of Congress allowing homestead entries on public lands of the United States are intended to apply to individual citizens only, and do not allow entries by corporations.[7]

Mining Claims. — But a corporation organized under the laws of the United States, or of any state, and authorized to acquire and hold mineral lands and

business, and to own the property necessary for that purpose, cannot buy up all other distilleries, so as to acquire a monopoly of the business. Distilling, etc., Co. *v.* People, 158 Ill. 448. See also *infra*, this section, *Powers with Respect to Contracts*.

1. Railroads. — Thus a railroad company having power, under its charter, to construct a particular line of railroad, with general power to purchase all kinds of property, of whatsoever nature, may purchase from another company a road constructed upon such line, with the franchise of using the same, which the latter company has power to sell. Branch *v.* Jesup, 106 U. S. 468, 9 Am. & Eng. R. Cas. 558, *affirming* 3 Woods (U. S.) 481. *Compare* Thomas *v.* Millville, etc., R. Co., 101 U. S. 71; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 35 Am. & Eng. R. Cas. 94. See *infra*, this section, *Power to Alienate Property — Alienation by Quasi-Public Corporations*.

Turnpikes and Gravel Roads. — And a corporation authorized to construct a gravel road along a certain route, and take tolls thereon, may purchase from another company a similar road already constructed along such route. State *v.* Hannibal, etc., Gravel Road Co., 37 Mo. App. 496.

Water Works, Gas Works, etc. — The same would be true of other kinds of corporations, as gas companies, water companies, etc. See Gamble *v.* Queens County Water Co., 123 N. Y. 91, *reversing* 52 Hun (N. Y.) 166.

Bridges. — A corporation authorized to build a bridge at a particular point may buy one already built at the same point, if suitable for its purposes. Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625.

2. Thomas *v.* Milville, etc., R. Co., 101 U. S. 71; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 35 Am. & Eng. R. Cas. 94.

As to the power to sell, see *infra*, this article, *Power to Alienate Property*.

3. Distilling, etc., Co. *v.* People, 156 Ill. 448, 47 Am. St. Rep. 200. See also *infra*, *Powers with Respect to Contracts*.

4. Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

5. McKinley *v.* Wheeler, 130 U. S. 630, 27 Am. & Eng. Corp. Cas. 399; State *v.* Nashville University, 4 Humph. (Tenn.) 157; Dawson *v.* McLeary, (Tex. Civ. App. 1894) 25 S. W. Rep. 705.

Power to Exclude Corporations. — In State *v.* Nashville University, 4 Humph. (Tenn.) 157, it was contended that the state of Tennessee had no power to exclude corporations from becoming purchasers of its public domain, but the contention was overruled.

6. Under a *Tennessee* statute (Act 1837, c. 2), by which the state offered certain public lands for sale, and provided that they should be subject to appropriation " by all persons who may choose to enter the same," it was held that the word " persons " included corporations having power under their charters to purchase and hold lands without limit, and an appropriation by the Nashville University was therefore sustained. State *v.* Nashville University, 4 Humph. (Tenn.) 157.

7. Dictum of Mr. Justice Field, in McKinley *v.* Wheeler, 130 U. S. 630, 27 Am. & Eng. Corp. Cas. 399.

engage in mining, may, if all its members are citizens of the United States, and it would seem even if some of them are aliens, locate mining claims under the Act of Congress [1] allowing such locations by citizens of the United States.[2]

(13) *Power to Take Lease.* — The power of a corporation to take a lease of property depends upon the same considerations as govern its power to purchase. It may take a lease without express authority in its charter, for the purpose of carrying out the objects of its creation;[3] but not for a purpose foreign to such objects.[4]

1. Rev. Stat. U. S., § 2319.

2. **Mineral Lands.** — In McKinley *v.* Wheeler, 130 U. S. 630, 27 Am. & Eng. Corp. Cas. 399, the Supreme Court of the United States held that a mining corporation organized under the laws of *Colorado* for the purpose of prospecting for valuable mineral deposits in the public domain of the United States in Colorado, all of the stockholders of which were citizens of the United States, was authorized under the federal statute (Rev. Stat. U. S., § 2319) to locate a mining claim upon the public lands, as the statute, though not expressly mentioning corporations, does not expressly exclude them, and was intended, as expressed in its title, "to promote the development of the mining resources of the United States," — a purpose which could be accomplished by corporations as well as by individuals; and further than this, as other sections of the statutes (Rev. Stat. U. S., §§ 2321, 2325), expressly recognized locations by corporations. The words "citizens of the United States" was held to include corporations, just as the word "citizens" in the acts relating to the jurisdiction of the federal courts has been held to include them. And see, to the same effect, Thomas *v.* Chisholm, 13 Colo. 105. *Compare* Stem-Winder Min. Co. *v.* Emma, etc., Consol. Min. Co., 2 Idaho 421, where the lower court charged that an Idaho corporation could not locate a mining claim, but the question was not passed upon by the Supreme Court.

Coal Lands. — As to the entry of coal lands of the United States by natural persons for a corporation, and subsequent conveyance to the corporation, being a fraud upon the statutes (Rev. Stat. U. S., §§ 2347–2350) for the disposal of such lands, see U. S. *v.* Trinidad Coal, etc., Co., 137 U. S. 160.

Alienage of Stockholders. — In the case of McKinley *v.* Wheeler, 130 U. S. 630, 27 Am. & Eng. Corp. Cas. 399. it was assumed, but not decided, that all the stockholders of the corporations must be citizens of the United States. Whether or not it would be so held if the point arose, is not clear. Perhaps it might be held that they must be, on the ground that it is the policy of the United States to extend the right to locate upon and acquire public lands only to its citizens and such as have declared an intention to become citizens.

On the other hand, however, a corporation and its stockholders are separate and distinct persons in the law, and a corporation is for many purposes regarded in law as a citizen of the state or country to which it owes its existence; whatever may be the citizenship of its stockholders.

Thus in Reg. *v.* Arnaud, 16 L. J. N. S. 55, it was held that a vessel owned by a British corporation was entitled to registry as belonging wholly to a British subject — this being a requirement of the statute — though some of the stockholders were foreigners; and the court said that it would be the same if all the stockholders were foreigners.

So under the decisions of the United States Supreme Court, it is well settled that a corporation is a citizen of the state by which it was created, for the purpose of suits in the federal courts, though its stockholders may be citizens of a different state, or even aliens. Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286; Shaw *v.* Quincy Min. Co., 145 U. S. 444. See the title UNITED STATES COURTS.

3. Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

Authorized Leases. — A turnpike company has, as incident to the purposes of its incorporation, a right to take and hold under lease premises necessary for storing implements used in road repairs, and for sheltering its servants. Crawford *v.* Longstreet, 43 N. J. L. 325.

And a brewing company organized for "the business of brewing, manufacturing, buying and selling lager beer," may rent a saloon to sell beer in. Welsh *v.* Ferd Heim Brewing Co., 47 Mo. App. 608; Keeley Brewing Co. *v.* Emrick, 64 Ill. App. 247. See *supra*, this section, *Business of Corporations in General.*

In Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514, it was held that a railroad company could take a lease of a summer hotel at the terminus of its road on a beach distant from any town.

Terms of Lease. — In taking a lease a corporation has the incidental power to agree to the terms usual in leases. Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143. See *infra*, this section, *Powers with Respect to Contracts; Contracts Incident to Leases.*

4. Occum Co. *v.* A. & W. Sprague Mfg. Co., 34 Conn. 529.

Unauthorized Leases. — A corporation chartered for a specific purpose has no power to take a lease of property not needed for that purpose, or of no substantial use for it, with the intention and for the purpose of harassing another party by the use, under the forms of law, of the supposed rights obtained. Occum Co. *v.* A. & W. Sprague Mfg. Co., 34 Conn. 529.

In the absence of express authority one railroad company cannot take a lease of another railroad. Camden, etc., R. Co. *v.* May's Landing, etc., R. Co., 48 N. J. L. 530. And see Thomas *v.* Millville, etc., R. Co., 101 U. S. 71. See *infra*, this section, *Power to Alienate Property — Alienation by Quasi-Public Corporations.* See also the title RAILROADS.

(14) *Power to Take Mortgage on Real Property.* — A corporation, in the absence of express prohibition, has the implied power to take and enforce mortgages on real property for loans made or debts otherwise contracted in the course of its business.[1]

(15) *Power to Take by Devise* — **England.** — In the English statute of wills, allowing land to be devised to any person or persons, bodies politic and corporate were expressly excepted.

United States. — And in *New York*, by statute, no devise to a corporation is valid unless it is expressly authorized by its charter or by statute to take by devise.[2] When, however, the statute of wills is general, as in other states, a corporation may take by devise, in the absence of express prohibition in its charter.[3]

(16) *Express Prohibition or Limitation* — (a) **Statutes of Mortmain — England.** —

1. See *infra*, this section, *Taking and Enforcing Securities*.

2. Devise to Corporation — *New York.* — M'Cartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Atty.-Gen. *v.* Reformed Protestant Dutch Church, 33 Barb. (N. Y.) 312; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 183; Theological Seminary *v.* Childs, 4 Paige (N. Y.) 419; White *v.* Howard, 46 N. Y. 144; Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133 (*construing* New York statute).

What Constitutes Express Authority. — A charter permitting a corporation to acquire land "by direct purchase or otherwise" confers upon it the power to take by devise under the *New York* statute. Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

And the same is true of a power to "acquire" real estate conferred upon a corporation. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 56 Am. Rep. 776.

But it has been said that such a power is not included in a power merely to "purchase," though that term in its broadest legal sense includes "devise." See M'Cartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516. *Compare*, however, American Bible Soc. *v.* Marshall, 15 Ohio St. 537.

Power given to a corporation to take and hold "subscriptions or contributions" in money or otherwise has been held not to include power to take by devise. Brown *v.* Tompkins, 49 Md. 423.

In Maryland, where the Bill of Rights requires legislative sanction to render valid a devise to a religious corporation, it has been held that the power to take and hold property by gift, grant, devise, or otherwise, expressed in the charter of such a corporation, whether the same be created by express legislative enactment or formed under the general corporation law, is not sufficient to confer the power; but that the Bill of Rights contemplates that the sanction of the legislature shall be expressly given to each particular devise to render it valid. Church Extension *v.* Smith, 56 Md. 392.

Legislative Sanction After Death of Testator. — The sanction of the legislature to a devise to a religious corporation, required by the *Maryland* Bill of Rights, may be given within a reasonable time after the death of the testator, provided the corporation was in existence at the time of his death. Church Extension *v.* Smith, 56 Md. 393.

States and United States. — It has been held that the word "person" in the *New York* statute of wills, authorizing devises to be made to any person capable by law of holding real estate, does not include a state or the United States. Matter of Fox's Will, 52 N. Y. 530, 11 Am. Rep. 751, *sub nom.* U. S. *v.* Fox, 94 U. S. 315. See the note following.

Devise of Rents and Profits. — In Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290, it was held that the prohibition in the *New York* statute of wills, of devises to corporations not expressly authorized to take by the legislature, renders void a power in a will so far as it would operate to give the rents and profits of land for the benefit of corporations not thus authorized; and that they can take no interest in land under a power created by will.

Power of Court of Chancery. — Where real estate is devised to a corporation incapable of taking by devise, a court of chancery has no power to convert the real estate into money and direct the payment thereof to the devisee. Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133.

Corporations Formed After Testator's Death. — See the title LEGACIES AND DEVISES.

3. When Statute of Wills Is General. — *United States.* — Perin *v.* Carey, 24 How. (U. S.) 465.

Connecticut. — White *v.* Howard, 38 Conn. 342.

Illinois. — Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 56 Am. Rep. 776.

Kentucky. — Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417.

Massachusetts. — See Sutton *v.* Cole, 3 Pick. (Mass.) 232.

New York. — See M'Cartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

Ohio. — American Bible Soc. *v.* Marshall, 15 Ohio St. 537.

Pennsylvania. — Thompson *v.* Swoope, 24 Pa. St. 474.

South Carolina. — McIntosh *v.* Charleston, 45 S. Car. 584, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 235.

Virginia. — Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

Devise to the United States. — In Dickson *v.* U. S., 125 Mass. 311, 28 Am. Rep. 230, it was held that the United States could take real property by devise as a body politic and corporate. See the preceding note.

In England, by a succession of statutes beginning with the *Magna Charta*, 9 Hen. III., and ending with 9 Geo. II., known as the Statutes of Mortmain, the capacity to hold land which was vested in a corporation by the common law was taken away. These statutes prohibited corporations, both ecclesiastical and lay, from taking and holding lands without license from the King, or from Parliament, if they derived their power from that source.[1]

Canada. — The English statutes of mortmain are in force in Canada.[2]

United States. — But they have not been recognized in the United States; nor have they been generally regarded as in force as a part of their common law.[3] *Pennsylvania* is the only state which has recognized them as a part of its laws.[4]

(b) Constitutional and Statutory Restrictions in the United States. — While the English statutes of mortmain are not in force in the United States, in most of the states, if not in all, there are constitutional or statutory provisions having the same object, and expressly limiting the power of corporations or of particular kinds of corporations to take and hold lands by purchase or devise; and sometimes express restrictions will be found in the charters.[5]

1. Statutes of Mortmain — *England.* — 1 Bl. Com. 478; 2 Kent's Com. 282; 1 Washb. Real Prop. 76.

Purpose of These Statutes. — These statutes were originally enacted for the purpose of preventing ecclesiastical corporations in England "from absorbing in perpetuity, in hands that never die, all the lands of the kingdom, and thereby withdrawing them from public and feudal charges." 2 Kent's Com. 282; Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

Corporations Affected. — The earlier statutes of mortmain were originally directed at religious houses only; but the statute of 15 Rich. II., c. 5, declared that civil or lay corporations were equally within the mischief, and within the prohibition. 2 Kent's Com. 282.

Conveyances for Use of Corporations. — The statute of 15 Rich. II., c. 5, also made lands conveyed to any third person for the use of a corporation liable to forfeiture in like manner as if conveyed directly to the corporation. 2 Kent's Com. 282; Co. Litt. 2b; 2 Bl. Com. 268.

2. In Force in Canada. — Chaudière Gold Min. Co. *v.* Desbarats, 13 L. C. Jur. 182, 15 L. C. Jur. 44, 4 Rev. Leg. 645, 17 L. C. Jur. 275; Doe *v.* Todd, 2 U. C. Q. B. 82; Hallock *v.* Wilson, 7 U. C. C. P. 28; Mercer *v.* Hewston, 9 U. C. C. P. 349; Hambly *v.* Fuller, 22 U. C. C. P. 141; Whitby *v.* Liscombe, 22 Grant's Ch. (U. C.) 203, 23 Grant's Ch. (U. C.) 1 on appeal; Anderson *v.* Kilborn, 13 Grant's Ch. (U. C.) 219; Ferguson *v.* Gibson, 22 Grant's Ch. (U. C.) 36. *Compare* Ray *v.* Annual Conference, 6 Can. Sup. Ct. Rep. 308.

But a conveyance to a corporation in violation of the prohibition is voidable only, and not void, and can only be forfeited by the crown after office found. McDiarmid *v.* Hughes, 16 Ont. Rep. 570.

Modern civil corporations established for commercial and trading purposes, as joint-stock companies or incorporated manufacturing or railway companies, cannot be considered mortmain corporations, nor do the restrictions placed by law on the latter apply to them. Kierzkowski *v.* Grand Trunk R. Co., 4 L. C. Jur. 86, 8 L. C. Rep. 3, 10 L. C. Rep. 47; Les Messieurs des Seminaires, 3 L. C. Rep. 26.

3. Statutes of Mortmain Not in Force in the United States. — Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183. And see Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274; Perin *v.* Carey, 24 How. (U. S.) 465; Cotter *v.* Thornton, 7 R. I. 252; State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575; Dodge *v.* Williams, 46 Wis. 70; Chambers *v.* St. Louis, 29 Mo. 543.

4. Contra in Pennsylvania. — In Pennsylvania it has been held that the English statutes of mortmain are a part of its common law, and that no corporation can hold land in that state except under special authority from the legislature. 3 Binn. (Pa.) Appendix 625; Leazure *v.* Hillegas, 7 S. & R. (Pa.) 313; Runyan *v.* Coster, 14 Pet. (U. S.) 122.

Since the declaration of the judges to this effect statutes have been enacted in Pennsylvania substantially to the same effect.

5. Retroactive Effect of Statutes or Constitutional Provisions. — A statute or constitutional prohibition against a conveyance, devise, or bequest to corporations, though it may be general in its terms, is not to be construed as retroactive in its operation so as to apply to a conveyance, devise, or bequest before it took effect. Kelso *v.* Stiger, 75 Md. 376.

Leave of Legislature. — A constitutional provision (as in the Maryland Bill of Rights of 1776, art. 34), that every sale, gift, or devise of lands to any religious order without leave of the legislature shall be void, imposes no restriction upon the legislature in giving such leave, but authorizes it in its discretion to prescribe conditions and declare limitations, both as to the extent and quality of the estate to be purchased, and as to the uses to which it shall be devoted. Catholic Cathedral Church *v.* Manning, 72 Md. 116.

Ratification by Legislature. — If a corporation purchases land when it has no power to do so, the legislature, if it has the power to amend the charter, or without such power, if all the stockholders or members consent, may ratify the purchase and render its holding of the land legal. In Catholic Cathedral Church *v.* Manning, 72 Md. 116, a corporation, after

(c) **Effect of Unauthorized Purchase or Conveyance.** — By the weight of authority a conveyance to a corporation of land which it is not authorized by its charter to hold, or which it is expressly prohibited from taking or holding, is not absolutely void, but passes the title as against every one but the state. On this question, however, there is much conflict of opinion.[1] The subject will be discussed at length in another place.[2]

(d) **Effect of Devise to Corporation Incapable of Taking.** — A devise to a corporation, when the statute of wills does not allow such devises, is absolutely void, for the sole authority to devise real property is derived from the statute.[3] And the same has been held true of devises of land in violation of either constitutional or statutory restrictions.[4] As to this, however, there is conflict of opinion.[5]

(e) **Limitations as to Amount or Value of Property.** — Corporations, or particular corporations, are frequently restricted as to the amount of real property which

having acquired all the land which its charter authorized it to hold, made an additional purchase. Afterwards the legislature passed an act authorizing it to purchase a greater quantity of land than it had. It was held that this was a ratification of the unauthorized purchase, though the act did not expressly refer to it.

Partial Express Grant of Incidental Power. — A general prohibition against acquiring land, taking mortgages, etc., is not to be implied from a mere partial enactment of the incidental common-law power. As was said by Judge Baldwin, in Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 21, 46 Am. Dec. 183: "The prohibition [against acquiring property] may be implied from an insertion, by way of enactment, of the general incidental power to purchase, with a proviso limiting it to a given purpose. But a general prohibition would not be inferred from a mere partial enactment of the incidental common-law power; as, for example, from a clause authorizing a bank, or insurance, or manufacturing company, to purchase land for the erection of its necessary buildings. Such a clause, whether with or without limitation as to quantity or value, would not exclude the incidental power to take mortgages or other securities on real or personal estate for debts due the corporation, or assignments or conveyances of chattels or lands in commutation therefor."

As to Restrictions in the Statute of Wills, and their effect on the power to take by devise, see *supra*, this section, *Power to Take by Devise*.

1. Unauthorized or Prohibited Conveyance. — Some courts have held that where a corporation is authorized in some cases, or for some purposes, or to a certain extent, to take and hold the title to real estate, no one but the state can raise the question whether its real estate has been acquired for the authorized uses or not, or is in excess of the capacity of the corporation to take and hold. Alexander *v.* Tolleston Club, 110 Ill. 65, 8 Am. & Eng. Corp. Cas. 239; Barnes *v.* Suddard, 117 Ill. 237, 13 Am. & Eng. Corp. Cas. 7; Hamsher *v.* Hamsher, 132 Ill. 273; Hough *v.* Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230; Mapes *v.* Scott, 94 Ill. 379; Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101; Chamberlain *v.* R. Co., 41 S. Car. 399, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 233.

But they hold that when a corporation is absolutely forbidden to take or receive lands, such prohibition goes to its capacity to acquire, and a deed made to it under such circumstances passes no title, and the conveyance will be absolutely void; and that the same rule applies when such corporation has once exhausted its capacity in acquiring lands to the limit that is given. St. Peter's Roman Catholic Cong. *v.* Germain, 104 Ill. 440; Cromie *v.* Louisville Orphans' Home Soc., etc., 3 Bush (Ky.) 365.

The cases, however, are not all in accord with these rules. See Becher *v.* Woods, 16 U. C. C. P. 29; Hickory Farm Oil Co. *v.* Buffalo, etc., R. Co., 32 Fed. Rep. 22; Fritts *v.* Palmer, 132 U. S. 282; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405; Cowell *v.* Colorado Springs Co., 100 U. S. 55; Runyan *v.* Coster, 14 Pet. (U. S.) 122; Jones *v.* Habersham, 107 U. S. 174; Southern Pac. R. Co. *v.* Orton, 6 Sawy. (U. S.) 157; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633; Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274.

2. See the title ULTRA VIRES.

3. Unauthorized or Prohibited Devise. — M'Cartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Atty.-Gen. *v.* Reformed Protestant Dutch Church, 33 Barb. (N. Y.) 312; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 183; Theological Seminary *v.* Childs, 4 Paige (N. Y.) 419; White *v.* Howard, 46 N. Y. 144; Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133.

4. Brown *v.* Thompkins, 49 Md. 423; Heiskell *v.* Chickasaw Lodge, 87 Tenn. 686. See the title LEGACIES AND DEVISES.

5. That a Devise of More Property to a corporation than it is authorized by its charter to hold is not absolutely void, and can only be attacked by the state, see Jones *v.* Habersham, 107 U. S. 174; De Camp *v.* Dobbins, 29 N. J. Eq. 36.

Contra. — In *New York*, where there is a prohibition against the taking of property beyond a certain value by a corporation, it has been held that a devise or bequest to a corporation which will exceed that value is void as to the excess. Matter of McGraw, 111 N. Y. 66. And see Wood *v.* Hammond, 16 R. I. 98.

For Further Decisions see the titles LEGACIES AND DEVISES; ULTRA VIRES.

they may hold, and they have no right to exceed the limit in taking either by conveyance or devise.[1]

(f) **Prohibition Against "Holding."** — Some courts hold that a statute or charter prohibition against the "holding" of lands by a corporation implies a prohibition against a conveyance or devise to it.[2] Others have taken a different view, and have held that while a corporation cannot hold land in violation of such a statute, it is not prohibited from taking title to the same and conveying it.[3]

(g) **Corporations Within the Statutes.** — Generally there is little difficulty in determining what corporations are within the statutes limiting the power to take or hold real property, as they usually specify the particular kinds of corporations to which they are intended to apply, or are in terms applicable to all corporations, with specified exceptions. They are not to be applied to corporations not falling clearly within their terms.[4]

(h) **Exception of Particular Purposes.** — Such statutes and charters generally contain exceptions. These, of course, vary.[5]

Property Necessary for Transaction of Business. — For example, it is expressly provided that they may purchase and hold such real estate as may be necessary for their immediate accommodation in the transaction of their business.[6]

1. Cromie *v.* Louisville Orphans' Home Soc., etc., 3 Bush (Ky.) 365; Matter of McGraw, 111 N. Y. 66, *affirming* 45 Hun (N. Y.) 354; Wood *v.* Hammond, 16 R. I. 98.

Limitation as to Quantity Only. — Where a corporation is limited as to the quantity of real estate which it may hold, as to a certain number of acres, but nothing is said as to value, there is no limit as to value. Andrews *v.* Andrews, 110 Ill. 223.

Deduction of Debts. — In estimating the value of property held by a corporation, to ascertain whether the amount it can take and hold is limited by its charter or by statute is exceeded, its indebtedness for its property must be deducted. Wetmore *v.* Parker, 52 N. Y. 450, *affirming* 7 Lans. (N. Y.) 121.

Increase in Value. — An increase in the income of a corporation from its vested estates, by reason of increase of value, to a point beyond what its charter prescribes, cannot have the effect to divest its title in any portion of such estates. Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 758.

A Limit as to the Amount of Personal Property which a corporation may hold does not limit the amount or value of real property which may be devised to trustees to be sold, the proceeds to be applied in erecting a building which the corporation is authorized to erect and own. Cruse *v.* Axtell, 50 Ind. 49. See *infra*, this section, *Personal Property, Choses in Action, etc.*

Repeal of Statutes. — A statute authorizing grants, devises, or bequests to particular corporations does not impliedly repeal a prior general law limiting the amount of property which such corporations may take and hold. Chamberlain *v.* Chamberlain, 43 N. Y. 424, *modifying* 3 Lans. (N. Y.) 348; Matter of McGraw, 111 N. Y. 66, *affirming* 45 Hun (N. Y.) 354.

2. **Effect of Prohibition Against "Holding."** — State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575. In this case it was said by Felch, J.: "The disability to hold lands seems almost necessarily to imply a disability to become the grantee and vendor of real estate. There can be no grant of land without a grantee capable of taking; and he who takes and conveys to another must necessarily be, for the time intervening, the holder of the estate. If the restriction in the charter takes away the capacity to hold, it must, therefore, take away the power of receiving the estate for the purpose of conveying to another. The corporation cannot deal in real estate, receiving and conveying the title in its corporate capacity, without in every instance holding that estate; and a title derived through it, to be good, must necessarily imply the right of the corporation to take the estate and hold the title until conveyed."

To the same effect is Matter of McGraw, 111 N. Y. 66, *affirming* 45 Hun (N. Y.) 354. In this case it was held that the charter of Cornell University, declaring that the corporation might hold property "not exceeding $3,000,000 in the aggregate," prohibited its taking, as well as holding, beyond that amount; and that a bequest to it in excess of that amount was void. See also Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 22, 46 Am. Dec. 183, *per* Baldwin, J. *Compare* Rainey *v.* Laing, 58 Barb. (N. Y.) 453.

3. Leazure *v.* Hillegas, 7 S. & R. (Pa.) 313. See the title ULTRA VIRES.

4. **Corporations for Religious Worship.** — A statutory restriction upon the amount of property which may be held by corporations formed for "the purpose of religious worship" does not apply to corporations for missionary purposes, as the Board of Foreign Missions of the Presbyterian Church in the United States, and the Board of Home Missions of that church. Gilmer *v.* Stone, 120 U. S. 586, 24 Cent. L. J. 491. And see Hamsher *v.* Hamsher, 132 Ill. 273, where such a prohibition was held not to apply to a Young Men's Christian Association.

5. See the various local statutes.

6. There is such an exception in the National Bank Act. Under it a national bank could purchase and hold land for the erection of its banking house. See the title NATIONAL BANKS.

Taking as Security for Debts. — And it is generally provided that they may take a mortgage on land in good faith by way of security for debts previously contracted;[1] or merely for debts, without requiring that they shall have been previously contracted.[2]

Taking in Satisfaction of Debts. — Or that they may take a conveyance in payment or satisfaction of debts previously contracted in the course of their dealings.[3]

Purchase at Execution or Foreclosure Sale, etc. — Or that they may purchase at sales under judgments, decrees, or mortgages held by them, or may purchase to secure debts due to them;[4] or that they may purchase at a sale under a mortgage given for a debt previously contracted.[5]

Necessity to Dispose of Property. — It is sometimes provided that when a corporation which is prohibited generally from taking and holding real estate takes real estate in payment of a debt, or purchases it at an execution sale, etc., under exceptions like the above, it must dispose of it at public or private sale within a certain time. It is allowed to take property in these cases to realize

1. Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305.

2. Sparks *v.* State Bank, 7 Blackf. (Ind.) 469; Thomaston Bank *v.* Stimpson, 21 Me. 195.

As to the power to take a mortgage on real property, and the effect of charter and statutory restrictions, see *infra*, this section, *Taking and Enforcing Securities*.

3. See Mapes *v.* Scott, 94 Ill. 379; Columbus Buggy Co. *v.* Graves, 108 Ill. 459; Turner *v.* Madison First Nat. Bank, 78 Ind. 19; Thomaston Bank *v.* Stimpson, 21 Me. 195.

Construction of Such Proviso. — Where a corporation is empowered to hold "such lands as are *bona fide* mortgaged or conveyed to it in satisfaction of debts previously contracted in the course of its dealings," it has a general power to commute debts really due for real estate; and this power does not depend upon whether, in the opinion of the jury, the debt was in danger, and prudence required that the real estate should be taken in satisfaction of it. Baird *v.* Washington Bank, 11 S. & R. (Pa.) 411.

A Conveyance of Land to a Corporation in Return for Drafts owned by the corporation and assigned by it to the grantor, the latter not having been a party to the drafts, is not within an exception allowing the corporation to take land "in satisfaction of debts previously contracted in the course of its dealings." State Bank *v.* Coquillard, 6 Ind. 232.

4. See Martin *v.* Branch Bank, 15 Ala. 587, 50 Am. Dec. 147.

Construction of Such Proviso. — There is some conflict in the decisions construing such provisos or exceptions.

In Russell *v.* Topping, 5 McLean (U. S.) 194, a statute prohibiting a corporation from purchasing or holding real estate contained a proviso or exception allowing it to purchase and hold such as might be mortgaged to it, and such as might be conveyed in satisfaction of debts, and such as might be purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts. It was held that this did not allow it, on a foreclosure sale under a prior mortgage of land, a part only of which was covered by its mortgage, to purchase the part not covered, even though the purchase was for the purpose of protecting itself and preventing a sacrifice of the part that was mortgaged to it.

And in Chautauqua County Bank *v.* Risley, 4 Den. (N. Y.) 480, it was held that a proviso allowing a corporation to purchase at sales upon judgments obtained for debts did not allow a corporation having a judgment which was a lien on land to purchase at a sale under a prior judgment, or to take an assignment from a purchaser at such a sale, though its purpose was to protect itself.

In Brown *v.* Hogg, 14 Ill. 219, on the other hand, it was held that, under such provisions as the above, the state bank of Illinois had the right to purchase a judgment which was a prior lien on lands mortgaged to it, in order to secure the payment of existing debts, if the object was to protect itself and secure the payment of its own claim; and that in such case it might purchase the lands of the debtor on an execution sale founded on such judgment. See also Holmes *v.* Boyd, 90 Ind. 332, in which it was held that a national bank, lawfully holding a mortgage on real estate, may, under the provisions of the National Bank Act, purchase a prior mortgage on the same real estate in order to protect itself. And see Kingsmill *v.* Upper Canada Bank, 13 U. C. C. P. 600.

5. There is such a provision as this in the National Bank Act. See Heath *v.* Lafayette Second Nat. Bank, 70 Ind. 106; Wherry *v.* Hale, 77 Mo. 20. See also the title NATIONAL BANKS.

Purchase on Foreclosure. — In John A. Roebling Sons' Co. *v.* Richmond First Nat. Bank, 30 Fed. Rep. 744, a national bank had loaned a man money to engage in the lumber business. The borrower afterwards became embarrassed, and the bank, to save its debt, secured a deed of trust upon his timber land. The deed was foreclosed, and the bank became the purchaser and then employed an agent to cut and sell the timber. It was held that this was an authorized means of realizing the debt.

Purchase in Part Invalid. — The fact that a corporation subject to such a statute, in order to secure a debt, purchased real estate not mortgaged to it in addition to that mortgaged cannot affect the title to the land which it was

on debts due to it, and not for the purpose of acquiring and holding the same.[1]

(i) **Purchasing Through Agent.** — If a corporation is prohibited from purchasing and holding real estate, it cannot evade the prohibition by purchasing indirectly through an agent.[2]

(j) **Taking as Trustee.** — Nor can it take land as trustee. A conveyance in trust, it is held, would tend as much as an absolute conveyance to create perpetuities, and one is as much within the statutory prohibition as the other.[3]

(k) **Conveyance or Devise in Trust for Benefit of Corporation — In General.** — It has been said that land which a corporation cannot hold in its own name cannot be held for it in the name of another; that when a corporation cannot take the legal title to land, it cannot take a beneficial interest in it.[4]

Qualification of Rule. — But this statement is too broad. A prohibition, express or implied, against purchasing or holding real property by a corporation does not prevent a conveyance of land to a trustee to sell the same and apply the proceeds to the satisfaction of a debt due the corporation,[5] or otherwise for its benefit.[6]

(l) **Conversion of Real Property into Personalty.** — Under the doctrine of equitable conversion, if land is conveyed or devised to a trustee to be sold by him and converted into money which is to be paid to a corporation, this is generally to be regarded as a gift of money, and not of land, and would not be within a prohibition against the purchase or devise of land by or to a corporation.[7]

b. PERSONAL PROPERTY, CHOSES IN ACTION, ETC. — (1) *Capacity in General.* — At common law all corporations have capacity to take and hold personal property; it need not be expressly conferred.[8]

(2) *Joint Tenancy and Tenancy in Common.* — They cannot take personal property as joint tenant;[9] but they may take as tenant in common.[10]

(3) *When the Power to Purchase Will Be Implied.* — In the absence of

authorized to purchase. Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405.

1. There is such a provision as this in the National Bank Act. See the title NATIONAL BANKS.

As to the Effect of the Failure of a corporation to dispose of real estate taken by it on foreclosure of a mortgage owned by it, see Home Ins. Co. *v.* Head, 30 Hun (N. Y.) 405. And see the title ULTRA VIRES.

Contract of Sale Unperformed. — When a corporation is required to sell real estate acquired by it in satisfaction of a debt within a certain time, under penalty of forfeiture, a *bona fide* contract of sale is sufficient, though the purchaser makes default and the corporation resumes possession. London, etc., Loan, etc., Co. *v.* Graham, 16 Ont. Rep. 329.

2. Purchase Through Agent. — See Cox *v.* Gould, 4 Blatchf. (U. S.) 341. *Compare* Fisk *v.* Patton, 7 Utah 399.

3. Taking as Trustee. — U. S. Trust Co. *v.* Lee, 73 Ill. 142. And see Wright *v.* Methodist Episcopal Church, Hoffm. Ch. (N. Y.) 202.

4. See Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

5. Zantzingers *v.* Gunton, 19 Wall. (U. S.) 32.

6. Germain *v.* Baltes, 113 Ill. 29. See Fisk *v.* Patton, 7 Utah 399.

That a Devise to a Natural Person in Trust for a corporation would be valid under the *New York* statute of wills, prohibiting devises to corporations unless expressly authorized to take by devise, see M'Cartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

Contra. — Theological Seminary *v.* Childs, 4 Paige (N. Y.) 419; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290. *Compare* Wright *v.* Methodist Episcopal Church, Hoffm. Ch. (N. Y.) 202.

7. Equitable Conversion. — Given *v.* Hilton, 95 U. S. 591; State *v.* Wiltbank, 2 Harr. (Del.) 22; Germain *v.* Baltes, 113 Ill. 29; Orrick *v.* Boehm, 49 Md. 72; Church Extension *v.* Smith, 56 Md. 362; Theological Seminary *v.* Childs, 4 Paige (N. Y.) 419; Draper *v.* Harvard College, 57 How. Pr. (N. Y. Supreme Ct.) 269; Wright *v.* Methodist Episcopal Church, Hoffm. Ch. (N. Y.) 202; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46; American Bible Soc. *v.* Noble, 11 Rich. Eq. (S. Car.) 156; Dodge *v.* Williams, 46 Wis. 70; Milwaukee Protestant Home *v.* Becher, 87 Wis. 409, 45 Am. & Eng. Corp. Cas. 562. *Compare* King *v.* Rundle, 15 Barb. (N. Y.) 150. And see the title CONVERSION AND RECONVERSION, *ante*.

Illustration. — A devise of lands to be sold by executors, with direction to distribute the proceeds among certain corporations, is a gift of personalty, and not prohibited by a statute excepting corporations as objects of devise of lands. American Bible Soc. *v.* Noble, 11 Rich. Eq. (S. Car.) 156.

8. 1 Kyd on Corp. 104.

9. Telfair *v.* Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637. See *supra*, this section, *Power to Take and Hold Property — Real Property*.

10. New York, etc., Canal Co. *v.* Fulton Bank, 7 Wend. (N. Y.) 412; Telfair *v.* Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637.

express restrictions, a corporation has the implied power to purchase any personal property that may be reasonably necessary or convenient to enable it to carry out the objects of its creation; or, as it has been otherwise expressed, it may purchase for any purpose that is not inconsistent with the objects for which it was created.[1]

Property Needed in Business. — Thus a business corporation may purchase any personal property that may be needed to enable it to carry on its business.[2]

Taking as Collateral Security. — And it may always, unless expressly prohibited, take personal property of any kind as collateral security for a debt, whether previously contracted or contracted at the time.[3]

Taking in Payment of Debt. — A corporation may also take personal property in payment of a debt due to it, in order to prevent loss, though the property may be such that it would not under ordinary circumstances have the right to purchase it.[4]

Purchase at Sale on Execution or Under Mortgage or Pledge. — And in like manner it may purchase at a sale on an execution in its favor, or under a valid mortgage or pledge of property taken by it for a loan or other debt.[5]

(4) *When the Power to Purchase Will Not Be Implied.* — But a corporation has no implied power to purchase personal property for a purpose that is foreign to the objects for which it was created.[6]

1. When Power Implied — *United States.* — Blanchard's Gun-Stock Turning Factory *v.* Warner, 1 Blatchf. (U. S.) 277.

Connecticut. — National Shoe, etc., Bank's Appeal, 55 Conn. 469.

Massachusetts. — Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315.

Michigan. — Adams Min. Co. *v.* Senter, 26 Mich. 73.

Missouri. — Calloway Min., etc., Co. *v.* Clark, 32 Mo. 305.

New Jersey. — Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 467.

Virginia. — Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

Charitable Institutions. — A corporation organized for the purpose of establishing and maintaining an institution wherein aged people may find an asylum, under such conditions and rules as may be prescribed by its constitution and by-laws, may impose, as a condition of admission into the institution, that an applicant, besides paying a stipulated entrance fee, shall transfer to the institution all property of any kind which he may have. General German Aged People's Home *v.* Hammerbacker, 64 Md. 595, 54 Am. Rep. 782.

2. Mining Companies. — A mining corporation, for example, has power to buy timber for use in its business. Adams Min. Co. *v.* Senter, 26 Mich. 73.

So, a corporation created for the purpose of mining and transporting coal has the power to purchase and use a steamboat for the purposes of its business in transporting and delivering coal, etc. Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305.

Manufacturing and Trading Companies. — A manufacturing company may purchase raw material in excess of its necessities at the time, for the purpose of taking advantage of low prices in the market. National Shoe, etc., Bank's Appeal, 55 Conn. 469.

And a corporation organized "for the purpose of manufacturing and selling all the varieties of glass" may purchase glassware for the purpose of keeping up its stock and supplying its customers until its works, bought from a preceding company, are put in repair. Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315.

A Railroad Company may purchase steamboats to enable it to carry across waters on its line and constituting part of its route. Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147. And see Shawmut Bank *v.* Plattsburgh, etc., R. Co., 31 Vt. 491. See *infra*, this section, *When the Power to Purchase Will Not Be Implied.*

3. Commercial Bank *v.* Nolan, 7 How. (Miss.) 508; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

4. De Graff *v.* American Linen Thread Co., 21 N. Y. 124; Panhandle Nat. Bank *v.* Emery, 78 Tex. 498.

Illustrations. — A bank may take grain or other property from a customer in payment of a debt due to it from him. Rosenbaum *v.* Horton, 89 Iowa 692.

And a national bank has the power to accept personal property in payment for its real estate which it has disposed of, though without power to deal generally in personal property. Ottumwa First Nat. Bank *v.* Reno, 73 Iowa 145. See the title NATIONAL BANKS.

5. Farmers,' etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

Express Grant of Power to Purchase Real Property. — An express grant in the charter of a corporation of power to take real estate sold on execution in its favor, or under a mortgage to it, does not impliedly abridge its power to purchase personal property so sold. Farmers,' etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

6. When Power Not Implied — *United States.* — Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441.

Alabama. — Morgan *v.* Donovan, 58 Ala. 241.

Maine. — Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9.

Purchase for Use in Unauthorized Business. — Thus a purchase of property for use in an unauthorized business is *ultra vires*.[1]

Purchase for Speculation. — The same is true of purchases of goods merely for speculation by manufacturing companies and other corporations not organized for the purpose of dealing generally in goods.[2]

Purchase to Remove Competition. — And a corporation cannot lawfully purchase property of a rival company merely for the purpose of removing competition.[3]

(5) *Purchasing or Taking Choses in Action* — **When Authorized to Take.** — Not only may a corporation take and hold chattels, but it may also, in the general conduct of its business, take choses in action, as promissory notes, bills, bonds and other contracts, if there are no charter or statutory restrictions.[4]

When Taking Unauthorized. — But it cannot purchase or deal in securities when

Michigan. — Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352.

Minnesota. — Farmers,' etc., Bank *v.* Baldwin, 23 Minn. 198, 23 Am. Rep. 683.

New Hampshire. — Downing *v.* Mount Washington Road Co., 40 N. H. 230.

Texas. — Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306.

1. A Railroad Company, for example, has no right to purchase steamboats or canal boats to run in connection with its road, but beyond its terminus. Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353, 25 Am. & Eng. R. Cas. 25; Parish *v.* Wheeler, 22 N. Y. 494.

A Turnpike or Toll-road Company, given authority by its charter to make and keep in repair a road, to take tolls of passengers and for carriages, to build and own toll houses, and to take land for the road, cannot establish stage and transportation lines, or buy carriages and horses for such a purpose. Nor is such power conferred by an additional act, authorizing the company to erect and maintain, lease, and dispose of, any buildings found convenient for the accommodation of its business and of the horses and carriages and travelers passing over its road. Downing *v.* Mount Washington Road Co., 40 N. H. 230.

2. A Manufacturing Company may purchase goods necessary in its manufactures for the purpose of manufacturing, but it cannot purchase such goods to sell them again on speculation. Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352; Chewacla Lime-Works *v.* Dismukes, 87 Ala. 344.

Purchase on Credit of Property Not Needed. — A savings bank, it has been held, and the same would be true of other corporations, cannot purchase on credit property of any kind not needed for immediate use or the investment of existing funds. Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9.

Dealing in Futures. — It is *ultra vires* for a corporation, as a bank or manufacturing company, to deal in futures on the produce exchange. Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482, *affirming* 44 Hun (N. Y.) 412.

But the mere fact that a manufacturing corporation purchases material suitable for its manufactures through a broker, and for future delivery, does not render the purchase *ultra vires* as a speculation, if as a fact it was not a purchase on speculation, but a purchase for the legitimate business of the corporation. Sampson *v.* Camperdown Cotton Mills, 82 Fed. Rep. 833.

3. See Distilling, etc., Co. *v.* People, 156 Ill. 448.

A Railroad Company cannot purchase property of a rival carrier, as of an opposition steamship company, not with the view of employing it in connection with the business of the road, but to withdraw it from business, and thereby prevent or lessen competition. And the same would be true of other corporations. Morgan *v.* Donovan, 58 Ala. 241.

4. When Authorized to Take Choses in Action — *United States.* — Alexander *v.* Horner, 1 McCrary (U. S.) 641; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 350.

Alabama. — Gee *v.* Alabama L. Ins., etc., Co., 13 Ala. 579.

Illinois. — McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Frye *v.* Tucker, 24 Ill. 180; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

Indiana. — Hardy *v.* Merriweather, 14 Ind. 203; Lagow *v.* Badollet, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258.

Iowa. — Western Cottage Organ Co. *v.* Reddish, 51 Iowa 55.

Missouri. — Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91; Salmon Falls Bank *v.* Leyser, 116 Mo. 51; State Bank *v.* Price, 1 Mo. 54; Buckley *v.* Briggs, 30 Mo. 452.

New Jersey. — Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 467.

New York. — Comstock *v.* Willoughby, Hill & D. Supp. (N. Y.) 271; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134; Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

Ohio. — Ashland Bank *v.* Jones, 16 Ohio St. 145.

Wisconsin. — Wayland University *v.* Boorman, 56 Wis. 657.

A Promissory Note is "Personal Property," within the meaning of a charter conferring on a corporation the power to acquire and hold personal property for the purpose of accomplishing the objects for which it was created. Wayland University *v.* Boorman, 56 Wis. 657.

City Warrants. — Under a statute giving a corporation (savings bank) power to discount non-negotiable notes, and take, hold, and convey any property, real, personal, or mixed, it has the power to take and hold city warrants. Aull Sav. Bank *v.* Lexington, 74 Mo. 104.

Water Bonds. — A banking corporation, having authority to buy and sell negotiable and non-negotiable paper, "as well as all kinds of commercial paper," is authorized to buy and

such transactions are foreign to the objects of its creation.[1]

Stock in Other Corporations. — The power of a corporation to take and hold stock in other corporations, and its power to acquire and hold its own stock, are elsewhere considered.[2]

(6) *Purchase of Judgments.* — A corporation may also, in the course of its legitimate business, purchase a judgment in favor of another, and take an assignment thereof, and enforce the same.[3]

(7) *Purchase of Franchises.* — A franchise, as a franchise to operate or maintain a ferry, telegraph, bridge, etc., is a vested right in the nature of property and the subject of purchase and enjoyment by all who are capable of purchasing, holding, and enjoying property. And it may be purchased by corporations as well as by natural persons when it is of such a character as to be reasonably included in the objects and purposes for which the corporation was created,[4] provided the owner has the power to sell.[5]

sell negotiable water bonds. Mount Vernon Bank *v.* Porter, 52 Mo. App. 244.

Taking Assignment of Account. — In Bank of North America *v.* Tamblyn, 7 Mo. App. 571, it was held that, in order to save itself from loss, a banking company may take an assignment of an account due a debtor of the corporation.

And in Mahoney *v.* Butte Hardware Co., (Mont. 1897) 48 Pac. Rep. 545, it was held that a hardware company, having a claim against a mining company, could, to protect its own interests as such creditor, purchase an account secured by lien in favor of a third person against the mining company.

Assignment of Other Contracts. — And a corporation may take an assignment of rights under any other contract for a legitimate corporate purpose, as to realize on a debt due it. Lagow *v.* Badollet, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258.

1. When Unauthorized to Take Choses in Action. — Simpson Centenary College *v.* Bryan, 50 Iowa 293; Edwardsville Bank *v.* Simpson, 1 Mo. 184; Edwardsville Bank *v.* Hammond, 1 Mo. 186; Hope Mut. L. Ins. Co. *v.* Taylor, 2 Robt. (N. Y.) 278; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601.

A Mining Company, for example, cannot purchase choses in action. Salmon River Min., etc., Co. *v.* Dunn, 2 Idaho 30.

A Manufacturing Corporation cannot deal in or purchase state bonds. Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

Nor Can a Railroad Company deal in promissory notes or other securities by buying and selling them. Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

An Insurance Company, authorized by its charter to invest its funds and capital stock as shall be deemed best by the directors for the safety of the capital and interest of the stockholders, has no power to purchase upon credit the promissory note of one insured by the company, and entitled to indemnity for a loss, for the purpose of setting off the note against the claim. Straus *v.* Eagle Ins. Co., 5 Ohio St. 59. And see Kansas Ins. Co. *v.* Craft, 18 Kan. 283.

Discounting, Negotiating, and Purchasing Distinguished. — Discounting a note is not a "purchase" of the note, and is not within the power of a corporation which is prohibited from exercising banking powers. New York State L. & T. Co. *v.* Helmer, 77 N. Y. 64. See also the title BANKS AND BANKING, vol. 3, p. 841.

And on the other hand, by the better opinion, when a corporation, like a bank, is only authorized to discount and negotiate bills and notes, it has no power to deal in them by buying and selling, when the transaction is not a loan, but an out-and-out purchase. Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355; Rochester First Nat. Bank *v.* Harris, 108 Mass. 514; Rochester First Nat. Bank *v.* Pierson, 24 Minn. 140; Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Atlantic State Bank *v.* Savery, 82 N. Y. 291. *Compare* Smith *v.* Exchange Bank, 26 Ohio St. 141; Niagara County Bank *v.* Baker, 15 Ohio St. 68.

In Nicholson *v.* National Bank, 92 Ky. 251, it is held that the purchase of a note from the payee, with the latter's indorsement, is a purchase by discounting, and not by barter and sale, as it would be if the note were taken without indorsement, or by indorsement without recourse. See also the titles BANKS AND BANKING, vol. 3, p. 841; NATIONAL BANKS.

2. See *infra*, this section, *Power of Corporation to Acquire and Hold Its Own Stock.*

3. Purchase of Judgment. — Thus, a corporation having a lien on lands by judgment or mortgage may purchase a judgment in favor of another, which is a prior lien thereon, in order to protect itself and secure the payment of its own claim. Brown *v.* Hogg, 14 Ill. 219. And see Harwood *v.* Ramsey, 15 S. & R. (Pa.) 31.

4. Purchase of Franchise. — In California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398, the legislature of California had granted to individuals "or their assigns" the exclusive right to maintain a line of telegraph between certain cities. The grantees of this franchise sold the same to a corporation formed under the general laws of the state for the purpose of constructing and operating telegraph lines. It was held that the franchise was valid, that it was property, and that the corporation had the power to purchase the same. See also San Luis Water Co. *v.* Estrada, 117 Cal. 168, where it was held that a corporation could purchase an exclusive franchise to furnish a town with water.

5. See *infra*, this section, *Power to Alienate Property.*

(8) *Purchase of Patents.* — A corporation also has the power to purchase a patent when it is necessary or proper to own the same in order to accomplish its legitimate objects.[1]

(9) *Bailments.* — A corporation may become bailee of property for any purpose that is reasonably within the objects of its creation;[2] but it has no right to become a bailee when the transaction is foreign to such objects.[3]

(10) *Power to Take by Bequest.* — In the absence of express restrictions in its charter or in some statute governing it, a corporation has the power to take personal property by bequest.[4]

(11) *Express Constitutional and Statutory Restrictions.* — In some states there are express constitutional or statutory restrictions on the power of corporations to take and hold personal property by purchase, gift, or bequest.[5]

Limitation as to Amount of Property. — Thus the amount of personal property which a corporation may take and hold is sometimes limited.[6]

Limitation as to Amount of Bequest. — The statutes may limit the amount of a bequest which a person may make to corporations.[7] This, however, does not

1. Purchase of Patents. — A corporation organized for the manufacture of an article may purchase a patent for making the article. Blanchard's Gun-Stock Turning Factory *v.* Warner, 1 Blatchf. (U. S.) 258; Dorsey Harvester Revolving-Rake Co. *v.* Marsh, 6 Fisher Pat. Cas. 387.

And a corporation organized for the purpose of working a patented machine has the power to purchase the patent. *In re* British, etc., Cork Co., L. R. 1 Eq. 231.

2. Carriers. — A common illustration is the taking of property by railroad, express, steamship, and similar corporations, under a contract of carriage. See the title CARRIERS OF GOODS, vol. 5, p. 154.

Warehousemen and Innkeepers. — Among other illustrations may be mentioned the taking of property for storage by warehouse companies, and the taking of a guest's property by a hotel company. See the titles INNS AND INNKEEPERS; WAREHOUSEMEN.

Museums, etc. — Under a statute authorizing the establishment of a library board of a city, with power to hold, by gift, purchase, or otherwise, real and personal property, and to provide "for the government and regulation of the libraries and other collections," the board has power to become an ordinary bailee of any property that may be of such a character as to be proper for exhibition in a public museum, as a collection of coins, for example. Smith *v.* Library Board, 58 Minn. 108.

3. Thus a Savings Bank cannot, in the absence of express authority, receive bonds or other property for safe-keeping. Greeley *v.* Nashua Sav. Bank, 63 N. H. 145. See the title SAVINGS BANKS.

4. Bequests to Corporations — *United States.* — Perin *v.* Carey, 24 How. (U. S) 465.

Louisiana. — Williams *v.* Western Star Lodge No. 24, 38 La. Ann. 620.

Massachusetts. — Phillips Academy *v.* King, 12 Mass. 546.

Mississippi. — Wade *v.* American Colonization Soc., 7 Smed. & M. (Miss.) 663, 45 Am. Dec. 324.

Missouri. — Soldiers' Orphans' Home *v.* Wolff, 10 Mo. App. 596.

New York. — Chamberlain *v.* Chamberlain, 43 N. Y. 424; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 396; Williams *v.* Williams, 8 N. Y. 530; Sherwood *v.* American Bible Soc., 4 Abb. App. Dec. (N. Y.) 227, 1 Keyes (N. Y.) 561. See Draper *v.* Harvard College, 57 How. Pr. (N. Y. Supreme Ct.) 269.

South Carolina. — Telfair *v.* Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637.

Virginia. — Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183; Protestant Episcopal Education Soc. *v.* Churchman, 80 Va. 718.

West Virginia. — Lewisburg Baptist University *v.* Tucker, 31 W. Va. 621.

An Incorporated Theological Seminary authorized by its charter to take and hold real and personal property and manage the same for the benefit of the institution, whose object is declared to be the education of pious young men for the ministry, may take a bequest for the purpose of endowing a professorship. Theological Seminary *v.* Kellogg, 16 N. Y. 83; Theological Seminary *v.* Cole, 18 Barb. (N. Y.) 300.

Bequest to United States. — In Dickson *v.* U. S., 125 Mass. 311, 28 Am. Rep. 230, a bequest to the United States was sustained.

5. See the constitutions of the various states and various local statutes.

6. Determination of Amount. — Under charter restrictions as to the amount of property which a corporation may take and hold, the capacity of the corporation to take a bequest which might increase its property beyond the statute limit must be determined by the law in force at the time of the vesting of the bequest. This test applies in ascertaining both the amount of the corporate property and the value of the bequest. Betts *v.* Betts, 4 Abb N. Cas. (N. Y. Supreme Ct.) 319.

Indebtedness of a Corporation for Its Property is to be deducted in determining whether a legacy would increase its property beyond what it is authorized to hold. Wetmore *v.* Parker, 52 N. Y. 450, *affirming* 7 Lans. (N. Y.) 121.

An Amendment to the Charter of a corporation after a testator's death, increasing the amount of property which it can hold, does not entitle it to take more of a legacy than it was authorized to take at the time of the testator's death. Coggeshall *v.* Home for Friendless Children, 18 R. I. 606.

7. Limitation of Amount of Bequest. — In some states there are statutes expressly prohibiting

go to the question of the power of corporations.

Isolated Transactions. — It has been held that a restriction in a charter against dealing or trading, in buying or selling goods, does not apply to an isolated transaction.[1]

Taking as Collateral Security. — And a prohibition merely against dealing or trading in particular kinds of personal property or choses in action does not prohibit taking as collateral security for debts.[2]

(12) *Effect of Unauthorized Purchase, Gift, or Bequest.* — Some courts, but not all, hold that a constitutional or statutory prohibition or limitation cannot be set up to defeat the title of a corporation under an unauthorized purchase of goods or choses in action.[3] By the weight of authority a prohibited bequest is void.[4]

c. PRESUMPTION AS TO POWER. — By the great weight of authority, when a corporation which may have power to acquire real or personal property for some purposes takes a conveyance, and the purpose for which the property was taken does not appear, the power to take and hold the same is to be presumed.[5]

5. Power to Act as Trustee — *a.* OLD DOCTRINE. — It was formerly held

a person, or a person leaving a wife, child, etc., from bequeathing to a corporation, or particular kinds of corporations, more than a certain proportion of his estate. See Leary's Estate, Tuck. (N. Y.) 233. See also the title LEGACIES AND DEVISES.

Under such a restriction, applying to particular kinds of corporations only, bequests to corporations not within the restriction are not to be taken into account in determining how much has been given to the corporations within the restriction. Betts *v.* Betts, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317.

1. Isolated Transactions. — Sacket's Harbor Bank *v.* Lewis County Bank, 11 Barb. (N. Y.) 213.

In Graham *v.* Hendricks, 22 La. Ann. 523, it was held that the purchase of a lot of cotton by a railroad company was not within the prohibition of a statute declaring that no corporation should engage "in mercantile or agricultural business, nor in commission, brokerage, stock jobbing, exchange, or banking business of any kind," as the statute only contemplated the buying and selling of merchandise as an employment.

2. Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

3. See the title ULTRA VIRES.

4. Cornell University *v.* Fiske, 136 U. S. 152; Cromie *v.* Louisville Orphans' Home Soc., etc., 3 Bush (Ky.) 365; State *v.* Warren, 28 Md. 338; Brown *v.* Thompkins, 49 Md. 423; Matter of McGraw, 111 N. Y. 66; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 317.

That a Bequest of More Property to a corporation than it is authorized by its charter to hold is not absolutely void, and can be attacked only by the state, see De Camp *v.* Dobbins, 29 N. J. Eq. 36.

Contra. — Trustees, etc., *v.* Chambers, 3 Jones Eq. (N. Car.) 253; Wood *v.* Hammond, 16 R. I. 98; Coggeshall *v.* Home For Friendless Children, 18 R. I. 696. See also the title ULTRA VIRES.

5. Presumption in Favor of Power — *United States.* — Myers *v.* Croft, 13 Wall. (U. S.) 291.

California. — Hagar *v.* Yolo County, 47 Cal. 222; People *v.* La Rue, 67 Cal. 526; Stockton Sav. Bank *v.* Staples, 98 Cal. 189; Granite Gold-Min. Co. *v.* Maginess, (Cal. 1897) 50 Pac. Rep. 269.

Georgia. — Mitchell *v.* Rome R. Co., 17 Ga. 574.

Michigan. — State University *v.* Detroit Young Men's Soc., 12 Mich. 158.

Missouri. — Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91.

New Jersey. — Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

New York. — *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540; Chautauqua County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347; Yates *v.* Van de Bogert, 56 N. Y. 526.

North Carolina. — Mallett *v.* Simpson, 94 N. Car. 37, 55 Am. Rep. 595.

Contra in Georgia. — Carver Cotton Gin Co. *v.* Barrett, 66 Ga. 526.

Applications of Rule. — In Kentucky Lumber Co. *v.* Green, 87 Ky. 257, 10 Ky. L. Rep. 139, where the charter of a lumber company authorized it to purchase and hold timber lands or any other lands that might be necessary or convenient for the purpose of transacting its business — a power which would have been implied if not expressly granted — it was held that the fact that a part of a tract purchased by it was cleared and used for farming purposes did not show that the purchase was *ultra vires*, as it did not follow that the remainder of the tract was covered with timber suitable for the company's business.

In Chautauqua County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347, a corporation with power to acquire real estate in "satisfaction of debts" took from the holder of a sheriff's certificate of sale, after the same had become absolute, an assignment of all his right, and then received the sheriff's deed. The consideration of the assignment was expressed in general terms to be "for value received," and there was no other proof of the consideration. It was held that the assignment was presumptively a valid transfer to the bank, the words "for value received" being equally referable to a debt due from the assignor or to a present payment in money.

on technical grounds that a corporation could not hold lands to the use of another.[1]

b. MODERN DOCTRINE — **When the Power Exists.** — This doctrine, however, has long since been abandoned, and it is now settled beyond any question that a corporation has the power to hold real or personal property in trust for any purpose that is not foreign to the business for which it was created, and that a court of equity will enforce the trust.[2]

Charities. — Thus cities, towns, and other public corporations may take and hold property in trust for charitable purposes not inconsistent with their charters, as for educational purposes, relief of the poor, etc.[3] And the same is true of colleges, hospitals, and other private eleemosynary corporations.[4]

Religious Corporations. — In like manner, religious corporations may take property in trust to carry out the business of their creations, as to support a church or mission, or the poor, etc.[5]

1. Early Doctrine as to Power to Act as Trustee. — 1 Bl. Com. 477; Bacon on Uses 347.

Reasons for Doctrine. — The reasons for the old doctrine were technical. One was that no trust or confidence could be reposed in a corporation aggregate. Another was that a court of chancery, which acted upon the conscience of the trustee in enforcing trusts, could not compel a corporation to execute a trust, as it had no conscience. Another reason was that a corporation could not be imprisoned on refusal to obey the decrees of the court. Still another reason was that it could not take an oath. See 1 Bl. Com. 477; Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 27 Am. & Eng. Corp. Cas. 386.

2. Present Doctrine — *England.* — Green *v.* Rutherford, 1 Ves. 462; Atty.-Gen. *v.* Clarendon, 17 Ves. Jr. 491; Atty.-Gen. *v.* Landerfield, 9 Mod. 286.

United States. — Jones *v.* Habersham, 107 U. S. 189, *affirming* 3 Woods (U. S.) 477; Vidal *v.* Philadelphia, 2 How. (U. S.) 127.

Connecticut. — First Congregational Soc. *v.* Atwater, 23 Conn. 34; Crandall *v.* Lincoln, 52 Conn. 97, 52 Am. Rep. 560.

Delaware. — Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. (Del.) 416, 1 Am. St. Rep. 150.

Louisiana. — Williams *v.* Western Star Lodge No. 24, 38 La. Ann. 620.

Massachusetts. — Holland *v.* Cuft, 3 Gray (Mass.) 175; Phillips Academy *v.* King, 12 Mass. 546.

Michigan. — White *v.* Rice, (Mich. 1897) 70 N. W. Rep. 1024.

Minnesota. — Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 27 Am. & Eng. Corp. Cas. 386.

Mississippi. — Sinking Fund Com'rs *v.* Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; Wade *v.* American Colonization Soc., 7 Smed. & M. (Miss.) 663, 45 Am. Dec. 324.

New Hampshire. — Atty.-Gen. *v.* Dublin, 38 N. H. 577.

New York. — Matter of Howe, 1 Paige (N. Y.) 214; Wetmore *v.* Parker, 52 N. Y. 450, *affirming* 7 Lans. (N. Y.) 121; Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339; Sheldon *v.* Chappell, 47 Hun (N. Y.) 59; Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. (N. Y.) 33, *affirmed* in 41 N. Y. 619.

Oregon. — Liggett *v.* Ladd, 23 Oregon 26.

Pennsylvania. — Bethlehem *v.* Perseverance F. Co., 81 Pa. St. 445.

South Carolina. — *Ex p.* Greenville Academies, 7 Rich. Eq. (S. Car.) 471.

Tennessee. — Heiskell *v.* Chickasaw Lodge No. 8, 87 Tenn. 668; Lincoln Sav. Bank *v.* Ewing, 12 Lea (Tenn.) 598.

Virginia. — Protestant Episcopal Education Soc. *v.* Churchman, 80 Va. 718.

3. Charitable Purposes — *England.* — Dummer *v.* Chippenham, 14 Ves. Jr. 245.

United States. — Vidal *v.* Philadelphia, 2 How. (U. S.) 127; McDonogh *v.* Murdoch, 15 How. (U. S.) 367.

Indiana. — Rush County *v.* Dinwiddie, 139 Ind. 128.

Maryland. — Barnum *v.* Baltimore, 62 Md. 293, 50 Am. Rep. 219.

Massachusetts. — Sutton *v.* Cole, 3 Pick. (Mass.) 232; Webb *v.* Neal, 5 Allen (Mass.) 575.

New Hampshire. — Atty.-Gen. *v.* Dublin, 38 N. H. 577.

Pennsylvania. — Philadelphia *v.* Elliott, 3 Rawle (Pa.) 170.

See also the titles CHARITIES, vol. 5, p. 893; MUNICIPAL CORPORATIONS.

4. *England.* — Atty.-Gen. *v.* St. John's Hospital, 2 DeG. J. & S. 621; Green *v.* Rutherford, 1 Ves. 462; Atty.-Gen. *v.* Foundling Hospital, 2 Ves. Jr. 42; Atty.-Gen. *v.* Ironmongers' Co., 2 Beav. 313.

United States. — Jones *v.* Habersham, 107 U. S. 189.

Connecticut. — First Congregational Soc. *v.* Atwater, 23 Conn. 34.

Louisiana. — Williams *v.* Western Star Lodge No. 24, 38 La. Ann. 620.

Massachusetts. — Phillips Academy *v.* King, 12 Mass. 546.

Mississippi. — Wade *v.* American Colonization Soc., 7 Smed. & M. (Miss.) 663, 45 Am. Dec. 324.

New York. — Wetmore *v.* Parker, 52 N. Y. 450, *affirming* 7 Lans. (N. Y.) 121.

Oregon. — Liggett *v.* Ladd, 23 Oregon 26.

South Carolina. — *Ex p.* Greenville Academies, 7 Rich. Eq. (S. Car.) 471.

Tennessee. — Heiskell *v.* Chickasaw Lodge No. 8, 87 Tenn. 668.

See also the title CHARITIES, vol. 5, p. 893.

5. Power of Religious Corporations — *United States.* — Jones *v.* Habersham, 107 U. S. 189.

Massachusetts. — Phillips Academy *v.* King, 12 Mass. 546.

New Jersey. — Mason *v.* Methodist Episcopal Church, 27 N. J. Eq. 47.

New York. — Sheldon *v.* Chappell, 47 Hun

Business Corporations. — And even a private business corporation, as a bank or manufacturing company or insurance company, may take property in trust for the purpose of accomplishing its legitimate business.[1]

When the Power Does Not Exist. — But, since a corporation has such powers only as are conferred by its charter, it cannot take and hold property in trust for a purpose in which it has no interest, or which is foreign to the objects of its creation.[2]

Express Prohibition or Limitation. — A corporation which is expressly prohibited from taking land by devise or otherwise cannot take as trustee.[3]

Effect of Incapacity of Corporation to Execute Trust. — If property is conveyed, devised, or bequeathed to a corporation in trust for such a purpose that it is without the power to execute the trust, it cannot be compelled to do so. But the trust does not fail; for a court of equity will appoint a trustee who can execute it.[4]

c. POWER TO ACT AS EXECUTOR, ADMINISTRATOR, GUARDIAN, ETC. — It was at one time held on technical grounds that a corporation could not act as executor, administrator, etc.;[5] but this doctrine is no longer recognized. A corporation, if authorized by its charter, and not prohibited by any statute, may act as executor, administrator, guardian, committee of insane person or habitual drunkard, receiver, etc.[6]

(N. Y.) 59; Harris *v.* American Bible Soc., 4 Abb. Pr. N. S. (N. Y. Ct. App.) 421, 2 Abb. App. Dec. (N. Y.) 316, *affirming* 46 Barb. (N. Y.) 470.

Pennsylvania. — Witman *v.* Lex, 17 S. & R. (Pa.) 88, 17 Am. Dec. 644.

Virginia. — Protestant Episcopal Education Soc. *v.* Churchman, 80 Va. 718.

See also the title RELIGIOUS SOCIETIES.

1. Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. (N. Y.) 33, *affirmed* 41 N. Y. 619; Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339; Morris *v.* Way, 16 Ohio 469.

Conveyance in Trust to Secure Debt. — A business corporation, for instance, has the power to receive a conveyance in trust to secure a debt due to it. Morris *v.* Way, 16 Ohio 469; Lincoln Sav. Bank *v.* Ewing, 12 Lea (Tenn.) 598.

Oath and Bond. — And the fact that it fails or is unable to comply with a statute as to the oath and bond of trustees does not affect the validity of the trust deed. Lincoln Sav. Bank *v.* Ewing, 12 Lea (Tenn.) 598.

2. **Limitation of Power.** — Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58; South Newmarket Methodist Seminary *v.* Peaslee, 15 N. H. 317; Chapin *v.* School Dist. No. 2, 35 N. H. 445; Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422; Matter of Howe, 1 Paige (N. Y.) 214; Farmers' L. & T. Co. *v.* Carroll, 5 Barb. (N. Y.) 613.

Illustrations. — A school district cannot hold lands in trust for the support of the ministry. Chapin *v.* School Dist. No. 2, 35 N. H. 445.

And a corporation empowered to establish an institution "for the instruction of youth" cannot be a trustee, to hold funds and pay over the income thereof for the support of missionaries. South Newmarket Methodist Seminary *v.* Peaslee, 15 N. H. 317.

Partial Want of Power. — It has been held that where property is devised or granted to a corporation, partly for its own use and partly for the use of others, the right of the corporation to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others. Matter of Howe, 1 Paige (N. Y.) 214.

3. U. S. Trust Co. *v.* Lee, 73 Ill. 142. See *supra*, this section, *Power to Take and Hold Property*.

4. **Effect of Incapacity to Act** — *United States.* — Vidal *v.* Philadelphia, 2 How. (U. S.) 127.

Massachusetts. — Winslow *v.* Cummings, 3 Cush. (Mass.) 358.

Mississippi. — Wade *v.* American Colonization Soc., 7 Smed. & M. (Miss.) 663, 45 Am. Dec. 324.

New Hampshire. — Chapin *v.* School Dist. No. 2, 35 N. H. 445.

New Jersey. — Mason *v.* Methodist Episcopal Church, 27 N. J. Eq. 47.

New York. — Sheldon *v.* Chappell, 47 Hun (N. Y.) 59.

Vermont. — See Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

See the title TRUSTS AND TRUSTEES.

5. 1 Bl. Com. 477; Georgetown College *v.* Browne, 34 Md. 450. See Matter of Kirkpatrick, 22 N. J. Eq. 463; Matter of Thompson's Estate, 33 Barb. (N. Y.) 334, *affirmed* 28 How. Pr. (N. Y.) 581.

Reason for Old Doctrine. — The reason given by Blackstone was that it could not take an oath for the due execution of the office. 1 Bl. Com. 477.

Another reason was that the office involved the element of trust and confidence. See *supra*, this section, *Power to Act as Trustee*.

6. *Connecticut.* — Crandall *v.* Lincoln, 52 Conn. 97, 52 Am. Rep. 560.

Delaware. — Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. (Del.) 416, 1 Am. St. Rep. 157.

Kentucky. — Johnson *v.* Johnson, 88 Ky. 275; Coleman *v.* Parrott, 11 Ky. L. Rep. 947, (Ky. 1890) 13 S. W. Rep. 525, 32 Am. & Eng. Corp. Cas. 1.

Michigan. — Matter of Rice, 42 Mich. 528.

Minnesota. — Minnesota L. & T. Co. *v.*

6. Power to Alienate Property — *a.* IN GENERAL. — In the absence of express or implied restrictions imposed by its charter or by statute, and subject to the exceptions shown in the following pages, a corporation owning real or personal property has, as an incident to its ownership, the same power as a natural person to dispose of or alienate the same, provided it does so for a legitimate corporate purpose.[1]

b. ALIENATION OF ENTIRE PROPERTY. — And by the weight of authority,

Beebe, 40 Minn. 7, 27 Am. & Eng. Corp. Cas. 386.

Missouri. — Glaser *v.* Priest, 29 Mo. App. 1.

New Jersey. — See Camden Safe Deposit, etc., Co. *v.* Ingham, 40 N. J. Eq. 3.

New York. — Ledwith *v.* Ledwith, 1 Dem. (N. Y.) 154; Matter of Cordova, 4 Redf. (N. Y.) 66.

Corporations as Guardians. — Johnson *v.* Johnson, 88 Ky. 275; Phalan *v.* Louisville Safety Vault, etc., Co., 88 Ky. 24; Matter of Rice, 42 Mich. 528; Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 27 Am. & Eng. Corp. Cas. 386; Ledwith *v.* Ledwith, 1 Dem. (N. Y.) 154; Matter of Cordova, 4 Redf. (N. Y.) 66.

As Committee of Insane Person or Drunkard. — Glaser *v.* Priest, 29 Mo. App. 1.

Constitutionality of Statutes. — Statutes conferring such power on corporations have been upheld as constitutional. See Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 27 Am. & Eng. Corp. Cas. 386.

The charter of a trust company authorizing it to act as administrator, and providing that its capital stock should, except in certain cases, be taken as security required by law for the faithful performance of its duties, was held not to be unconstitutional as conferring upon the corporation an exclusive privilege, or discriminating in its favor. Coleman *v.* Parrott, 11 Ky. L. Rep. 947, (Ky. 1890) 13 S. W. Rep. 525, 32 Am. & Eng. Corp. Cas. 1. See also Johnson *v.* Johnson, 88 Ky. 275.

1. Power to Alienate in General — *England.* — *In re* Patent File Co., L. R. 6 Ch. 83.

California. — Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 579, 99 Am. Dec. 300; People *v.* State College, 38 Cal. 166.

Connecticut. — Eggleston *v.* Doolittle, 33 Conn. 402.

Illinois. — Aurora Agricultural, etc., Soc. *v.* Paddock, 80 Ill. 263.

Iowa. — Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 518.

Kansas. — State *v.* Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166.

Louisiana. — New Orleans Nat. Bank *v.* Raymond, 29 La. Ann. 355; Leathers *v.* Janney, 41 La. Ann. 1120.

Maine. — Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34.

Massachusetts. — Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Sargent *v.* Webster, 13 Met. (Mass.) 497, 46 Am. Dec. 743; Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Dupee *v.* Boston Water Power Co., 114 Mass. 37.

Michigan. — State University *v.* Detroit Young Men's Soc., 12 Mich. 138; Town *v.* River Raisin Bank, 2 Dougl. (Mich.) 530; Detroit *v.* Mutual Gas Co., 43 Mich. 594.

New Jersey. — Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130; Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York. — Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 36 Am. & Eng. Corp. Cas. 682; Yates *v.* Van De Bogert, 56 N. Y. 526; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; De Ruyter *v.* St. Peter's Church, 3 N. Y. 238, *affirming* 3 Barb. Ch. (N. Y.) 119; De Graff *v.* American Linen Thread Co., 21 N. Y. 124, *reversing* 24 Barb. (N. Y.) 375.

North Carolina. — Benbow *v.* Cook, 115 N. Car. 324, 44 Am. St. Rep. 454, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 238.

Ohio. — Reynolds *v.* Stark County, 5 Ohio 204.

Pennsylvania. — Burton's Appeal, 57 Pa. St. 213; Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., 81* Pa. St. 104; Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375.

Wisconsin. — Uncas Nat. Bank *v.* Rith, 23 Wis. 339.

Statements of the Rule. — "A corporation is an artificial person, and by the terms of its creation it possesses the same capacity to purchase or to sell that an individual has who possesses the capacity to contract. This doctrine has been long settled, and repeatedly recognized, from a very early period to the present time. Co. Litt. 44, 300, 306; Sid. 162; Com. Dig., title Franchise; Colchester *v.* Lowten, 1 Ves. & B. 226. Indeed, so necessarily incidental is this power, that it has been holden (10 Rep. 1) that a corporation cannot be created possessing the power of holding without the power of disposing; and that a clause in the charter, restricting the alienation of their property without consent of the chancellor, is void." Reynolds *v.* Stark County, 5 Ohio 205.

"As a general rule," it was said by Judge Christiancy, "corporations may be said to have an incidental power to dispose of their property, real and personal, either by sale absolute, or by mortgage or other mode of security, for any debt which they may rightfully contract, to the same extent as natural persons, except so far as that power may be restrained by their charter, by considerations connected with the purposes of their creation, or limited by express provision or just implication of some statute, or by the general policy of the state to be deduced from its legislation." Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 164.

A Trading or Manufacturing Corporation has the same authority as an individual trader or manufacturer to sell or consign its goods, to select its selling agents, and to impose conditions as to whom they shall sell to, and the terms upon which they shall sell. Stockton *v.* American Tobacco Co., (N. J. 1897) 36 Atl. Rep. 971.

both in *England* and in the *United States*, a strictly private commercial corporation, owing no peculiar duties to the public, may, with the consent of all the shareholders, and in the absence of express or implied restrictions in its charter, or prejudice to the rights of creditors, transfer all of its property to another corporation or person, if the latter is capable of taking. And it may do so, even though the effect may be to render it incapable of further carrying on its business.[1] There seems to be no doubt that it may do so when it is no longer able to profitably continue its business.[2]

No Duty to the Public to Carry on Business. — The reason is that when a strictly private business corporation is organized it assumes no obligation to the public to carry on the business for which it was formed, throughout the period specified in its certificate or articles of incorporation, whether the enterprise proves profitable or not.[3]

Dissent of Stockholders. — Some courts hold that a majority of the stockholders of a strictly private corporation may thus sell and convey all of its property, even against the dissent of the minority, when the exigencies of its business render it necessary or expedient to do so.[4] Other courts require the consent,

1. Power to Dispose of All Its Property — *England.* — *In re* Patent File Co., L. R. 6 Ch. 83; Wilson *v.* Miers, 10 C. B. N. S. 348, 100 E. C. L. 348, 3 L. T. 780; Featherstonhaugh *v.* Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318. See Matter of Joint-Stock Companies, 1 DeG. J. & S. 29, *reversing* 2 J. & H. 408.

California. — People *v.* State College, 38 Cal. 166; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 579, 99 Am. Dec. 300.

Iowa. — Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 2 Am. St. Rep. 263.

Kansas. — State *v.* Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166.

Louisiana. — Leathers *v.* Janney, 41 La. Ann. 1120.

Massachusetts. — Sargent *v.* Webster, 13 Met. (Mass.) 497, 46 Am. Dec. 743; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Dupee *v.* Boston Water Power Co., 114 Mass. 37.

New York. — Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 36 Am. & Eng. Corp. Cas. 682.

Contra. — Cass *v.* Manchester Iron, etc., Co., 9 Fed. Rep. 640, is to the contrary.

Amalgamation and Consolidation of corporations is treated in another part of this work. See the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

2. Inability to Profitably Continue Business. — In Dupee *v.* Boston Water Power Co., 114 Mass. 37, it was held that a corporation chartered with power to purchase and hold water power created by the erection of dams, and to hold real estate, may, when its water privileges can no longer be profitably used, and when by contract with the commonwealth it has extinguished its water power, lawfully sell its lands and receive its own stock in payment thereof.

"The very idea of private property, in which the public has no rights," said Chief Justice Sawyer, in a leading *California* case, in speaking of a sale of its property by a ditch company, "involves the idea of a right to sell and convey when the exigencies of the corporation require it. If a corporation could convey a part, it could convey the whole. The enterprise of the Miners' Ditch Company may have proved unprofitable, and rendered it necessary to dispose of its assets, and wind up the concern, as the only means of avoiding insolvency. It might be necessary to sell and convey a part or the whole of its property, in order to raise means to pay its debts and avoid a sacrifice by forced sale. In either event, the sale and conveyance of the property, with these objects in view, would be a lawful purpose of the corporation. Although the object for which it was formed was to construct a ditch, and convey water for sale to miners, and for mechanical purposes, there was no obligation resting on the corporation to pursue this object after it became evident that the enterprise would be unprofitable and result in insolvency or loss. When such a result appears to be unavoidable, obviously the only mode by which the interests of the parties, and of the public, could be subserved, would be to dispose of its assets in the most advantageous way, and pay off its debts, with a view to winding up the affairs of the corporation with the least possible loss." Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

English Companies' Act. — The English Companies' Act provides for such a transfer when a corporation is proposed to be or is in the course of being wound up voluntarily. *In re* Imperial Mercantile Credit Assoc., L. R. 12 Eq. 504; Southall *v.* British Mut. L. Assur. Soc., L. R. 6 Ch. 614; Clinch *v.* Financial Corp., L. R. 4 Ch. 117. See *In re* Irrigation Co., L. R. 6 Ch. 176.

3. See Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 36 Am. & Eng. Corp. Cas. 682.

Quasi-Public Corporations. — Neither the reason for this rule nor the rule itself applies to *quasi*-public corporations. See *infra*, this section, *Alienation by Quasi-Public Corporations.* And see the title ULTRA VIRES.

4. Rights of Stockholders. — Wilson *v.* Miers, 10 C. B. N. S. 348, 100 E. C. L. 348, 3 L. T. 780; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Sargent *v.* Webster, 13 Met. (Mass.) 497, 46 Am. Dec.

or at least the acquiescence, of all the stockholders; and no doubt all require such consent when the sale is not required by the exigencies of the particular business.[1]

c. SALE AND TRANSFER FOR STOCK IN PURCHASING CORPORATION — **To Wind Up Business.** — It has been held in several cases that such a corporation, when it can no longer conduct its business profitably, may sell and convey all of its property to another corporation for the purpose of winding up its business, and take stock in the other corporation, to be distributed among its stockholders, provided no stockholder dissents.[2]

Continuation of Vendor Corporation. — But a corporation has no power to thus transfer all of its property to another corporation and take stock in the latter in payment where no exigency for such a transaction exists, and the object is not to wind up the corporation, but to hold the stock and carry on the business through the instrumentality of the purchasing corporation.[3]

743; Sewell *v.* East Cape May Beach Co., 50 N. J. Eq. 717. See Hodges *v.* New England Screw Co., 1 R. I. 347, 53 Am. Dec. 624; Peabody *v.* Westerly Water-Works, (R. I. 1897) 37 Atl. Rep. 807. See also the titles STOCK; STOCKHOLDERS.

Trading and Manufacturing Companies. — In Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490, where a stockholder filed a bill to restrain the sale of all the property of the company to a new corporation for stock, to be distributed to the stockholders of the old, it was held that the directors of a manufacturing corporation, as the best means of continuing the business, and pursuant to the votes of a majority of the stockholders, though against the protest of a minority, may sell the whole property of the corporation to a new corporation, taking payment in shares of the new corporation, to be distributed among those of the old stockholders who are willing to take them. The court said: "We entertain no doubt of the right of a corporation established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if, in the exercise of a sound discretion, they deem it expedient so to do."

1. *England.* — Ernest *v.* Nicholls, 6 H. L. Cas. 401; Gregory *v.* Patchett, 33 Beav. 597; Bird *v.* Bird's Patent Deodorizing, etc., Co., L. R. 9 Ch. 358, 30 L. T. N. S. 281, 43 L. J. Ch. 399, *affirming* the decision of Bacon, V. C., 29 L. T. N. S. 881; Hindustan Bank *v.* Alison, L. R. 6 C. P. 222; Clinch *v.* Financial Corp., L. R. 5 Eq. 450; Simpson *v.* Westminster Palace Hotel Co., 8 H. L. Cas. 712; Ward *v.* Attornies' Soc., 1 Coll. 370.

United States. — Cass *v.* Manchester Iron, etc., Co., 9 Fed. Rep. 640.

Alabama. — Elyton Land Co. *v.* Dowdell, 113 Ala. 177.

Kansas. — State *v.* Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166.

Minnesota. — Small *v.* Minneapolis Electro-Matrix Co., 45 Minn. 264.

Missouri. — Barden *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 248; Price *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 262; Buford *v.* Keokuk Northern Line Packet Co., 3 Mo. App. 159.

New Jersey. — Kean *v.* Johnson, 9 N. J. Eq. 401.

New York. — Taylor *v.* Earle, 8 Hun (N. Y.) 1; Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y. C. Pl.) 419; Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578; Copeland *v.* Citizens' Gas Light Co., 61 Barb. (N. Y.) 60; People *v.* Ballard, 134 N. Y. 269. See Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 36 Am. & Eng. Corp. Cas. 682.

Pennsylvania. — Carter *v.* Producers', etc., Oil Co., 24 Pittsb. L. J. N. S. 380; McCurdy *v.* Myers, 44 Pa. St. 535; Balliet *v.* Brown, 103 Pa. St. 546.

Rhode Island. — Boston, etc., R. Corp. *v.* New York, etc., R. Co., 13 R. I. 260.

Express Authority. — A statutory or charter provision giving a corporation the power of purchasing, holding, and conveying any lands, tenements, goods, and chattels whatever, necessary and expedient to the objects of the corporation; only authorizes property to be sold and conveyed away when it is necessary or expedient to the objects of the incorporation; and the objects of the incorporation cannot require that the necessary source of its profitable existence should be sold and conveyed away. Kean *v.* Johnson, 9 N. J. Eq. 401.

2. **Transfer for Stock in Purchasing Corporation.** — McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787, 37 U. S. App. 586; Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336; Leathers *v.* Janney, 41 La. Ann. 1120; Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Buford *v.* Keokuk Northern Line Packet Co., 3 Mo. App. 159; Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 36 Am. & Eng. Corp. Cas. 682.

Otherwise Where a Stockholder Dissents. — Elyton Land Co. *v.* Dowdell, 113 Ala. 177.

Transfer to Sole Stockholder. — In Wagner *v.* Marple, 10 Tex. Civ. App. 505, it was held that a transfer of all its property by a corporation to its only stockholder in consideration of a surrender of the stock by him was valid as against a stranger.

3. **Where Vendor Corporation Continues.** — McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787, 37 U. S. App. 586, *affirming* 67 Fed. Rep. 414; Easun *v.* Buckeye Brewing Co., 51 Fed. Rep. 156, 41 Am. & Eng. Corp. Cas. 19; People *v.* Ballard, 134 N. Y. 269; Taylor *v.* Earle, 8 Hun (N. Y.) 1; Frothingham *v.* Barney, 6 Hun (N. Y.) 366. And see Thomas *v.* Millville, etc., R. Co., 101 U. S. 71; Central

d. PREJUDICE TO RIGHTS OF CREDITORS. — Nor can a corporation thus transfer all of its property, if the transfer will constitute a fraud upon and prejudice to the rights of its creditors.[1]

c. LEASE OF REAL PROPERTY — (1) *In General.* — A corporation may lease its real property, or any part thereof, whenever its business renders such a transfer necessary or expedient;[2] but it cannot lease its property if the lease is inconsistent with its charter and the objects of its creation,[3] nor can it lease on terms other than those, if any, specified in its charter.[4]

(2) *Lease of Entire Property.* — A strictly private corporation may make a lease of its entire property for a term of years when it finds it cannot profitably continue operations, though it may thereby render itself unable to carry on business during the term of the lease;[5] but it cannot do so when no such exigency exists, without the consent of the shareholders,[6] or according to

Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24; Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336; People *v.* North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843; Mallory *v.* Hanaur Oil Works, 86 Tenn. 598.

1. Rights of Creditors. — Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 36; Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. Rep. 809, 31 U. S. App. 432; Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Hancock *v.* Holbrook, 40 La. Ann. 53. See the titles FRAUDULENT SALES AND CONVEYANCES; STOCK; STOCKHOLDERS.

2. Authorized Leases — *England.* — Simpson *v.* Westminster Palace Hotel Co., 8 H. L. Cas. 712; Featherstonhaugh *v.* Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318.

Indiana. — Phillip *v.* Aurora Lodge No. 104, 87 Ind. 505.

Massachusetts. — Nye *v.* Storer, 168 Mass. 53.

New Hampshire. — See Mount Washington Hotel Co. *v.* Marsh, 63 N. H. 230.

New Jersey. — Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130.

New York. — Smith *v.* Berndt, (Supreme Ct.) 1 N. Y. Supp. 108.

Pennsylvania. — Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375.

Illustrations — Hotel Company. — Thus where a company was established for "the erection, furnishing, and maintenance of an hotel, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects," and the directors, while the hotel was in the course of building, agreed to let off, for a stipulated period of short duration, a large portion of it to the head of a government department for the business of his office, and evidence was given that such a letting was calculated to be productive of advantage to the company in its intended business, and that a majority of shareholders had sanctioned the act, it was held that the arrangement was valid within the words of a clause giving power to do "all such things as are incidental or otherwise conducive to the attainment" of the objects for which the company was established. Simpson *v.* Westminster Palace Hotel Co., 8 H. L. Cas. 712.

Railroad Company. — So in Gilliland *v.* Chicago, etc., R. Co., 19 Mo. App. 411, it was held that a railroad company may lease land to individuals for the erection and maintenance of an elevator thereon to be used in connection with the railroad.

Religious, Literary, and Scientific Corporations have power to lease part of a building owned by them, for theatrical and operatic purposes. Catholic Institute *v.* Gibbons, 3 Cinc. Wkly. L. Bul. 581.

And it seems that an incorporated academy or seminary may, during the usual summer vacation, lease its building for a boarding house. See Temple Grove Seminary *v.* Cramer, 98 N. Y. 121.

Duration of Lease. — A lease of its property by a corporation for a longer term than that for which the corporation was created is not *ultra vires*, where the law is such that its charter may be extended from time to time so as to cover the period of the lease. Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y. Supreme Ct.) 193.

Lease with Option of Purchase. — Where a corporation has the power to sell and exchange land, a power to lease the land and give the option of purchase to the lessee is implied. *Re* Female Orphan Asylum, 17 L. T. N. S. 59, 15 W. R. 1056.

3. Unauthorized Leases. — See Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Metropolitan Concert Co. *v.* Abbey, 52 N. Y. Super. Ct. 97. In the case last cited it was held that where the charter of a corporation only empowers it to sell the real estate necessary for the transaction of its business when not required for the uses of the corporation, it cannot lease such real estate nor maintain an action for rent under its lease, such leasing not being necessary to the exercise of the purposes for which the charter was given.

And see Dow *v.* Northern R. Co., (N. H. 1887) 36 Atl. Rep. 510, where it was held not within the purposes of a railroad company to lease its road to another corporation.

See also *infra*, this section, *Alienation by Quasi-Public Corporations.*

4. Terms of Lease. — Taylor *v.* Dullidge Hospital, 1 P. Wms. 655. See Atty.-Gen. *v.* Avon, 3 De G. J. & S. 637.

5. Leasing Entire Property. — Featherstonhaugh *v.* Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318.

6. Small *v.* Minneapolis Electro-Matrix Co., 45 Minn. 264; Copeland *v.* Citizens' Gas Light Co., 61 Barb. (N. Y.) 60. See *supra*, this section, *Power to Alienate Property — In General.*

some cases, it seems, even when all the shareholders acquiesce.[1]

f. HIRING OF PERSONAL PROPERTY. — In like manner a corporation may hire out personal property owned by it, and at the time not needed in its business.[2]

g. GRANT OF EASEMENT. — A corporation may also grant an easement, if the grant, under the particular circumstances, is not inconsistent with its objects,[3] but not otherwise.[4]

h. DEDICATION OF LAND TO PUBLIC USE. — And it is not *ultra vires* for a corporation, owning real property, to dedicate part of it in a proper case for public use, as for a public highway, provided the dedication is not inconsistent with its charter or the purposes of its creation.[5]

i. MORTGAGE OR PLEDGE OF PROPERTY — (1) *Real Property.* — In the absence of express restrictions, and subject to an exception in the case of *quasi*-public corporations, which will be hereafter referred to, every corporation having the power to sell and convey its real property has the power to execute a mortgage on all or any part of the same to secure the payment of money borrowed by it, or the payment of any other debt lawfully contracted.[6]

1. See Cass *v.* Manchester Iron, etc., Co., 9 Fed. Rep. 640.

2. Hiring of Personal Property. — See Forrest *v.* Manchester, etc., R. Co., 30 Beav. 40. In this case it was held that a railroad company having authority to keep steam vessels for the purposes of a ferry could employ such vessels, when otherwise unemployed, in excursion trips to the sea. "What," said the Master of the Rolls, "are they to do with those steamboats at other times when unemployed at the ferry? Are they to keep them idle? I am of opinion that they are not; and that if the capital of the company is really embarked for the purpose of the ferry, and not for the purpose of excursions, when the steamboats are not required to carry over the persons who wish to use the ferry, they are at liberty to use them as they think fit, for the profit of the company, and either to let them out to private parties for excursions, or to carry excursion parties themselves." And see Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326, where it was held that a ferry corporation could lease its vessels when not otherwise employed, and was not required to allow them to remain idle.

3. Grant of Easements. — Thus in Odd Fellows' Assoc. *v.* Hegele, 24 Oregon 16, it was held that where a corporation, organized to buy and hold real estate for the use and occupation of the lodges of a social order, and to generally advance the good of the order, has erected a building for the use of the different lodges, and rents the lower part for stores, it has power to grant to another person the use of an alley across the premises in consideration of reciprocal benefits; and that such a grant is not necessarily *ultra vires* because it deprives the corporation of the exclusive use of all the lot, for it may be essential to the better use and enjoyment of the building.

4. Unauthorized Grant of Easement. — Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 5 Am. L. Reg. N. S. 733.

Thus it has been held that a railroad company cannot grant an easement of a footway, for persons to walk along, not across, their roadbed or tracks. Sapp *v.* Northern Cent. R. Co., 51 Md. 115.

5. Dedication. — "As a mere question of power in the company," said Hinman, J., in Green *v.* Canaan, 29 Conn. 166, "we suppose that corporations have the same right to dedicate their lands to the public use as any other proprietors; unless, indeed, it is contrary to the provisions of their charters, or amounts to a breach of duty to their stockholders." See the title DEDICATION.

By Railroad Companies. — Thus it has been repeatedly held that railroad corporations have power, in connection with the owners of the fee, to dedicate for a public highway lands taken by them under their charters, where there is nothing in their charters to forbid it. People *v.* Eel River, etc., R. Co., 98 Cal. 665; Green *v.* Canaan, 29 Conn. 157; Williams *v.* New York, etc., R. Co., 39 Conn. 519; Skjeggerud *v.* Minneapolis, etc., R. Co., 38 Minn. 56; Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496.

Other Corporations Owning Real Property, as land companies, agricultural societies, bridge companies, cemetery companies, etc., are also within the rule. Grand Surrey Canal *v.* Hall, 1 M. & G. 392, 39 E. C. L. 497; Logan *v.* Rose, 88 Cal. 263; Los Angeles Cemetery Assoc. *v.* Los Angeles, 95 Cal. 420; Hammerslough *v.* Kansas City, 46 Kan. 37; Canal Bridge *v.* Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; Union Co. *v.* Peckham, 16 R. I. 64.

6. Mortgage of Real Property — *England.* — *In re* Patent File Co., L. R. 6 Ch. 83.

Canada. — *In re* Nash Brick, etc., Mfg. Co., 3 Nova Scotia Dec. 254; Sheppard *v.* Bonanza Nickel Min. Co., 25 Ont. Rep. 305.

United States. — Gaytes *v.* Lewis, 2 Biss. (U. S.) 136; Jones *v.* New York Guaranty, etc., Co., 101 U. S. 622; Memphis, etc., R. Co. *v.* Dow, 19 Fed. Rep. 388; White Water Valley Canal Co. *v.* Vallette, 21 How. (U. S.) 414.

Alabama. — Allen *v.* Montgomery R. Co., 11 Ala. 437; Mobile, etc., R. Co. *v.* Talman, 15 Ala. 488; Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229.

Illinois. — Aurora Agricultural, etc., Soc. *v.* Paddock, 80 Ill. 263; West *v.* Madison County Agricultural Board, 82 Ill. 205; Wood *v.* Whelen, 93 Ill. 153.

(2) *Personal Property.* — And in a like manner it has the power to execute a mortgage on its personal property,[1] or to pledge the same.[2]

j. NEGOTIATION OR TRANSFER OF CHOSES IN ACTION — (1) *In General.* — In the absence of express restrictions, a bank or other corporation having received bills of exchange, promissory notes, bonds, or other choses in action, in the course of its business, has, as an incident to its ownership, the right to negotiate or transfer them, provided it does so for a legitimate corporate purpose.[3]

Indiana. — Wright *v.* Hughes, 119 Ind. 324, 12 Am. St. Rep. 412.

Iowa. — Thompson *v.* Lambert, 44 Iowa 239; Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 2 Am. St. Rep. 263.

Kentucky. — Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 206, 81 Am. Dec. 541.

Louisiana. — Matter of Mechanics' Soc., 31 La. Ann. 627.

Maine. — Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34.

Maryland. — Swift *v.* Smith, 65 Md. 428, 57 Am. Rep. 336; Booth *v.* Robinson, 55 Md. 419; Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305, 56 Am. Dec. 740.

Massachusetts. — Burrill *v.* Nahant Bank, 2 Met. (Mass.) 163, 35 Am. Dec. 395.

Michigan. — Detroit *v.* Mutual Gas Co., 43 Mich. 594; Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

Mississippi. — Thompson *v.* Natchez Water, etc., Co., 68 Miss. 423; Wood *v.* Meyer, (Miss. 1890) 7 So. Rep. 359.

New Jersey. — Leggett *v.* New-Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Magie *v.* German Evangelical Dutch Church, 13 N. J. Eq. 77, *affirmed* in 15 N. J. Eq. 500.

New York. — Jackson *v.* Brown, 5 Wend. (N. Y.) 590; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; Central Gold Min. Co. *v.* Platt, 3 Daly (N. Y.) 263; New Britain Nat. Bank *v.* A. B. Cleveland Co., 91 Hun (N. Y.) 447; Beebe *v.* Richmond Light, etc., Co., 13 Misc. Rep. (N. Y. Supreme Ct.) 737; Preston *v.* Loughran, 58 Hun (N. Y.) 210; Osborn *v.* Montelac Park, 89 Hun (N. Y.) 167.

North Carolina. — Antietam Paper Co. *v.* Chronicle Pub. Co., 115 N. Car. 143; Benbow *v.* Cook, 115 N. Car. 324, 44 Am. St. Rep. 454.

Ohio. — Burt *v.* Rattle, 31 Ohio St. 116; Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330.

Pennsylvania. — Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Watts's Appeal, 78 Pa. St. 370.

Tennessee. — Hunt *v.* Memphis Gaslight Co., 95 Tenn. 136.

Texas. — Collier *v.* Myers, (Tex. Civ. App. 1896) 37 S. W. Rep. 183.

Vermont. — Miller *v.* Rutland, etc., R. Co., 36 Vt. 452.

Virginia. — Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364.

Wisconsin. — Lehigh Valley Coal Co. *v.* West Depere Agricultural Works, 63 Wis. 45.

Deposit of Title Deeds. — *In re* General Provident Assur. Co., L. R. 14 Eq. 507; *In re* Patent File Co., L. R. 6 Ch. 83, 40 L. J. Ch. 190, 19 W. R. 193.

A Prohibition Against a Sale does not prohibit a mortgage of corporate property to secure a debt. Middleton Sav. Bank *v.* Dubuque, 15 Iowa 394; Krider *v.* Western College, 31 Iowa 547.

1. Chattel Mortgage — *Illinois.* — Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439.

Massachusetts. — See Hamilton *v.* McLaughlin, 145 Mass. 20.

Michigan. — Walrath *v.* Campbell, 28 Mich. 111; Eureka Iron, etc., Works *v.* Bresnahan, 60 Mich. 332.

New Hampshire. — Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Pierce *v.* Emery, 32 N. H. 484.

New Jersey. — Amerman *v.* Wiles, 24 N. J. Eq. 13.

Pennsylvania. — Covey *v.* Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173.

Bill of Sale as Security. — It is competent for a company established for trading purposes to give a bill of sale as security for goods sold to or work done for it. Shears *v.* Jacob, L. R. 1 C. P. 513; Deffell *v.* White, L. R. 2 C. P. 144.

Mortgage of Future Earnings. — A corporation having authority to mortgage its property may mortgage its future earnings. Boykin *v.* Shaffer, 13 La. Ann. 129.

2. Pledge — *England.* — Ward *v.* Royal Exch. Shipping Co., 58 L. T. 174, 6 Asp. M. C. 239.

United States. — White Water Valley Canal Co. *v.* Vallette, 21 How. (U. S.) 414; Burgess *v.* Seligman, 107 U. S. 20; Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24; Leo *v.* Union Pac. R. Co., 17 Fed. Rep. 273.

Louisiana. — Bezou *v.* Pike, 23 La. Ann. 788.

Massachusetts. — Fay *v.* Noble, 12 Cush. (Mass.) 1.

New Jersey. — Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513.

New York. — Brookman *v.* Metcalf, 32 N. Y. 591, *affirming* 5 Bosw. (N. Y.) 429; Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190.

Pledge of Bonds, Notes, and Other Choses in Action. — See *infra*, this section, *Negotiation or Transfer of Choses in Action.*

3. Negotiation or Transfer of Choses in Action — *United States.* — Planters' Bank *v.* Sharp, 6 How. (U. S.) 302; Alexander *v.* Horner, 1 McCrary (U. S.) 641.

Illinois. — McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Frye *v.* Tucker, 24 Ill. 180.

Indiana. — Hardy *v.* Merriweather, 14 Ind. 203; Blake *v.* Holley, 14 Ind. 383.

Louisiana. — Myers *v.* De Lee, 1 Rob. (La.) 516.

Massachusetts. — Northampton Bank *v.* Pepoon, 11 Mass. 288; Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178.

Missouri. — Buckley *v.* Briggs, 30 Mo. 452; Detweiler *v.* Breckenkamp, 83 Mo 45; Alex-

(2) *As Collateral Security.* — And it may transfer bonds, notes, and other choses in action as collateral security for a debt lawfully contracted.[1]

(3) *Assignment of Mortgage.* — It may assign a mortgage which it holds.[2]

(4) *Assignment of Unpaid Stock Subscriptions.* — And it may sell, mortgage, or pledge unpaid stock subscriptions where a call has been made or is unnecessary.[3] By the weight of authority, however, it cannot assign future calls, the making of which is discretionary.[4]

k. CONVEYANCE OR TRANSFER IN PAYMENT OF DEBTS — (1) *In General.* — It is no doubt safe to say that private corporations of all kinds may always convey any part of their property, or all if necessary, in payment of debts lawfully contracted, though they thereby disable themselves from carrying on their business.[5]

ander *v.* Rollins, 84 Mo. 657, *affirming* 14 Mo. App. 109.

New York. — Gillett *v.* Campbell, 1 Den. (N. Y.) 520; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Marvine *v.* Hymers, 12 N. Y. 223; Wood *v.* Wellington, 30 N. Y. 218; Farmers' Bank *v.* Maxwell, 32 N. Y. 579; Brookman *v.* Metcalf, 32 N. Y. 591, *affirming* 5 Bosw. (N. Y.) 429; Great Western Ins. Co. *v.* Thayer, 4 Lans. (N. Y.) 459, 60 Barb. (N. Y.) 633; Central Bank *v.* Lang, 1 Bosw. (N. Y.) 202; Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122.

Wisconsin. — Uncas Nat. Bank *v.* Rith, 23 Wis. 339.

Contra in Mississippi. — In Payne *v.* Baldwin, 3 Smed. & M. (Miss.) 661, and McIntyre *v.* Ingraham, 35 Miss. 25, it was held that the power to assign promissory notes, not being essential to the enjoyment of the franchise of banking, dealing in exchange and stocks, and constructing a railroad, could not be implied from an express grant of such franchises to a corporation. And in the latter case it was further held that such power was not granted by a charter giving the power to purchase, possess, and dispose of "personal estate of any kind whatever." These cases, however, seem to stand alone, and are opposed to numerous cases in other jurisdictions. See the cases cited *supra* on this point.

1. Transfer as Collateral Security — *England.* — *In re* Regent's Canal Ironworks Co., 3 Ch. Div. 43, 45 L. J. Ch. 620, 24 W. R. 687, 35 L. T. N. S. 288, *affirming* the decision of Malins, V. C., in 45 L. J. Ch. 360, 24 W. R. 513, 34 L. T. N. S. 130.

United States. — Leo *v.* Union Pac. R. Co., 17 Fed. Rep. 273; Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 54 Fed. Rep. 759.

Alabama. — Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

Illinois. — Ward *v.* Johnson, 95 Ill. 215.

Maine. — Androscoggin R. Co. *v.* Auburn Bank, 48 Me. 335.

New Jersey. — Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513.

New York. — Brookman *v.* Metcalf, 32 N. Y. 591, *affirming* 5 Bosw. (N. Y.) 429; Nelson *v.* Eaton, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113, *reversing* 7 Abb. Pr. (N. Y. Supreme Ct.) 305, and *affirming* 15 How. Pr. (N. Y. Supreme Ct.) 305; Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Scott *v.* Johnson, 5 Bosw. (N. Y.) 213; Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178; Great Western Ins. Co. *v.* Thayer, 4 Lans. (N. Y.) 459, 60 Barb. (N. Y.) 633; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190; Nelson *v.* Edwards, 40 Barb. (N. Y.) 279.

Tennessee. — Baxter *v.* Washburn, 8 Lea (Tenn.) 1.

Wisconsin. — Uncas Nat. Bank *v.* Rith, 23 Wis. 339.

2. Assignment of Mortgage. — A bank or other corporation may assign a mortgage held by it for the purpose of securing a debt which it has lawfully contracted, or to raise funds, or for any other legitimate purpose. Detweiler *v.* Breckenkamp, 83 Mo. 45; Gillett *v.* Campbell, 1 Den. (N. Y.) 520; Uncas Nat. Bank *v.* Rith, 23 Wis. 339.

3. Assignment of Stock Subscriptions. — A corporation having a claim for an unpaid subscription to its stock, when no call or assessment is necessary, has the power to sell and assign or mortgage or pledge the same to raise money in order to carry out the objects of its creation or to pay its debts. *In re* International L. Assur. Soc., L. R. 10 Eq. 312; *In re* Sankey Brook Coal Co., L. R. 10 Eq. 381, 22 L. T. 784, 18 W. R. 914; Morris *v.* Cheney, 51 Ill. 451; Wells *v.* Rodgers, 50 Mich. 294; Shultz *v.* Sutter, 3 Mo. App. 137; Shockley *v.* Fisher, 75 Mo. 498.

Authority to Sell Unpaid Stock Subscriptions has been held not to give authority to pledge or mortgage them. Morris *v.* Cheney, 51 Ill. 451.

The English cases just cited, however, are to the contrary.

4. When Call Is Necessary. — Shultz *v.* Sutter, 3 Mo. App. 137.

In England it has generally been held that future calls cannot be mortgaged or pledged in the absence of express authority, and that such power is not conferred by a grant of power to mortgage or pledge "the funds or property" of the company. Matter of Joint-Stock Companies, 4 De G. J. & S. 407, 33 L. J. Ch. 535. And see King *v.* Marshall, 33 Beav. 565; South Australia Bank *v.* Abrahams, L. R. 6 P. C. 265; *In re* Sankey Brook Coal Co., L. R. 10 Eq. 381, 22 L. T. 784, 18 W. R. 914. *Compare*, however, *Ex p.* Lehman, 23 L. T. N. S. 599, 19 W. R. 344; Howard *v.* Patent Ivory Mfg. Co., 38 Ch. Div. 156; Jackson *v.* Rainford Coal Co., [1896] 2 Ch. 340, 65 L. J. Ch. 757.

5. Transfer in Payment of Debts — *United States.* — Hancock *v.* Holbrook, 4 Woods (U. S.) 52.

Connecticut. — Eggleston *v.* Doolittle, 33 Conn. 402; Barr *v.* Bartram, etc., Mfg. Co., 41 Conn. 506.

(2) *Assignment for Benefit of Creditors* — (a) **In General.** — And it has repeatedly been held that a corporation may make an assignment of all its property in trust for the benefit of creditors, and it may exercise such right to the same extent and in the same manner as a natural person, unless restricted by its charter or by some statutory provision.[1] This is true not only of business corporations, as banks, insurance companies, manufacturing and trading companies, etc., but also of corporations for religious purposes, etc.[2]

(b) **Preferring Creditors — Denial of Right.** — In some jurisdictions the courts have held that a corporation, when it is insolvent[3] and has ceased or determined to cease business, has no right, on making an assignment of its property for the benefit of creditors, or by transfers, mortgages, confessions of judgment, etc., to prefer certain creditors over others. This doctrine proceeds on the theory that the assets of an insolvent corporation constitute a trust fund for all the creditors, in which they are entitled to share equally.[4]

Massachusetts. — Sargent *v.* Webster, 13 Met. (Mass.) 497, 46 Am. Dec. 743.

Missouri. — Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38.

New York.—Everson *v.* Eddy, (Supreme Ct.) 36 N. Y. St. Rep. 763, 12 N. Y. Supp. 872; De Ruyter *v.* St. Peter's Church, 3 N. Y. 238, *affirming* 3 Barb. Ch. (N. Y.) 119; Sheldon Hat Blocking Co. *v.* Eickmeyer Hat Blocking Co., 56 How. Pr. (N. Y. Supreme Ct.) 70.

Ohio. — Stetson *v.* City Bank, 12 Ohio St. 577.

Washington. — Klosterman *v.* Mason County Cent. R. Co., 8 Wash. 281, 47 Am. & Eng. Corp. Cas. 387.

Illustration. — Thus, in Sargent *v.* Webster, 13 Met. (Mass.) 498, 46 Am. Dec. 743, it was held that the directors of an insolvent manufacturing company have authority to convey all the property of the corporation to one of its creditors, upon condition that he shall apply the property to the payment of his claim, and pay over the surplus, if any, to the treasurer of the corporation, as such a transaction is in furtherance of the objects of the corporation.

Religious Corporations. — De Ruyter *v.* St. Peter's Church, 3 N. Y. 238, *affirming* 3 Barb. Ch. (N. Y.) 119.

1. May Assign for Benefit of Creditors — *Alabama.* — Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Chamberlain *v.* Bromberg, 83 Ala. 576.

Arkansas. — *Ex p.* Conway, 4 Ark. 302; Ringo *v.* Biscoe, 13 Ark. 563.

Georgia. — McCallie *v.* Walton, 37 Ga. 611, 95 Am. Dec. 369; Harvey *v.* Cubbedge, 75 Ga. 792.

Illinois. — Reichwald *v.* Commercial Hotel Co., 106 Ill. 439.

Indiana. — De Camp *v.* Alward, 52 Ind. 468.

Maryland. — State *v.* State Bank, 6 Gill & J. (Md.) 205; Union Bank *v.* Ellicott, 6 Gill & J. (Md.) 363.

Massachusetts. — Sargent *v.* Webster, 13 Met. (Mass.) 497, 46 Am. Dec. 743.

Michigan. — Town *v.* River Raisin Bank, 2 Dougl. (Mich.) 530; Covert *v.* Rogers, 38 Mich. 363; Boynton *v.* Roe, (Mich. 1897) 72 N. W. Rep. 257.

Minnesota. — See Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400.

Mississippi. — Arthur *v.* Commercial, etc., Bank, 9 Smed. & M. (Miss.) 394, 48 Am. Dec. 719; State *v.* Commercial Bank, 13 Smed. & M. (Miss.) 569, 53 Am. Dec. 106; Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590.

Missouri. — Shockley *v.* Fisher, 75 Mo. 498; Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429; Hutchinson *v.* Green, 91 Mo. 367.

New Hampshire. — Flint *v.* Clinton Co., 12 N. H. 430.

New York. — Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13; De Ruyter *v.* St. Peter's Church, 3 N. Y. 238, *affirming* 3 Barb. Ch. (N. Y.) 119; Hill *v.* Reed, 16 Barb. (N. Y.) 280; Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221; Bowery Bank Case, 5 Abb. Pr. (N. Y. Supreme Ct.) 415; Vanderpoel *v.* Gorman, 140 N. Y. 563, 37 Am. St. Rep. 601; Croll *v.* Empire State Knitting Co., 17 N. Y. App. Div. 282; Home Bank *v.* Brewster, 17 Misc. Rep. (N. Y. Supreme Ct.) 442.

Ohio. — Stetson *v.* City Bank, 12 Ohio St. 577.

Pennsylvania. — Dana *v.* U. S. Bank, 5 W. & S. (Pa.) 223; Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375.

Tennessee. — Hopkins *v.* Gallatin Turnpike Co., 4 Humph. (Tenn.) 403.

Texas. — Birmingham Drug Co. *v.* Freeman, (Tex. Civ. App. 1897) 39 S. W. Rep. 626.

Utah. — Wyeth Hardware, etc., Co. *v.* James-Spencer-Bateman Co., (Utah 1897) 47 Pac. Rep. 604.

Vermont. — Warner *v.* Mower, 11 Vt. 385.

Virginia. — Planters' Bank *v.* Whittle, 78 Va. 737; Lewis *v.* Glenn, 84 Va. 947; Burr *v.* M'Donald, 3 Gratt. (Va.) 206.

Washington. — Nyman *v.* Berry, 3 Wash. 734.

2. Religious Corporations. — De Ruyter *v.* St. Peter's Church, 3 N. Y. 238, *affirming* 3 Barb. Ch. (N. Y.) 119.

3. What Constitutes Insolvency. — A corporation, it has been said, is insolvent when its assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is about to take, a step which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassment is such that early suspension and failure must ensue. Corey *v.* Wadsworth, 99 Ala. 68, 42 Am. St. Rep. 29. See the titles FRAUDULENT SALES AND CONVEYANCES; INSOLVENCY AND BANKRUPTCY.

4. Denial of Right to Prefer Creditors — *United States.* —Wisconsin M. & F. Ins. Co.'s Bank *v.* Lehigh, etc., Coal Co., 64 Fed. Rep. 497.

Contrary Doctrine. — In most jurisdictions, however, this doctrine is repudiated, and it is held that, in the absence of charter or statutory restrictions, and in the absence of actual fraud, every corporation, though insolvent, and though it has ceased or determined to cease doing business, may prefer certain creditors over others whenever a natural person could do so.[1]

See Smith Middlings Purifier Co. *v.* McGroarty, 136 U. S. 237 (following *Ohio* decisions).

New Hampshire.—See Richards *v.* New Hampshire Ins. Co., 43 N. H. 263.

Ohio. — Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493, 15 Am. St. Rep. 644.

South Dakota. — Adams, etc., Co. *v.* Deyette, 8 S. Dak. 119.

Tennessee. — Tradesman Pub. Co. *v.* Knoxville Car Wheel Co., 95 Tenn. 634; Smith *v.* Bradt Printing Co., 97 Tenn. 351; Levins *v.* W. O. Peeples Grocery Co., (Tenn. 1896) 38 S. W. Rep. 733; Memphis Barrel, etc., Co. *v.* Ward, (Tenn. 1897) 42 S. W. Rep. 13; Brown *v.* Morristown Co-operative Stove Co., (Tenn. 1897) 42 S. W. Rep. 161.

Texas. — Fowler *v.* Bell, 90 Tex. 150; Harrigan *v.* Quay, (Tex. Civ. App. 1894) 26 S. W. Rep. 512; Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 88 Tex. 468.

Washington. — Biddle Purchasing Co. *v.* Port Townsend Steel Wire, etc., Co., 16 Wash. 681; Thompson *v.* Huron Lumber Co., 4 Wash. 600; Conover *v.* Hull, 10 Wash. 673, 45 Am. St. Rep. 810. See Holbrook *v.* Peters, etc., Co., 8 Wash. 344.

Wisconsin. — Stevens Point First Nat. Bank *v.* Knowles, 67 Wis. 373; Ford *v.* Plankinton Bank, 87 Wis. 363.

Otherwise Before Cessation of Business. — But even in most of those jurisdictions a corporation may, by chattel mortgage or otherwise, prefer creditors, if it is a going concern, and has not ceased business. It is not to be regarded as insolvent within the rule if it is doing business, though its indebtedness exceeds its assets. College Park Electric Belt Line *v.* Ide, (Tex. Civ. App. 1897) 40 S. W. Rep. 64; Comfort *v.* McTeer, 7 Lea (Tenn.) 660; McClaren *v.* Roller Mill Co., 95 Tenn. 696; Tullahoma First Nat. Bank *v.* North Alabama Lumber, etc., Co., 91 Tenn. 12; Smith *v.* Bradt Printing Co., 97 Tenn. 351; Brooks *v.* Skookum Mfg. Co., 9 Wash. 80; South Bend Chilled Plow Co. *v.* George C. Cribb Co., (Wis. 1897) 72 N. W. Rep. 749.

A Prior Agreement to Give a Preference, as to give a mortgage, does not affect the rule or render the preference valid. Biddle Purchasing Co. *v.* Port Townsend Steel Wire, etc., Co., 16 Wash. 651.

Adverse Proceedings by Creditor. — Some of the courts have held that this doctrine does not prevent a creditor from pursuing the remedies given him by law for the collection of his debt, as by attachment, entry of judgment on judgment note, etc., though he thereby secures a preference over other creditors, but merely prevents the creation of a preference by the act of the corporation.

United States. — White, etc., Mfg. Co. *v.* Henry B. Pettes Importing Co., 30 Fed. Rep. 864.

Colorado. — Breene *v.* Merchants', etc., Bank, 11 Colo. 97.

Illinois. — Roseboom *v.* Whittaker, 132 Ill. 81.

Missouri. — La Grange Butter Tub Co. *v.* National Bank of Commerce, 122 Mo. 154, 43 Am. St. Rep. 558; Webb *v.* Midway Lumber Co., 68 Mo. App. 546.

New York. — Varnum *v.* Hart, 119 N. Y. 101.

Texas. — Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., (Tex. Civ. App. 1896) 35 S. W. Rep. 337; Harrigan *v.* Quay, (Tex. Civ. App. 1894) 26 S. W. Rep. 512, 27 S. W. Rep. 897; Florsheim Bros. Dry Goods Co. *v.* Wettermark, 10 Tex. Civ. App. 102.

Wisconsin. — Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278, 46 Am. St. Rep. 834; Ford *v.* Hill, 92 Wis. 188.

Other Courts Have Refused to Recognize Any Such Distinction, and hold that when a corporation becomes insolvent and ceases to do business its assets become a trust fund for all its creditors, and that a preference can neither be created by act of the corporation itself nor obtained by a creditor by adversary proceedings, as by attachment. Marr *v.* West Tennessee Bank, 4 Coldw. (Tenn.) 471; Levins *v.* W. O. Peeples Grocery Co., (Tenn. 1896) 38 S. W. Rep. 733; Memphis Barrel, etc., Co. *v.* Ward, (Tenn. 1897) 42 S. W. Rep. 13; Orr, etc., Shoe Co. *v.* Thompson, 89 Tex. 501; Rogers *v.* East Line Lumber Co., 11 Tex. Civ. App. 108; Wright *v.* Euless, 12 Tex. Civ. App. 136; Compton *v.* Schwabacher, 15 Wash. 306.

Such a preference may be obtained by a creditor, however, if the corporation has not ceased to do business, though it be insolvent. Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 89 Tex. 511; American Nat. Bank *v.* Dallas Tinware Mfg. Co., (Tex. Civ. App. 1897) 39 S. W. Rep. 955.

National Banks. — As to preferences by national banks, see the title NATIONAL BANKS.

1. Doctrine Allowing Preference of Creditors — *United States.* — Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577; Allis *v.* Jones, 45 Fed. Rep. 148; Gould *v.* Little Rock, etc., R. Co., 52 Fed. Rep. 680; Doe *v.* Northwestern Coal, etc., Co., 78 Fed. Rep. 62. See, as tending to sustain this view, Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371.

Alabama. — O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205; Barrett *v.* Pollak Co., 108 Ala. 390; Pollak Co. *v.* Muscogee Mfg. Co., 108 Ala. 467.

Arkansas. — *Ex p.* Conway, 4 Ark. 302; Ringo *v.* Biscoe, 13 Ark. 563; Worthen *v.* Griffith, 59 Ark. 562, 43 Am. St. Rep. 50.

Colorado. — West *v.* Hanson Produce Co., 6 Colo. App. 467.

Connecticut. — Catlin *v.* Eagle Bank, 6 Conn. 233; Smith *v.* Skeary, 47 Conn. 47.

Georgia. — Albany, etc., Iron, etc., Co. *v.* Southern Agricultural Works, 76 Ga. 108, 2 Am. St. Rep. 26; Weihl *v.* Atlanta Furniture Mfg. Co., 89 Ga. 297.

Illinois. — Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Glover *v.* Lee, 140 Ill. 102;

(c) **Preferring Officers and Stockholders.** — Though there are decisions in some jurisdictions to the contrary, in cases in which there is no fraud or unfairness, and the preferred officer's vote is not necessary,[1] by the decided weight of authority an insolvent corporation cannot prefer debts due to its officers, even where it is held that it has the right to prefer other creditors; and this is particularly true if the vote of the preferred officer is necessary.[2] It can, how-

Warren *v.* Columbus First Nat. Bank, 149 Ill. 9; Peterson *v.* Brabrook Tailoring Co., 150 Ill. 290; J. W. Butler Paper Co. *v.* Robbins, 151 Ill. 588; Gottlieb *v.* Miller, 154 Ill. 44; State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519; Blair *v.* Illinois Steel Co., 159 Ill. 350; Juillard *v.* Walker, 54 Ill. App. 517.

Indiana. — Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 550; Henderson *v.* Indiana Trust Co., 143 Ind. 561; Levering *v.* Bimel, 146 Ind. 545; Smith *v.* Wells Mfg. Co., (Ind. 1897) 46 N. E. Rep. 1000.

Iowa. — Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 59 Am. Rep. 461; Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 2 Am. St. Rep. 263.

Kentucky. — Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

Maryland. — State *v.* State Bank, 6 Gill & J. (Md.) 205.

Massachusetts. — Sargent *v.* Webster, 13 Met. (Mass.) 497, 46 Am. Dec. 743.

Michigan. — Town *v.* River Raisin Bank, 2 Dougl. (Mich.) 530; Montreal Bank *v.* J. E. Potts Salt, etc., Co., 90 Mich. 345.

Mississippi. — Arthur *v.* Commercial, etc., Bank, 9 Smed. & M. (Miss.) 394, 48 Am. Dec. 719; Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590; Palmer *v.* George W. Hutchison Grocery Co., (Miss. 1892) 11 So. Rep. 789; Mason *v.* Fischer, etc., Lumber Co., (Miss. 1896) 21 So. Rep. 5.

Missouri. — Manhattan Brass Co. *v.* Webster Glass, etc., Co., 37 Mo. App. 145; Foster *v.* Mullanphy Planing Mill Co., 92 Mo. 79; Alberger *v.* National Bank of Commerce, 123 Mo. 313; Slavens *v.* Cook Drug Co., 128 Mo. 341; Waggoner-Gates Milling Co. *v.* Ziegler-Zaiss Commission Co., 128 Mo. 473; Meyer *v.* American Folding Chair Co., 130 Mo. 188; Schufeldt *v.* Smith, 131 Mo. 280. *Compare* Kankakee Woolen Mill Co. *v.* Kampe, 38 Mo. App. 229; State *v.* Brockman, 39 Mo. App. 131.

Montana. — Ames, etc., Co. *v.* Heslet, (Mont. 1897) 47 Pac. Rep. 805, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 220.

Nebraska. — Shaw *v.* Robinson, etc., Co., 30 Neb. 403; Wallachs *v.* Robinson, etc., Co., (Neb. 1897) 70 N. W. Rep. 52.

New Jersey. — Stratton *v.* Allen, 16 N. J. Eq. 229; Wilkinson *v.* Bauerle, 41 N. J. Eq. 635; Vail *v.* Jameson, 41 N. J. Eq. 648; Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397; Savage *v.* Miller, (N. J. 1897) 36 Atl. Rep. 578.

New York. — Coats *v.* Donnell, 94 N. Y. 178; McQueen *v.* New, 10 Misc. Rep. (N. Y. Supreme Ct.) 255.

North Carolina. — Blalock *v.* Kernersville Mfg. Co., 110 N. Car. 99; Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 507.

Oregon. — See Sabin *v.* Columbia Fuel Co., 25 Oregon 15, 42 Am. St. Rep. 756.

Pennsylvania. — Dana *v.* U. S. Bank, 5 W. & S. (Pa.) 223; Pairpoint Mfg. Co. *v.* Philadelphia Optical, etc., Co., 161 Pa. St. 17; Borton *v.* Brines-Chase Co., 175 Pa. St. 209.

Utah. — Wyeth Hardware, etc., Co. *v.* James-Spencer-Bateman Co., (Utah 1897) 47 Pac. Rep. 604. *Compare* W. P. Noble Mercantile Co. *v.* Mount Pleasant Equitable Co-operative Inst., 12 Utah 213.

Vermont. — Warner *v.* Mower, 11 Vt. 385.

Virginia. — Burr *v.* M'Donald, 3 Gratt. (Va.) 206; Planters' Bank *v.* Whittle, 78 Va. 737.

West Virginia. — Pyles *v.* Riverside Furniture Co., 30 W. Va. 123.

Wyoming. — Conway *v.* Smith Mercantile Co., (Wyoming 1896) 46 Pac. Rep. 1084.

1. Doctrine Allowing Preference of Officers — *England.* — See *In re* Wincham Shipbuilding, etc., Co., 9 Ch. Div. 322.

United States. — Gould *v.* Little Rock, etc., R. Co., 52 Fed. Rep. 680.

Connecticut. — Smith *v.* Skeary, 47 Conn. 47.

Georgia. — See Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503. But see *infra*, the next note.

Indiana. — Levering *v.* Bimel, 146 Ind. 545.

Iowa. — Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 518; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 59 Am. Rep. 461; Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 2 Am. St. Rep. 263; Rollins *v.* Shaver Wagon, etc., Co., 80 Iowa 380, 20 Am. St. Rep. 427; *In re* Bloomfield Woolen Mills, (Iowa 1897) 70 N. W. Rep. 115.

Missouri. — Foster *v.* Mullanphy Planing Mill Co., 92 Mo. 79; Schufeldt *v.* Smith, 131 Mo. 280; Butler *v.* Harrison Land, etc., Co., 139 Mo. 467. *Compare* Roan *v.* Winn, 93 Mo. 503; Williams *v.* Jackson County Patrons, 23 Mo. App. 132; Kankakee Woolen Mill Co. *v.* Kampe, 38 Mo. App. 229.

Virginia. — Planters' Bank *v.* Whittle, 78 Va. 737.

West Virginia. — Hope *v.* Valley City Salt Co., 25 W. Va. 789; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351.

If the Preferred Officer's Vote Was Necessary to secure the preference, it is not valid. Rickerson Roller-Mill Co. *v.* Farrell Foundry, etc., Co., 75 Fed. Rep. 554, 43 U. S. App. 452; Savage *v.* Miller, (N. J. 1897) 36 Atl. Rep. 578. *Compare* South Bend Chilled Plow Co. *v.* George C. Cribb Co., (Wis. 1897) 72 N. W. Rep. 749.

Corporations with Same Stockholders and Officers. — And it may prefer another corporation, though both corporations have officers and stockholders in common. Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590. *Compare* Savage *v.* Miller, (N. J. 1897) 36 Atl. Rep. 578.

2. Doctrine Denying Right to Prefer Officers — *United States.* — Corbett *v.* Woodward, 6 Fed. Cas. No. 3223; Bradley *v.* Farwell, 3 Fed. Cas. No. 1779; Sutton Mfg. Co. *v.* Hutchinson, 24

ever, generally prefer debts due to stockholders.[1]

Debts as to Which Officers Are Guarantors, Sureties, or Indorsers. — Where preference of directors and other officers is allowed, a corporation may, of course, prefer debts as to which its officers are guarantors, sureties, or indorsers.[2] But it cannot do so, so as to save them to the prejudice of other creditors, where the right to prefer its officers is not recognized.[3]

U. S. App. 145, 63 Fed. Rep. 496; Northwestern Mut. L. Ins. Co. *v.* Cotton Exch. Real Estate Co., 70 Fed. Rep. 155; Consolidated Tank Line Co. *v.* Kansas City Varnish Co., 45 Fed. Rep. 7; Howe *v.* Sanford Fork, etc., Co., 44 Fed. Rep. 231, *reversed* in Sanford Fork, etc., Co. *v.* Howe, 157 U. S. 312, on the ground that there was no cessation of or intention to cease business; Bosworth *v.* Jacksonville Nat. Bank, 24 U. S. App. 413, 64 Fed. Rep. 615; Adams *v.* Kehlor Milling Co., 35 Fed. Rep. 433; Sprague-Brimmer Mfg. Co. *v.* M. J. Murphy Furnishing Goods Co., 26 Fed. Rep. 572; Coons *v.* Tome, 9 Fed. Rep. 532; Kittel *v.* Augusta, etc., R. Co., 78 Fed. Rep. 855.

Alabama. — Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357; Corey *v.* Wadsworth, 99 Ala. 68, 42 Am. St. Rep. 29.

California. — Bonney *v.* Tilley, 109 Cal. 346.

Georgia. — Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624. *Compare* Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503.

Illinois. — O'Donnell *v.* Illinois Steel Co., 53 Ill. App. 314; Beach *v.* Miller, 130 Ill. 162, 17 Am. St. Rep. 291, *explaining* and *distinguishing* Merrick *v.* Peru Coal Co., 61 Ill. 479, and Harts *v.* Brown, 77 Ill. 226; Roseboom *v.* Whittaker, 132 Ill. 81; Warren *v.* Columbus First Nat. Bank, 149 Ill. 9; Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605; Gottlieb *v.* Miller, 154 Ill. 44.

Kansas. — Hays *v.* Citizens' Bank, 51 Kan. 535; Chicago, etc., Bridge Co. *v.* Fowler, 55 Kan. 17.

Louisiana. — See Cahill *v.* People's Slaughter House, etc., Co., 47 La. Ann. 1483.

Mississippi. — Love Mfg. Co. *v.* Queen City Mfg. Co., 74 Miss. 290.

Nebraska. — Ingwersen *v.* Edgecombe, 42 Neb. 740; Tillson *v.* Downing, 45 Neb. 549.

New Hampshire. — Richards *v.* New-Hampshire Ins. Co., 43 N. H. 263; Smith *v.* Putnam, 61 N. H. 632.

New Jersey. — Montgomery *v.* Phillips, 53 N. J. Eq. 203; Mallory *v.* Kirkpatrick, 54 N. J. Eq. 50; Savage *v.* Miller, (N. J. 1897) 36 Atl. Rep. 578.

North Carolina. — Hill *v.* Pioneer Lumber Co., 113 N. Car. 173, 37 Am. St. Rep. 621. *Compare* Blalock *v.* Kernersville Mfg. Co., 110 N. Car. 99.

Pennsylvania. — Sicardi *v.* Keystone Oil Co., 149 Pa. St. 148.

Rhode Island. — Olney *v.* Conanicut Land Co., 16 R. I. 597, 27 Am. St. Rep. 767.

Wisconsin. — Haywood *v.* Lincoln Lumber Co., 64 Wis. 639. See South Bend Chilled Plow Co. *v.* George C. Cribb Co., (Wis. 1897) 72 N. W. Rep. 749.

Before Cessation of Business. — A number of courts hold that this doctrine against the preference of officers does not apply where the corporation has not ceased to do business, but intends in good faith to continue. Sanford Fork, etc., Co. *v.* Howe, 157 U. S. 312; Rickerson Roller Mill Co. *v.* Farrell Foundry, etc., Co., 43 U. S. App. 452, 75 Fed. Rep. 554; Childs *v.* N. B. Carlstein Co., 76 Fed. Rep. 86; Brown *v.* Grand Rapids Parlor Furniture Co., 16 U. S. App. 221, 58 Fed. Rep. 286; South Bend Chilled Plow Co. *v.* George C. Cribb Co., (Wis. 1897) 72 N. W. Rep. 749.

1. **A Corporation May Prefer a Debt Due a Stockholder**, if the preference is in good faith and the stockholder does not unite with directors in preferring themselves. Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Parsons *v.* Hatton-Snowden Co., 58 Ill. App. 272; Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Whitwell *v.* Warner, 20 Vt. 426; Burr *v.* M'Donald, 3 Gratt. (Va.) 206. *Compare* Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605; Krause *v.* Malaga Glass Co., (N. J. 1889) 18 Atl. Rep. 367.

But a Majority of the Stockholders of a corporation cannot, by controlling the corporation and its officers, prefer debts due themselves, and thus obtain an advantage over other creditors. Sidell *v.* Missouri Pac. R. Co., 78 Fed. Rep. 724, 51 U. S. App. 1.

2. **Cases Allowing Preference When Officers Are Guarantors, Sureties, etc.** — *England.* — See *In re* Wincham Shipbuilding, etc., Co., 9 Ch. Div. 322.

United States. — Brown *v.* Grand Rapids Parlor Furniture Co., 16 U. S. App. 221, 58 Fed. Rep. 286.

Arkansas. — Worthen *v.* Griffith, 59 Ark. 562, 43 Am. St. Rep. 50.

Georgia. — See Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503.

Illinois. — Blair *v.* Illinois Steel Co., 159 Ill. 350.

Indiana. — Levering *v.* Bimel, 146 Ind. 545; Henderson *v.* Indiana Trust Co., 143 Ind. 561.

Michigan. — See Lucas *v.* Friant, (Mich. 1897) 69 N. W. Rep. 735.

Virginia. — Burr *v.* M'Donald, 3 Gratt. (Va.) 206.

3. **Cases Denying Such Right.** — *United States.* — Sutton Mfg. Co. *v.* Hutchinson, 24 U. S. App. 145, 63 Fed. Rep. 496; Consolidated Tank Line Co. *v.* Kansas City Varnish Co., 45 Fed. Rep. 7; Bosworth *v.* Jacksonville Nat. Bank, 24 U. S. App. 413, 64 Fed. Rep. 615; Howe *v.* Sanford Fork, etc., Co., 44 Fed. Rep. 231, (*reversed* in Sanford Fork, etc., Co. *v.* Howe, 157 U. S. 312, on the ground that the corporation had not ceased business, but intended in good faith to continue); Sprague-Brimmer Mfg. Co. *v.* M. J. Murphy Furnishing Goods Co., 26 Fed. Rep. 572.

Alabama. — Goodyear Rubber Co. *v.* George D. Scott Co., 96 Ala. 439.

Georgia. — Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624.

Illinois. — Roseboom *v.* Whittaker, 132 Ill. 81.

Debts Due Relatives of Officers. — It seems that debts due relatives of officers may be preferred whether the right to prefer officers is recognized or not,[1] provided there is no fraud or unfairness.[2]

Express Statutory Prohibition. — In some states there are express statutory prohibitions against voluntary assignments for the benefit of creditors, or against the preferring of creditors by a corporation, or of its officers or stockholders, when it is insolvent or contemplates insolvency.[3]

l. EXPRESS OR IMPLIED PROHIBITION OR LIMITATION — (1) *Express Prohibition or Limitation.* — Of course a corporation has no authority to sell, convey, lease, or mortgage all or any part of its property in violation of an express charter or statutory prohibition or limitation;[4] but the *ultra vires* character of the transaction cannot always be set up to defeat or escape its effect.[5] The chief difficulty in these cases is in construing the charter or statute and determining the extent and effect of the restrictions. Some of the decisions will be found in the note below.[6]

Mississippi. — Love Mfg. Co. *v.* Queen City Mfg. Co., 74 Miss. 290.

Nebraska. — Tillson *v.* Downing, 45 Neb. 549.

New Jersey. — Savage *v.* Miller, (N. J. 1897) 36 Atl. Rep. 578.

Exoneration of Cosurety Not Allowed. — Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624.

Rights of Creditors Not Affected. — This, however, it has been held, does not prevent the creditor from taking advantage of the preference, but merely prevents the officer from deriving any advantage, or escaping liability to other creditors. Weihl *v* Atlanta Furniture Mfg. Co., 89 Ga. 297; Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503; Blair *v.* Illinois Steel Co., 159 Ill. 350; Waggoner-Gates Milling Co. *v.* Ziegler-Zaiss Commission Co., 128 Mo. 473.

1. **Preferring Relatives of Officers.** — Blair *v.* Illinois Steel Co., 159 Ill. 350.

2. See Savage *v.* Miller, (N. J. 1897) 36 Atl. Rep. 578; Adams *v.* Kehlor Milling Co., 35 Fed. Rep. 433.

3. **Express Prohibition.** — See Kendall *v.* Bishop, 76 Mich. 634; Coryell *v.* New Hope Delaware Bridge Co., 9 N. J. Eq. 457; Curtis *v.* Leavitt, 15 N. Y. 9; Throop *v.* Hatch Lithographic Co., 125 N. Y. 530; Sibell *v.* Remsen, 33 N. Y. 96; Robinson *v.* Attica Bank, 21 N. Y. 406; Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221; Jones *v.* Blun, 145 N. Y. 333. And see the titles FRAUDULENT SALES AND CONVEYANCES; INSOLVENCY AND BANKRUPTCY; NATIONAL BANKS.

4. **Express Prohibition or Limitation.**—See Cox *v.* Gould, 4 Blatchf. (U. S.) 341; Saltmarsh *v.* Spaulding, 147 Mass. 224; Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43; Rochester Sav. Bank *v.* Averell, 96 N. Y. 467; Lord *v.* Yonkers Fuel Gas Co., 99 N. Y. 555; Astor *v.* Westchester Gas-Light Co., 33 Hun (N. Y.) 333.

Against Negotiation or Transfer of Notes, etc. — Payne *v.* Baldwin, 3 Smed. & M. (Miss.) 661.

As to Assignments for Creditors and statutory prohibitions against preferences, see the preceding subdivision.

5. **Effect of Ultra Vires Transfer.** — Warfield *v.* Marshall County Canning Co., 72 Iowa 666, 2 Am. St. Rep. 263; Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, *affirming* 44 Hun (N. Y.) 130. See also the title ULTRA VIRES.

6. **Prohibition Against Alienation of Particular Property Only.** — A clause in a charter of a university, that "no gifts, grants, or devises made to the university for a particular purpose shall be applied to any other purpose," has reference only to donations in aid of the accomplishment of a special object, as to endow a chair, as distinguished from aid to the university generally. It does not prohibit the alienation of land conveyed to it by a general deed expressing no specific purposes of the grant. Douglas *v.* Union Mut. Life Ins. Co., 127 Ill. 102.

Specification of Particular Purpose. — Although a corporation by a special provision in its charter is empowered to mortgage its effects, etc., for a particular purpose, this will not be construed as taking away or abridging its general power to execute a mortgage for the security of creditors. Allen *v.* Montgomery R. Co., 11 Ala. 439; Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472.

Mortgages for Price of Property. — A statute prohibiting a corporation from mortgaging its property is intended to apply only to property which the corporation already owns, and is not to be construed as forbidding a corporation, on purchasing property, to give a mortgage to secure payment of the price. McMurray *v.* St. Louis Oil Mfg. Co., 33 Mo. 377.

Debts Contracted Simultaneously. — It seems that, under a provision authorizing a corporation, upon written consent of stockholders owning two-thirds of its capital stock, to mortgage its real and personal estate to secure the payment of any debt which may be contracted by it in the business for which it was incorporated, it is not essential to the validity of a mortgage that it should have been given to secure an antecedent debt, but that a debt contracted simultaneously with the giving of the security, if legitimate and incurred in the business of the company, is within the authority conferred. Lord *v.* Yonkers Fuel Gas Co., 99 N. Y. 547.

A Loan of Money to Pay Debts of a corporation, where the money is so applied, is a debt contracted in the business for which the corporation was organized, within the meaning of a statute allowing a mortgage to secure such

(2) *Implied Prohibition or Limitation in General.* — Nor can a corporation convey, lease, or mortgage its property if the terms of its charter or the duties imposed on it are such as impliedly to prohibit such a transfer.[1]

(3) *Unauthorized Business or Purpose.* — For example, a corporation has no right to apply its funds or convey its property in an unauthorized business, or for any purpose that is foreign to the business for which it was created.[2]

(4) *Property Held Subject to Limitations or in Trust.* — When property is acquired by a corporation, not absolutely but subject to limitations, or on a specified trust, it cannot be diverted from the use and trust for which it was conveyed.[3]

debts. Rochester Sav. Bank *v.* Averell, 96 N. Y. 467.

Increase of Indebtedness. — Merely to give a mortgage for a pre-existing debt is not a violation of a statute prohibiting a corporation from increasing its indebtedness without the consent of its stockholders, a change in the form of a debt not being an increase of indebtedness. Powell *v.* Blair, 133 Pa. St. 550.

Leave of Court. — Sometimes particular kinds of corporations are required by statute to obtain an order of court allowing them to execute a mortgage on their property, and they cannot make a valid mortgage without such an order.

Religious Societies. — In *New York*, by statute, religious corporations cannot alienate their lands without the consent of the court, the statute being intended to protect the corporators from the perversion of the property. See Madison Ave. Baptist Church *v.* Baptist Church, 73 N. Y. 82; Congregation Beth Elohim *v.* Central Presb. Church, 10 Abb. Pr. N. S. (Brooklyn City Ct.) 484. See also the title RELIGIOUS SOCIETIES.

Benevolent Societies. — Dudley *v.* Congregation, etc., 138 N. Y. 451, *affirming* 65 Hun (N. Y.) 21, 22 Civ. Pro. Rep. (N. Y.) 380.

Requirement of Consent of Stockholders. — In some states, but not in all, it is held that a statutory or charter provision prohibiting a conveyance, mortgage, or pledge of its property by a corporation without the consent of its stockholders is intended for the benefit of the stockholders, and others cannot object for want of such consent. Barrett *v.* Pollak Co., 108 Ala. 390; Alabama Iron, etc., Co. *v.* McKeever, 112 Ala. 134; Nelson *v.* Hubbard, 96 Ala. 238; Beecher *v.* Marquette, etc., Rolling Mill Co., 45 Mich. 103.

Contra. — Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356; McShane *v.* Carter, 80 Cal. 310.

As to the effect of a provision in the *New York* statute requiring the written assent of a certain proportion of stockholders, and the sufficiency of the assent and evidence thereof, see The Vigilancia, 68 Fed. Rep. 781, 73 Fed. Rep. 452; Campbell *v.* Argenta Gold, etc., Min. Co., 51 Fed. Rep. 1; McComb *v.* Barcelona Apartment Assoc., (Supreme Ct.) 10 N. Y. Supp. 546, *affirmed* in 134 N. Y. 598, 45 N. Y. St. Rep. 784; Matter of State Reservation, 122 N. Y. 177; Lord *v.* Yonkers Fuel Gas Co., 99 N. Y. 547; Rochester Sav. Bank *v.* Averell, 96 N. Y. 467; Vail *v.* Hamilton, 85 N. Y. 453; Greenpoint Sugar Co. *v.* Whitin, 69 N. Y. 328, *affirming* 7 Hun (N. Y.) 44; Astor *v.* Westchester Gas-Light Co., 33 Hun (N. Y.) 333; Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 170, *affirming* 44 Hun (N. Y.) 130. And see the titles STOCK; STOCKHOLDERS.

Such a provision, as far as manufacturing companies are concerned, applies to its permanent property only, and not to its product. Alabama Iron, etc., Co. *v.* McKeever, 112 Ala. 134.

1. Implied Prohibition. — See Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 36. And see illustrations in the following pages.

2. Unauthorized Business or Purpose. — Gregory *v.* Patchett, 33 Beav. 595; East Anglian R. Co *v.* Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775; MacGregor *v.* Deal, etc., R. Co., 16 Eng. L. & Eq. 180; Salomons *v.* Laing, 12 Beav. 339; Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1; Gray *v.* Lewis, L. R. 8 Eq. 526; Kean *v.* Johnson, 9 N. J. Eq. 401; Rabe *v.* Dunlap, 51 N. J. Eq. 40, 40 Am. & Eng. Corp. Cas. 220; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

Illustrations. — Thus a corporation created for the purpose of constructing a railroad between certain termini will be enjoined from using its funds for the purpose of extending its road beyond such termini. Baltimore United F. Dept. *v.* Creamer, 17 Md. 243; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

A corporation cannot pay the expenses of a suit not instituted by it, even though it may be benefited. Kernaghan *v.* Williams, L. R. 6 Eq. 228.

3. Binney's Case, 2 Bland (Md.) 142.

Charitable and Religious Corporations. — This rule is more particularly applicable to corporations organized for charitable and religious purposes, as hospitals, and colleges and other educational corporations. McBride *v.* Porter, 17 Iowa 203.

Land donated to an educational corporation, for example, for the purpose of building and maintaining thereon a college or seminary, cannot be used for any other purpose, nor disposed of. Mott *v.* Danville Seminary, 129 Ill. 403. See Hillsdale College *v.* Rideout, 82 Mich. 94. See also the titles CHARITIES, vol. 5, p. 893; RELIGIOUS SOCIETIES.

Other Corporations. — But it also applies to other corporations. See Rochdale Canal Co. *v.* Radcliffe, 18 Q. B. 287, 83 E. C. L. 287; Staffordshire, etc., Canal Nav. *v.* Birmingham Canal Navigations, L. R. 1 H. L. 254.

Railroad Companies. — A railroad company has no right to convey or lease to private traders or manufacturers, for their trade or manufactures, land taken under the power of eminent domain for the location of its road; or in any other way to divert the property from the purposes for which it was acquired. Merrimac River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1. See Western Union Tel. Co.

(5) *Gifts of Property.* — And ordinarily, unless created for the purpose, as in the case of charitable corporations, it is not within the power of a corporation to make a gift of its property, however worthy of encouragement or aid the object of the gift may be. This would generally be in violation of the rights of shareholders or members not consenting.[1] But there may be cases in which a gift of property by a corporation would be authorized as a legitimate mode of increasing or carrying on its business, and there are a number of cases upholding gifts on this ground.[2]

(6) *Alienation by Quasi-Public Corporations* — (a) **In General.** — By the weight of authority, on the ground of public policy, the rule allowing alienation of its property by a corporation does not apply to the full extent to a corporation which is invested with the power of eminent domain, and whose business is of a public character. Such corporations, in the absence of express authority, cannot alienate their property, either by sale, lease, or mortgage, if by doing so they will be disabled even partially from performing the duties which they owe to the public.[3]

v. American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781. See also the title RAILROADS.

Mutual Benefit Societies. — Podesta *v.* Societa di Unione, 10 Ohio Cir. Ct. Rep. 19.

1. Gifts Ultra Vires. — McCrory *v.* Chambers, 48 Ill. App. 445; Polar Star Lodge No. 1 *v.* Polar Star Lodge No. 1, 16 La. Ann. 53; Davis *v.* Old Colony R. Co., 131 Mass. 271, 41 Am. Rep. 221; Beers *v.* New York L. Ins. Co., 66 Hun (N. Y.) 75. See *infra*, this section, *Subscriptions to Other Enterprises.*

A Bank (national bank) has no right to make a donation to keep a manufacturing company from moving its plant from the city. McCrory *v.* Chambers, 48 Ill. App. 445.

Payment for Past Services. — It follows from this that it is generally *ultra vires* to pay or contract to pay money in consideration of past services where there is no legal duty to pay therefor, and where there is no legal consideration. Beers *v.* New York L. Ins. Co., 66 Hun (N. Y.) 75.

2. Cases in Which Gifts Have Been Upheld. — In Taunton *v.* Royal Ins. Co., 2 Hem. & M. 135, it was held that an insurance company had authority to pay to one of its customers a loss not covered by the policy, and for which it could not be held liable, where the gratuity would tend to increase its business.

And in Hampson *v.* Price's Patent Candle Co., 45 L. J. Ch. 437, it was held not to be *ultra vires* for a corporation to give out of its undivided profits certain extra wages to its workmen.

So in Hutton *v.* West Cork R. Co., 23 Ch. Div. 654, 52 L. J. Ch. 689, 49 L. T. 420, 31 W. R. 827, *reversing* in part 52 L. J. Ch. 377, 48 L. T. 626, 31 W. R. 542, it was held that a company carrying on business has power, by the vote of a general meeting, to expend a portion of its funds in gratuities to servants or directors, provided such grants are made for the purpose of advancing the interests of the company; though it was held that this did not apply to a case where the company had transferred its undertaking to another company and was being wound up.

And in Henderson *v.* Bank of Australasia, 40 Ch. Div. 170, 24 Am. & Eng. Corp. Cas. 78, it was held that a majority of the stockholders of a bank had authority to pay a half-yearly pension for five years for the benefit of the family of a deceased officer.

In Toledo, etc., R. Co. *v.* Rodriques, 47 Ill. 188, 95 Am. Dec. 484, it was held that a corporation, where one of its employees was injured in the course of his employment, could employ a physician or nurse, or otherwise incur expense on such account, though no power to do so was expressly given by its charter.

In Steinway *v.* Steinway, 17 Misc. Rep. (N. Y. Supreme Ct.) 43, it was held that a manufacturing corporation may give away some of the goods manufactured by it in order to advertise its goods and extend their reputation.

And in Louisville, etc., R. Co. *v.* Literary Society of St. Rose, 91 Ky. 395, it was held that a literary society having power to buy and sell real and personal property for the purpose of sustaining and carrying on its institution of learning, could donate money to a railroad company to aid in constructing its road, where the road would benefit the association in giving a means of access for persons and supplies, and for shipping the produce of its land. And see Whetstone *v.* Ottawa University, 13 Kan. 320; Sherman Centre Town Co. *v.* Russell, 46 Kan. 382. See also *infra*, this section, *Powers with Respect to Contracts — Subscriptions to Other Enterprises.*

3. Alienation by Quasi-Public Corporations — *England.* — Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113, 3 Jur. N. S. 775, 26 L. J. Ch. 482. *Compare* Blackmore *v.* Yates, L. R. 2 Exch. 225, 36 L. J. Exch. 121, 15 W. R. 750. See Winch *v.* Birkenhead, etc., R. Co., 5 De G. & Sm. 562, 16 Jur. 1035, 13 Eng. L. & Eq. 506; Beman *v.* Rufford, 15 Jur. 914, 6 Eng. L. & Eq. 106; Staffordshire, etc., Canal Nav. *v.* Birmingham Canal Navigations, L. R. 1 H. L. 254; Reg. *v.* South Wales R. Co., 14 Q. B. 902, 68 E. C. L. 902.

Canada. — *In re* Canada Southern R. Co., (Ont. 1884) 20 Am. & Eng. R. Cas. 196.

United States. — Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 McCrary (U. S.) 541; American Union Tel. Co. *v.* Union Pac. R. Co., 1 McCrary (U. S.) 788; York, etc., R. Co *v.* Winans, 17 How. (U. S.) 30; Thomas *v.* Millville, etc., R. Co., 101 U. S. 71; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 630, 24 Am. & Eng. R. Cas. 58; Central Transp. Co.

Particular Quasi-Public Corporations. — Though, as will be seen, there are some decisions to the contrary, by the weight of authority this doctrine applies to railroad companies,[1] including horse and street railroad companies,[2] sleeping-car companies,[3] canal companies,[4] gas and electric-light companies,[5] cemetery

v. Pullman's Palace Car Co., 139 U. S. 24, 45 Am. & Eng. R. Cas. 607.

Alabama. — Memphis, etc., R. Co. *v.* Grayson, 88 Ala. 572, 16 Am. St. Rep. 69.

California. — Visalia Gas, etc., Co. *v.* Sims, 104 Cal. 326, 43 Am. St. Rep. 105.

Colorado. — Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 45 Am. Rep. 512.

Georgia. — Singleton *v.* Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574.

Illinois. — Doane *v.* Chicago City R. Co., 51 Ill. App. 353; Palmer *v.* Forbes, 23 Ill. 301; Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124.

Indiana. — Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

Maryland. — State *v.* Consolidation Coal Co., 46 Md. 1.

Massachusetts. — Middlesex R. Co. *v.* Boston, etc., R. Co., 115 Mass. 347; Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

Minnesota. — Freeman *v.* Minneapolis, etc., R. Co., 28 Minn. 443.

New Hampshire. — Pierce *v.* Emery, 32 N. H. 484.

New Jersey. — Stockton *v.* Central R. Co., 50 N. J. Eq. 54, 51 Am. & Eng. R. Cas. 1; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 399.

New York. — Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

Ohio. — Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Oregon. — Lakin *v.* Willamette Valley, etc., R. Co., 13 Oregon 436, 57 Am. Rep. 25.

Pennsylvania. — Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 27, 42 Am. Dec. 315.

South Carolina. — Harmon *v.* Columbia, etc., R. Co., 28 S. Car. 401, 13 Am. St. Rep. 686.

Tennessee. — Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138.

Texas. — Russell *v.* Texas, etc., R. Co., 68 Tex. 646; International, etc., R. Co. *v.* Moody, 71 Tex. 614; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 35 Am. & Eng. R. Cas. 94; Central, etc., R. Co. *v.* Morris, 68 Tex. 49; International, etc., R. Co. *v.* Eckford, 71 Tex. 274.

Vermont. — See Nelson *v.* Vermont, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

West Virginia. — Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366. See Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 25 Am. St. Rep. 901.

1. Railroad Companies. — Reg. *v.* South Wales R. Co., 14 Q. B. 902, 68 E. C. L. 902; York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30; Thomas *v.* Millville, etc., R. Co., 101 U. S. 71; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 24 Am. & Eng. R. Cas. 58. *Compare* Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 8 Biss. (U. S.) 456.

In Thomas *v.* Millville, etc., R. Co., 101 U. S. 83, it is said that "where a corporation like a railroad company has granted to it by charter a franchise intended, in large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions; which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void, as against public policy."

2. Horse and Street Railroad Companies. — Doane *v.* Chicago City R. Co., 51 Ill. App. 353; Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Middlesex R. Co. *v.* Boston, etc., R. Co., 115 Mass. 347; Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am Rep. 572.

3. Sleeping Car Companies. — In Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 45 Am. & Eng. R. Cas. 607, a corporation which was organized for transportation of passengers in railroad cars constructed and to be owned by it, and authorized to contract with other corporations for the leasing, hiring, and transfer to them of its cars and other personal property, had leased all its property, including its cars, patents, and contracts with railroad companies for hire of its cars, to another company for the term of ninety-nine years, and agreed not to engage in the business of manufacturing and using or hiring cars during the term of the lease. It was held that the company was of a *quasi*-public character, and that the lease was void as an abandonment of its duty to the public.

4. Canal Companies. — Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 27, 42 Am. Dec. 315.

5. Gas and Electric Light Companies. — Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; Visalia Gas, etc., Co. *v.* Sims, 104 Cal. 326, 43 Am. St. Rep. 105; Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124; Brunswick Gas-Light Co. *v.* United Gas, etc., Co., 85 Me. 532, 35 Am. St. Rep. 385, 43 Am. & Eng. Corp. Cas. 459; St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 117; Bath Gaslight Co. *v.* Claffy, (Supreme Ct.) 26 N. Y. Supp. 287, 74 Hun (N. Y.) 638.

Some courts do not regard gas companies as *quasi*-public corporations within this rule. See Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75; Evans *v.* Boston Heating Co., 157 Mass. 37, 41 Am. & Eng. Corp. Cas. 69. And see Detroit *v.* Mutual Gas Co., 43 Mich. 594.

Qualification of Rule. — In Hunt *v.* Memphis Gaslight Co., 95 Tenn. 136, it was held that a gaslight company whose charter did not confer upon it the right of eminent domain or exclusive privilege was not within the rule, and could mortgage its entire property to secure debts.

Heating Companies. — In Evans *v.* Boston Heating Co., 157 Mass. 37, it was held that the rule did not apply to a corporation for the purpose of supplying heat through pipes laid like gas pipes in the public streets.

companies,[1] and others of the same general nature.[2]

(b) **Grant of Easement.** — The doctrine, it has been held, prevents such a corporation from granting an easement if the grant will interfere with the performance of its duties to the public.[3]

(c) **Contract for Joint Use of Property.** — But it does not prevent such a corporation from entering into a contract by which it allows another corporation or person to use its property jointly with it, where it is not thereby prevented from performing its duties to the public.[4]

(d) **Surrender of Exclusive Right.** — Nor does it prevent a corporation, given the exclusive privilege of carrying on a certain enterprise, from surrendering the right to exclude others from a similar enterprise, when it does not bind itself not to carry on the enterprise in common with others; for the exclusiveness of the privilege is for the benefit of the corporation, and not of the public.[5]

(e) **Property Not Needed.** — Nor does it prevent a *quasi*-public corporation from selling real or personal property that is no longer needed for the proper conduct of its business.[6]

(7) *Alienation of Franchises and Special Privileges* — **England and Canada.** — It is held in England that a corporation cannot transfer its franchises or special powers and privileges to another without express legislative authority.[7] And so it has also been held in Canada.[8]

1. **Cemetery Companies.** — In Wolford *v.* Crystal Lake Cemetery Assoc., 54 Minn. 440, 44 Am. & Eng. Corp. Cas. 658, it was held that the purposes for which alone cemetery corporations could be formed under the *Minnesota* laws were public rather than private, and that such a company, after using the land for burials, could not convey or mortgage the same. See the title CEMETERIES, vol. 5, p. 781.

2. **Water Companies.** — See Foster *v.* Fowler, 60 Pa. St. 27.

Storage and Elevator Companies. — A corporation created for the purpose of transacting a general storage and elevator business, including the right to issue warehouse receipts, advance money, etc., is not a *quasi*-public corporation within this rule. Girard Point Storage Co. *v.* Southwark Foundry Co., 105 Pa. St. 248.

3. **Grant of Easement by Railroad Company.** — *In re* Canada Southern R. Co., (Ont. 1884) 20 Am. & Eng. R. Cas. 196. See also Pacific Postal Tel. Cable Co. *v.* Western Union Tel. Co., 50 Fed. Rep. 493.

4. **Joint Use of Property.** — Union Pac. R. Co. *v.* Chicago, etc., R. Co., 51 Fed. Rep. 309, 10 U. S. App. 98, 51 Am. & Eng. R. Cas. 162, *affirming* 47 Fed. Rep. 15, 47 Am. & Eng. R. Cas. 340.

In this case the Union Pacific Railroad Company let another railroad company into the joint use and occupation of its bridge over the Missouri River, and of its terminal facilities at Omaha, together with about seven miles of its track, for a period of nine hundred and ninety-nine years. It was held that as such use did not interfere with the business of the Union Pacific Company and the performance of its duties to the public, the transaction was not *ultra vires*. See also Prospect Park, etc., R. Co. *v.* Brooklyn, etc., R. Co., 81 Hun (N.Y.) 516.

5. **Surrender of Exclusive Right.** — Thus in St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 117, a gas company which had been given the exclusive right to manufacture and sell gas in the city of St. Louis made a contract by which it surrendered and abandoned its exclusive right, but did not bind itself not to carry on the business in common with others. It was held that the contract was valid. "This right to exclude competition," said the court, "was not a right vested in the company for the benefit of the public, because in its very nature it was injurious to the public; but it was a right vested in the company for its own benefit, which it might therefore surrender with the consent of its stockholders. The right to make and vend gas to the city and its inhabitants was a right conferred upon the company for the benefit both of the company and the public, and not for the sole benefit of [either], but the right to exclude competition was solely for the benefit of the company. If in the provision of the contract above quoted the company surrendered and abandoned a right to make and vend gas in that portion of the city described therein, then the position taken by counsel, that it abandoned a public duty, is maintainable. We do not think that said provision is susceptible of that construction, but, on the contrary, it is expressly declared 'that both of said companies, or any other company or individual, shall be permitted to exist and do business in the aforesaid district or portion of said city without hinderance.'"

6. **Unnecessary Property.** — Hendee *v.* Pinkerton, 14 Allen (Mass.) 381; Yates *v.* Van De Bogert, 56 N. Y. 526. And see *supra*, this section, *Lease of Real Property*.

7. **Alienation of Franchises and Special Privileges — Doctrine in England.** — Green's Brice's Ultra Vires, 398; Great Northern R. Co. *v.* Eastern Counties R. Co., 21 L. J. Ch. 837, 9 Hare 306, 12 Eng. L. & Eq. 224; Winch *v.* Birkenhead, etc., R. Co., 7 Ry. Cas. 334, 13 Eng. L. & Eq. 506; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914; Beman *v.* Rufford, 1 Sim. N. S. 550, 20 L. J. N. S. Ch. 537, 6 Eng. L. & Eq. 106; Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113.

8. **Doctrine in Canada.** — Hinckley *v.* Gildersleeve, 19 Grant's Ch. (U. C.) 212.

United States. — The rule is certainly the same in the United States so far as the franchise to be a corporation is concerned. And by the weight of authority the rule is the same as to other special privileges and powers. A corporation has no power, in the absence of express legislative authority, to transfer its franchises or special privileges either absolutely or by lease for a term of years, or by mortgage or otherwise.[1] This rule has been applied to various kinds of corporations.[2]

1. **Doctrine in the United States.** — *United States.* — Earle *v.* Seattle, etc., R. Co., 56 Fed. Rep. 909; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1; Thomas *v.* Millville, etc., R. Co., 101 U. S. 71; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 24 Am. & Eng. R. Cas. 58; Memphis, etc., R. Co. *v.* Railroad Com'rs, 112 U. S. 609.

Idaho. — See Palmer *v.* Utah, etc., R. Co., 2 Idaho 350.

Illinois. — Hays *v.* Ottawa, etc., R. Co., 61 Ill. 422; Archer *v.* Terre Haute, etc., R. Co., 102 Ill. 493; Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124; Snell *v.* Chicago, 133 Ill. 413.

Louisiana. — State *v.* Morgan, 28 La. Ann. 482; New Orleans, etc., R. Co. *v.* Delamore, 34 La. Ann. 1225.

Maine. — Brunswick Gas-Light Co. *v.* United Gas, etc., Co., 85 Me. 532, 35 Am. St. Rep. 385, 43 Am. & Eng. Corp. Cas. 459.

Maryland. — State *v.* Consolidation Coal Co., 46 Md. 1.

Massachusetts. — Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

Michigan. — See Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

Nebraska. — Chollette *v.* Omaha, etc., R. Co., 26 Neb. 159.

New Jersey. — Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 399; Randolph *v.* Larned, 27 N. J. Eq. 557; Stockton *v.* Central R. Co., 50 N. J. Eq. 52, 12 Ry. & Corp. L. J. 194, 51 Am. & Eng. R. Cas. 1.

New Mexico. — Southern Pac. R. Co. *v.* Esquibel, 4 N. Mex. 337, 36 Am. & Eng. R. Cas. 410.

New York. — See Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Welch *v.* Old Dominion Min., etc., Co., (Supreme Ct.) 10 N. Y. Supp. 174; Beebe *v.* Richmond Light, etc., Co., 13 Misc. Rep. (N. Y. Supreme Ct.) 737.

Ohio. — Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

Pennsylvania. — Philadelphia *v.* Western Union Tel. Co., 2 W. N. C. (Pa.) 455, 33 Leg. Int. (Pa.) 129, 11 Phila. (Pa.) 327; Wood *v.* Bedford, etc., R. Co., 8 Phila. (Pa.) 94; Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 27, 42 Am. Dec. 315; Stewart's Appeal, 56 Pa. St. 413; Pittsburgh, etc., R. Co. *v.* Bedford, etc., R. Co., 81* Pa. St. 104.

Tennessee. — Ragan *v.* Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

Texas. — East Line, etc., R. Co. *v.* State, 75 Tex. 434; City Water Co. *v.* State, 88 Tex. 600.

Virginia. — Roper *v.* McWhorter, 77 Va. 214.

Reason for the Rule. — "The rule," said Chancellor Zabriskie, in speaking of a lease of a canal and railroad, "is founded on reason and principle. The franchises granted by the state are often parts of the sovereign power delegated to a subject, and always privileges to which other citizens are not entitled. In these grants the state is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchise of maintaining a canal and railroads across public highways and navigable rivers, and of taking tolls and rates of fare fixed by themselves without control, are with others a material part of the property leased; these cannot be leased or aliened without consent of the state." Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 400.

Mortgage of Franchise. — The incapacity of a corporation to transfer its franchise without legislative authority is not limited to absolute conveyances and leases, but extends to mortgages as well. South Yorkshire R., etc., Co. *v.* Great Northern R. Co., 3 De G. M. & G. 576; Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700. See Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

As was said by Hoar, J., in Com. *v.* Smith, 10 Allen (Mass.) 455, 87 Am. Dec. 672: "The power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure."

Mortgage for Purchase Price. — In Memphis, etc., R. Co. *v.* Dow, 19 Fed. Rep. 388, it was held that where a corporation lawfully purchases its franchises it has implied authority to mortgage them for the purchase price.

Cannot Assign Franchise for Benefit of Creditors. — Fietsam *v.* Hay, 122 Ill. 293, 3 Am. St. Rep. 492.

2. **Railroad Companies.** — Thomas *v.* Millville, etc., R. Co., 101 U. S. 71; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 630, 24 Am. & Eng. R. Cas. 58; Stockton *v.* Central R. Co., 50 N. J. Eq. 52, 12 Ry. & Corp. L. J. 194, 51 Am. & Eng. R. Cas. 1. See also the title RAILROADS.

Street Railroad Companies. — Abbott *v.* Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

Telegraph Companies. — A railroad company, authorized to construct a railroad and telegraph line, is without the power to lease its right to construct, maintain, and operate a line of telegraph, although it be stipulated in the contract that the lessee shall perform all duties imposed upon the railroad company by its charter. Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 McCrary (U. S.) 541; American Union Tel. Co. *v.* Union Pac. R. Co., 1 McCrary (U. S.) 188; Western Union Tel. Co. *v.* Union Pac. R.

Conflicting Decisions in Some States. — In some states this doctrine has been criticised and the courts have shown a tendency to disregard it in so far as it prevents *quasi*-public corporations from mortgaging their special franchises and privileges other than that of existing as a corporation.[1]

(8) *Express Authority to Alienate Franchises, Special Privileges, and Property* — (a) **In General.** — A corporation of any kind, whether strictly private or *quasi*-public, may, in the absence of constitutional restrictions, be expressly authorized by the legislature to sell, lease, or mortgage its franchises and special privileges, and all or any part of its property, whether necessary for the performance of its duties to the public or not.[2] In such a case the mode and terms of transfer pointed out by the charter or statute must be followed;[3] and a conveyance, lease, or mortgage can be made only for the purpose or purposes specified.[4]

(b) **What Amounts to Express Authority — In General.** — Questions sometimes arise as to whether particular statutes or charters confer this authority, or as to the extent of the authority conferred. Such questions, of course, depend upon a

Co., 1 McCrary (U. S.) 418, 558, 581; Central Branch Union Pac. R. Co. *v.* Western Union Tel. Co., 1 McCrary (U. S.) 551. *Compare* Montreal Tel. Co. *v.* Low, 27 L. C. Jur. 257.

Canal Companies. — Hinckley *v.* Gildersleeve, 19 Grant's Ch. (U. C.) 212.

Plank-road and Turnpike Companies. — Snell *v.* Chicago, 133 Ill. 413.

Gas and Electric Light Companies. — Visalia Gas, etc., Co. *v.* Sims, 104 Cal. 326, 43 Am. St. Rep. 105; Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124; Brunswick Gas Light Co. *v.* United Gas, etc., Co., 85 Me. 532, 35 Am. St. Rep. 385, 43 Am. & Eng. Corp. Cas. 459.

Water Companies. — See Louisville Water Co. *v.* Hamilton, 81 Ky. 517.

Banking Companies. — Fietsam *v.* Hay, 122 Ill. 293, 3 Am. St. Rep. 492.

1. In Joy *v.* Jackson, etc., Plank-road Co., 11 Mich. 155, a plank-road company was expressly authorized to mortgage its property and franchises; but Judge Christiancy was of the opinion that the power would have existed without an express grant of authority.

And in Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364, a dock company whose charter declared the dock to be a public highway, was held to have the power to mortgage its dock, though the power was contested as conflicting with its duties to the public. See also Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. Rep. 423; Western Union Tel. Co. *v.* Kansas Pac. R. Co., 4 Fed. Rep. 284; State *v.* Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166; Bardstown, etc., R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 206, 81 Am. Dec. 541; Detroit *v.* Mutual Gas Co., 43 Mich. 594; Threadgill *v.* Pumphrey, 87 Tex. 573, *affirming* 9 Tex. Civ. App. 184; Middlebury Bank *v.* Edgerton, 30 Vt. 182; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452; Eldridge *v.* Smith, 34 Vt. 484.

2. Express Authority to Alienate Franchise, etc. — *United States.* — Willamette Mfg. Co. *v.* British Columbia Bank, 119 U. S. 191; Branch *v.* Jesup, 106 U. S. 468, 9 Am. & Eng. R. Cas. 558.

Alabama. — Meyer *v.* Johnston, 53 Ala. 237.

Illinois. — Reed *v.* Bradley, 17 Ill. 321; St. Louis, etc., R. Co. *v.* East St. Louis, etc., R. Co., 39 Ill. App. 354; Quincy *v.* Chicago, etc., R. Co., 94 Ill. 537; Snell *v.* Chicago, 133 Ill. 413.

Indiana. — State *v.* Hare, 121 Ind. 308.

Iowa. — Dunham *v.* Isett, 15 Iowa 284; Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437.

Kentucky. — Phillips *v.* Winslow, 18 B. Mon. (Ky.) 445, 68 Am. Dec. 729.

Massachusetts. — East Boston Freight R. Co. *v.* Eastern R. Co., 13 Allen (Mass.) 422.

Minnesota. — Pence *v.* St. Paul, etc., R. Co., 28 Minn. 488.

Missouri. — Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 632.

New Hampshire. — Pierce *v.* Emery, 32 N. H. 484; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

New Jersey. — Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130; Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505. And see Randolph *v.* Larned, 27 N. J. Eq. 557.

North Carolina. — See State *v.* Richmond, etc., R. Co., 72 N. Car. 634.

Pennsylvania. — Pittsburgh, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126; Lipton *v.* Bald Eagle Plank-road Co., 17 Leg. Int. (Pa.) 365; Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 46, 72 Am. Dec. 685; Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 30 Am. St. Rep. 763.

Texas. — Pumphrey *v.* Threadgill, 87 Tex. 573.

Ratification by Legislature. — A mortgage or other conveyance by a corporation, invalid because executed without authority from the legislature, may be ratified by the legislature and thereby rendered binding. Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395; Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 23; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

3. Compliance with Statutes. — Snell *v.* Chicago, 133 Ill. 413; Brownell *v.* Old Colony R. Co., 164 Mass. 29.

4. Purpose of Transfer. — Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358.

For illustrations, see *infra*, this section.

construction of the particular provisions under the rules governing the construction of statutes.[1]

Power to Sell Property and Incorporate Stock. — It has been held that a grant to a *quasi*-public corporation, of power to sell its property and to incorporate its stock with that of another company, gives it the power to sell its property and special privileges to such other corporation;[2] but, it seems, not to lease them.[3]

Authority to Purchase as Authority to Another to Sell. — It has been held that if a statute gives one corporation the power to buy the property and franchises of another corporation, it impliedly gives the latter the power to sell, though no such power is expressed in its charter.[4]

Authority to "Contract." — And authority to contract may give authority to lease.[5]

Authority to "Mortgage" or "Pledge." — A grant of authority to mortgage or pledge does not confer the power to sell,[6] but it confers the power to give a deed of trust, and to give a mortgage with a power of sale.[7]

Authority to "Sell" or "Dispose of." — A grant of power to sell or dispose of property gives the power to mortgage.[8]

Other Decisions on the construction of statutes giving, or which are claimed to give, corporations power to alienate their franchises and property, are given in the note below.[9]

1. See Pierce *v.* Emery, 32 N. H. 484.

2. **Sale.** — Branch *v.* Jesup, 106 U. S. 468, 9 Am. & Eng. R. Cas. 558. In this case it was held that a corporation authorized to construct a railroad between certain points, to purchase and sell all kinds of property, and to incorporate its stock with that of any other company, had the power to agree with another company owning or constructing a road over part of the same route, to build a road over the rest of the route, so as to connect with the latter's road, and to sell the same to the latter company, together with the franchise of operating the same, and to incorporate its stock with that of the latter.

3. **Lease.** — In Mills *v.* Central R. Co., 41 N. J. Eq. 1, it was held that a statute authorizing corporations to "merge" and "consolidate" their franchises and other property, did not authorize a lease by one company to another. And see to the same effect, Archer *v.* Terre Haute, etc., R. Co., 102 Ill. 493, 7 Am. & Eng. R. Cas. 249. See also the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

4. New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 275.

In State *v.* Consolidation Coal Co., 46 Md. 1, however, it was held that the mere fact that the charter of a corporation conferred upon it the general power to purchase railroads did not imply a grant of power to railroad companies within the state to sell their roads to it. See further the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800, where this point is treated.

5. **Authority to Contract as Authority to Lease.** — In St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, it was held that a statute authorizing certain corporations (railroad companies) to contract with each other in any manner not inconsistent with the scope, object, and purpose of their creation and management, authorized one company to lease its entire property to another.

6. State *v.* Chicago, etc., R. Co., 89 Mo. 523; Southern Pac. R. Co. *v.* Esquibel, 4 N. Mex. 337, 36 Am. & Eng. R. Cas. 410.

7. **Deed of Trust.** — The grant of authority to mortgage property includes the power to make a deed of trust in the nature of a mortgage. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 4 Biss. (U. S.) 35.

Power of Sale. — The authority to mortgage is to be understood as authorizing the ordinary power of sale to be inserted in the mortgage. Joy *v.* Jackson, etc., Plank-road Co., 11 Mich. 155; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

8. McAllister *v.* Plant, 54 Miss. 106, 17 Am. Ry. Rep. 389. See also Gordon *v.* Preston, 1 Watts (Pa.) 388, 26 Am. Dec. 75; Watts's Appeal, 78 Pa. St. 370; Willamette Mfg. Co. *v.* British Columbia Bank, 119 U. S. 191; Bickford *v.* Grand Junction R. Co., 1 Can. Sup. Ct. Rep. 696; Platt *v.* Union Pac. R. Co., 99 U. S. 48.

9. A provision in a general act for the organization of corporations, that a corporation organized under it may authorize its own dissolution and the disposition of its property thereafter, does not authorize such a corporation, not dissolving but continuing in existence, to dispose of all its corporate franchises and powers by lease. Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 2.

Nor does a provision in a general act for organizing corporations for a *quasi*-public purpose, that a corporation organized under it shall not lease its property, imply that without such a restraint it could make such a lease. Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 2.

The Use of the Words "Successors or Assigns" or "Lessees" in a proviso attached to a statute making specific grants to a corporation does not necessarily imply that the corporation can transfer all its property and its franchises to another corporation, to be exercised by the latter. Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 2; Thomas *v.* Millville, etc., R. Co., 101 U. S. 71.

Purpose of Mortgage and Debts Secured. — A corporation given authority to mortgage its

(c) **Property and Rights Included.** — If a charter or statute authorizes a corporation to sell, lease, or mortgage its franchises and rights, it impliedly gives the power to sell, lease, or mortgage everything necessary to the enjoyment of the franchises.[1] But a grant of authority to a corporation to sell, lease, or mortgage its "property" merely, gives it no authority to sell, lease, or mortgage its franchises.[2] Other decisions are shown in the note below.[3]

(d) **Effect of Authorized Conveyance or Mortgage.** — An authorized conveyance or mortgage of the franchises, special privileges, and property of a corporation transfers the property and special privileges, other than the franchise to be a corporation, to the grantee or to the purchaser at a foreclosure sale under a mortgage; but such grantee or purchaser is not *ipso facto* given corporate

property for the purpose of carrying on its business is not prohibited from executing such a mortgage to secure the payment of money to be thereafter advanced. Jones *v.* New York Guaranty, etc., Co., 101 U. S. 622.

Under a statute providing that a turnpike company might borrow money to be used in the construction of its road or in paying for materials purchased for its construction, and mortgage its road to secure the payment of the money so borrowed, it was held that the company might mortgage its road to secure the payment of money due a contractor for constructing the road. Greensburgh, etc., Turnpike Co. *v.* McCormick, 45 Ind. 239.

So where a statute authorized the trustees of a corporation to mortgage its property for the purpose of securing purchase money and erecting a certain building, and the trustees mortgaged to persons to secure their claims for work and materials upon such building, it was held that the mortgages were valid, as the general object of the statute was to be looked to and not its strict letter. Miller *v.* Chance, 3 Edw. Ch. (N. Y.) 399.

To Whom Sale May Be Made. — A statute authorizing corporations to sell their property to other corporations does not authorize a sale to a person about to form a company. Bird *v.* Bird's Patent Deodorizing, etc., Co., L. R. 9 Ch. 358, 30 L. T. N. S. 281, 43 L. J. Ch. 399.

1. Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729.

2. Pullan *v.* Cincinnati, etc., Air-Line R. Co., 4 Biss. (U. S.) 35; Butler *v.* Rahm, 46 Md. 541; Randolph *v.* Wilmington, etc., R. Co., 11 Phila. (Pa.) 502. See Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13.

Authority Conferred upon a Telegraph Company to Lease Its Lines does not give authority to lease its franchise. Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327.

Plank-road Companies. — In Joy *v.* Jackson, etc., Plank-road Co., 11 Mich. 155, it was held that under a special act empowering a plank-road company to "mortgage the road and other property of the company" the franchise of taking toll was to be understood as included with the road and its fixtures; but that the company could not under this power mortgage any franchise essentially corporate in its character, and which could not be enjoyed by a natural person.

3. **Mortgages in General.** — In Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203, it was held that a railroad company, authorized by its charter to borrow money and to execute and deliver "such securities in amount and kind" as might be deemed expedient to secure such loans, might lawfully mortgage its entire road, with its franchises and all its property, including all future acquisitions for the use of the road.

"**Property.**" — In Robert's, etc., Appeal, 60 Pa. St. 400, it was held, on a construction of the language of a particular statute, that in authorizing mining companies to mortgage their "property" for loans, the legislature did not intend to authorize them to mortgage chattels, but only real estate. Ordinarily, however, the term "property" must be construed to include both real and personal property.

After-Acquired Property and future earnings may be mortgaged by a railroad or other *quasi*-public corporation under authority to mortgage all its franchises, rights, privileges, and property.

United States. — Shaw *v.* Bill, 95 U. S. 10; Pennock *v.* Coe, 23 How. (U. S.) 117.

Louisiana. — Boykin *v.* Shaffer, 13 La. Ann. 129.

New Hampshire. — See Pierce *v.* Emery, 32 N. H. 484.

Ohio. — Ludlow *v.* Hurd, 1 Disney (Ohio) 552.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596.

Wisconsin. — Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am. Rep. 203.

Authority to Sell or Lease Completed Works, as a completed railroad, for example, does not authorize the transfer of a franchise to construct works, as to build a railroad. Wood *v.* Bedford, etc., R. Co., 8 Phila. (Pa.) 94; Clarke *v.* Omaha, etc., R. Co., 4 Neb. 458, 19 Am. Ry. Rep. 423.

Sale of Part under Authority to Sell All. — It has been held that a statute giving a corporation, as a railroad, turnpike, or plank-road company, the right to sell and convey its franchise, road, property, etc., does not authorize a sale and conveyance of a part only of the road constructed and operated. Snell *v.* Chicago, 133 Ill. 413; Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 108.

But in Joy *v.* Jackson, etc., Plank-road Co., 11 Mich. 155, it was held that under an authority to mortgage its whole road, a plank-road company might give a valid mortgage on any specific portion of it, upon which separate tolls could lawfully be collected. And see Greensburgh, etc., Turnpike Co. *v.* McCormick, 45 Ind. 239. See also Upson County R. Co. *v.* Sharman, 37 Ga. 644.

existence in place of the vendor or mortgagor.[1] The legislature, however, may make such provision in the charter or statute granting the power to sell or mortgage, as to confer the franchise of being a corporation upon the purchaser.[2]

(e) **Conveyance, Lease, or Mortgage, Unauthorized in Part.** — The partial invalidity of a conveyance, lease, or mortgage of the franchise and property of a corporation does not necessarily render the whole invalid.[3]

m. PRESUMPTION OF POWER. — A conveyance by a corporation having the power under some circumstances to execute the same, whether it be an absolute conveyance, mortgage, or lease, will be presumed to be valid until the contrary is made to appear.[4]

7. Powers with Respect to Contracts — *a.* IN GENERAL. — Corporations are frequently, if not generally, expressly authorized to make all such contracts as may be necessary to accomplish the objects for which they were created. But an express grant of power in the charter is not always necessary. Under many circumstances it is to be implied. Corporations are usually created for limited and specific purposes, and their implied power to contract depends upon what these purposes are.[5]

Contracts in Anticipation of Legislative Authority. — Contracts of corporations to do something, at the time not authorized, but conditioned upon obtaining legislative authority therefor, are valid, and their stipulations become enforceable after the passage of the act.[6]

1. Sale of Franchise. — In Snell *v.* Chicago, 133 Ill. 413, it was held that, although the word "franchise" in the law is broad enough to include the franchise to be a corporation, with the power of perpetual succession, still, where a corporation is expressly authorized to sell and convey its franchise, immunities, and property, and a sale is made as directed, the purchaser is not thereby made a corporation under the old charter, but merely vested with the right to organize as a corporation. The franchise of becoming and being a corporation, it was said, is in its nature uncommunicable by the act of the parties, and incapable of passing by assignment, or by the law of descent.

Mortgage of Franchise. — So it has been held that a mortgage of the charter of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation; but if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation, subject to laws existing at the time of the reorganization. Memphis, etc., R. Co. *v.* Railroad Com'rs, 112 U. S. 610. See also Meyer *v.* Johnston, 53 Ala. 237; Wellsborough, etc., Plank Road Co. *v.* Griffin, 57 Pa. St. 417; Memphis Water Co. *v.* Magens, 15 Lea (Tenn.) 37.

As to Reorganization by purchasers at foreclosure sale under a mortgage by a corporation, see the title REORGANIZATION OF CORPORATIONS.

2. State *v.* Sherman, 22 Ohio St. 411. In this case it was held that where a railroad company, in pursuance of an act of the legislature, transfers or conveys its franchise to be a corporation to others, the transaction, in legal effect, is a surrender or abandonment of its charter by the corporation, and a grant by the legislature of a similar charter to the transferees or purchasers. See also Com. *v.* Central Pass. R. Co., 52 Pa. St. 506; Stephenson *v.* Texas, etc., R. Co., 42 Tex. 163; Acres *v.* Moyne, 59 Tex. 623.

3. Illustrations of Partial Invalidity. — Thus a conveyance or mortgage of property otherwise good is not invalid because of an unauthorized attempt in the same instrument to convey, lease, or mortgage the franchise, or property which the corporation is without authority to alienate. The instrument is invalid only as to the latter. Butler *v.* Rahm, 46 Md. 541; Hendee *v.* Pinkerton, 14 Allen (Mass.) 381; Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43; Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13.

Nor is a mortgage invalid as to debts for which the corporation was authorized to give the same, because it was made to cover also debts for which there was no authority to execute it. Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 51.

4. Presumption of Power to Alienate. — McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Blake *v.* Holley, 14 Ind. 383; State University *v.* Detroit Young Men's Soc., 12 Mich. 138; Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466, De Graff *v.* American Linen Thread Co., 21 N. Y. 124; Wood *v.* Wellington, 30 N. Y. 218; Brownwood Ice Co. *v.* York Mfg. Co., (Tex. Civ. App. 1896) 37 S. W. Rep. 339.

5. See Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

6. Contracts in Anticipation of Legislative Authority. — New Haven, etc., Co. *v.* Hayden, 107 Mass. 525; Portage County *v.* Wisconsin Cent. R. Co., 121 Mass. 460.

In Scottish North Eastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 382, a railroad company had bound itself to purchase land, provided authority should be given to it by Parliament. Lord Wensleydale, in rendering judgment, observed: "No objection can, I think, be made on the *ultra vires* doctrine to a contract by a company who wish to alter one of the

b. When the Power to Contract Will Be Implied — **General Statement.** — It is a well-settled principle of corporation law, that a corporation, except in so far as it may be restricted by its charter, has the same power as an individual to enter into any contract that may be necessary or usual in the course of the business for which it was created, or that is reasonably incident thereto. This power is always implied in the absence of a positive restriction in its charter.[1]

branches of their railroad, and are about to apply to Parliament for authority to do so, engaging to purchase land from a neighboring proprietor, if they should obtain their act."

In Norwich *v.* Norfolk R. Co., 4 El. & Bl. 410, 82 E. C. L. 396, Mr. Justice Erle says: "Although the works contracted for would have been unlawful without an Act of Parliament, still, if the parties intended to obtain the act before the works were done, they would not intend to violate the law when the contract was made, nor violate it by doing the works according to the act."

So, in Taylor *v.* Chichester, etc., R. Co., L. R. 4 H. L. 628, it was held that "an agreement to arise and take effect on the passing of a bill then pending in Parliament, is to be regarded, by virtue of that stipulation, as if it had been *de facto* made after the passing of the bill." And in Sussex R. Co. *v.* Morris, etc., R. Co., 19 N. J. Eq. 13, where a railroad company had made a contract relating to business "upon any future extension or branches," it was held that branches not then authorized, but subsequently allowed by the legislature, were included.

1. Implied Power to Contract — *England.* — London, etc., R. Co. *v.* Price, 11 Q. B. Div. 485, 13 Am. & Eng. R. Cas. 128; Burnley Equitable Co-operative, etc., Soc. *v.* Casson, (1891) 1 Q. B. 75, 32 Am. & Eng. R. Corp. Cas. 30; Simpson *v.* Westminster Palace Hotel Co., 8 H. L. Cas. 712; *In re* British, etc., Cork Co., L. R. 1 Eq. 231; Murray *v.* Scott, L. R. 9 App. 519; Atty.-Gen. *v.* Great Eastern R. Co., L. R. 5 App. 473; Bateman *v.* Ashton-under-Lyne, 27 L. J. Exch. 458, 3 H. & N. 323; Norwich *v.* Norfolk R. Co., 4 El. & Bl. 397, 82 E. C. L. 397, 3 C. L. R. 519, 1 Jur. N. S. 344, 24 L. J. Q. B. 105.

United States. — Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371.

Alabama. — Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 73.

California. — Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620.

Colorado. — Spangler *v.* Butterfield, 6 Colo. 356.

Illinois. — Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234; Ward *v.* Johnson, 95 Ill. 215.

Indiana. — Wright *v.* Hughes, 119 Ind. 324, 12 Am. St. Rep. 412.

Kansas. — Fulton *v.* Sterling Land, etc., Co., 47 Kan. 621.

Kentucky. — Muir *v.* Louisville, etc., Canal Co., 8 Dana (Ky.) 161; Frankfort Bridge Co. *v.* Frankfort, 18 B. Mon. (Ky.) 41.

Maine. — Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Maryland. — Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476.

Massachusetts. — Morville *v.* American Tract Soc., 123 Mass. 137, 25 Am. Rep. 40.

Minnesota. — Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

Mississippi. — Prairie Lodge No. 87 *v.* Smith, 58 Miss. 301; Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. — Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519, 5 Am. & Eng. R. Cas. 1; Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212; Ashenbroedel Club *v.* Finlay, 53 Mo. App. 256.

Nevada. — Sutro Tunnel Co. *v.* Segregated Belcher Min. Co., 19 Nev. 121.

New Jersey. — First Presb. Church *v.* National State Bank, 57 N. J. L. 27; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 35 Am. & Eng. Corp. Cas. 388.

New York. — Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; Moss *v.* Averell, 10 N. Y. 449; Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269; Legrand *v.* Manhattan Mercantile Assoc., 80 N. Y. 638, *affirming* 44 N. Y. Super. Ct. 562; Sistare *v.* Best, 88 N. Y. 527; Holmes *v.* Willard, 125 N. Y. 75, *affirming* (Supreme Ct.) 5 N. Y. Supp. 610; Ellis *v.* Howe Mach. Co., 9 Daly (N. Y.) 78; Pendleton *v.* Waterloo Baptist Church, 49 Hun (N. Y.) 596; McCraith *v.* National Mohawk Valley Bank, 104 N. Y. 414; Clark *v.* Farmers', etc., Mfg. Co., 15 Wend. (N. Y.) 256.

North Dakota. — Anderson *v.* Grand Forks First Nat. Bank, 5 N. Dak. 451.

Ohio. — Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330; Cleveland, etc., R. Co. *v.* Himrod Furnace Co., 37 Ohio St. 321, 41 Am. Rep. 509.

Oregon. — Odd Fellows' Assoc. *v.* Hegele, 24 Oregon 16; Killingsworth *v.* Portland Trust Co., 18 Oregon 351, 17 Am. St. Rep. 737, 32 Am. & Eng. Corp. Cas. 33.

Pennsylvania. — Hand *v.* Clearfield Coal Co. 143 Pa. St. 408, 48 Leg. Int. (Pa.) 442, 29 W. N. C. (Pa.) 9; Dunlap *v.* Water Com'rs, 151 Pa. St. 481, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 242.

Texas. — Heady *v.* Bexar Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. Rep. 468. See Steger *v.* Davis, 8 Tex. Civ. App. 23.

Virginia. — Norfolk, etc., R. Co. *v.* Shippers Compress Co., 83 Va. 272.

Wisconsin. — North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31; Winterfield *v.* Cream Brewing Co., (Wis. 1897) 71 N. W. Rep. 101, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 242.

Statements of the Rule. — "In deciding * * * whether a corporation can make a particular contract," said Judge Miller, in Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 590, 20

Borrowing Money and Giving Securities. — Thus a corporation has the implied power to borrow money when it is necessary in the transaction of its business.[1] And, as an incident to such power, it has the further power to give the ordinary securities therefor, as bonds,[2] negotiable bills and notes,[3] and mortgages.[4]

Loaning Money and Taking Securities. — In like manner a corporation may have power to loan money.[5] And if it has such power, it may take the ordinary securities for the loan.[6]

Powers Implied from Power to Own or Deal in Property. — So, if a corporation has the power to own or deal in property, real or personal, it has the power to make all contracts necessary for its preservation and enjoyment,[7] or the enhancement of its value.[8]

Powers Incident to Power to Manufacture or Trade. — A corporation authorized by its charter to engage in trade has, as an incident, the power to make any contract that is necessary or usual in the particular business.[9]

Advertising. — A corporation has implied power to advertise when it is neces-

Am. Rep. 95, "it must be considered, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfil the purpose of its existence; or whether the contract is entirely foreign to that purpose."

"In the absence of charter restrictions, the power of a corporation to make contracts is usually measured by the general objects and purposes of the incorporation, and it is always presumed that any proper contract may be made whose scope and tendency are manifestly to further the design and purposes of its creation." Spangler *v.* Butterfield, 6 Colo. 364.

1. Borrowing Money. — See *infra*, this section, *Powers with Respect to Particular Contracts — Borrowing Money.*

2. Bonds. — See *infra*, this section, *Powers with Respect to Particular Contracts — Execution and Issue of Bonds.*

3. Negotiable Instruments. — See *infra*, this section, *Powers with Respect to Particular Contracts — Issue of Negotiable Instruments Generally.*

4. Mortgages. — See *supra*, this section, *Power to Alienate Property.*

5. Loaning Money. — See *infra*, this section, *Powers with Respect to Particular Contracts — Loaning Money.*

6. Taking Securities. — See *infra*, this section, *Powers with Respect to Particular Contracts — Taking and Enforcing Securities.*

7. Power Implied from Power to Own Building. — A national bank, or any other corporation, empowered by its charter to provide the real estate necessary for its accommodation in the transaction of its business, may make a contract to prevent the erection of buildings on adjacent land, and thereby secure the free entrance of light and air into its building. First Presb. Church *v.* National State Bank, 57 N. J. L. 27.

And a corporation authorized to hold real estate may contract for repairs to buildings thereon. Ashenbroedel Club *v.* Finlay, 53 Mo. App. 256.

Mining Companies. — A mining corporation may contract to advance to another mining corporation a specified sum of money for the construction of a tunnel to drain its own mine. Sutro Tunnel Co. *v.* Segregated Belcher Min. Co., 19 Nev. 121.

Railroad Companies. — A railroad company which has carried coal for coal merchants and delivered it at their wharf adjoining a siding at one of the company's stations, may allow the merchants to weigh out the coal to customers by a machine belonging to it and placed in its station yard, and charge therefor. London, etc., R. Co. *v.* Price, 11 Q. B. Div. 485, 13 Am. & Eng. R. Cas. 128.

8. Land and Town Site Companies. — A town company, organized to purchase lands, survey and plat town-sites, and sell town lots and other lands, may agree that if a person will remove a bank, a barn, and a restaurant located elsewhere to the town site, it will convey to him certain lots in the town and pay him a sum of money, as this tends directly to enhance the value of the remaining property of the corporation. Sherman Center Town Co. *v.* Russell, 46 Kan. 382.

And a land company authorized to purchase, sell, and improve lands, may contract to build a college on part of its lands, as this would tend directly to improve the land and enhance the value of the remainder of it. Fulton *v.* Sterling Land, etc., Co., 47 Kan. 621. See *infra*, this section, *Powers with Respect to Particular Contracts — Subscriptions to Other Enterprises.*

9. Powers Implied from Power to Manufacture and Trade. — A corporation organized to manufacture and sell a certain article may assume the filling of a contract made with another for the same article. Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244.

And a corporation organized "for the purpose of raising and smelting lead ore," may purchase property, with its appurtenances, necessary to carry on the business of smelting, and may assume a contract of the vendors for carrying the ore to market. Moss *v.* Averell, 10 N. Y. 449.

Contract of Apprenticeship. — A trading or manufacturing corporation may make a contract of apprenticeship. Burnley Equitable Co-operative, etc., Soc. *v.* Casson, (1891) 1 Q. B. 75.

sary or expedient in accomplishing its legitimate objects.[1]

Offer of Reward. — And a corporation, like a natural person, may offer a reward to the public generally for the performance of services for which it has a right to contract.[2]

c. When the Power to Contract Will Not Be Implied — **General Doctrine.** — But a corporation has no implied power to enter into a contract which is not within the purposes for which it was created. It can make no contract unless it be either expressly authorized by its charter, or reasonably necessary or proper in order to enable it to fulfil the purpose of its existence and carry on its authorized business.[3]

1. Advertising. — It is not *ultra vires* for a corporation organized for the purpose of carrying out a public enterprise, as the building of a bridge over a river, to contract with the proprietor of a newspaper to have published therein statistical articles and communications favoring the project, and showing the value of the enterprise as an investment. Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212.

2. Offer of Reward. — A corporation, for example, may offer a reward for the detection of persons committing offenses against its property. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 37 Am. & Eng. R. Cas. 282. And see American Exp. Co. *v.* Patterson, 73 Ind. 430; Norwood, etc., Co. *v.* Andrews, 71 Miss. 641; Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

3. Ultra Vires Contracts in General — *England.* — Tomkinson *v.* South-Eastern R. Co., 35 Ch. Div. 677; Colman *v.* Eastern Counties R. Co., 10 Beav. 1; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775; Ashbury Railway Carriage, etc., Co. *v.* Riche, L. R. 7 H. L. 653, *reversing* L. R. 9 Exch. 224; Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113, 3 Jur. N. S. 775, 26 L. J. Ch. 482; Macgregor *v.* Dover, etc., R. Co., 18 Q. B. 618, 83 E. C. L. 618, 22 L. J. Q. B. 69; Brooks *v.* Blackburn, etc., Ben. Bldg. Soc., L. R. 9 App. 857; Matter of Worcester Corn Exch. Co., 3 De G. M. & G. 180; Norwich *v.* Norfolk R. Co., 4 El. & Bl. 397, 82 E. C. L. 397, 3 C. L. R. 519, 1 Jur. N. S. 344, 24 L. J. Q. B. 105.

Canada. — Lyman *v.* Upper Canada Bank, 8 U. C. Q. B. 354.

United States. — Safety Insulated Wire, etc., Co. *v.* Baltimore, 74 Fed. Rep. 363; Oregon R., etc., Co. *v.* Oregonian R. Co., 130 U. S. 1; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 587, *per* Chief Justice Taney.

Alabama. — Simmons *v.* Troy Iron Works, 92 Ala. 427; Chewacla Lime Works *v.* Dismukes, 87 Ala. 344; Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558; Chambers *v.* Falkner, 65 Ala. 448; Grand Lodge *v.* Waddill, 36 Ala. 313.

California. — Bates *v.* Coronado Beach Co., 109 Cal. 160.

Colorado. — Spangler *v.* Butterfield, 6 Colo. 364.

Connecticut. — New-York Firemen's Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100; Hood *v.* New York, etc., R. Co., 22 Conn. 502, 23 Conn. 609.

Florida. — State *v.* Florida Cent. R. Co., 15 Fla. 690.

Georgia. — Harriman *v.* First Bryan Baptist Church, 63 Ga. 186; Screven Hose Co. *v.* Philpot, 53 Ga. 625.

Illinois. — Durkee *v.* People, 53 Ill. App. 396, *affirmed* 155 Ill. 354.

Indiana. — Brooklyn Gravel Road Co. *v.* Slaughter, 33 Ind. 185.

Iowa. — Lucas *v.* White Line Transfer Co., 70 Iowa 541, 59 Am. Rep. 449; Twiss *v.* Guaranty L. Assoc., 87 Iowa 733, 43 Am. St. Rep. 418.

Kansas. — Getty *v.* C. R. Barnes Milling Co., 40 Kan. 281.

Kentucky. — Lithgow Mfg. Co. *v.* Fitch, 5 Ky. L. Rep. 604.

Maine. — Bailey *v.* Methodist Episcopal Church, 71 Me. 472; Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9; Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256; Bangor Boom Corp. *v.* Whiting, 29 Me. 123.

Maryland. — Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 595, 20 Am. Rep. 95; Maryland Hospital *v.* Foreman, 29 Md. 524; Abbott *v.* Baltimore, etc., Steam Packet Co., 1 Md. Ch. 542; Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248.

Massachusetts. — Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543; Dresser *v.* Traders' Nat. Bank, 165 Mass. 120.

Michigan. — Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352; State Bank *v.* Niles, 1 Dougl. (Mich.) 401; Orr *v.* Lacey, 2 Dougl. (Mich.) 230.

Minnesota. — Rochester Ins. Co. *v.* Martin, 13 Minn. 59; Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 23 Am. Rep. 683.

Mississippi. — Littlewort *v.* Davis, 50 Miss. 403; Mobile, etc., R. Co. *v.* Franks, 41 Miss. 494; Bacon *v.* Mississippi Ins. Co., 31 Miss. 116; Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. — Blair *v.* Perpetual Ins. Co., 10 Mo. 559; Bowman Dairy Co. *v.* Mooney, 41 Mo. App. 665.

New Hampshire. — Downing *v.* Mount Washington Road Co., 40 N. H. 230; Hall *v.* Paris, 59 N. H. 71; Greeley *v.* Nashua Sav. Bank, 63 N. H. 145.

New Jersey. — Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133.

New York. — People *v.* Campbell, 144 N. Y. 166; Colles *v.* Trow City Directory Co., 11 Hun (N. Y.) 397; Schurr *v.* New York, etc., Invest. Co. (C. Pl.) 18 N. Y. Supp. 454, *affirming* (City Ct.) 16 N. Y. Supp. 210; Nassau Bank *v.* Jones, 95 N. Y. 115; Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105; Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482; Brisay *v.*

Contracts Foreign to Manufacturing, Trading, Banking, etc. — No manufacturing or trading company, whatever may be the nature of the business authorized by its charter, can lawfully enter into a contract that is not necessary or usual in its particular business.[1]

Suretyship, Guaranty, and Accommodation Paper. — Ordinarily a corporation has no power to enter into contracts of suretyship or guaranty, or to issue or indorse commercial paper for the accommodation of others, as these contracts are

Star Corp., 13 Misc. Rep. (N. Y. Supreme Ct.) 349.

North Carolina. — Wiswall *v.* Greenville, etc., Plank Road Co., 3 Jones Eq. (56 N. Car.) 183.

Ohio. — Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 275, 43 Am. Rep. 425; Simpson *v.* Greenfield Bldg., etc., Assoc., 38 Ohio St. 349.

Pennsylvania. — McMasters *v.* Reed, 1 Grant's Cas. (Pa.) 36; Pittsburg, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126; Pittsburgh, etc., R. Co. *v.* Allegheny County, 79 Pa. St. 210.

Tennessee. — Memphis *v.* Memphis City Bank, 91 Tenn. 574; Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167; Marble Co. *v.* Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71; Memphis, etc., Elev. Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703.

Texas. — Northside R. Co. *v.* Worthington, 88 Tex. 562.

Vermont. — Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

Wisconsin. — Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank-Road Co., 7 Wis. 59; Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669; Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, 19 Am. Rep. 781; Dietrich *v.* Madison Relief Assoc., 45 Wis. 79; Luthe *v.* Farmers' Mut. F. Ins. Co., 55 Wis. 543; Kennan *v.* Rundle, 81 Wis. 212.

Statements of the Rule. — "A corporation and an individual do not stand upon the same footing in regard to the right of contracting. The latter may make all contracts which in the eye of the law are not inconsistent with the interests of society; whereas the former, being created for a specific purpose, must look to its charter, which is, as it were, the law of its nature, to ascertain the extent of its capacity. It can not only make no contracts forbidden by its charter, but it can only make those which are necessary to effectuate the purposes of its creation." Blair *v.* Perpetual Ins. Co., 10 Mo. 565.

"A corporation," said Chief Justice Gray, in Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543, "has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation."

Whether a Contract Is "Essential" to the transaction of its ordinary affairs, or for the purposes of the corporation, within the meaning of a statute, is to be determined by the corporation or those to whom the management of its affairs is intrusted. If it is within the apparent scope of the organization, the fact that the contract has been entered into by it or by its representative is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect. Bates *v.* Coronado Beach Co., 109 Cal. 160.

1. Manufacturing and Trading Companies Generally. — A corporation for the "manufacture, repairing, buying, selling, and operating machinery of all kinds, and all such other business pertaining or belonging to machine shops or foundries," cannot make a contract to furnish a person with ice weekly. Simmons *v.* Troy Iron Works, 92 Ala. 427.

Banking Companies. — A savings bank not expressly authorized cannot receive bonds or other property for safe keeping. Greeley *v.* Nashua Sav. Bank, 63 N. H. 145.

A contract whereby a person agrees to furnish a customer to a national bank, in consideration of which and of the advantage and profit thereby to accrue to the bank the latter promises to turn over to him a certain amount of fire insurance which would be to his profit, is not within the power of the bank. Dresser *v.* Traders' Nat. Bank, 165 Mass. 120.

Insurance Companies. — A corporation authorized to insure against particular risks only cannot insure against other risks. Andrews *v.* Union Mut. F. Ins. Co., 37 Me. 256.

Boom Companies. — A corporation authorized by its charter to boom lumber, and receive toll therefor, cannot receive toll for driving lumber, that business not being within the scope of its authority. Bangor Boom Corp. *v.* Whiting, 29 Me. 123.

Land and Investment Companies. — A corporation for the purpose of "purchasing, taking, holding, possessing, selling, improving, and leasing real estate and buildings, manufacture, lease, sale, and use of building stone, lumber, and other building materials," cannot contract to pay for organizing stock companies to locate upon its land. Schurr *v.* New York, etc., Invest. Co., (C. Pl.) 18 N. Y. Supp. 454, *affirming* (City Ct.) 16 N. Y. Supp. 210.

For Further Illustrations of this principle, see *supra*, this title, *Engaging in Different Business*.

seldom necessary or usual in conducting its business.[1]

Contracts of Partnership. — The same is generally true of contracts of partnership, either with another corporation or with a natural person.[2]

Excursions for Pleasure or Profit. — Ordinarily contracts for excursions for pleasure or profit are not within the implied powers of a corporation.[3]

d. BENEFIT TO CORPORATION FROM CONTRACT. — The mere fact that a particular contract will be a benefit to the corporation, and will greatly increase its business and profits, does not authorize it to make the same, if it is not within the scope of its authorized business.[4]

e. CONTRACTS WITH MEMBERS OR STOCKHOLDERS. — A corporation and its members or stockholders are separate and distinct persons in the law, and there is nothing to prevent it from entering into contracts with them,[5] unless, as is sometimes the case, there is an express prohibition in the charter.[6]

f. CONTRACTS WITH OFFICERS. — The same is true of a corporation and its directors or other officers. They are separate and distinct persons, and may contract with each other. There is this difference, however: because of the *quasi*-trust relation existing between a corporation and the officers charged with the management of its affairs and the custody and care of its property, the contract may be avoided by the corporation if it is not entirely free from fraud and perfectly fair.[7]

g. UNLAWFUL AGREEMENTS — (1) *In General.* — As a general rule a corporation stands upon exactly the same footing as a natural person with respect to contracts in violation of the common law or of the general statutory law. Unless expressly authorized, it can make no contract which would be unlawful, in the sense of illegal, if made by a natural person.[8]

(2) *Restraint of Trade, and Monopolies.* — Thus a corporation cannot make a valid contract which, if it were made by a natural person, would be illegal and void as in restraint of trade, or as tending to create a monopoly or prevent competition.[9]

(3) *Contracts Constituting an Abandonment of Duties to the Public.* — A pri-

1. Suretyship, Guaranty, etc. — See *infra*, this section, *Powers with Respect to Particular Contracts — Contracts of Guaranty and Suretyship — Issue of Accommodation Paper.*

2. Partnership. — See *infra*, this section, *Powers with Respect to Particular Contracts — Contracts of Partnership and Joint Contracts.*

3. Contracts for Excursions. — A company created for the purpose of keeping a hose carriage and hose with which to extinguish fires cannot contract with the owners of a steamboat, for the use of the boat to convey the members of the company and their friends on an excursion of pleasure and profit. Screven Hose Co. *v.* Philpot, 53 Ga. 625.

Nor can a religious corporation contract for a steamer for a public excursion, or engage in selling tickets therefor. Harriman *v.* First Bryan Baptist Church, 63 Ga. 186.

4. Benefit Not the Test. — Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Harriman *v.* First Bryan Baptist Church, 63 Ga. 186; Central R. Co. *v.* Collins, 40 Ga. 582; Dresser *v.* Traders' Nat. Bank, 165 Mass. 120; Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543; People *v.* Campbell, 144 N. Y. 166; Schurr *v.* New York, etc., Invest. Co. (C. Pl.) 18 N. Y. Supp. 454, *affirming* (City Ct.) 16 N. Y. Supp. 210. See *supra*, this title, *Benefit to Corporation from Contract.*

5. International Wrecking, etc., Co. *v.* McMorran, 73 Mich. 467; Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

6. See A. C. Nellis Co. *v.* Nellis, 62 Hun (N. Y.) 63.

7. Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

8. Lobbying Contracts. — Chippewa Valley R. Co. *v.* Chicago, etc., R. Co., 75 Wis. 224.

Agreement to Withdraw Opposition to Bill in Parliament. — Scottish North-eastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 382, 5 Jur. N. S. 607. See *infra*, this title, *Powers with Respect to Application to the Legislature.*

9. Restraint of Trade, and Monopolies. — Oliver *v.* Gilmore, 52 Fed. Rep. 562; State *v.* Nebraska Distilling Co., 29 Neb. 700. See Manchester, etc., R. Co. *v.* Concord R. Corp., 66 N. H. 100; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 60 Am. Rep. 464; Leslie *v.* Lorillard, 110 N. Y. 519, *reversing* 40 Hun (N. Y.) 392. *Compare* Benedict *v.* Western Union Tel. Co., 9 Abb. N. Cas. (N. Y. Supreme Ct.) 214.

A corporation authorized by its charter to engage in manufacturing and trading cannot buy up substantially all the factories or plants used in such business in the country, so as to acquire a monopoly of the business. Such a transaction, if not *ultra vires* because beyond the scope of its authorized business, would be unlawful as in restraint of trade and contrary to public policy. Distilling, etc., Co. *v.* People, 156 Ill. 448.

vate corporation whose business is of a public character, and which owes peculiar duties to the public, as railroad companies, steamship companies, water companies, gas-light companies, etc., can make no contract which will have the effect of disabling it, even partially, from performing such duties. Such a contract is contrary to public policy and void.[1] To this extent corporations are not on the same footing as natural persons with respect to contracts in partial restraint of trade.[2]

h. EXPRESS PROHIBITION OR LIMITATION. — Of course, a corporation has no power to enter into contracts that are expressly prohibited, nor to contract in violation of charter or statutory limitations. There are principles of law upon which, under certain circumstances, corporations may be held liable or may be permitted to recover on such contracts, but the contract, if prohibited is nevertheless *ultra vires*, and generally it is void.[3]

Amount of Obligations. — A limitation as to the amount of corporate obligations must be observed.[4]

i. FORM AND MANNER OF ENTERING INTO CONTRACTS — (1) *In the Case of Express Requirements.* — With respect to the manner of entering into contracts the general rule is, that a corporation must contract in the manner and with the formalities, if any, prescribed by its charter, for the legislature, in

1. Abandonment of Duty to Public. — Ayr Harbour Trustees *v.* Oswald, L. R. 8 App. 623; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124; Doane *v.* Chicago City R. Co., 51 Ill. App. 353; Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 45 Am. Rep. 512. *Compare* St. Louis *v.* St. Louis Gas-Light Co., 5 Mo. App. 484, 70 Mo. 69. See also *supra*, this section, *Power to Alienate Property — Alienation by Quasi-Public Corporations.*

Illustrations — Railroad Companies. — In Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489, it was held that the duties which railroad corporations owe to the public, and which are the considerations upon which their privileges are conferred, cannot be avoided by neglect, by refusal, or by agreement with other persons or corporations, and that any contract to prevent the faithful discharge of any such duties will be against public policy and void.

In Thomas *v.* West Jersey R. Co., 101 U. S. 83, it is said that: "Where a corporation, like a railroad company, has granted to it by charter a franchise intended, in large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy." And see Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 35 Am. & Eng. R. Cas. 94.

A Gas Company to which is granted by its charter the privilege of manufacturing and supplying a city and its inhabitants with gas for illuminating purposes, cannot by contract with another company disable itself from the performance of its duty to the public, and transfer absolutely its right to furnish gas to any part of the city. Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124.

A Street Railroad Company cannot, by contract with an abutting property holder, agree, in consideration of his consent to the laying of a track in the street, not to lay at any time in the future an additional track, where the interests of the public may at some time require another track. Doane *v.* Chicago City R. Co., 51 Ill. App. 353.

2. Partial Restraint of Trade. — The general rule that contracts in partial restraint are not invalid, does not apply to corporations engaged in a public business in which the public are interested. Such corporations cannot be allowed, by contract, to disable themselves, even partially, in the discharge of duties of a public nature, the performance of which is beneficial to the public. Any private contract by them which is injurious or prejudicial to the public interests, is void on the ground of public policy. Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124.

See generally the title ILLEGAL CONTRACTS.

3. Contracts Expressly Prohibited. — Rendall *v.* Crystal Palace Co., 4 Kay & J. 326, 27 L. J. Ch. 397; *Re* Pooley Hall Colliery Co., 18 W. R. 201, 21 L. T. N. S. 690; Canton Masonic Mut. Benev. Soc. *v.* Rockhold, 26 Ill. App. 141, *affirmed* (Ill. 1889) 19 N. E. Rep. 710, 129 Ill. 440; Plummer *v.* Penobscot Lumbering Assoc., 67 Me. 363; Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100. See *infra*, this section, *Form and Manner of Entering into Contracts.* And as to particular contracts, see *infra*, *Powers with Respect to Particular Contracts.*

4. Guaranty of Interest Coupons. — A statute providing that the obligations of a corporation shall not be for less than one hundred dollars each is not violated by a guaranty to pay the interest upon a bond as specified in the interest coupons thereto attached, each coupon being for less than one hundred dollars, as it is a guaranty of all the interest to become due on the bonds, and not a separate promise

granting the franchise to be a corporation and to make contracts, has the right to prescribe the conditions upon which the franchise and power shall be exercised.[1]

(2) *In the Absence of Express Requirements.* — But subject to the exceptions shown in the following sections, if there are no express requirements on the subject in the charter, or in some statute applicable to the corporation, it may contract, and thereby acquire contractual rights or incur contractual liabilities in the same manner and to the same extent as a natural person.[2]

(3) *Use of Corporate Seal* — (a) **The Old Doctrine.** — At one time, under the old common law, it was held that a corporation aggregate could not enter into

to pay each coupon. Eastern Townships Bank *v.* St. Johnsbury, etc., R. Co., 40 Fed. Rep. 423.

1. Express Requirements Must Be Observed — *England.* — Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137, 20 L. J. Exch. 193; Leominster Canal Co. *v.* Shrewsbury, etc., R. Co., 3 Kay & J. 654, 26 L. J. Ch. 764; Aggs *v.* Nicholson, 1 H. & N. 165, 25 L. J. Exch. 348.

United States.—Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 167.

Arkansas. — Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461.

California. — Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Foulke *v.* San Diego, etc., Southern Pac. R. Co., 51 Cal. 365.

Connecticut. — Couch *v.* City F. Ins. Co., 38 Conn. 187, 9 Am. Rep. 375.

Florida. — St. Andrew's Bay Land Co. *v.* Mitchell, 4 Fla. 192, 54 Am. Dec. 340.

Georgia. — And see Dobbins *v.* Etowah Mfg., etc., Co., 75 Ga. 238.

Indiana. — Leonard *v.* American Ins. Co., 97 Ind. 299; Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593.

Maine. — Female Orphan Asylum *v.* Johnson, 43 Me. 180.

New Jersey. — Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548.

New York. — McSpedon *v.* New York, 7 Bosw. (N. Y.) 601, 20 How. Pr. (N. Y.) 395, *affirming* 15 How. Pr. (N. Y.) 462.

North Carolina. — Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 401; Roberts *v.* P. A. Deming Woodworking Co., 111 N. Car. 432.

Ohio. — Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

Pennsylvania. — Manderson *v.* Commercial Bank, 28 Pa. St. 379.

Tennessee. — Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162; Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337.

Wisconsin. — Rockwell *v.* Elkhorn Bank, 13 Wis. 653; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

In Couch *v.* City F. Ins. Co., 38 Conn. 181, 9 Am. Rep. 375, it was held that a provision in the charter of a fire insurance company that if there should be any other insurance upon the property insured by any policy issued by the company, every such policy should be void, in the absence of consent of the company, indorsed upon the policy under the hand of the secretary, was of such a character that it could not be waived by the company, and that it was not competent to prove their consent to double insurance by any other evidence than an indorsement upon the policy under the hand of the secretary. And see Blanchard *v.* Atlantic Mut. F. Ins. Co., 33 N. H. 9; Fabyan *v.* Union Mut. F. Ins. Co., 33 N. H. 203. See also specific illustrations, *infra*.

Where Writing Is Expressly Required, a corporation cannot bind itself by an executory oral contract. Foulke *v.* San Diego, etc., Southern Pac. R. Co., 51 Cal. 365. See *infra*, this section, *Express Requirement of Writing*.

Where Particular Officers Are Required to Make Contracts, the provision not being merely directory, the requirement must be observed, and executory contracts made by other officers, or by less than the prescribed number, will not be binding. Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137, 20 L. J. Exch. 193; Manderson *v.* Commercial Bank, 28 Pa. St. 379.

Directory Provisions. — Such provisions may be merely directory, in which case the power of the corporation is not affected. See *infra*, this section, *Directory Provisions*.

Requirements Not Applicable to Ordinary Transactions. — It may appear in particular cases that requirements as to manner or form of contracting were not intended to apply to ordinary transactions of the corporation. Thus in Carey *v.* McDougald, 7 Ga. 84, it was held that a provision in bank charters requiring all contracts whatever to be signed by the president and countersigned by the cashier, in order to bind the company, did not apply to such dealings and transactions as were usually and necessarily to be performed by the cashier or some other duly authorized agent of the institution. And to the same effect see Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

Estoppel to Set Up Failure to Comply with Charter. — Generally, a corporation will not be allowed to defend against an action on its contract on the ground that the provisions of its charter were not complied with, if it has received the consideration from the other party. Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381; Witte *v.* Derby Fishing Co., 2 Conn. 260; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166. See the title ULTRA VIRES.

2. McKiernan *v.* Lenzen, 56 Cal. 61; Crowley *v.* Genesee Min. Co., 55 Cal. 273; Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448; Abby *v.* Billups, 35 Miss. 618,

contracts except under the corporate seal affixed by a duly authorized agent.[1] Gradually, from reasons of necessity or convenience, exceptions were recognized by the courts in the case of contracts of little importance or frequent occurrence.[2] Subject to these exceptions, the old rule was for a long time adhered to.[3] Now, however, the old doctrine is no longer recognized to the full extent in any jurisdiction.

(b) **Modern Doctrine in the United States.** — In the United States the old rule is not recognized at all. On the contrary, it is held that in the absence of charter or statutory provisions to the contrary a corporation may make a simple contract in writing, or an oral contract, through its authorized agents, of course, whenever a natural person could do so, provided the subject-matter of the contract is within its powers. Neither the corporate seal nor a formal resolution of the directors or managers is necessary.[4]

72 Am. Dec. 143; Pendleton *v.* Waterloo Baptist Church, 49 Hun (N. Y.) 596. See Kelly *v.* Board of Public Works, 75 Va. 263.

1. Old Doctrine as to Use of Seal. — Winne *v.* Bampton, 3 Atk. 475; Carter *v.* Ely, 7 Sim. 227; Cope *v.* Thames Haven Dock, etc., Co., 3 Exch. 841; Preston *v.* Liverpool, etc., R. Co., 17 Beav. 117; Gooday *v.* Colchester, etc., R. Co., 17 Beav. 136; Smart *v.* Guardians of Poor, 10 Exch. 867; East London Water Works Co. *v.* Bailey, 4 Bing. 283, 13 E. C. L. 435; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299; Waller *v.* State Bank, 3 J. J. Marsh. (Ky.) 202; Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Frankfort Bank *v.* Anderson, 3 A. K. Marsh. (Ky.) 2; Kennedy *v.* Baltimore Ins. Co., 3 Har. & J. (Md.) 367, 6 Am. Dec. 499.

Reason for the Old Doctrine. — The reason given by Blackstone for the old doctrine was that "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole." 1 Blackstone Com. 475.

2. Growth of Exceptions. — See Horn *v.* Ivy, 1 Vent. 47; Manby *v.* Long, 3 Lev. 107; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299.

The principle laid down in Church *v.* Imperial Gas Light, etc., Co., 6 Ad. & El. 846, 33 E. C. L. 230, was that "wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions." See also Wells *v.* Kingston-upon-Hull, L. R. 10 C. P. 402; Ludlow *v.* Charlton, 6 M. & W. 822.

"The general rule, no doubt," said Alderson, B., in Diggle *v.* London, etc., R. Co., 5 Exch. 450, "is that [corporations] must contract under their corporate seal, that being the only way by which the governing body of a corporation can properly express the mind of the corporation. To this general rule there are no doubt exceptions, all of which, I think, may be classed under one of two heads: First, when the acts done are such as the corporation, by its very constitution, is appointed to do, as in the case of trading corporations, whose duty, by their very appointment, being to draw bills of exchange, they may do it without affixing the common seal. Secondly, when the acts are required for convenience, management, and comfort, as in the cases which have been cited from Com. Dig., 'Franchise,' F. 13; as where either the acts are trivial in their nature, and of frequent occurrence, so that the doing them in the usual way would be inconvenient or absurd; or such that an overruling necessity requires them to be done at once; in that case, also, the corporation may proceed by parol, instead of affixing the seal according to the proper and regular course. All these, however, are cases of necessity, and are exceptions to the general rule."

3. East London Water Works Co. *v.* Bailey, 4 Bing. 283, 13 E. C. L. 435; Copper Miners' Co. *v.* Fox, 16 Q. B. 229, 71 E. C. L. 229, 20 L. J. Q. B. 174; Lamprell *v.* Guardians of Poor, 3 Exch. 283, 18 L. J. Exch. 282; Diggle *v.* London, etc., R. Co., 5 Exch. 442, 19 L. J. Exch. 308; Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137, 20 L. J. Exch. 193; London Dock Co. *v.* Sinnott, 8 El. & Bl. 347, 92 E. C. L. 347, 37 L. J. Q. B. 129; Finlay *v.* Bristol, etc., R. Co., 7 Exch. 409, 21 L. J. Exch. 117; Smart *v.* Guardians of Poor, 10 Exch. 867, 24 L. J. Exch. 201; Austin *v.* Bethnal Green, L. R. 9 C. P. 91; Ludlow *v.* Charlton, 6 M. & W. 815; Wells *v.* Kingston-upon-Hull, L. R. 10 C. P. 402; Arnold *v.* Poole, 4 M. & G. 860, 43 E. C. L. 444.

4. Modern Doctrine as to Corporate Seal in United States — *United States.* — Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299; Gottfried *v.* Miller, 104 U. S. 527; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338; Bank of Metropolis *v.* Guttschlick, 14 Pet. (U. S.) 19.

Alabama. — Everett *v.* U. S., 6 Port. (Ala.) 166, 30 Am. Dec. 584; Curry *v.* Mobile Bank, 8 Port. (Ala.) 360; Montgomery County *v.* Barber, 45 Ala. 237; Selma *v.* Mullen, 40 Ala. 411; Jones *v.* Florence Wesleyan University, 46 Ala. 626; McCullough *v.* Talledega Ins. Co., 46 Ala. 376; State University *v.* Moody, 62 Ala. 389.

California. — San Francisco Gas Co. *v.* San

(c) **Modern Doctrine in England — Contracts Within Ordinary Business.** — There is so much conflict in the cases that it is difficult, if not impossible, to say exactly

Francisco, 9 Cal. 470; Crowley *v.* Genesee Min. Co., 55 Cal. 273.

Connecticut. — Savings Bank *v.* Davis, 8 Conn. 191.

Delaware. — Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. (Del.) 416; Bancroft *v.* Wilmington Conference Academy, 5 Houst. (Del.) 577; Vandergrift *v.* Delaware R. Co., 2 Houst. (Del.) 287.

Illinois. — Seagraves *v.* Alton, 13 Ill. 371; Dennis *v.* Maynard, 15 Ill. 477; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166; Maher *v.* Chicago, 38 Ill. 266; Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595; Board of Education *v.* Greenebaum, 39 Ill. 609; Coppinger *v.* Armstrong, 8 Ill. App. 210; New Athens *v.* Thomas, 82 Ill. 259; B. S. Green Co. *v.* Blodgett, 159 Ill. 169, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 242.

Indiana. — Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536; Christian Church *v.* Johnson, 53 Ind. 273; Ross *v.* Madison, 1 Ind. 281; Sheffield School Tp. *v.* Andress, 56 Ind. 157.

Iowa. — Ring *v.* Johnson County, 6 Iowa 265; Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa 74; Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276; Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112, 39 Am. St. Rep. 284.

Kentucky. — Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171.

Maine. — Cram *v.* Bangor House Proprietary, 12 Me. 354.

Maryland. — Cape Sable Co.'s Case, 3 Bland. (Md.) 610; Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392; Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324.

Massachusetts. — Spear *v.* Ladd, 11 Mass. 94; Sanborn *v.* Fireman's Ins. Co., 16 Gray (Mass.) 448.

Michigan. — State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

Mississippi. — Petrie *v.* Wright, 6 Smed. & M. (Miss.) 707; Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

Missouri. — Sandford *v.* Tremlett, 42 Mo. 384; Henning *v.* U. S. Ins. Co., 47 Mo. 425; Buckley *v.* Briggs, 30 Mo. 452; Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371.

New Hampshire. — Eastman *v.* Coos Bank, 1 N. H. 23; Goodwin *v.* Union Screw Co., 34 N. H. 378. See Keyser *v.* School Dist. No. 8, 35 N. H. 477.

New Jersey. — Antipoeda Baptist Church *v.* Mulford, 8 N. J. L. 182; Crawford *v.* Longstreet, 43 N. J. L. 325.

New Mexico. — Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, (N. Mex. 1897) 47 Pac. Rep. 721.

New York. — Moss *v.* Averell, 10 N. Y. 449; Hoag *v.* Lamont, 60 N. Y. 96, 16 Abb. Pr. N. S. (N. Y.) 369; First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305; Leinkauf *v.* Calman, 110 N. Y. 50, *affirming* 23 N. Y. Wkly. Dig. 520; Congregation Beth Elohim *v.* Central Presb. Church, 10 Abb. Pr. N. S. (Brooklyn City Ct.) 484; Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 587; Steele *v.* Oswego Cotton Mfg. Co., 15 Wend. (N. Y.) 265; Danforth *v.* Schoharie, etc., Turnpike Road, 12 Johns. (N. Y.) 227; Dunn *v.* St. Andrews Church, 14 Johns. (N. Y.) 118; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; St. Mary's Church *v.* Cagger, 6 Barb. (N. Y.) 579; Whitford *v.* Laidler, 94 N. Y. 145; Holm *v.* Claus Lipsius Brewing Co., 21 N. Y. App. Div. 204.

Pennsylvania. — Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 251; North Whitehall Tp. *v.* South Whitehall Tp., 3 S. & R. (Pa.) 117; Bushel *v.* Commonwealth Ins. Co., 15 S. & R. (Pa.) 176; Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339; Hand *v.* Clearfield Coal Co., 143 Pa. St. 408, 48 Leg. Int. (Pa.) 442, 29 W. N. C. (Pa.) 9; Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 S. & R. (Pa.) 16; Rathbone *v.* Tioga Nav. Co., 2 W. & S. (Pa.) 74; Hanson *v.* Railroad Co., 1 W. N. C. (Pa.) 7; Graham *v.* Railroad Co., 1 W. N. C. (Pa.) 40.

South Carolina. — Garvey *v.* Colcock, 1 Nott & M. (S. Car.) 231.

Texas. — San Antonio *v.* Lewis, 9 Tex. 69; Fowler *v.* Bell, (Tex. Civ. App. 1896) 35 S. W. Rep. 822.

Vermont. — Poultney *v.* Wells, 1 Aik. (Vt.) 180; Gassett *v.* Andover, 21 Vt. 342.

Virginia. — State, etc., Bank *v.* Poitiaux, 3 Rand. (Va.) 136; Legrand *v.* Hampden Sidney College, 5 Munf. (Va.) 324; Grubbs *v.* National L. Maturity Ins. Co., (Va. 1897) 27 S. E. Rep. 464.

Wisconsin. — Ford *v.* Hill, 92 Wis. 188; Winterfield *v.* Cream City Brewing Co., (Wis. 1897) 71 N. W. Rep. 101, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 242.

See also *infra*, this section, *Employment of Agents and Servants*.

Statements of Modern Rule and Reason Therefor. — "The technical doctrine," said Mr. Justice Story, in Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 306, "that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court that adjudged cases fully support the position."

what the modern doctrine in England as to the necessity for use of the seal is. It is certain that the old doctrine has been greatly modified, though not to the same extent as in the United States. The general rule still requires a seal, but the courts now recognize more exceptions than formerly. The present rule seems to be that the seal is not necessary in the case of contracts within the ordinary business of the corporation, as in the case of bills and drafts by banking companies, usual purchases and sales of goods by trading companies, etc., or, generally, of contracts into which the constitution and objects of the corporation require it to enter.[1]

Unusual Contracts. — But in other cases, that is, in unusual and uncommon cases, the seal is still required.[2]

Matters of Importance and Infrequent Occurrence. — The exceptions to the general

" There was a time," said Tilghman, C. J., " when it seems to have been supposed that [corporations] could make no contract but by writing under their common seal. The reason assigned was, that being incorporeal, and consequently incapable of speaking, it was impossible that they should enter into a parol contract. But, upon reflection, this reason has been thought insufficient, for, if pursued to its full extent, it would prove that a corporation could not act at all. It has no hand to affix a seal, and must, therefore, employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now if it can appoint an agent without seal for one purpose, there is no reason why it may not for another." Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 S. & R. (Pa.) 15.

1. Modern English Doctrine. — Rex *v.* Bigg, 3 P. Wms. 419; Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 620; Clarke *v.* Cuckfield Union, 21 L. J. Q. B. 349; Henderson *v.* Australian Royal Mail Steam Nav. Co., 5 El. & Bl. 409, 85 E. C. L. 409, 24 L. J. Q. B. 322; Sanders *v.* St. Neot's Union, L. R. 8 Q. B. 810, 55 E. C. L. 810, 15 L. J. M. C. 104, 10 Jur. 566; De Grave *v.* Monmouth, 4 C. & P. 111, 19 E. C. L. 300.

Cases in Which Seal Is Not Necessary. — For example, in Sanders *v.* St. Neot's Union, 8 Q. B. 810, 55 E. C. L. 810, 15 L. J. M. C. 104, 10 Jur. 566, Lord Denman, C. J., held that a contract for the purchase of iron gates for the union workhouse was a contract incident to the purposes for which the corporation was created, and therefore within the exceptions to the general rule requiring contracts by a corporation to be under seal.

And it has been held, on the same principle, that a seal is not necessary in the case of a contract by a gas-light company for the purchase of gas meters. Beverley *v.* Lincoln Gas Light, etc., Co., 6 Ad. & El. 829, 33 E. C. L. 222.

Or a contract by such a company to furnish gas. Church *v.* Imperial Gas Light, etc., Co., 6 Ad. & El. 846, 33 E. C. L. 230. *Compare* Smith *v.* London Gas Co., 7 Grant's Ch. (U. C.) 112, where the contrary was held in the case of a contract to furnish gas on unusual terms.

It has also been held under this rule that a contract of purchase of coal by a corporation maintaining a workhouse need not be under seal. Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 620.

Trading Companies, etc. — This rule has frequently been applied to trading companies, including railroad companies, etc. Henderson *v.* Australian Royal Mail Steam Nav. Co., 5 El. & Bl. 409, 85 E. C. L. 409, 24 L. J. Q. B. 322; Australian Royal Mail Steam Nav. Co. *v.* Marzetti, 11 Exch. 228, 24 L. J. Exch. 273; South of Ireland Colliery Co. *v.* Waddle, L. R. 3 C. P. 463, 37 L. J. C. P. 211, 18 L. T. N. S. 405, 16 W. R. 756, *affirmed* L. R. 4 C. P. 617, 38 L. J. C. P. 338, 17 W. R. 896 (*overruling* East London Water Works Co. *v.* Bailey, 4 Bing. 283, 13 E. C. L. 435); Broughton *v.* Manchester, etc., Water-Works Co., 3 B. & Ald. 1, 5 E. C. L. 215; Copper Miners' Co. *v.* Fox, 16 Q. B. 229, 71 E. C. L. 229; Reuter *v.* Electric Tel. Co., 6 El. & Bl. 341, 88 E. C. L. 341; *In re* Contract Corp., L. R. 8 Eq. 14; Pauling *v.* London, etc., R. Co., 8 Exch. 867.

Employment of Agents or Servants. — See Haight *v.* North Bierley Union, El. Bl. & El. 873, 96 E. C. L. 873, 28 L. J. Q. B. 62; Totterdell *v.* Fareham Blue Brick, etc., Co., L. R. 1 C. P. 674; Browning *v.* Great Cent. Min. Co., 5 H. & N. 856, 29 L. J. Exch. 399.

2. Diggle *v.* London, etc., R. Co., 5 Exch. 442, 19 L. J. Exch. 308; London Dock Co. *v.* Sinnott, 8 El. & Bl. 347, 92 E. C. L. 347, 27 L. J. Q. B. 129; Fishmongers' Co. *v.* Robertson, 5 M. & G. 131, 44 E. C. L. 78.

Cases in Which Seal Is Necessary. — Thus in Paine *v.* Guardians of Poor, 8 Q. B. 326, 55 E. C. L. 326, 15 L. J. M. C. 89, 10 Jur. 308, Lord Denman held that a contract by the said corporation for making a survey and map of one of the parishes comprised in the Union was not a contract incident to the purposes for which the guardians were incorporated, and therefore not within the exceptions to the rule requiring the corporate seal.

And so it has been held of contracts for the erection of buildings or works, as a dam, for instance. Barker *v.* Clunes, 2 W. & W. 315.

And of contracts by corporations erecting buildings or works for alterations and additions. Lamprell *v.* Guardians of Poor, 3 Exch. 283, 18 L. J. Exch. 282; Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137.

Employment of Agents and Servants. — See Dyte *v.* St. Pancras, 27 L. T. 342; Austin *v.* Bethnal Green, L. R. 9 C. P. 91.

rule in England are not limited, as has sometimes been supposed, to matters of frequent occurrence and small importance, but extend to all matters within the corporation's ordinary business.[1]

(d) **Modern Doctrine in Canada.** — The modern doctrine in Canada as to the use of the corporate seal is the same as in England.[2]

(e) **Executed and Implied Contracts — Recovery Against Corporation.** — It seems to have been thought at one time that the rule in *England*, requiring contracts to be under the corporate seal, while it prevented a recovery against the corporation on an executory contract not under seal, did not prevent a recovery when the contract was executed.[3] And in *Canada* it has been so held.[4] It seems to be settled, however, in England, that in neither case can an action be maintained on the contract.[5] But in a number of cases it has been held that when an unsealed contract has been executed by the other party, he may recover from the corporation on an implied contract to the extent of the benefit received.[6]

Recovery by Corporation. — And it seems to be well settled that when an unsealed contract has been executed by the corporation, it may recover thereon against the other party.[7]

1. South of Ireland Colliery Co. *v.* Waddle, L. R. 3 C. P. 463, 37 L. J. C. P. 211, 18 L. T. N. S. 405, 16 W. R. 756, *affirmed* in L. R. 4 C. P. 617, 38 L. J. C. P. 338, 17 W. R. 896; Henderson *v.* Australian Royal Mail Steam Nav. Co., 5 El. & Bl. 409, 85 E. C. L. 409, 24 L. J. Q. B. 322.

2. **Canada.** — Smith *v.* London Gas Co., 7 Grant's Ch. (U. C.) 112; Pim *v.* Municipal Council, 9 U. C. C. P. 302, note; Hamilton *v.* Niagara Harbor, etc., Co., 6 U. C. Q. B. O. S. 381; Great Western R. Co. *v.* Preston, etc., R. Co., 17 U. C. Q. B. 477; Brown *v.* Belleville, 30 U. C. Q. B. 373; Wentworth County *v.* Hamilton, 34 U. C. Q. B. 585; Perry *v.* Ottawa, 23 U. C. Q. B. 391; Brewster *v.* Canada Co., 4 Grant's Ch. (U. C.) 443; Whitehead *v.* Buffalo, etc., R. Co., 7 Grant's Ch. (U. C.) 351; Calvin *v.* Provincial Ins. Co., 20 U. C. C. P. 267. In this case it was held that a parol agreement entered into by the duly authorized agents of an incorporated insurance company, to refer to arbitration the question of the legal liability of said company to bear any portion of the expenses of raising and repairing a vessel insured by them and subsequently lost, was not binding upon the company as not being a contract relating to the purposes for which the company was incorporated. And see Smith *v.* London Gas Co., 7 Grant's Ch. (U. C.) 112. *Compare* Wingate *v.* Enniskillen Oil Refining Co., 14 U. C. C. P. 379.

3. Green's Brice's Ultra Vires 456. See East London Water Works Co. *v.* Bailey, 4 Bing. 283, 13 E. C. L. 435.

4. **Canada.** — Pim *v.* Municipal Council, 9 U. C. C. P. 304; Perry *v.* Ottawa, 23 U. C. Q. B. 391; Brown *v.* Belleville, 30 U. C. Q. B. 373.

5. **England — Action Against Corporation on Contract.** — Green's Brice's Ultra Vires 456; Lindley on Law of Companies 221; Ludlow *v.* Charlton, 6 M. & W. 815; Paine *v.* Guardians of Poor, 8 Q. B. 326, 55 E. C. L. 326; Diggle *v.* London, etc., R. Co., 5 Exch. 442; Homersham *v.* Wolverhampton Water Works Co., 6 Exch. 137; Kidderminster *v.* Hardwick, L. R. 9 Exch. 13; Lamprell *v.* Guardians of Poor, 3 Exch. 283; Cope *v.* Thames Haven Dock, etc., Co., 3 Exch. 841; Arnold *v.* Poole, 4 M. & G. 860, 43 E. C. L. 444.

6. **Action on Implied Contract.** — Lowe *v.* London, etc., R. Co., 18 Q. B. 632, 83 E. C. L. 632; Barber Surgeons *v.* Pelson, 2 Lev. 252; Pauling *v.* London, etc., R. Co., 8 Exch. 867.

Use and Occupation. — Thus a corporation is liable for use and occupation of land which it has actually used and occupied, for a corporate purpose, by permission of the owner, but without a contract under seal. Lowe *v.* London, etc., R. Co., 18 Q. B. 632, 83 E. C. L. 632.

Money Had and Received. — Hall *v.* Swansea, 5 Q. B. 526, 48 E. C. L. 526.

7. **Recovery by Corporation on Unsealed Executed Contract.** — Fishmongers' Co. *v.* Robertson, 5 M. & G. 131, 44 E. C. L. 78; Australian Royal Mail Steam Nav. Co. *v.* Marzetti, 32 Eng. L. & Eq. 572; Stafford *v.* Till, 4 Bing. 75, 13 E. C. L. 347; Beverley *v.* Lincoln Gas Light, etc., Co., 6 Ad. & El. 829, 33 E. C. L. 222; Denton *v.* East Anglian R. Co., 3 C. & K. 16; Carmarthen *v.* Lewis, 6 C. & P. 608, 25 E. C. L. 560; Ecclesiastical Com'rs *v.* Merral, L. R. 4 Exch. 162; Rochester *v.* Pierce, 1 Campb. 466; Doe *v.* Taniere, 18 L. J. Q. B. 49; London *v.* Hunt, 3 Lev. 37.

"We agree," said Tindal, C. J., in Fishmongers' Co. *v.* Robertson, 5 M. & G. 192, 44 E. C. L. 109, "in the general rule of law as above stated [as to necessity for use of seal], and that the case now under consideration does not fall within any of those exceptions, which are so well known as to require no enumeration; but, whatever may be the consequences where the agreement is entirely executory on the part of the corporation, yet if the contract, instead of being executory, is executed on their part — if the persons who are parties to the contract with the corporation have received the benefit of the consideration moving from the corporation — in that case, we think, both upon principle and decided authorities, the other parties are bound by the contract, and liable to be sued thereon by the corporation."

(f) **In Equity.** — It has been said that the rule requiring the corporate seal does not apply in equity,[1] but this statement is too broad. Courts of equity have not interfered to enforce unsealed contracts, when a seal was required by law, unless peculiar grounds for equitable relief existed.[2] When, however, there has been part performance, and the nature of the contract and other circumstances have been such that the court would have decreed specific performance as between individuals, the corporation has been held bound.[3]

(g) **Express Requirement of Seal.** — Of course, in all jurisdictions, if the corporate seal is expressly required by the charter of a corporation, or by statute, the requirement must be observed, whether the seal be required for an executory contract or for a conveyance.[4]

(h) **When Required in Case of Natural Person.** — And, as a rule, the corporate seal is also necessary in any case in which a natural person would be required to use a seal, as, for example, in executing a bond, conveyance, or other instrument required by law to be under seal.[5]

(4) *Express Requirement of Writing.* — If the contracts of a corporation are required by its charter to be in writing, it cannot bind itself by an oral executory contract.[6]

1. **In Equity.**— Brewster *v.* Canada Co., 4 Grant's Ch. (U. C.) 443.

2. Crampton *v.* Varna R. Co., L. R. 7 Ch. 562; Kirk *v.* Guardians of Poor, 2 Phil. 640, 12 Jur. 85; Carter *v.* Ely, 7 Sim. 211. And see Jackson *v.* North Wales R. Co., 13 Jur. 69.

3. **Part Performance** — *England.* — Lindley, Law of Comp. 223; Melbourne Banking Corp. *v.* Brougham, L. R. 4 App. 168; Wilson *v.* West Hartlepool R. Co., 2 DeG. J. & Sm. 475, 34 Beav. 187; Crook *v.* Seaford, L. R. 6 Ch. 551, L. R. 10 Eq. 678. See Kidderminster *v.* Hardwick, L. R. 9 Exch. 13.

Canada. — Brewster *v.* Canada Co., 4 Grant's Ch. (U. C.) 443; McDonald *v.* Upper Canada Min. Co., 15 Grant's Ch. (U. C.) 179.

4. Frend *v.* Dennett, 4 C. B. N. S. 576, 93 E. C. L. 576, 27 L. J. C. P. 314, 4 Jur. N. S. 897; Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461; Allen *v.* Brown, (Kan. App. 1897) 50 Pac. Rep. 505. *Compare* Cunningham *v.* Wolverhampton Local Board, 26 L. J. M. C. 33.

5. *California.* — Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150.

Connecticut. — Savings Bank *v.* Davis, 8 Conn. 191.

Florida. — Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Illinois. — Danville Seminary *v.* Mott, 136 Ill. 289.

Missouri. — Sandford *v.* Tremlett, 42 Mo. 384; South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360.

South Carolina. — State *v.* Senft, 2 Hill L. (S. Car.) 367.

6. See Relief F. Ins. Co. *v.* Shaw, 94 U. S. 574; Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Foulke *v.* San Diego, etc., Southern Pac. R. Co., 51 Cal. 365; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 401; Roberts *v.* P. A. Deming Woodworking Co., 111 N. Car. 432.

Illustrations. — In North Carolina there is a statute (Code, § 683, Acts 1871–72, c. 199, § 23), declaring that "every contract of every corporation by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto."

"This provision," said Merrimon, C. J., in Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 403, "is important and not merely directory. Its purpose is to protect corporations against the hasty or fraudulent acts and practices of their incautious or faithless officers and agents, and as well those persons who deal with them in respect to contracts involving pecuniary liability of importance. They must necessarily act and contract by and through their officers and agents, and it is wise and salutary to protect them and those who deal with them in the way thus provided. Such contracts must be in writing and under the common seal of the corporation, or signed by some one of its officers authorized thereto. It is not sufficient to simply recognize, by such officer or agent, a merely verbal contract to give it efficiency. It must be done in writing, and in such way as to give evidence of the nature, purpose, and substance of the contract. Otherwise the statute would be practically nugatory."

Whether Writing Is Required, must depend in each case upon the language of the charter and the intention of the legislature to be gathered therefrom. The mere mention of contracts in writing, without a prohibition of oral contracts, does not exclude the latter.

In Relief F. Ins. Co. *v.* Shaw, 94 U. S. 574, the charter of an insurance company declared that its purpose and business should "be by instrument, under seal or otherwise, to make insurance," etc. In another clause it was declared that certain officers should "be authorized, in the name and behalf of the company, and in and by policy of insurance in writing to be signed by the president or other officer and secretary of the company, to make contracts of insurance with any person," etc. It was held that the charter mentioned written policies of insurance merely because they were the usual mode of contracting insurance, but did not prohibit oral contracts of insurance. See Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

Acceptance of Order to Pay Money by a corpora-

(5) *Implied and Quasi Contracts* — **Liability of Corporation.** — A corporation, like a natural person, is liable on an implied or *quasi* contract, as where it receives and uses goods sent to it by another, or accepts the benefit of services, without any valid express contract to pay for them; or where money is paid to it by mistake, or obtained by it by fraud; or in an *ultra vires* transaction.[1]

Recovery by Corporation. — And in like manner a corporation may be entitled to recover on an implied or *quasi* contract.[2]

Effect of Requirements as to Form or Mode of Contract. — It is also well settled that an express charter or statutory provision that contracts of a corporation shall be executed in a certain form, as that they shall be in writing, or signed by certain officers, has no application to contracts implied in law, or *quasi* contracts.[3]

(6) *Directory Provisions.* — Care must be taken to distinguish between provisions which limit the power of a corporation, and provisions which are merely directory to its officers. The latter do not affect the powers of the corporation.[4] Whether a particular provision is mandatory or merely directory must depend upon the intention of the legislature, to be determined, as in other cases, according to the rules governing the construction of statutes.[5]

tion, the money being due under a previous valid contract, does not come within a requirement in the articles of association that all contracts involving liabilities for the payment of money shall be in writing. French Spiral Spring Co. *v.* New England Car Trust, 32 Fed. Rep. 44.

1. Liability on Implied and Quasi Contracts — *England.* — Beverley *v.* Lincoln Gas Light, etc., Co., 6 Ad. & El. 829, 33 E. C. L. 222; East London Water Works Co. *v.* Bailey, 4 Bing. 283, 13 E. C. L. 435; Clark *v.* Cucfield Union, 1 Bro. C. C. 81, 21 L. J. Q. B. 349, 16 Jur. 686; *Ex p.* Key, 16 W. R. 1103; Hall *v.* Swansea, 5 Q. B. 526, 48 E. C. L. 526; Denton *v.* East Anglian R. Co., 3 C. & K. 16. See *supra*, this section, *Use of Corporate Seal.*

Canada. — Wingate *v.* Enniskillen Oil Refining Co., 14 U. C. C. P. 379; Turley *v.* Grafton Road Co., 8 U. C. Q. B. 579.

United States. — Manville *v.* Belden Min. Co., 17 Fed. Rep. 425; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67; Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 604; People's Bank *v.* National Bank, 101 U. S. 181; New Castle Northern R. Co. *v.* Simpson, 23 Fed. Rep. 214.

Connecticut. — Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Tryon *v.* White, etc., Co., 62 Conn. 161.

Florida. — Allen *v.* Freedman's Sav., etc., Co., 14 Fla. 418.

Illinois. — New Athens *v.* Thomas, 82 Ill. 259; Maher *v.* Chicago, 38 Ill. 266.

Kentucky. — Underwood *v.* Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260; Frankfort Bridge Co. *v.* Frankfort, 18 B. Mon. (Ky.) 41.

Maryland. — Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392; Maryland Hospital *v.* Foreman, 29 Md. 524.

Massachusetts. — White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Canal Bridge *v.* Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; Smith *v.* First Cong. Meeting-house, 8 Pick. (Mass.) 178.

Michigan. — Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352; Cicotte *v.* Catholic, etc., Church, 60 Mich. 552.

Mississippi. — Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

New Hampshire. — Goodwin *v.* Union Screw Co., 34 N. H. 378.

New York. — Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Danforth *v.* Schoharie, etc., Turnpike Road, 12 Johns. (N. Y.) 227; Dunn *v.* St. Andrews Church, 14 Johns. (N. Y.) 118; New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562.

Vermont. — Stone *v.* Congregational Society, 14 Vt. 86.

Use and Occupation. — A corporation may be liable on implied contract for use and occupation of land. *Ex p.* Key, 16 W. R. 1103.

2. Salvage Compensation. — A wrecking company is not, by the fact of its being incorporated, rendered incapable of being in law a salvor, and of receiving compensation for its services as such. The Camanche, 8 Wall. (U. S.) 462; The Blackwall, 10 Wall. (U. S.) 1.

3. Provisions as to Form Not Applicable to Quasi Contract — *England.* — See Australian Royal Mail Steam Nav. Co. *v.* Marzetti, 32 Eng. L. & Eq. 572.

United States. — Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326.

California. — Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623 (as *explained* in Foulke *v.* San Diego, etc., Southern Pac. R. Co., 51 Cal. 365).

Georgia. — Carey *v.* McDougald, 7 Ga. 84.

North Carolina. — Roberts *v.* P. A. Deming Woodworking Co., 111 N. Car. 432; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. Car. 401.

Tennessee. — Northern Bank *v.* Johnson, 5 Coldw. (Tenn.) 88.

4. Prince of Wales L., etc., Assur. Co. *v.* Harding, El. Bl. & El. 183, 96 E. C. L. 183, 27 L. J. Q. B. 297; Cole *v.* Green, 6 M. & G. 872, 46 E. C. L. 872; U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64; Barnes *v.* Ontario Bank, 19 N. Y. 152. And see cases cited *infra*, this section.

5. See the title STATUTES.

Illustrations — Requirement of Order or Reso-

(7) *Place of Contract.* — In the absence of charter or statutory restrictions a corporation may enter into contracts at any place in the state or country to which it owes its existence. And it may through its agents contract in other states or countries, provided the contract is not expressly prohibited by the laws of such state or country and is not contrary to its public policy.[1]

j. LIMITATION AS TO AMOUNT OF INDEBTEDNESS. — Particular corporations, or classes of corporations, are sometimes expressly prohibited by their charters or by some general law from incurring indebtedness beyond a certain amount, as beyond the amount of the capital stock, or capital stock actually paid in, or beyond a certain proportion thereof. There is some conflict of opinion as to the construction and effect of such a provision.[2]

View that Contract in Excess of Limit Is Void. — Some courts construe these statutes strictly as prohibiting contracts which will have the effect of increasing the liabilities of the company beyond the limit, so that no recovery can be had on such a contract by the other party if he entered into it with knowledge of the circumstances.[3]

lution. — In Prince of Wales L., etc., Assur. Co. *v.* Harding, El. Bl. & El. 183, 96 E. C. L. 183, 27 L. J. Q. B. 297, the deed of settlement of the plaintiff company provided that the "common seal shall not be affixed to any policies or other documents of the society, except by the order of three directors, signed by them and countersigned by the manager." The seal was affixed to a policy without the order first obtained, but in other respects in accordance with the deed of settlement. It was held that this provision was directory merely, and that consequently such policy was not void, the assured having been *bona fide* ignorant of the informality.

Requirement of Acceptance by Directors. — In U. S. Bank *v.* Dandridge, 12 Wheat. (U. S.) 64, a provision in the charter of a bank that the official bond of the cashier should be accepted by the directors as satisfactory was held to be merely directory to the board.

Requirement of Signatures of Particular Officers. — In Barnes *v.* Ontario Bank, 19 N. Y. 152, a statute of *New York* declared that all contracts of banking associations and all notes and bills issued by them should be signed by the president or vice-president and cashier. Objection was made to a certificate of deposit issued by a bank on the ground that it was signed by the cashier alone. The court held that it was valid, construing the statute as appointing statutory agents to contract on behalf of the bank when no designation of agents should be made by the bank, and not as prohibiting the bank from appointing other agents to contract on its behalf.

A similar decision was made by the Supreme Court of *Minnesota* in Dana *v.* St. Paul Bank, 4 Minn. 385.

And in New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536, it was held that a provision in the charter of an insurance company that the "policies and all other contracts" of the company should be "signed by the president or vice president and countersigned by the secretary, and, being so signed and executed," should be obligatory on the company, did not prevent the company from making a valid parol contract of insurance. *Compare* Constant *v.* Allegheny Ins. Co., 3 Wall. Jr. (C. C.) 313, 1 Am. L. Reg. N. S. 116, 6 Fed. Cas. No. 3136.

So, in *In re* Norwich Yarn Co., 22 Beav. 143, it was held that a provision in the deed of settlement of a trading company that all checks on bankers should be signed by three directors was merely directory.

1. See *supra*, this section, *Place of Doing Business and Exercising Powers.*

2. **"Capital Stock."** — It has been held that a limitation of the indebtedness of a corporation to the par value of the "capital stock," or to a certain proportion thereof, is to be construed as meaning the capital stock actually paid up, and not the authorized capital stock. Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405.

Capital "Not Called Up." — In English Channel Steamship Co. *v.* Rolt, 17 Ch. Div. 715, it was held that a prohibition against borrowing money to an amount exceeding two-thirds of the capital of the company "not called up" did not mean merely the amount not called up of the shares actually issued, but that shares not issued were to be included.

Effect on Existing Corporation. — Such a prohibition does not apply to existing corporations, unless the charter is amended under a power to amend reserved by the legislature in creating the corporation. Gloninger *v.* Pittsburgh, etc., R. Co., 27 W. N. C. (Pa.) 497.

3. **Contract Carrying Indebtedness Beyond Limit Void.** — *Re* Pooley Hall Colliery Co., 18 W. R. 201, 21 L. T. N. S. 690; Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 117 E. C. L. 588; Covington First Nat. Bank *v.* D. Kiefer Milling Co., 95 Ky. 97; Kraniger *v.* People's Bldg. Soc., 60 Minn. 94; Pittsburgh, etc., R. Co. *v.* Rothschild, (Pa. 1886) 4 Cent. Rep. 107.

In Covington First Nat. Bank *v.* D. Kiefer Milling Co., 95 Ky. 97, it was held that a bank which had loaned a corporation money, which increased the liabilities of the corporation beyond the limit fixed by the articles of incorporation, could not recover the amount of the loan as against the assignee of the corporation for the benefit of the creditors, on the ground that the loan was *ultra vires*. In this case the articles of incorporation provided that the company should not, in any event, incur any liability or indebtedness in excess of one-half of its capital stock *bona fide* subscribed.

Negotiable Instruments — Bona Fide Purchasers for Value. — Where a corporation issues negotiable bills, notes, or bonds, and thereby in-

Contrary View. — By the weight of authority, however, while a contract in excess of the limit is *ultra vires* and may render the officers liable to the prescribed penalties, if any, and may render the franchises of the corporation subject to forfeiture at the suit of the state, it is not absolutely void, and the corporation, after having received the consideration, cannot set up its violation of the prohibition to defeat an action on the contract.[1]

Provisions Merely Directory. — In several states the courts have held that such a provision is merely directory and does not even render the contract *ultra vires*.[2] This is certainly the proper construction of some statutes.[3]

Debts Prohibited — In General. — Statutes limiting the indebtedness which a corporation may incur vary considerably in the different jurisdictions. Some of the statutes limit only particular kinds of indebtedness, for example bonded indebtedness.[4]

Debts Contracted in Course of Ordinary Business. — It seems to have been held that a prohibition against an increase of indebtedness by a corporation does not apply to debts contracted in the conduct of its ordinary business.[5]

creases its indebtedness beyond the statutory limit, it cannot, unless it is expressly so provided, set up the statute as against a *bona fide* holder of the instrument for value. Wood *v.* Corry Water-Works Co., 44 Fed. Rep. 146; Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285.

1. Weber *v.* Spokane Nat. Bank, 64 Fed. Rep. 208, 29 U. S. App. 97, *reversing* 50 Fed. Rep. 735; Poole *v.* West Point Butter, etc., Assoc., 30 Fed. Rep. 513; Allis *v.* Jones, 45 Fed. Rep. 148; Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607. See Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966. See also the titles NATIONAL BANKS; ULTRA VIRES.

Indebtedness to Directors Beyond Prescribed Limit. — Garrett *v.* Burlington Plow Co., 70 Iowa 697, 59 Am. Rep. 461.

2. Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 19 Am. St. Rep. 134; Sherman Center Town Co. *v.* Russell, 46 Kan. 382; Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295; Connecticut River Sav. Bank *v.* Fiske, 60 N. H. 363.

Illustrations. — In Ossipee Hosiery, etc., Mfg. Co. *v.* Canney, 54 N. H. 295, a statute provided that no corporation, with certain exceptions, should contract debts or incur liabilities exceeding one-half of its capital stock actually paid in and unimpaired and of its other property and assets. The statute further provided that if any corporation by vote or by its officers should violate such provision, the directors should be liable for the amount of the excess of debts and liabilities above such limit "for all the debts and contracts of the corporation." It was held that the provision limiting the amount of the indebtedness was directory; that the borrowing of money in excess of the limitation would render the directors liable for the debts of the corporation, but would not affect the validity of the loan. The court, in so construing the statute, considered the fact that it spoke of liabilities in excess of the limitation as "the debts and contracts of the corporation."

And in Sherman Center Town Co. *v.* Morris, 43 Kan. 282, 19 Am. St. Rep. 134, it was held that a provision in the charter of a private business corporation, organized under the Kansas statute, that its indebtedness shall not exceed five hundred dollars, is to be regarded as merely a by-law, and therefore directory merely; and that it will not avoid a contract within the scope of its business creating a greater indebtedness.

Construction of These Decisions. — The language of the opinions in these cases is broad enough to sustain the statement in the text, but it would seem that the court did not mean to say that the prohibition did not render a contract in violation thereof *ultra vires*, but merely, as in the cases cited above, that it did not render it void so as to prevent a recovery. It was expressly said in the New Hampshire case first cited that its violation might render the officers liable to the prescribed penalties and render the charter of the corporation subject to forfeiture at suit of the state.

3. **Statutes Making Directors Liable.** — A statute merely making the directors of a corporation individually liable for debts contracted in excess of the capital stock does not render such debts *ultra vires*. Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590.

4. **"Bonded" Indebtedness.** — Non-negotiable notes secured by mortgages do not constitute "bonded indebtedness" in the sense of a constitutional or statutory prohibition of an increase by corporations of their bonded indebtedness. Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300, 37 Am. & Eng. Corp. Cas. 83.

Bonds and Mortgages. — Corporate bonds and mortgages securing the same are within the prohibition against an increase of "indebtedness." Pittsburgh, etc., R. Co. *v.* Rothschild, (Pa. 1886) 4 Cent. Rep. 107; Rothschild *v.* Pittsburgh, etc., R. Co., 1 Pa. Co. Ct. Rep. 620.

5. **Indebtedness in Course of Ordinary Business.** — Thus, in Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110, it was held that the debts of a manufacturing corporation, accruing in the employment of labor and the purchase of materials, in the course of its ordinary business, did not constitute such an increase of indebtedness as, under the *Pennsylvania* constitution and statute, required a previous meeting and consent of stockholders to validate them.

And it was said in this case, *citing* Ahl *v.* Rhoads, 84 Pa. St. 319, that the liabilities of a

Indebtedness Arising from Implied Contracts. — And it has been held that a limitation of indebtedness to a certain amount does not apply to the indebtedness of a corporation arising out of an implied contract, as because of the receipt of money by it which in equity it ought to repay, etc.[1]

Excepted Debts. — In some jurisdictions the statutes except certain kinds of debts, or debts secured in a particular way.[2]

Determination of Amount of Indebtedness. — In determining the amount of a corporation's indebtedness at the time it incurs a liability, debts which are excepted from the operation of the statute are to be excluded unless the intention of the legislature to the contrary is clear.[3]

Change in Form of Debt. — Merely to change the form of an existing debt is not an increase of indebtedness, nor the creation of a debt; nor is the contracting of a debt to one person to pay a debt of equal amount to another, and its actual payment, an increase of indebtedness.[4]

k. PRESUMPTION OF POWER TO CONTRACT. — In accordance with a rule elsewhere stated,[5] unless it affirmatively appears that a particular contract was beyond the scope of the business for which the corporation was created, the power to enter into it will be presumed, the burden of proof in such case being on one who asserts that the contract was *ultra vires*.[6]

bank created by its deposits did not fall within such a provision.

1. Indebtedness from Implied Contracts. — See Weber *v.* Spokane Nat. Bank, 64 Fed. Rep. 208, 29 U. S. App. 97; Humphrey *v.* Patron's Mercantile Assoc., 50 Iowa 607.

In Litchfield *v.* Ballou, 114 U. S. 190, 7 Am. & Eng. Corp. Cas. 378, it was held that a provision in a state constitution that municipal corporations should not become indebted in any manner nor for any purpose to an amount exceeding five per cent. of the taxable property therein prohibited implied as well as express indebtedness, and that, when a city borrowed money and issued bonds in excess of the limit, there was "no more reason for a recovery on the implied contract to repay the money than on the express contract found in the bonds."

As was said, however, in Weber *v.* Spokane Nat. Bank, 64 Fed. Rep. 208, 29 U. S. App. 97, this decision and others relating to the indebtedness of municipal corporations rest upon peculiar principles not applicable to private corporations.

"There is good reason," said Judge Rothrock, in Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607, "for making a distinction between municipal and private corporations in this respect. The creditor of a municipal corporation may, far more properly than the creditor of a private corporation, be required to take notice at his peril as to when the limit is reached."

2. Exception of Debts Secured on Real Estate. — A proviso in a statute limiting the amount of indebtedness of a corporation that the statute shall not apply where the corporate debts are secured "by an actual transfer of real estate securities," is not limited to cases in which the debt is secured by the transfer of notes, bonds, or other evidences of debt secured upon real estate not belonging to the corporation. A mortgage by the corporation of its own real estate to secure a debt is a transfer of real estate securities within the meaning of the statute. Montpelier First Nat. Bank *v.* Sioux City Terminal R., etc., Co., 69 Fed. Rep. 441.

3. National Bank Act. — In the National Bank Act a national bank is prohibited from contracting liabilities in excess of its paid-up capital stock, except upon (1) notes of circulation; (2) moneys deposited with or collected by the association; (3) bills of exchange or drafts drawn against money actually on deposit to the credit of the association; (4) liabilities to the stockholders for dividends and reserved profits.

In Weber *v.* Spokane Nat. Bank, 50 Fed. Rep. 735, it was held that this statute does not require that the excepted items of indebtedness shall be excluded in determining whether the indebtedness of the bank exceeds its paid-up capital stock at the time it incurs a liability not within this exception. But in Weber *v.* Spokane Nat. Bank, 64 Fed. Rep. 208, 29 U. S. App. 97, this judgment was reversed, and it was held that a bank can lawfully incur liabilities up to the limit, no matter how great may be its liabilities on the excepted items at the time. And see Eastern Townships Bank *v.* Vermont Nat. Bank, 22 Fed. Rep. 186.

4. Securing Existing Debt. — Thus it is not an increase of indebtedness within the meaning of a prohibition to give a bond, and a mortgage to secure the same, for a pre-existing debt. Powell *v.* Blair, 133 Pa. St. 550.

So it is not an increase of indebtedness for a bank to give a mortgage to secure its liability on deposits previously made. Ahl *v.* Rhoads, 84 Pa. St. 319.

Contract to Pay Existing Debt. — And borrowing money and actually using it for the purpose of paying off an existing indebtedness of equal amount for goods purchased, or for any other cause, is not an increase of indebtedness. Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa 607. And see Powell *v.* Blair, 7 Pa. Co. Ct. Rep. 492.

5. See *supra*, this title, *Corporate Powers in General — Presumptions as to Corporate Powers*.

6. Power to Contract Presumed. — Scottish North-Eastern R. Co. *v.* Steward, 3 Macq. H. L. Cas. 382; Shrewsbury, etc., R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 125; Ohio.

I. POWERS WITH RESPECT TO PARTICULAR CONTRACTS — (1) *Borrowing Money* — (a) **When the Power Will Be Implied — United States.** — It is well settled in the United States that a private corporation has the same power as an individual to borrow money whenever it is either reasonably necessary or usual and proper in the transaction of the business for which it was created. This power is often expressly conferred by the charter or act of incorporation, but it need not be so. It is always to be implied in the absence of an express restriction.[1]

etc., R. Co. *v.* McCarthy, 96 U. S. 267; Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 73; Evans *v.* Bailey, 66 Cal. 112; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 242; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217; Howard *v.* Boorman, 17 Wis. 459. And see *infra*, this section, *Powers with Respect to Particular Contracts.*

Construction of General Words in Contracts. — General words used in a contract by a corporation are always to be construed, if possible, so as to uphold the contract as against a claim that it is *ultra vires*. As was said by Bedle, J., in Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 561: "It cannot be held with any reason, that when general words used in a contract by a corporation can be applied consistently with the scope of its act of incorporation, that simply because they are general they may be taken to refer to objects outside of it, even where, by their general application, they might include them."

1. Power to Borrow Implied — *United States.* — Mississippi, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 412; Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192; Matter of Hercules Mut. L. Assur. Soc., 6 Ben. (U. S.) 35, 6 Nat. Bank Reg. 338; Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 386; Chemical Nat. Bank *v.* Armstrong, 76 Fed. Rep. 339.

Alabama. — Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229; Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 73; Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

California. — Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 258; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1. And see Allen *v.* Citizens' Steam Nav. Co., 22 Cal. 28.

Colorado. — Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Arapahoe Cattle, etc., Co. *v.* Stevens, 13 Colo. 534.

Connecticut. — National Shoe, etc., Bank's Appeal, 55 Conn. 469. And see Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 600.

Illinois. — Ward *v.* Johnson, 95 Ill. 215; Wood *v.* Whelen, 93 Ill. 153; West *v.* Madison County Agricultural Board, 82 Ill. 205; Tuttle *v.* National Bank of Republic, 48 Ill. App. 486; Millard *v.* St. Francis Xavier Female Academy, 8 Ill. App. 341.

Indiana. — Wallis *v.* Johnson School Tp., 75 Ind. 368; Wright *v.* Hughes, 119 Ind. 324, 12 Am. St. Rep. 412.

Iowa. — Thompson *v.* Lambert, 44 Iowa 239.

Kentucky. — Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 14, 35 Am. Dec. 171.

Louisiana. — Bezou *v.* Pike, 23 La. Ann. 788.

Maryland. — Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285; Booth *v.* Robinson, 55 Md. 419; Heironimus *v.* Sweeney, 83 Md. 146. See Brown *v.* State, 62 Md. 439.

Massachusetts. — Fay *v.* Noble, 12 Cush. (Mass.) 1; Davis *v.* Second Universalist Meeting-House, 8 Met. (Mass.) 321; Morville *v.* American Tract Soc., 123 Mass. 136, 25 Am. Rep. 40; Bradbury *v.* Boston Canoe Club, 153 Mass. 77.

Missouri. — Ringling *v.* Kohn, 6 Mo. App. 333; Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453.

New Hampshire. — Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127.

New Jersey. — Lucas *v.* Pitney, 27 N. J. L. 221; Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133; Stratton *v.* Allen, 16 N. J. Eq. 229; Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513.

New York. — Curtis *v.* Leavitt, 15 N. Y. 9; Barnes *v.* Ontario Bank, 19 N. Y. 152; Smith *v.* Law, 21 N. Y. 296; Nelson *v.* Eaton, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113, *reversing* 7 Abb. Pr. (N. Y. Supreme Ct.) 305, and *affirming* 15 How. Pr. (N. Y.) 305; City Bank *v.* Perkins, 4 Bosw. (N. Y.) 420; Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; Beers *v.* Phœnix Glass Co., 14 Barb. (N. Y.) 358; Mead *v.* Keeler, 24 Barb. (N. Y.) 20, Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Partridge *v.* Badger, 25 Barb. (N. Y.) 146; Hoyt *v.* Thompson, 19 N. Y. 217; Genesee Bank *v.* Patchin Bank, 19 N. Y. 312; National Park Bank *v.* German American Mut. Warehousing, etc., Co., 53 N. Y. Super. Ct. 367; Bicknell *v.* Speir, 7 Misc. Rep. (N. Y.) 111, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 222.

North Carolina. — Craven *v.* Atlantic, etc., R. Co., 77 N. Car. 292.

Ohio. — Larwell *v.* Hanover Sav. Fund Soc., 40 Ohio St. 282. And see Chillicothe Bank *v.* Chillicothe, 7 Ohio, pt. ii., 31; Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Stichter, 21 Am. L. Reg. N. S. 713; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387; Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 27 W. N. C. (Pa.) 497, 46 Am. & Eng. R. Cas. 276. And see Ridgway *v.* Farmers' Bank, 12 S. & R. (Pa.) 256, 14 Am. Dec. 681.

Tennessee. — Moss *v.* Harpeth Academy, 7 Heisk. (Tenn.) 283; Union Bank *v.* Jacobs, 6 Humph. (Tenn.) 515.

Virginia. — Burr *v.* M'Donald, 3 Gratt. (Va.) 206.

Wisconsin. — Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120; North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31. And see Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

England. — And the rule is the same in England, except, it seems, that the power must be necessary for the purpose of carrying on the business of the corporation, and not merely usual or proper.[1]

Particular Corporations. — The power to borrow money is not limited to any particular kind of corporation, nor to corporations organized for any particular purpose. It exists not only in the case of ordinary manufacturing and trading corporations, insurance companies, and banking companies, but it exists in the case of railroad companies, mining companies, and all other corporations, whose business or objects may render it necessary or proper to borrow.[2]

Power to Borrow Implied from Power to Mortgage. — Where a corporation, as a railroad company, for example, is expressly authorized by its charter to mortgage its property, it need not be expressly authorized to borrow money. The purpose of a mortgage being to secure loans, the power to borrow money is a necessary incident to the power to mortgage. Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 46 Am. & Eng. R. Cas. 276.

Power to Borrow Incident to Power to Incur Debts. — Whenever a corporation has power to incur a debt in the course of its business, it has the power, as incident thereto, to borrow money to pay the same, provided there is no express prohibition. See Lucas *v.* Pitney, 27 N. J. L. 221; Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513.

Borrowing Money to Purchase Property. — In Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 77, Brickell, C. J., speaking of the power of a corporation to borrow money to pay for property, said: "The corporation has the capacity of an individual in this respect, within the scope of its legitimate objects and purposes. Having the power to acquire and hold personal and real estate by purchase, it has, as an incident, the power to borrow money to make the purchase. The exercise of such power may be advantageous and useful, enabling the corporation the sooner to put its powers into active exercise and to acquire the necessary property on terms more profitable to its stockholders. It would scarcely be affirmed that the power to acquire and hold real and personal estate must be so narrowed that the corporation could not contract a debt for its purchase — that at the very moment of the purchase and conveyance the purchase money must be counted out, or the purchase and conveyance is void. If the necessities and interests of the corporation require it, which must be determined by those having charge of its affairs, and intrusted with the power and duty, that a debt be contracted in the acquisition of the necessary property, the power to contract it cannot be denied. If more advantageous to borrow the money and make immediate payment than to contract the debt for the purchase money with the vendor, the contract is equally within the scope of corporate power, and valid. The authorities, we think, support the proposition that every private corporation, unless prohibited, may borrow money to carry out the purposes of its creation."

Securities for Money Borrowed. — As to the power of corporations with respect to giving securities for money borrowed, see *infra*, this section, *Issue of Negotiable Instruments Generally; Execution and Issue of Bonds;* and *supra*, *Power to Alienate Property — Mortgage or Pledge of Property.*

1. England — Power Must Be Necessary. — *In re* International L. Assur. Soc., L. R. 10 Eq. 312; Royal British Bank *v.* Turquand, 5 El. & Bl. 248, 85 E. C. L. 248, 6 El. & Bl. 327; Maclae *v.* Sutherland, 3 El. & Bl. 1, 77 E. C. L. 1; Australasia Bank *v.* Breillat, 6 Moo. P. C. 152, 12 Jur. 189; Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 4 Kay & J. 733; *In re* Hamilton's Windsor Ironworks, 12 Ch. Div. 707; General Auction Estate, etc., Co. *v.* Smith, (1891) 3 Ch. 432, 60 L. J. Ch. 723, 65 L. T. 188, 40 W. R. 106; Murray *v.* Scott, L. R. 9 App. 519; Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123; Ward *v.* Royal Exch. Shipping Co., 58 L. T. 174, 6 Asp. M. C. 239; Fisher *v.* Tayler, 2 Hare 218.

In *In re* International L. Assur. Soc., L. R. 10 Eq. 312, Sir R. Malins, V. C., said: "I should say — as, indeed, I have already said on many occasions — that in the ordinary course of transactions of a mercantile concern, whether it be an insurance office or anything else, where the possession of money is essential for the purpose of carrying on the business, if the company finds itself in temporary difficulties for want of money, I cannot consider it beyond the powers of the directors to obtain money from their bankers or others who will temporarily lend it to them, for the purpose of preventing that which would be disastrous to all — namely, the stoppage of the company; that is to say, I cannot consider it beyond their powers to prevent that disaster by means of loans to a moderate extent, such as would not be unreasonable, having regard to the nature and extent of the business in which the company is engaged, for the purpose of carrying on the business of the company."

2. Railroad Companies. — Royal British Bank *v.* Turquand, 5 El. & Bl. 248, 85 E. C. L. 248, 6 El. & Bl. 327; Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 386; Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 127; Lucas *v.* Pitney, 27 N. J. L. 221; Craven *v.* Atlantic, etc., R. Co., 77 N. Car. 292; Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 27 W. N. C. (Pa.) 497, 46 Am. & Eng. R. Cas. 276; Philadelphia, etc., R. Co. *v.* Stichter, 21 Am. L. Reg. N. S. 713; Union Bank *v.* Jacobs, 6 Humph. (Tenn.) 515.

Steamship Companies. — Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 4 Kay & J. 733; Booth *v.* Robinson, 55 Md. 419.

(b) **When the Power Will Not Be Implied** — *aa.* NATURE OF THE CORPORATION. — The nature and business of a corporation may be such that no power to borrow

Plank-road and Turnpike Companies. — Smith *v.* Law, 21 N. Y. 296.

Banking Companies, Including Savings Banks. — Maclae *v.* Sutherland, 3 El. & Bl. 1, 77 E. C. L. 1; Australasia Bank *v.* Breillat, 6 Moo. P. C. 152, 12 Jur. 189; Ward *v.* Johnson, 95 Ill. 215; Tuttle *v.* National Bank of Republic, 48 Ill. App. 486; Heironimus *v.* Sweeney, 83 Md. 146; Ringling *v.* Kohn, 6 Mo. App. 333; Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513. And see Hackettstown *v.* Swackhamer, 37 N. J. L. 191, *dictum;* Curtis *v.* Leavitt, 15 N. Y. 51, *affirming* 17 Barb. (N. Y.) 309; Barnes *v.* Ontario Bank, 19 N. Y. 152; City Bank *v.* Perkins, 4 Bosw. (N. Y.) 420; Genesee Bank *v.* Patchin Bank, 19 N. Y. 312; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134; Ridgway *v.* Farmers' Bank, 12 S. & R. (Pa.) 256, 14 Am. Dec. 681; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

Manufacturing and Trading Companies. — *In re* Hamilton's Windsor Ironworks, 12 Ch. Div. 707; General Auction Estate, etc., Co. *v.* Smith, (1891) 3 Ch. 432, 60 L. J. Ch. 723, 65 L. T. 188, 40 W. R. 106; Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; National Shoe, etc., Bank's Appeal, 55 Conn. 469; Pitman *v.* Kintner, 5 Blackf. (Ind.) 250; Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 14, 35 Am. Dec. 171; Fay *v.* Noble, 12 Cush. (Mass.) 1; Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453; Stratton *v.* Allen, 16 N. J. Eq. 229; Beers *v.* Phœnix Glass Co., 14 Barb. (N. Y.) 358; Mead *v.* Keeler, 24 Barb. (N. Y.) 20; Burr *v.* M'Donald, 3 Gratt. (Va.) 206.

Extent of Power of Manufacturing Company. — In Beers *v.* Phœnix Glass Co., 14 Barb. (N. Y.) 362, Strong, J., speaking of the power of a manufacturing company to borrow money, said: "It is difficult to fix any limit, but I should suppose that it extended to all cases where it was essential to the transaction of its ordinary affairs. It is then incidental, and is in effect included in the grant of the principal power. The defendants had to purchase the raw materials for the factory, and they had also to employ workmen. Occasionally they might want money to pay for such materials, or to compensate their laborers. I can see no reason why they should not effect a loan for either purpose. Nor, indeed, can there be any reasonable objection to their hiring money, when it is essential to conduct any of their legitimate operations. * * * Their power to loan money should be limited to and for the appropriate business of the corporation. In other words, they possess it as an incidental, and not as a principal, power."

Mining Companies. — Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192; Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 258; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Larwell *v.* Hanover Sav. Fund Soc., 40 Ohio St. 282.

Contra in England. — In England it seems to be held that mining companies have no implied power to borrow money. See Tredwen *v.* Bourne, 6 M. & W. 465; Hawtayne *v.* Bourne, 7 M. & W. 595; Burmester *v.* Norris, 6 Exch. 796.

Insurance Companies. — The power exists in all kinds of insurance companies, whether fire, life, accident, or marine, and in mutual as well as joint-stock companies. *In re* International L. Assur. Soc., L. R. 10 Eq. 312; Matter of Hercules Mut. L. Assur. Soc., 6 Ben. (U. S.) 35, 6 Nat. Bank. Reg. 338; Wright *v.* Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; Bezou *v.* Pike, 23 La. Ann. 788; Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133; Stratton *v.* Allen, 16 N. J. Eq. 229; Nelson *v.* Eaton, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113, *reversing* 7 Abb. Pr. (N. Y. Supreme Ct.) 305, and *affirming* 15 How. Pr. (N. Y.) 305; Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387.

In Bacon *v.* Mississippi Ins. Co., 31 Miss. 116, it was held that a corporation, having power under its charter to make insurance on property against loss, and to loan money on bottomry and respondentia, etc., had no power to borrow money to pay its liabilities. This case is contrary to the overwhelming weight of authority, as shown by the cases cited above.

Warehouse Companies. — National Park Bank *v.* German-American Mut. Warehousing, etc., Co., 53 N. Y. Super. Ct. 367. In this case it was held that when a part of the business of a corporation under its charter is to make advances on merchandise consigned to or stored or on deposit with it, it has an incidental power to borrow money for the purpose of making its advances.

Religious Corporations. — Davis *v.* Second Universalist Meeting-House, 8 Met. (Mass.) 321.

Educational Corporations. — Moss *v.* Harpeth Academy, 7 Heisk. (Tenn.) 283.

Corporations for Encouraging Athletics. — In Bradbury *v.* Boston Canoe Club, 153 Mass. 77, it was held that a corporation for encouraging athletic exercises, given power to hold real and personal estate, and to hire, purchase, or erect suitable buildings for its accommodation, had authority to borrow money for the purpose of erecting a building.

Agricultural and Mechanical Corporations, authorized by their charters to acquire lands and erect buildings, have the implied power to borrow money. Taylor *v.* Agricultural, etc., Assoc., 68 Ala 229; Alabama Gold L. Ins. Co. *v.* Central Agricultural, etc., Assoc., 54 Ala. 73; Thompson *v.* Lambert, 44 Iowa 239.

Gaslight Companies. — Wood *v.* Whelen, 93 Ill. 153; Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330.

Merchants' Exchange Company. — Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

Water Power Companies. — Partridge *v.* Badger, 25 Barb. (N. Y.) 146.

Building and Loan Associations. — See Murray *v.* Scott, L. R. 9 App. 519; Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285.

In North Hudson Mut. Bldg., etc., Assoc. *v.*

money can be implied. It cannot be implied in any case where the business is such that it is not necessary or usual to borrow money in conducting it. In such a case an express prohibition against borrowing is not necessary in order to limit its powers in this respect.[1]

bb. When a Particular Fund Is Provided. — So, if the charter of a corporation provides a particular fund with which to accomplish its business, showing an intention on the part of the legislature that its objects are to be attained by the use of this fund and no other, the corporation has no implied power to borrow money and thereby provide a different fund.[2]

cc. Unauthorized Business or Purpose. — And of course the borrowing must be in the transaction of the corporation's legitimate business. If a corporation engages in a business not authorized by its charter, and borrows money in the transaction of such business, the borrowing is *ultra vires.*[3] And the rule is general that a corporation has no power to borrow for a purpose which is foreign to the objects for which it was created; that is, for a purpose which is neither expressly authorized by its charter, nor necessary or usual for accomplishing the purposes authorized.[4] It possesses the power to borrow as an

Hudson First Nat. Bank, 79 Wis. 31, it was held that a building association, not expressly prohibited by statute or any by-law from borrowing money, has the same power in that respect as have other corporations, and may do so when it is reasonably necessary in order to carry out the purposes of its organization; and that it may, therefore, on maturity of a series of stock entitling non-borrowing members of such series to payment of their shares, borrow money to make such payment, instead of accumulating funds for that purpose. See the title Building and Loan Associations, vol. 4, p. 999.

1. Borrowing Inconsistent with Nature of Corporation. — Green's Brice's Ultra Vires 219; *Ex p.* Williamson, L. R. 5 Ch. 312; Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133; Pittsburg, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126.

In Ruitz *v.* Roman Catholic Episcopal Corp., 30 U. C. Q. B. 269, it was contended that a Roman Catholic bishop incorporated as a corporation sole had implied power to borrow money. The statute declared that the corporation should have power "to have, hold, purchase, acquire, possess, and enjoy, for the general use or uses eleemosynary, ecclesiastical, or educational of the said Church, * * * any lands, tenements, or hereditaments within the Province of Canada; and the same real estate, or any part thereof, from time to time (by and with the advice and consent hereafter mentioned), to sell or exchange, alienate, let, demise, lease, or otherwise dispose of; and in case of sale, to purchase other real estate in lieu of that sold, with the proceeds or purchase money arising from such sale, and to hold and enjoy such newly purchased or exchanged estate or estates for the religious, eleemosynary, ecclesiastical, or educational purposes aforesaid." It was held that there was nothing in the act rendering it necessary for bishops to borrow money so as to charge their corporate property, or their successors, and therefore that no such power could be implied.

2. Particular Fund Provided by Charter. — Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133. In this case it was held that where the charter of an insurance company makes its members mutual insurers, and constitutes a fund to meet losses made up from premiums to be contributed by the members, and one per centum on the amount for which each is insured, no other fund can be created for that purpose.

So in Lewis, etc., County Turnpike Road Co. *v.* Thomas, (Ky. 1887) 3 S. W. Rep. 907, where the charter of a turnpike company authorized it to borrow $5,000 only, and levied a tax, which it authorized the company to collect, and provide a fund for completing the road, it was held that the company had no power to borrow money for the purpose of completing the road at an earlier date, and charge interest up so as to include it in the tax levied.

See also State University *v.* Hart, 7 Minn. 61.

3. Borrowing to Make Ultra Vires Purchase. — Thus, where it is held that a corporation has no power to purchase its own stock, it has no power to borrow money for such purpose. Adams, etc., Co. *v.* Deyette, 8 S. Dak. 110. And see *In re* London, etc., Exch. Bank, L. R. 5 Ch. 444, *reversing* L. R. 9 Eq. 270; Matter of Worcester Corn Exch. Co., 3 De G. M. & G. 180; Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134.

Borrowing to Speculate. — In Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134, it was held that an association under the general banking law of New York might borrow money to discount notes, and also to purchase stocks and other securities to be deposited with the comptroller; but that it had no right to borrow money to be used in speculations or in mercantile or other business having no relation to the ordinary business of a bank.

4. Borrowing to Provide Fund for Purpose of Getting Credit. — Although a mutual insurance company may, under proper circumstances, borrow money to pay its losses or expenses, it cannot, under pretense of borrowing money, provide a fund for the purpose of giving credit to the company. Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133.

incidental, and not as a principal power.[1]

dd. Express Prohibition Against Borrowing. — Sometimes the charter of a corporation expressly prohibits it from borrowing money. In such case, of course, the power to borrow does not exist.[2]

(c) **Power to Borrow Unlimited as to Amount.** — In the absence of express limitation a corporation can borrow any amount of money that may be necessary or usual in the transaction of the business for which it was created. It is not restricted by the amount of its capital stock.[3]

(d) **Limitation as to Amount, Manner, or Purpose of Borrowing.** — *aa.* In General. — But if, as is frequently the case, the amount which a corporation is authorized to borrow is limited by its charter, either expressly or impliedly, it has no power to exceed that limit. In some cases it cannot set up the limitation to defeat an action on the contract, or on an implied contract to repay,[4] but the excessive borrowing is nevertheless *ultra vires*. And the same is true of limitations as to the manner or purpose of borrowing. Whether or not there is such a limitation in either case, depends upon a construction of the charter and the intention of the legislature.[5]

bb. Implied Limitation as to Amount. — If a charter or statute authorizes a corporation to borrow a certain sum, specifying it, or sums not exceeding a certain amount, this is an implied prohibition against borrowing any other sums, and excludes any general power of borrowing which the corporation might otherwise have.[6]

cc. Express Power to Borrow in Particular Way or for Particular Purpose. — So,

1. Beers *v.* Phœnix Glass Co., 14 Barb. (N. Y.) 358.

2. See Wallis *v.* Johnson School Tp., 75 Ind. 368.

Statutes Intended to Prohibit Banking. — The statutes in the different states, prohibiting corporations from issuing bills, notes, or other evidences of debt, upon loans, or for circulation as money, are intended to prohibit banking and the issue of bills and notes by a corporation for the purpose of lending its credit, or for circulation as money, and do not limit or affect the general power of corporations to borrow money when necessary in the course of their business. Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 259; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442; Curtis *v.* Leavitt, 15 N. Y. 9; Rockwell *v.* Elkhorn Bank, 13 Wis. 653. And see *infra*, this section, *Issue of Negotiable Instruments Generally*.

3. Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

4. See the title Ultra Vires.

5. **Express Limitation as to Amount — Rule in England.** — In England the courts have been very strict in holding that where the statute limits the amount which a corporation may borrow, it has no power to exceed the limit. Gordon *v.* Sea F. L. Assur. Soc., 1 H. & N. 599; *In re* Cork, etc., R. Co., L. R. 4 Ch. 748; Fountaine *v.* Carmarthen R. Co., L. R. 5 Eq. 316; Chapleo *v.* Brunswick Permanent Bldg. Soc., 6 Q. B. Div. 696; English Channel Steamship Co. *v.* Rolt, 17 Ch. Div. 715; Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 117 E. C. L. 588; *Re* Pooley Hall Colliery Co., 18 W. R. 201, 21 L. T. N. S. 690; Wenlock *v.* River Dee Co., L. R. 10 App. 354, 54 L. J. Q. B. 577, 53 L. T. 62, 49 J. P. 773. And see Wenlock *v.* River Dee Co., 36 Ch. Div. 674, 20 Am. & Eng. Corp. Cas. 486.

Rule in United States. — And the same rule obtains in the United States. Covington First Nat. Bank *v.* D. Kiefer Milling Co., 95 Ky. 97; Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405, 46 Leg. Int. (Pa.) 412; Commonwealth's Appeal, 24 W. N. C. (Pa.) 530. In the case last cited it was held that a railroad company authorized by its charter "to borrow money in any sum or sums not exceeding in amount one-half of the par value of the capital stock," would be restrained from borrowing in excess of that amount.

Construction as to Amount. — If a statute specifies a certain sum as that beyond which a corporation cannot borrow, there is no difficulty in construing it, but difficulties have arisen where the limitation was to a certain proportion of the "capital stock," or "paid up capital stock," etc.

"Capital Stock." — In Commonwealth's Appeal, 24 W. N. C. (Pa.) 530, a corporation was authorized to borrow not exceeding one-half of the par value of the "capital stock." It was held that this meant the capital actually paid up, and not the full amount of the capital authorized. And see Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405.

"Capital Not Called Up." — In English Channel Steamship Co. *v.* Rolt, 17 Ch. Div. 715, a steamship company was authorized to borrow any sum not exceeding two-thirds of the capital of the company "not called up." It was held that the words quoted included the shares which would have been issued, and were not limited to the amount not called up, or shares actually issued.

6. Wenlock *v.* River Dee Co., L. R. 10 App. 354, 54 L. J. Q. B. 577, 53 L. T. 62, 49 J. P. 773; Landowners West of England, etc., Co. *v.* Ashford, 16 Ch. Div. 411; Commonwealth's Appeal, 24 W. N. C. (Pa.) 530. See also the last two notes *supra*.

also, the fact that the charter of a corporation authorizes it to borrow money in a certain way, or for a certain purpose, may limit it to such mode or purpose, and exclude any other power with respect to borrowing; but it is not necessarily so. It must depend in every case upon the construction of the charter and the intention of the legislature.[1]

dd. Limitation as to Amount of Indebtedness. — By the weight of authority, if a corporation is expressly prohibited from incurring indebtedness beyond a certain limit, it has no power to borrow money if it will increase its indebtedness beyond the limit.[2]

ee. Limitation on Power of Directors. — Care must be taken to distinguish between a limitation on the powers of a corporation to borrow money, and a limitation on the powers of the directors. A limitation on the power of the directors does not affect the power of the corporation.[3]

(e) **What Is Included in Power to Borrow or Prohibition Against Borrowing.** — A power conferred either expressly or impliedly upon a corporation to borrow money can be relied upon as authorizing only a "borrowing," and it cannot render valid an agreement by a corporation which is not a borrowing of money, but a scheme which would be *ultra vires* without express authority, though it may have been resorted to for the purpose of raising money and may have accomplished such purpose. A transaction is not a borrowing unless there is a promise or understanding that what is received will be repaid or returned, — the thing itself or something like it of value, with or without compensation for the use of it in the meantime.[4] The distinction applies also in the case of an

1. Particular Charters. — In Lucas *v.* Pitney, 27 N. J. L. 221, the charter of a railroad company provided that it should have power to borrow such sums of money from time to time as might be necessary to complete, construct, or operate its road, and furnish it with necessary engines and machinery, and to secure the payment thereof by bond or mortgage, or otherwise, on its property and franchises. It was contended that this was a limitation of the power of the company to borrow money, and tantamount to a prohibition of its borrowing for any other purpose or upon any other security than that specified. It was held, however, that it was merely a grant of powers additional to those which would ordinarily be implied in the case of railroad companies, and that it could not be construed to limit the general power and capacity, incident to every railroad company, to borrow money in the course of its business, and give or indorse negotiable instruments to secure the same.

So in Bradbury *v.* Boston Canoe Club, 153 Mass. 77, it was held that a clause in the charter of a corporation for encouraging athletic exercises, empowering it to receive and hold in trust funds received by gift or bequest, did not confine the corporation to that mode of raising money for the purpose of leasing or purchasing land and erecting buildings as authorized by its charter; but that it had, in addition thereto, the general power of borrowing money for this purpose.

2. In some cases it cannot be permitted to set up the limitation to defeat an action against it on the contract, but the borrowing is nevertheless unauthorized, and an excess of power. See Allis *v.* Jones, 45 Fed. Rep. 148. See *supra*, this section, *Limitation as to Amount of Indebtedness*.

3. Distinction Between Limitation on Power of Corporation and on Power of Directors. — This distinction is shown in Irvine *v.* Union Bank, 46 L. J. P. C. 87, L. R. 2 App. 366, 37 L. T. 176, 25 W. R. 682. In this case it was provided in the articles of association of a railroad company that the directors' power of borrowing money on the credit of the company should not exceed in the aggregate, as an existing debt at the same time, one-half of the then actual paid-up capital. The articles contained no restriction upon the company's power of borrowing, and the directors' power to borrow was capable of being extended by one-half of the votes of all the shareholders. It was held that the limitation was merely a limitation of the authority of the directors, and not of the general powers of the company, and that a borrowing by the directors in excess of their authority might be ratified by the company and rendered binding.

4. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159.

"Authority to raise money by borrowing does not imply the use of another and different method of raising it, however well adapted to the end it may be." Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 301.

Issue of Irredeemable Bonds. — A railroad company, for example, under authority to borrow money, has no power to raise money by an issue of irredeemable bonds entitling the holder merely to a share of the earnings after the payment of certain dividends to the stockholders. Such a transaction is not a borrowing. It resembles a loan only in the result attained. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 386; McCalmont *v.* Railroad Co., 10 W. N. C. (Pa.) 338. *Compare* Railroad Co. *v.* Stichter, 11 W. N. C. (Pa.) 325.

As was said by Judge McKennan: "It does not propose to create the relation of debtor and creditor between the defendant and the subscribers. The money obtained by the de-

express or implied prohibition against borrowing.[1]

(f) **Rate of Interest.** — In the absence of special legislation, corporations borrowing money are on the same footing as natural persons as to the rate of interest for which they may stipulate;[2] but if there are no constitutional provisions in the way, the charter may authorize them to borrow at a greater rate of interest than the general usury law prescribes.[3]

(2) *Issue of Negotiable Instruments Generally* — (a) **Doctrine in England.** — In England a corporation has the power to make promissory notes, to draw and accept bills of exchange, and to indorse bills and notes, if expressly authorized, or without express authority if its business is such that it cannot be carried on in the ordinary way without the exercise of such power.[4] Otherwise the

fendant could not be regarded as borrowed, because that implies reimbursement, and it is not demandable by the subscribers or payable by the defendant. It has not the essential and distinguishing qualities of a loan. It contemplates a stipulation that the subscribers, in consideration of the sums paid — not lent — by them, shall be entitled to receive, in a remote and uncertain contingency, a portion of the defendant's earnings, to be measured by a certain rate per cent. upon three times the sums paid by them, and after that shall participate with the common shareholders in the division of the residuary earnings. By what allowable definition of a loan or borrowing such a transaction can be embraced, I am at a loss to conceive." Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 390.

Issue of Preferred Stock. — The issuing of preferred stock, though for the purpose of raising money for the purposes of the corporation, is not a borrowing, and is not authorized under the express or implied power of a corporation to borrow money for use in its business. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159. See the title STOCK.

Borrowing Credit of Others. — Not only may a corporation borrow money by a direct negotiation of its own paper and security, but it may also borrow the credit of others and employ it in raising money, as by borrowing the notes of others and raising money thereon by indorsing and discounting, or pledging them. This capacity is involved in the power to borrow money. Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229; Lucas *v.* Pitney, 27 N. J. L. 221; Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147; Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53.

1. Sale and Hiring of Property. — In Yorkshire Railway Wagon Co. *v.* Maclure, 21 Ch. Div. 309, it appeared that a railway company being in want of money, and being advised that they had no power to borrow, sold part of their rolling stock to a wagon company for £30,000, at the same time making a contract with the wagon company for the hire of the same rolling stock at a rent which would repay the £30,000 with interest in five years, and then for its repurchase at a nominal price. At the same time three of the directors guaranteed to the wagon company the payment of the rent. It was held that the transaction was not a borrowing of money, but a *bona fide* sale and hiring of the rolling stock, and was valid both against the railway company and the sureties.

2. Rate of Interest and Usury. — Craven *v.* Atlantic, etc., R. Co., 77 N. Car. 289; Larwell *v.* Hanover Sav. Fund Soc., 40 Ohio St. 275. See also the title USURY.

3. Charter Abrogating Usury Laws. — Thus in Morrison *v.* Eaton, etc., R. Co., 14 Ind. 110, it was held that a clause in the charter of a corporation authorizing it to borrow money "on such terms as might be agreed upon by the parties" empowered it to borrow at a rate of interest beyond that established by the general law. See also Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. Car. 298.

Prohibiting Defense of Usury. — The legislature, if no constitutional provision is in the way, may provide that no corporation shall interpose the defense of usury. And such a provision is a repeal of the usury law as far as borrowing corporations are concerned. Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120; Southern L. Ins., etc., Co. *v.* Packer, 17 N. Y. 51. See also the title USURY.

Constitutional Restrictions. — But the legislature cannot authorize a corporation to pay more than the legal rate of interest if there are constitutional restrictions in the way, as a provision, for instance, requiring the legislature to establish a rate of interest which shall be equal and uniform throughout the state. McKinney *v.* Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104.

4. Negotiable Instruments — Rule in England. — See the opinion of Montague Smith, J., in Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 512. See Bills of Exchange Act, § 22.

In *In re* General Estates Co., L. R. 3 Ch. 758, the articles of association of a corporation contained no provisions as to the issue of negotiable instruments, but the objects, as stated in the memorandum, were "to acquire by purchase, lease, or otherwise, freehold, copyhold, leasehold, and other real property, for building thereon, improving, letting, or selling, and the doing of all such other things as are incidental or conducive to the attainment of the above objects." It was held that the objects of the company were such that a power to issue negotiable instruments was to be implied. And see *In re* Land Credit Co., L. R. 4 Ch. 460.

Express Grant of Power. — In Stark *v.* Highgate Archway Co., 5 Taunt. 792; Murray *v.* East India Co., 5 B. & Ald. 204, 7 E. C. L. 66, and *In re* Land Credit Co., L. R. 4 Ch. 460, the power was expressly conferred.

Power Implied from Recognition. — A statute may, and will impliedly, confer the power to issue negotiable instruments by recognizing it, as by regulating the mode of issuing them.

power does not exist. *Prima facie* there is no such power.[1] The mere fact, it has been said, that a corporation is authorized by its charter to trade or otherwise engage in business and incur debts, is not alone sufficient ground for implying authority to issue negotiable instruments.[2]

Particular Corporations. — According to an English authority on the subject,[3] the power has been denied to railway companies,[4] gas companies,[5] water-works companies,[6] a highway board,[7] mining companies,[8] a cemetery company,[9] a salt and alkali company,[10] a salvage company,[11] and a washing company.[12] The power is to be implied, however, in the case of corporations established for strictly trading purposes.[13]

See Halford *v.* Cameron's Coalbrookdale, etc., R. Co., 16 Q. B. 442, 71 E. C. L. 442.

1. 1 Lindley on Part. 267; Lindley's Law of Companies 185; Green's Brice's Ultra Vires 255. And see the cases cited *supra*.

Statement of Byles, J. — It was said by Byles, J., in Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 510: "Only three instances can be cited of the acceptance of negotiable instruments by corporations. The first is that of the Bank of England; but that establishment was incorporated for the very purpose — its promissory notes and bank post bills forming a very large portion of the circulating medium of this country. The second is that of the East India Company. There, the authority to draw, accept, and indorse bills and notes, if not created, is at all events ratified and confirmed by two acts of Parliament. * * * The third instance is that of Stark *v.* Highgate Archway Co., 5 Taunt. 792, where the company had express authority to give bills. Excepting these, there is no authority to show that a common-law corporation can draw, accept, or indorse bills of exchange; and it seems to me that there would be more difficulty in the case of a corporation created by statute." *Compare* Peruvian R. Co. *v.* Thames, etc., Marine Ins. Co., L. R. 2 Ch. 617, 36 L. J. Ch. 864, 16 L. T. 644, 15 W. R. 1002.

Reason of English Rule. — The judges in England seem to have been much influenced by what they considered a difficulty in reconciling the principle that a *bona fide* purchaser for value of a bill or note takes it free from the equities between the original parties, and the principle that a corporation is not liable on *ultra vires* contracts. See the opinions of Erle, C. J., and Keating, J., in Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 508, 511.

Indorsement by Corporation. — Though a corporation which has become the holder of a bill or note in the course of business may not, under the English decisions, be able to indorse the same so as to assume the liability of an indorser, it may indorse it so as to transfer title. English Bills of Exchange Act of 1882, § 22; Smith *v.* Johnson, 3 H. & N. 222.

Statutes for Protection of Bank of England. — Some of the English cases denying corporations the power to issue negotiable instruments turned upon the statute for the protection of the Bank of England. See Broughton *v.* Manchester, etc., Water-Works Co., 3 B. & Ald. 1, 5 E. C. L. 215.

2. Power Not Co-extensive with Power to Trade. — It has been said: "The mere fact that a corporation trades or otherwise engages in business, even in the most pronounced form of 'trade,' is not sufficient to enable it to issue negotiable instruments." Green's Brice's Ultra Vires 255. But this, while in a sense true, is apt to mislead. The power will be implied in the case of corporations established for strictly trading purposes. See *infra*, this section.

Power Not Co-extensive with Power to Incur Debts. — The power is not co-extensive with the power to incur debts. Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 499.

3. Green's Brice's Ultra Vires 255. And see Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 505.

4. Railway Companies. — Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 509, 12 Jur. N. S. 453. *Compare* Peruvian R. Co. *v.* Thames, etc., Marine Ins. Co., L. R. 2 Ch. 617.

5. Gas Companies. — Bramah *v.* Roberts, 3 Bing. N. Cas. 963, 32 E. C. L. 404.

6. Water-Works Companies. — Broughton *v.* Manchester, etc., Water-Works Co., 3 B. & Ald. 1, 5 E. C. L. 215. And see East London Water-Works Co. *v.* Bailey, 4 Bing. 283, 13 E. C. L. 435.

7. Incorporated Highway Board. — Mill *v.* Hawker, L. R. 9 Exch. 322.

8. Mining Companies. — Dickinson *v.* Valpy, 10 B. & C. 128, 21 E. C. L. 41, 5 M. & R. 126. *Compare* Burmester *v.* Norris, 6 Exch. 796. See Matter of Joint Stock Companies, 4 De G. J. & S. 758; Brown *v.* Byers, 16 M. & W. 252.

9. Cemetery Companies. — Steele *v.* Harmer, 14 M. & W. 831, 4 Exch. 1.

10. Salt and Alkali Company. — Bult *v.* Morrell, 12 Ad. & El. 745, 40 E. C. L. 180.

11. Salvage Company. — Thompson *v.* Universal Salvage Co., 1 Exch. 694, 18 L. J. Exch. 242.

12. Washing Company. — Neale *v.* Turton, 4 Bing. 149, 13 E. C. L. 382.

13. Trading Companies. — The power is to be implied in the case of corporations established strictly for trading purposes, for they could not carry out their objects without the power to make negotiable notes, to make and accept bills, and to indorse bills and notes like a natural person engaged in a similar business. Said Montague Smith, J., in Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 512: "That corporations created for the purpose of trading may have power to issue negotiable instruments is the well-known exception. But that applies where the primary object of the incorporation is the carrying on of trade as other persons carry it on, viz., by buying and selling." And see *In re* Land Credit Co., L. R. 4 Ch. 460; *In re* General Estates Co., L. R. 3 Ch. 758.

(b) **Doctrine in Canada.** — The Canadian doctrine on this subject seems to be the same as the English.[1]

(c) **Doctrine in the United States** — *aa.* When the Power Will Be Implied. — In the United States the English doctrine does not obtain. On the contrary, it is held that, in the absence of express restrictions, every private corporation, having the power to borrow money or otherwise incur debts in the course of its business, has, as incidental thereto, the implied power, if acting within its legitimate purposes, to make promissory notes, to draw and accept bills of exchange, and to indorse bills and notes, in payment or as security; and it may indorse, not only for the purpose of transfer, but also for the purpose of assuming the obligations of an indorser.[2] The charter need not expressly

This is the construction given to the English decisions in the Canadian case of Gilbert *v.* McAnnany, 28 U. C. Q. B. 387, in which it was said by Adam Wilson, J.: "The case of Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 499, shows that a corporation empowered to build a railway cannot bind itself by accepting a bill of exchange, but a corporation established strictly for trading purposes, that is, to buy and sell, may become parties to bills."

1. **Canadian Doctrine.** — The question was considered by the Court of Queen's Bench, Upper Canada, in Gilbert *v.* McAnnany, 28 U. C. Q. B. 384, and it was held, purporting to follow the doctrine of the English courts as shown by Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 499, that corporations established strictly for trading purposes, that is, to buy and sell, have implied power to become parties to bills, but that railroad companies, mining companies, and similar corporations have no such power, unless it has been conferred in express terms or by reasonable implication.

Particular Corporations — Mining Companies. — In the case referred to above, Gilbert *v.* McAnnany, 28 U. C. Q. B. 384, it was held that a mining company had no power to accept a bill of exchange.

Banks. — Banking corporations are trading companies within this doctrine, and have authority to accept bills of exchange as a necessary incident to the transaction of their business. Berton *v.* Central Bank, 10 New Bruns. 493.

Railroad Companies. — In Kingston Marine R. Co. *v.* Gunn, 3 U. C. Q. B. 368, it was held that a railroad company was established for trading purposes, and had implied authority to give or receive a promissory note. The statute contained a provision which might well be construed as recognizing such power, but the court did not base its decision on this ground. It held that the power was implied as incidental to the purpose of the corporation. The later case of Gilbert *v.* McAnnany, 28 U. C. Q. B. 384, *supra*, is in effect to the contrary.

2. **Doctrine in the United States** — *United States.* — Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338; Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192; Matter of Hercules Mut. L. Assur. Soc., 6 Ben. (U. S.) 35, 6 Nat. Bank Reg. 338; *In re* Great Western Tel. Co., 5 Biss. (U. S.) 363. See also Mississippi, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 412; *Ex p.* Estabrook, 2 Lowell (U. S.) 547; Grommes *v.* Sullivan, 81 Fed. Rep. 45, 53 U. S. App. 359.

Alabama. — Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Talladega Ins. Co. *v.* Peacock, 67 Ala. 253.

California. — Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 258; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; Temple St. Cable R. Co. *v.* Hellman, 103 Cal. 634.

Georgia. — See Butts *v.* Cuthbertson, 6 Ga. 166; Mitchell *v.* Rome R. Co., 17 Ga. 590.

Illinois. — Millard *v.* St. Francis Xavier Female Academy, 8 Ill. App. 341. And see Frye *v.* Tucker, 24 Ill. 180; Ward *v.* Johnson, 95 Ill. 215.

Indiana. — Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359. And see Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Indiana Cent., etc., R. Co. *v.* Davis, 20 Ind. 6, 83 Am. Dec. 303; Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457; Lebanon, etc., Gravel Road Co. *v.* Adair, 85 Ind. 244.

Iowa. — Thompson *v.* Lambert, 44 Iowa 239; Cattron *v.* First Universalist Soc., 46 Iowa 106; Des Moines Gas Co. *v.* West, 50 Iowa 26.

Kentucky. — Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171.

Louisiana. — Brode *v.* Fireman's Ins. Co., 8 Rob. (La.) 244. And see Donnelly *v.* St. John's Protestant Episcopal Church, 26 La. Ann. 738.

Maine. — Came *v.* Brigham, 39 Me. 35; Whitney *v.* South Paris Mfg. Co., 39 Me. 316.

Maryland. — Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285. And see Jackson *v.* Myers, 43 Md. 452; Muth *v.* Dolfield, 43 Md. 466.

Massachusetts. — Fay *v.* Noble, 12 Cush. (Mass.) 1; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270; Bird *v.* Daggett, 97 Mass. 494; Monument Nat. Bank *v.* Globe Works, 101 Mass. 58, 3 Am. Rep. 322; Morville *v.* American Tract Soc., 123 Mass. 136, 25 Am. Rep. 40; Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505, 38 Am. St. Rep. 453; Kneeland *v.* Braintree St. R. Co., 167 Mass. 161.

Michigan. — Odd Fellows *v.* Sturgis First Nat. Bank, 42 Mich. 461.

Minnesota. — Sullivan *v.* Murphy, 23 Minn. 6; Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285; Gebhard *v.* Eastman, 7 Minn. 56.

Mississippi. — See Prairie Lodge No. 87 *v.* Smith, 58 Miss. 301.

Missouri. — Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43; Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Sparks *v.* Dispatch Transfer

confer such power, nor need it appear that the corporation could not carry on its business without exercising it.[1]

Particular Corporations. — In the United States the power to issue negotiable bills and notes is not limited, as in England, to any particular kind of corporation, nor to corporations created for any particular purpose. It not only exists in the case of manufacturing and trading companies, and banking companies, whose every-day business requires the exercise of such power; but it exists in the case of railroad, mining, and insurance companies, and in the case of every other corporation whose business may render it necessary or proper to exercise the power.[2]

Co., 104 Mo. 531, 24 Am. St. Rep. 351; Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453.

Nebraska. — See Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Neb. 621, 59 Am. Rep. 852.

New Hampshire. — See Richards *v.* Merrimack, etc., R. Co., 44 N. H. 135.

New Jersey. — Lucas *v.* Pitney, 27 N. J. L. 221. And see Montague *v.* Church School Dist. No. 5, 34 N. J. L. 218; Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513; National Bank of Republic *v.* Young, 41 N. J. Eq. 531.

New York. — Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Barker *v.* Mechanic F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Moss *v.* Oakley, 2 Hill (N. Y.) 265; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442; McCullough *v.* Moss, 5 Den. (N. Y.) 567; Moss *v.* Averell, 10 N. Y. 449; Marvine *v.* Hymers, 12 N. Y. 223; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Curtis *v.* Leavitt, 15 N. Y. 66, *affirming*, on this point, 17 Barb. (N. Y.) 309; Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151, *affirmed* 66 N. Y. 616; Mead *v.* Keeler, 24 Barb. (N. Y.) 20; Partridge *v.* Badger, 25 Barb. (N. Y.) 171; Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179, 27 N. Y. 546, 84 Am. Dec. 298; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige (N. Y.) 470; Sheridan Electric-Light Co. *v.* Chatham Nat. Bank, 52 Hun (N. Y.) 575; Pusey *v.* New Jersey West Line R. Co., 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 434. And see Barnes *v.* Ontario Bank, 19 N. Y. 152; Smith *v.* Law, 21 N. Y. 299; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; Kelley *v.* Brooklyn, 4 Hill (N. Y.) 263; National Park Bank *v.* German American Mut. Warehousing, etc., Co., 53 N. Y. Super. Ct. 367.

Ohio. — Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330; Larwell *v.* Hanover Sav. Fund Soc., 40 Ohio St. 282.

Oregon. — Fink *v.* Canyon Road Co., 5 Oregon 301.

Pennsylvania. — McMasters *v.* Reed, 1 Grant's Cas. (Pa.) 36; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387. See First Baptist Church *v.* Caughey, 85 Pa. St. 271; Reading Industrial Mfg. Co. *v.* Graeff, 64 Pa. St. 395; Watts's Appeal, 78 Pa. St. 391; Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 208.

Rhode Island. — Clarke *v.* School Dist. No. 7, 3 R. I. 199.

Tennessee. — Union Bank *v.* Jacobs, 6 Humph. (Tenn.) 515.

Texas. — Marshall Nat. Bank *v.* O'Neal, 11 Tex. Civ. App. 640.

Virginia. — Burr *v.* M'Donald, 3 Gratt. (Va.) 206; Richmond, etc., R. Co. *v.* Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

Wisconsin. — Rockwell *v.* Elkhorn Bank, 13 Wis. 653; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

Power to Assume Liability of an Indorser. — In Genesee Bank *v.* Patchin Bank, 13 N. Y. 315, Denio, J., said: "I entertain no doubt but that a bank may lawfully indorse the commercial paper which it holds, with a view to raise money upon it by way of discount, or for any other lawful purpose. In this respect it has the same right as any other holder of such paper. The power of a bank to avail itself of its assets in this way is as perfect as that of any merchant. The authority to do so is very important, if not quite essential, to the existence of these institutions. * * * The contract of indorsement is incident to the negotiation of mercantile paper, and the right to transfer such paper includes the power to enter into the collateral contract which an indorser assumes." See also Bonner *v.* New Orleans, 2 Woods (U. S.) 135.

1. Express Authority Not Necessary. — In Curtis *v.* Leavitt, 15 N. Y. 66, it was said by Comstock, J.: "When a corporation can lawfully purchase property or procure money on loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have the power to give, any known assurance which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence." See also Moss *v.* Averell, 10 N. Y. 456.

And in Matter of Hercules Mut. L. Assur. Soc., 6 Ben. (U. S.) 37, 6 Nat. Bank Reg. 338, it was said by Mr. Justice Blatchford: "In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, or to become a party to negotiable paper. A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends; and this includes the power to borrow money for use in its legitimate business, and the power to give a time engagement to pay the debt, in any form not prohibited by statute."

2. Railroad Companies. — Frye *v.* Tucker, 24

bb. When the Power Will Not Be Implied — (*aa*) *Nature of the Corporation.* — The nature and business of a corporation may be such that the power to issue or indorse negotiable instruments cannot be implied. It can be implied in no case where the business is such that it is not necessary or usual to do so.[1]

(*bb*) *Unauthorized Business or Purpose.* — And a corporation has no more power to make a note, or to draw or accept a bill of exchange, than to make any other

Ill. 180; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Indiana, etc., Cent. R. Co. *v.* Davis, 20 Ind. 6. 83 Am. Dec. 303; Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457; Came *v.* Brigham, 39 Me. 35; Richards *v.* Merrimack, etc., R. Co., 44 N. H. 135; Lucas *v.* Pitney, 27 N. J. L. 221; Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179, 27 N. Y. 546, 84 Am. Dec. 298; Pusey *v.* New Jersey West Line R. Co., 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 434; Union Bank *v.* Jacobs, 6 Humph. (Tenn.) 515; Richmond, etc., R. Co. *v.* Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

Street Railway Companies. — Temple St. Cable R. Co. *v.* Hellman, 103 Cal. 634; Kneeland *v.* Braintree St. R. Co., 167 Mass. 161.

Telegraph Companies. — *In re* Great Western Tel. Co., 5 Biss. (U. S.) 363.

Canal Companies. — McMasters *v.* Reed, 1 Grant's Cas. (Pa.) 36.

Gravel Road, Plank Road, and Turnpike Companies. — Lebanon, etc., Gravel Road Co. *v.* Adair, 85 Ind. 244; Smith *v.* Law, 21 N. Y. 299; Fink *v.* Canyon Road Co., 5 Oregon 301.

Transfer Companies. — Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351.

Mining Companies. — Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192; Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 258; Moss *v.* Oakley, 2 Hill (N. Y.) 265; Larwell *v.* Hanover Sav. Fund Soc., 40 Ohio St. 282.

Banking Companies, Including Savings Banks. — Ward *v.* Johnson, 95 Ill. 215; Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442; Marvine *v.* Hymers, 12 N. Y. 223; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Curtis *v.* Leavitt, 15 N. Y. 66, *affirming* on this point 17 Barb. (N. Y.) 309; Barnes *v.* Ontario Bank, 19 N. Y. 152; Rockwell *v.* Elkhorn Bank, 13 Wis. 653; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

Insurance Companies. — Matter of Hercules Mut. L. Assur. Soc., 6 Ben. (U. S.) 35, 6 Nat. Bank Reg. 338; Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Brode *v.* Fireman's Ins. Co., 8 Rob. (La.) 244; Barker *v.* Mechanic F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige (N. Y.) 470; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387.

Contra. — Bacon *v.* Mississippi Ins. Co., 31 Miss. 116.

Gas Companies. — Des Moines Gas Co. *v.* West, 50 Iowa 26; Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505, 38 Am. St. Rep. 453; Hays *v.* Galion Gas Light, etc., Co., 29 Ohio St. 330.

Electric Light Companies. — Sheridan Electric Light Co. *v.* Chatham Nat. Bank, 52 Hun (N. Y.) 575.

Water Power Companies. — Gebhard *v.* Eastman, 7 Minn. 56; Partridge *v.* Badger, 25 Barb. (N. Y.) 171.

Manufacturing and Trading Companies — *Alabama.* — Oxford Iron Co. *v.* Spradley, 46 Ala. 98.

California. — Smith *v.* Eureka Flour Mills Co., 6 Cal. 1.

Kentucky. — Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171.

Maine. — Whitney *v.* South Paris Mfg. Co., 39 Me. 316.

Massachusetts. — Fay *v.* Noble, 12 Cush. (Mass.) 1; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Monument Nat. Bank *v.* Globe Works, 101 Mass. 58, 3 Am. Rep. 322

Minnesota. — Gebhard *v.* Eastman, 7 Minn. 56; Sullivan *v.* Murphy, 23 Minn. 7; Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285.

Missouri. — Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43; Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453.

New Jersey. — National Bank of Republic *v.* Young, 41 N. J. Eq. 531.

New York. — Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Moss *v.* Averell, 10 N. Y. 449; Mead *v.* Keeler, 24 Barb. (N. Y.) 20.

Virginia. — Burr *v.* M'Donald, 3 Gratt. (Va.) 206.

Loan and Commission Companies. — A corporation authorized to make loans on securities, having received and approved the same, although for its own convenience the payment of money on the loan is postponed until a future day, may bind itself by accepting a bill for the amount of the loan drawn by the borrower, payable on such future day. Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151, *affirmed* 66 N. Y. 616.

And a corporation authorized to employ its stock solely in advancing money upon goods, and the sale of such goods upon commission, may lawfully accept bills drawn on account of future consignments, or deposits of goods. Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219.

Building Associations. — Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285. And see Jackson *v.* Myers, 43 Md. 452; Muth *v.* Dolfield, 43 Md. 466. See the title Building and Loan Associations, vol. 4, p. 999.

Agricultural Societies. — Thompson *v.* Lambert, 44 Iowa 239.

Religious Societies. — Cattron *v.* First Universalist Soc., 46 Iowa 106. See Donnelly *v.* St. John's Protestant Episcopal Church, 26 La. Ann. 738; First Baptist Church *v.* Caughey, 85 Pa. St. 271.

Corporation for Erection of Monument. — Hayward *v.* Pilgrim Soc., 21 Pick. (Mass.) 270.

Order of Odd Fellows. — Odd Fellows *v.* Sturgis First Nat. Bank, 42 Mich. 461.

1. See Police Jury *v.* Britton, 15 Wall. (U. S.) 566.

contract,[1] for a purpose beyond the scope of its authorized business. And the same is true of an indorsement for an unauthorized purpose.[2]

(*cc*) *Express Prohibition or Limitation.* — Sometimes corporations are expressly prohibited by the acts of incorporation, or by the general laws, from issuing any negotiable instruments at all. And sometimes they are prohibited from issuing particular kinds of negotiable paper. By the weight of authority notes issued in violation of such a prohibition are *ultra vires* and void.[3]

(*dd*) *Statutes Intended to Prohibit or Regulate Banking, etc.* — There are statutes in many states intended to prohibit railroad companies, insurance companies, manufacturing companies, and other corporations, not expressly authorized, from engaging in the business of banking. The language of these statutes is sometimes so broad that they would seem to prohibit the issuance of bills and notes under any circumstances. They are to be construed, however, in the light of their purpose as prohibiting the issuance of such paper as banks usually issue for the purpose of lending their credit, or for circulation as money, and not as prohibiting the issue of bills and notes in the usual course of their business.[4]

1. See *supra*, this title, *Powers with Respect to Contracts*.

2. **Unauthorized Business or Purpose.** — Pearce *v.* Madison, etc., R. C., 21 How. (U. S.) 441. In this case it was held that a railroad company had no power to establish a steamboat line to run in connection with its road but beyond its terminus, and that a note, therefore, given for the price of a steamboat purchased by it, could not be recovered upon. See also James *v.* Rogers, 23 Ind. 451; People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; Atty.-Gen. *v.* Life, etc., Ins. Co., 9 Paige (N. Y.) 470; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59.

3. **Express Prohibition or Limitation.** — See Root *v.* Godard, 3 McLean (U. S.) 102, in which a note issued by a bank, and payable at a future day, was held void because in violation of a statute prohibiting moneyed corporations from issuing a bill or note unless made payable on demand. And see, to the same effect, Weed *v.* Snow, 3 McLean (U. S.) 265; Root *v.* Wallace, 4 McLean (U. S.) 8.

So of drafts or acceptances in violation of the statute. Hayden *v.* Davis, 3 McLean (U. S.) 276; Davis *v.* River Raisin Bank, 4 McLean (U. S.) 387. See generally Scott *v.* Colburn, 28 L. J. Ch. 635, 26 Beav. 276, 5 Jur. N. S. 183; Southern Loan Co. *v.* Morris, 2 Pa. St. 175, 44 Am. Dec. 188; and the title ULTRA VIRES.

4. **Prohibition Against Issue of Bills, Notes, etc., "upon Loan or for Circulation as Money."** — In a number of states corporations, or corporations not expressly incorporated for banking purposes, are prohibited from issuing bills, notes, or other evidences of debt, "upon loan or for circulation as money." A bill or note issued in violation of such a statute is void, and the same is true of any other evidence of debt. In New York L. Ins., etc., Co. *v.* Beebe, 7 N. Y. 364, an insurance company without banking powers issued certificates of deposit, payable at a future day, with interest, certifying that a certain sum had been deposited with them for the period of twenty years and irredeemable within that time, and with a provision for interest, and took a bond and mortgage to secure the same. It was held that this was the issuing of an evidence of debt upon loan in violation of the statute, and that the certificates were void.

Issue in Usual Course of Business — *California.* — In Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 259, it was contended that the act providing that no corporation should by any implication or construction be deemed to possess "the power of issuing bills, notes, or other evidences of debt, upon loans, or for circulation as money," rendered void notes issued by a mining company for money borrowed. It was held, however, that the restriction was to prevent corporations from carrying on the business of banking, — from lending their credit by issuing bills or notes, and their issuing them for circulation as money, and that it did not prevent the borrowing of money in the course of business and giving the usual evidence of debt therefor. And see Smith *v.* Eureka Flour Mills Co., 6 Cal. 1.

Connecticut. — See Kilgore *v.* Bulkley, 14 Conn. 362.

Maryland. — It is so also in Maryland. Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285.

New York. — So in New York it has been held that the law prohibiting banks and other corporations from issuing notes upon loan, or for circulation as money, without special authority, does not interfere with the incidental powers of a corporation to issue a note or other instrument for borrowed money, provided the instrument is not designed for circulation as money, or adapted to that purpose. Curtis *v.* Leavitt, 15 N. Y. 62; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280. And see Safford *v.* Wyckoff, 4 Hill (N. Y.) 442, *overruling* 1 Hill (N. Y.) 11, and Smith *v.* Strong, 2 Hill (N. Y.) 241.

Wisconsin. — To the same effect are the Wisconsin decisions under a similar statute. Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

Prohibition Against Issuing Bill or Note Unless Payable on Demand Without Interest. — In some states there are statutes prohibiting banking associations from issuing or putting in circulation any bill or note, unless payable on demand, without interest. These statutes are not confined to bills and notes capable of circulation as money, but also apply to bills and

(*ee*) *Grant of Power to Give Other Securities.* — The fact that the charter of a corporation authorizes it to borrow money and to secure the same by giving other securities than bills and notes, as bonds, for example, does not limit its power to giving the securities specified, and impliedly prohibit the issuing of bills and notes, unless such a legislative intent clearly appears.[1]

(*ff*) *Prohibition Against Issue of Bonds.* — And a restriction or limitation upon the issue of bonds by a corporation is not to be construed as affecting its power to issue bills and notes when necessary in its business.[2]

(3) *Execution and Issue of Bonds* — (a) **When the Power Will Be Implied.** — In the absence of charter or statutory restrictions, a corporation has the implied power to execute and issue its bonds for money borrowed or debts contracted, whenever it has the power, express or implied, to borrow money or contract debts.[3]

notes issued in the ordinary course of business for goods purchased, or for debts otherwise incurred; and bills or notes payable at a future day, in violation of the statute, are void. Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333. See also Bank Com'rs *v.* St. Lawrence Bank, 7 N. Y. 513; Chillicothe Bank *v.* Dodge, 8 Barb. (N. Y.) 233; Swift *v.* Beers, 3 Den. (N. Y.) 70. And see the title BANKS AND BANKING, vol. 3, p. 787.

Certificates of Deposit. — A certificate of deposit issued by a banking corporation and payable to the order of a particular person at a future day, without interest, is in effect a negotiable promissory note, within such statutes as those prohibiting the issue of bills or notes not payable on demand, and without interest. Orleans Bank *v.* Merrill, 2 Hill (N. Y.) 295. See generally the title CERTIFICATES OF DEPOSIT, vol. 5, p. 801.

Non-negotiable Instruments. — It has been held that the statute does not apply to notes and drafts which are non-negotiable, and cannot be used or circulated as money, as they are not within the mischief intended to be guarded against. Ontario Bank *v.* Schermerhorn, 10 Paige (N. Y.) 109. But see Schermerhorn *v.* Talman, 14 N. Y. 93.

Issue of Bonds. — As to the effect of this statute on the issuing of bonds, see *infra*, this section, *Execution and Issue of Bonds.*

1. Specification of Other Securities. — In Lucas *v.* Pitney, 27 N. J. L. 221, the charter of a railroad company had expressly authorized it to borrow money for certain purposes, and to secure the payment thereof by bond or mortgage, or otherwise, on its property and franchises. It was contended that this was tantamount to a prohibition of the company's borrowing on any other security than that specified. But the court held that it was a grant of an additional power, and that it did not impliedly prohibit the company from borrowing money and securing the same by negotiable instruments.

And in Talladega Ins. Co. *v.* Peacock, 67 Ala. 253, it was held that a corporation which is authorized by its charter to transact the business of life, fire, and marine insurance, receive money on deposit, collect promissory notes and bills of exchange, lend money, and discount or sell such notes, or bills, and to "borrow money, and issue its bonds therefor," is not restricted, by the latter provision, to making loans secured by bonds, but has the incidental and implied power, common to all such corporations, to borrow money, and make negotiable or non-negotiable paper, and give such securities as may be deemed most advantageous.

2. Merchants' Nat. Bank *v.* Citizen's Gas Light Co., 159 Mass. 505, 38 Am. St. Rep. 453.

3. Issue of Bonds — *England.* — Royal British Bank *v.* Turquand, 5 El. & Bl. 248, 85 E. C. L. 248, 6 El. & Bl. 327, 88 E. C. L. 327.

United States. — Whitewater Valley Canal Co. *v.* Vallette, 21 How. (U. S.) 424.

Alabama. — Nelson *v.* Hubbard, 96 Ala. 238, 42 Am. & Eng. Corp. Cas. 210.

California. — McLane *v.* Placerville, etc., R. Co., 66 Cal. 606.

Connecticut. — Mead *v.* New York, etc., R. Co., 45 Conn. 222.

Florida. — State *v.* Florida Cent. R. Co., 15 Fla. 690.

Kentucky. — Browning *v.* Mullins, (Ky. 1890) 13 S. W. Rep. 427.

Massachusetts. — Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

New Jersey. — Willoughby *v.* Chicago Junction R., etc., Co., 50 N. J. Eq. 656; Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667; Stratton *v.* Allen, 16 N. J. Eq. 229.

New York. — Seymour *v.* Spring Forest Cemetery Assoc., (Supreme Ct.) 19 N. Y. Supp. 94; Miller *v.* New York, etc., R. Co., 8 Abb. Pr. (N. Y. Supreme Ct.) 431, 18 How. Pr. (N. Y.) 374; Leavitt *v.* Blatchford, 17 N. Y. 521; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; Curtis *v.* Leavitt, 15 N. Y. 66; Smith *v.* Law, 21 N. Y. 296.

North Carolina. — Craven *v.* Atlantic, etc., R. Co., 77 N. Car. 289. And see Tucker *v.* Raleigh, 75 N. Car. 267.

Pennsylvania. — Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 27 W. N. C. (Pa.) 497, 46 Am. & Eng. R. Cas. 276; Watts's Appeal, 78 Pa. St. 370; Philadelphia, etc., R. Co. *v.* Stichter, 21 Am. L. Reg. N. S. 713; McMasters *v.* Reed, 1 Grant's Cas. (Pa.) 36.

Tennessee. — Baxter *v.* Washburn, 8 Lea (Tenn.) 16.

Wisconsin. — North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31.

Statement of the Rule. — It was said by Hoar, J., in Com. *v.* Smith, 10 Allen (Mass.) 455, 87 Am. Dec. 672: "There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for

Issue in Payment for Property or Labor. — Thus it may issue bonds in payment for property or labor which it is expressly or impliedly authorized by its charter to purchase or contract for.[1]

(b) **Form and Terms of Bonds** — *aa.* In General. — And it may issue bonds in any form and with any conditions or terms as to time of payment or otherwise, not prohibited by its charter or by law.[2]

bb. Negotiable Bonds. — Since a corporation has the implied power to execute negotiable instruments in the course of its legitimate business, it may issue negotiable as well as non-negotiable bonds.[3]

cc. Warrant of Attorney to Confess Judgment. — And it may give bonds with warrant of attorney to confess judgment.[4]

dd. Bonds in Judicial Proceedings. — All corporations, capable of suing and being sued, have the implied power to execute bonds in judicial proceedings.[5]

(c) **Issue at Discount, or for Less than Par.** — In the absence of express restrictions,[6] a corporation may issue its bonds or debentures at discount, under an express or implied authority to raise money or pay debts, provided it does not violate the usury law.[7]

any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement."

Power Implied from Express Power to Mortgage. — Where a railroad company has express statutory authority to mortgage its property it need not have specific authority in order to borrow money and issue bonds. The purpose of a mortgage is to secure loans, and the power to borrow money and issue bonds is a necessary incident to the power to mortgage. Gloninger *v.* Pittsburgh, etc., R. Co. 139 Pa. St. 13, 46 Am. & Eng. R. Cas. 276.

Invalidity of Mortgage Securing Bonds. — The validity of corporate bonds is not affected by the invalidity of a mortgage given to secure their payment. Philadelphia, etc., R. Co. *v.* Lewis, 33 Pa. St. 33, 75 Am. Dec. 574; Illinois Trust, etc., Bank *v.* Pacific R. Co., 117 Cal. 332.

1. Issue for Propriety or Labor. — A cemetery association, authorized by its charter to acquire and hold land for its purposes, may issue its bonds in payment for land purchased. Seymour *v.* Spring Forest Cemetery Assoc., (Supreme Ct.) 19 N. Y. Supp. 94.

And a railroad or canal company may give its bonds to contractors for constructing its road or canal. McMasters *v.* Reed, 1 Grant's Cas. (Pa.)36.

Issue to Take Up Bonds of Old Corporation. — Where a new corporation is formed and succeeds to the powers of an old corporation, with power to issue its bonds for constructing its works, it has the power to issue its bonds in exchange for, and take up, bonds previously issued by the old company. Mead *v.* New York, etc., R. Co., 45 Conn. 199.

2. Form and Terms of Bonds. — A corporation being authorized by charter to issue bonds for proper corporate purposes, and the validity of a contract providing for an issue being established, the court will not interfere to regulate the character of the payments, or of the instruments to be issued therefor, as long as the same are not expressly unauthorized. Willoughby *v.* Chicago Junction R., etc., Co., 50 N. J. Eq. 656, 39 Am. & Eng. Corp. Cas. 153. See also Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Bonds Having Effect of Mortgage. — A corporation may be authorized to issue bonds having the effect of a mortgage on its property. See State *v.* Florida Cent. R. Co., 15 Fla. 690.

Equitable Mortgage. — Bonds issued by a canal company, pledging the real and personal property of the company for the payment of debt and interest, and containing other corresponding stipulations, will be treated by a court of equity as a mortgage, and enforced according to the intention of the contracting parties. White Water Valley Canal Co. *v.* Vallette, 21 How. (U. S.) 414.

3. Negotiable Bonds. — Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Curtis *v.* Leavitt, 15 N. Y. 66. See Vicksburg *v.* Lombard, 51 Miss. 111.

See *supra*, this title, *Issue of Negotiable Instruments Generally*. And see *infra*, *Negotiability of Corporate Bonds*.

4. Warrant of Attorney to Confess Judgment. — Stratton *v.* Allen, 16 N. J. Eq. 229. As to the power of a corporation to confess judgment, see *infra*, this title, *Actions By and Against Corporations — Confession of Judgment*.

5. Bonds in Judicial Proceedings. — Collins *v.* Hammock, 59 Ala. 448 (appeal bonds); Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391 (attachment bond); Young *v.* Brompton, etc., Water Works Co., 1 B. & S. 675, 31 L. J. Q. B. 14. (bond for costs). And see Miller *v.* Superior Mach. Co., 79 Ill. 450.

6. See *infra*, this section, *Express or Implied Prohibition or Limitation*.

7. Issue at Discount or for Less than Par. — Gamble *v.* Queens County Water Co., 123 N. Y. 91, *reversing* 52 Hun (N. Y.) 166; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; North Side R. Co. *v.* Worthington, 88 Tex. 562. And see Nelson *v.* Hubbard, 96 Ala. 238, 42 Am. & Eng. Corp. Cas. 210.

(d) **Issue to Directors or Other Officers.** — There is nothing, in the absence of express prohibition, to prevent a corporation from issuing its bonds to a director or other officer for money borrowed or for any other debt due him,[1] but the transaction must be in good faith and fair to the corporation.[2]

(e) **Pledge of Bonds.** — A corporation, having authority to issue its bonds, can, in the absence of express restriction, pledge them for money borrowed for legitimate purposes, and also as collateral security for a precedent debt.[3]

(f) **When the Power Does Not Exist** — *aa.* In General. — A corporation, of course, has no power to issue its bonds if there is an express or implied prohibition in its charter, or in some statute governing it.[4]

bb. Issue for Unauthorized Purpose. — Nor has it any power to issue bonds for a purpose that is not within the scope of the business authorized by its charter. It may not be permitted to avoid a bond issued for money borrowed, or a debt contracted, beyond the scope of its legitimate business;[5] but the bond is none the less *ultra vires*, and under some circumstances it will be void.[6]

cc. Issue of Irredeemable Bonds. — The power to borrow money and issue bonds, express or implied, does not authorize an issue of irredeemable bonds entitling the holder to a share in the profits, for such a plan for raising money is not a borrowing at all.[7]

dd. Express or Implied Prohibition or Limitation. — In most jurisdictions, if not in all, the power of a corporation, or of corporations organized for particular purposes to issue bonds, is restricted to a greater or less extent by constitutional or statutory provisions; and while a corporation cannot always set up

In *Re* Anglo-Danubian Steam Nav. Co., 44 L. J. Ch. 502, L. R. 20 Eq. 339, 23 W. R. 783, 33 L. T. 118, the articles of association of a company empowered the directors to borrow money and to secure the repayment thereof, or to raise any money authorized to be borrowed by them, by the issue of debentures, promissory notes, or bills of exchange, or in such other manner as they might deem expedient; also to exercise and do all such powers, acts, deeds, and things as the company might exercise and do. It was held that, either under the special or the general power so conferred, they had power to issue debentures at discount. "The directors," it was said by Sir G. Jessel, M. R., "can do anything the company can do, and as there are no regulations prescribed by the articles of the company, they may borrow on any terms they think fit."

Usury. — But a corporation cannot, unless expressly authorized, legally sell or issue its bonds, bearing the highest legal rate of interest, at a discount, for the purpose of borrowing money, as such a sale is in effect a loan, and is usurious. Craven *v.* Atlantic., etc., R. Co., 77 N. Car. 289.

Exemption from Usury Laws. — But a corporation may be exempted from the usury laws, so as to be authorized to so issue its bonds. See *supra*, this section, *Powers with Respect to Particular Contracts — Borrowing Money*. And see the title Usury.

Thus, where the charter of a corporation authorizes it to borrow money "on such terms as its directors may determine upon," and to issue bonds, a loan to it is not usurious because the bonds are sold for less than their face value. Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. Car. 298.

1. Issue to Officers. — Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190.

2. Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190. See the title Officers and Agents of Private Corporations.

3. Pledge of Bonds. — Nelson *v.* Hubbard, 96 Ala. 238, 42 Am. & Eng. Corp. Cas. 210; Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667; Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190.

4. See *infra*, this subdivision, *Express or Implied Prohibition*.

5. Singer *v.* St. Louis, etc., R. Co., 6 Mo. App. 427. See also the title Ultra Vires.

6. Unauthorized Purpose. — Smith *v.* Alabama L. Ins., etc. Co., 4 Ala. 558; Kemble *v.* Wilmington, etc., R. Co., 13 Phila. (Pa.) 469. See the title Ultra Vires.

Loan of Credit. — Thus a corporation not expressly authorized has no power to loan its credit to promote the interest of another person or corporation, and therefore a bond issued by it for such a purpose is *ultra vires*. Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558.

In North Side R. Co. *v.* Worthington, (Tex. Civ. App. 1894) 27 S. W. Rep. 746, the same persons who were the owners of the land, in order to develop the same, formed a land corporation and a street railroad corporation. The two companies afterwards joined in the execution of bonds, and a mortgage on their property to secure the same, using the bonds to pay off an indebtedness of the land company, and to raise money to construct the road of the street railroad company. The Court of Civil Appeals sustained the bonds, but the Supreme Court reversed the judgment, holding that each company was liable for its proportion of the debt, but that the bonds were void in so far as each loaned its credit for the benefit of the other. Northside R. Co. *v.* Worthington, 88 Tex. 562.

7. Irredeemable Bonds. — Taylor *v.* Philadel-

such restrictions to escape liability on bonds issued in violation thereof, still the issue is *ultra vires*, and it may impose liability on its officers, or be ground for forfeiture of its charter, and in some cases the bonds will be void.[1]

cc. Against Issue Except for Money Paid, Labor Done, or Property Received, etc. — In a number of states it is provided by the constitution or by statute that "no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received," and that all fictitious increase of indebtedness shall be void. Under such a provision bonds issued by a corporation, on account of which no money, labor, or property is paid, performed, or received, are illegal and void, except in the hands of *bona fide* purchasers for value.[2]

Transactions Not Prohibited. — But the provision is not intended to obstruct and hamper corporations in the management of their business; and the validity of the bonds does not depend on the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the bonds.[3]

phia, etc., R. Co., 7 Fed. Rep. 386; s. c. *sub nom.* McCalmont *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 479, 3 Am. & Eng. R. Cas. 163.

1. **Express or Implied Prohibition or Limitation.** — *Re* Pooley Hall Colliery Co., 18 W. R. 201, 21 L. T. N. S. 690; Chambers *v.* Manchester, etc., R. Co., 5 B. & S. 588, 117 E. C. L. 588; National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. Rep. 29; Farmers' L. & T. Co. *v.* San Diego St. Car Co., 45 Fed. Rep. 518; Steelman *v.* Baker, 53 N. J. Eq. 672. See the title Ultra Vires.

2. "Under this provision of the constitution, railroad companies have no right to lend, give away, or sell on credit their bonds or stock, nor have they the right to dispose of either, except for a present consideration, and for a corporate purpose." Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 202. And the same is true of other corporations. See Farmers' L. & T. Co. *v.* San Diego St. Car Co., 45 Fed. Rep. 518; Merz *v.* Interior Conduit, etc., Co., 87 Hun (N. Y.) 430.

Issue to Pay Scrip Dividends. — Such a provision prohibits a corporation from issuing bonds to pay scrip dividends, or otherwise reducing its capital stock. Merz *v.* Interior Conduit, etc., Co., 87 Hun (N. Y.) 430.

Issue in Payment of or as Security for Pre-existing Debts. — An issue of bonds, not for money, labor, or property received on account of the issue, but in payment of or as collateral security for a pre-existing indebtedness of the corporation, has been held a violation of the prohibition. Farmers' L. & T. Co. *v.* San Diego St. Car Co., 45 Fed. Rep. 518.

"This constitutional and statutory prohibition is plain," said Judge Ross, in the case cited, "and has but one meaning — the money paid, labor done, or property actually received must be paid, performed, or received, as the case may be, on account of the issuance of the bonds; and any bonds issued contrary to this provision are of course illegally issued. The provision does not mean, and cannot be held to mean, that such bonds may be issued as collateral security for any sort of pre-existing indebtedness."

3. **Transactions Not Prohibited.** — Such a provision is not to be construed as obstructive to the extent of restricting and hampering corporations in their internal management, and embarrassing them in procuring means to carry out their legitimate purposes. To bring a case within the prohibition it must appear that the corporation has issued, or is about to fraudulently issue and put upon the market, bonds that do not and are not intended to represent money or property. Bonds may be disposed of for the best price that can be obtained, though for considerably less than their par value. Brown *v.* Duluth, etc., R. Co., 53 Fed. Rep. 889; Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287; Nelson *v.* Hubbard, 96 Ala. 238, 42 Am. & Eng. Corp. Cas. 210; Underhill *v.* Santa Barbara Land, etc., Co., 93 Cal. 300; Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187; Gamble *v.* Queens County Water Co., 123 N. Y. 91, 8 Ry. & Corp. L. J. 484, *reversing* 52 Hun (N. Y.) 166; Northside R. Co. *v.* Worthington, 88 Tex. 562. *Compare* Elyton Land Co. *v.* Birmingham Warehouse, etc., Co., 92 Ala. 407, 25 Am. St. Rep. 65.

Illustrations. — In Brown *v.* Duluth, etc., R. Co., 53 Fed. Rep. 889, it was held that a statute of *Minnesota* prohibiting railroad companies from issuing any stock or bonds, except for money, labor, or property received and applied for the purpose for which the corporation was created, did not forbid the issue of first mortgage bonds and full-paid stock by a railroad company in payment for the construction of its road, if the amount issued did not unreasonably exceed the value actually received.

In Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, which is a leading case, it was held that a provision in the constitution of *Arkansas* of 1874, that "no private corporation shall issue stock or bonds except for money or property actually received, or labor done, and all fictitious increase of stock or indebtedness shall be void," did not prevent the carrying out of an agreement between mortgage bondholders of an embarrassed railroad company in that state, by which it was agreed that trustees should buy in the mortgaged property on foreclosure, and convey it to a new company to be organized by the bondholders, which should issue new mortgage bonds to pay the expenses of the sale, and other new mortgage bonds to be taken by the bondholders in lieu of their old bonds, and full paid-up stock subject to the

ff. Against Issue in Excess of Stock Paid In. — So bonds issued in violation of a statute prohibiting an issue in excess of the capital stock actually paid in, or a certain amount thereof, are void, except in the hands of a *bona fide* purchaser for value.[1]

gg. Against Issue Except at Par or for Certain Amount of Par Value. — And the same is true of bonds issued in violation of a statute prohibiting their issue, except at par, or for an amount equal to a certain per cent. of their par value.[2]

hh. Against Issue of Bills and Notes. — A prohibition against the issue of bills and notes by a corporation does not exclude the power to issue non-negotiable bonds.[3]

ii. Formalities Prescribed. — In issuing its bonds a corporation must observe the formalities, if any, expressly prescribed by its charter or by statute. Whether failure to do so will render the bonds void depends, of course, upon the intention of the legislature, to be gathered from the language and purpose of the requirement.[4]

jj. Requirements as to Form and Terms of Instrument. — They must also observe the express charter or statutory requirements as to form, amount, time of payment, etc.[5]

kk. Requirement of Notice to or Consent of Stockholders. — A prohibition against the issue of bonds without the consent of the stockholders, or a certain proportion of them, or without notice to them, is intended for their protec-

mortgage debt, to be delivered to and held by the bondholders without any payment of money.

In Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187, it was said that the object of such a prohibition was "to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious."

A Deposit of Bonds as Collateral, in excess of the debt secured, has been held not a fictitious issue or disposition of the bonds, nor in violation of the provision given in the text. Dexter *v.* McClellan, (Ala. 1897) 22 So. Rep. 461; Atlantic Trust Co. *v.* Woodbridge Canal, etc., Co., 79 Fed Rep. 842; Illinois Trust, etc., Bank *v.* Pacific R. Co., 117 Cal. 332.

Changing Form of Debt Not an "Increase." — A change in form of the indebtedness of a corporation, as by issuing bonds for a pre-existing debt, is not an "increase" of indebtedness, within the meaning of a statutory prohibition. Powell *v.* Blair, 133 Pa. St. 550.

1. Issue in Excess of Stock Paid In. — *Re* Pooley Hall Colliery Co., 18 W. R. 201, 21 L. T. N. S. 690; Steelman *v.* Baker, 53 N. J. Eq. 672.

It is very generally held that where a corporation has received the benefit of bonds issued in excess of the limit, it cannot set up the limitation to escape liability thereon. Wood *v.* Corry Water Works Co., 44 Fed. Rep. 146. See also the title Ultra Vires.

2. National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. Rep. 29; Pfister *v.* Milwaukee Electric R. Co., 83 Wis. 86.

Implied Prohibition. — A corporation may be impliedly prohibited by a statute authorizing the issue of bonds from issuing them at less than par. Thus where a statute authorized a corporation to take stock in a public enterprise to a certain amount, and the only means provided for raising the money was by issuing bonds, and the amount of the bonds to be issued was restricted to the amount of the stock to be taken, it was held that these bonds could not be sold for a price less than par. Neuse River Nav. Co. *v.* Newbern, 7 Jones L. (52 N. Car.) 275.

3. Effect of Prohibition Against Bills and Notes. — Leavitt *v.* Blatchford, 17 N. Y. 521. In this case it was held that instruments issued by a banking association in the form of bonds for the payment of a particular sum at a future day, and convertible at the holder's option into stock of the association, with coupon warrants attached for the payment of semi-annual interest, were not, nor were the coupons, bills, or notes within the prohibition of the statute against the issue of bills or notes not payable on demand and without interest. And see Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280; McMasters *v.* Reed, 1 Grant's Cas. (Pa.) 36.

4. See *supra*, this section, *Form and Manner of Entering into Contracts.*

Penalty Prescribed for Failure to Furnish Description to Secretary of State. — In *Georgia* corporations were, and perhaps are still, required to furnish the secretary of state a description of bonds issued by them. As to the construction of this provision, see McDaniel *v.* Gate City Gas Light Co., 79 Ga. 58.

5. Form and Terms. — Failure to do so will render the bonds *ultra vires*, though the corporation may not always be permitted to set up the defense to defeat an action thereon. See Browning *v.* Mullins, (Ky. 1890) 13 S. W. Rep. 427; Com. *v.* Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

tion only, and they may waive it. It does not affect the power of the corporation.[1]

II. What Constitutes an "Issue" of Bonds. — A pledge of bonds, as well as a sale, is within a prohibition against an "issue" of bonds, or issue except under certain circumstances.[2]

(g) **Negotiability of Corporate Bonds.** — It is settled that bonds of a corporation and the coupons, if any, attached thereto are negotiable securities, and subject to the laws governing negotiable instruments, when it is shown by the form in which they were issued, and the mode of giving them circulation, that they were intended to possess this character.[3]

(4) *Contracts of Suretyship and Guaranty* — (a) **General Rule that the Power Does Not Exist.** — A corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary or is usual in the conduct of its business. Ordinarily the simple act of becoming surety or guarantor for the contract or debt of another person or corporation is not within the implied powers of a corporation.[4]

1. Notice to or Consent of Stockholders. — See Nelson *v.* Hubbard, 96 Ala. 238, 42 Am. & Eng. Corp. Cas. 210; Beecher *v.* Marquette, etc., Rolling Mill Co., 45 Mich. 103.

2. Pledge of Bonds an "Issue." — National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. Rep. 29; Pfister *v.* Milwaukee Electric R. Co., 83 Wis. 86; Atlantic Trust Co. *v.* Woodbridge Canal, etc., Co., 79 Fed. Rep. 842.

"When a corporation," said Lyon, C. J., in Pfister *v.* Milwaukee Electric R. Co., 83 Wis. 86, "puts its bonds beyond its control by hypothecating them as security for loans, or for any other purpose, or in any other manner, it issues them, within the meaning and intention of the statute."

In Mowry *v.* Farmers' L. & T. Co., 76 Fed. Rep. 38, 46 U. S. App. 164, the holders of railroad bonds deposited them with a trust company under a reorganization agreement, to be held by the trust company as security for other bonds then issued by the company. It was held that this was not a reissue of the bonds in violation of a prohibition against an issue except for money paid, etc.

3. Negotiability of Bonds — *United States.* — White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575.

Alabama. — State *v.* Cobb, 64 Ala. 127; Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Reid *v.* Mobile Bank, 70 Ala. 199.

Connecticut. — Mead *v.* New York, etc., R. Co., 45 Conn. 222.

Illinois. — Peoria, etc., R. Co. *v.* Thompson, 103 Ill. 187.

Indiana. — New Albany, etc., Plank-road Co. *v.* Smith, 23 Ind. 353.

Maryland. — Com. *v.* State, 32 Md. 547.

Massachusetts. — Haven *v.* Grand Junction R., etc., Co., 109 Mass. 88.

New Jersey. — Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667; Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18.

Pennsylvania. — Kerr *v.* Corry, 105 Pa. St. 282; Beaver County *v.* Armstrong, 44 Pa. St. 63; Carr *v.* Le Fevre, 27 Pa. St. 413. *Compare* Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

Rhode Island. — National Exch. Bank *v.* Hartford, etc., R. Co., 8 R. I. 375, 5 Am. Rep. 582.

See also the title Coupons.

As to the Rights of Holders and the defenses available against them, see the title Bills of Exchange and Promissory Notes, vol. 4, p. 65.

In England it was formerly held that bonds of a corporation were not negotiable, but were on the same footing as ordinary choses in action. Athenæum L. Assur. Soc. *v.* Pooley, 3 De G. & J. 294. And see *In re* Natal Invest. Co., L. R. 3 Ch. 355.

The later decisions, however, seem to be in accordance with the doctrine in the United States. *In re* Blakely Ordnance Co., L. R. 3 Ch. 154; *In re* General Estates Co., L. R. 3 Ch. 758; *In re* Imperial Land Co., L. R. 11 Eq. 478.

4. Contracts of Suretyship and Guaranty — *England.* — Colman *v.* Eastern Counties R. Co., 10 Beav. 1. *Compare In re* West of England Bank, 14 Ch. Div. 317.

Canada. — Johansen *v.* Chaplin, 6 Montreal L. R. Q. B. 111. *Compare* La Banque Molson *v.* Kennedy, 10 Révue Leg. 110.

United States. — Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 24 Am. & Eng. R. Cas. 58; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. Rep. 360; Seligman *v.* Charlottesville Nat. Bank, 3 Hughes (U. S.) 647; Louisville, etc., R. Co. *v.* Ohio Valley Imp., etc., R. Co., 69 Fed. Rep. 433. See Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47.

Alabama. — See Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558.

Connecticut. — Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 167.

Georgia. — See Cozart *v.* Georgia R., etc., Co., 54 Ga. 379.

Indiana. — See Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

Iowa. — Lucas *v.* White Line Transfer Co., 70 Iowa 541, 59 Am. Rep. 449; Twiss *v.* Guaranty L. Assoc., 87 Iowa 733, 43 Am. St. Rep. 418.

Maryland. — Savage Mfg. Co. *v.* Worthington, 1 Gill (Md.) 284.

Particular Corporations. — This rule is not limited to any particular corporation or kind of corporation, but extends to all.[1]

Reasons for the Rule. — The reasons for the rule are, that such a contract risks the capital and funds of the corporation in an enterprise not contemplated by the stockholders in subscribing for or purchasing its stock, prejudices the rights of its creditors, and exceeds the authority conferred by its charter.[2]

Benefit to Corporation from the Contract. — The mere fact that a contract of suretyship or guaranty may or will result in gain or benefit to the corporation, by increasing its business or otherwise, is not alone sufficient to authorize the same.[3] Nor is the rule affected by the mere fact that the corporation receives a consideration for its promise, if the promise be beyond the scope of the business authorized by its charter.[4]

Michigan. — Knickerbocker *v.* Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595.

New Hampshire. — Norton *v.* Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 335.

New York. — Bridgeport City Bank *v.* Empire Stone Dressing Co., 19 How. Pr. (N. Y. Supreme Ct.) 51; Filon *v.* Miller Brewing Co., (Supreme Ct.) 38 N. Y. St. Rep. 602, 15 N. Y. Supp. 57; Koehler *v.* Reinheimer, 20 Misc. Rep. (N. Y. Supreme Ct.) 62. And see Genesee Bank *v.* Patchin Bank, 13 N. Y. 314.

Pennsylvania. — *In re* Miners' Bank, 13 W. N. C. (Pa.) 370; Culver *v.* Reno Real Estate Co., 91 Pa. St. 376.

Tennessee. — Memphis Grain, etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798, 30 Am. & Eng. R. Cas. 522.

Texas. — Northside R. Co. *v.* Worthington, 88 Tex. 562.

Vermont. — See, as bearing on the question, Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144.

Wisconsin. — Madison, etc., Plank-road Co. *v.* Watertown, etc., Plank-road Co., 7 Wis. 59.

Corporation May Be Held Liable Though Contract Is Ultra Vires. — For reasons to be fully shown in another part of this work, a corporation may not be permitted to assert its want of power to enter into a contract of suretyship or guaranty after having received the benefit of it. See Macon, etc., R. Co. *v.* Georgia R. Co., 63 Ga. 103; Arkansas Valley Town, etc., Co. *v.* Lincoln, 56 Kan. 145; Bradford, etc., R. Co. *v.* New York, etc., R. Co., (Supreme Ct.) 16 N. Y. St. Rep. 208. And see, for a full discussion, the title ULTRA VIRES. But this does not affect the question of power.

1. Application of the Rule. — Thus a railroad company, without special authority, cannot guarantee the dividends upon the stock of a steamship corporation organized for the purpose of transporting passengers from the terminus of the railroad. Colman *v.* Eastern Counties R. Co., 10 Beav. 1.

So a bank cannot enter into a contract guaranteeing the payment by a customer of the hire of a steamship under a charter-party. Johansen *v.* Chaplin, 6 Montreal L. R. Q. B. 111.

Nor can a bank become surety on the bond of a public officer. *In re* Miners' Bank, 13 W. N. C. (Pa.) 370.

And a corporation created for the purpose of building a plank road or turnpike has no power to guarantee the payment of a loan of money made to another corporation of like character to enable it to build its road. Madison, etc., Plank-road Co. *v* Watertown, etc., Plank-road Co., 7 Wis. 59.

And national banks have no power to guarantee a contract between other persons for the delivery of building materials. Norton *v.* Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 335. See also Knickerbocker *v.* Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595. See the title NATIONAL BANKS.

2. Reason for Rule. — It was said by Taft, J., in Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. Rep. 356, 47 Am. & Eng. Corp. Cas. 242: "The objection to the guaranty is that it risks the funds of the company in a different enterprise and business under the control of another and different person or corporation, contrary to what its stockholders, its creditors, and the state have the right from its charter to expect."

The rule, said Lurton, J., in Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 51, "rests upon two or more very evident reasons: (1) The corporate funds belong to its shareholders, and, by the very terms of the law creating it, cannot be devoted to any other purpose than those indicated by its charter and constitution. Such obligations would violate the fundamental terms of the agreement between the corporators themselves. (2) To do so would be to exercise a power not conferred by the state, either expressly or impliedly. The state's grant of the corporate franchises is for the purpose prescribed, and the execution of such obligations would be beyond the power conferred, and therefore a diversion of the corporate purposes as well as of the corporate funds."

3. Benefit to Corporation. — Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. Rep. 797, 37 U. S. App. 602; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. Rep. 356, 22 U. S. App. 334; 47 Am. & Eng. Corp. Cas. 242; Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Filon *v.* Miller Brewing Co., (Supreme Ct.) 15 N. Y. Supp. 57; Memphis Grain, etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798; Madison, etc., Plank-road Co. *v.* Watertown, etc., Plank-road Co., 7 Wis. 59.

4. As was said by Dwight, J., in Filon *v.* Miller Brewing Co., (Supreme Ct.) 38 N. Y. St. Rep. 602, 15 N. Y. Supp. 57: "Whether an act is within corporate powers, depends upon the character of the act itself, and not upon the consideration for which it is performed."

(b) **When the Power Will Be Implied** — *aa.* In General. — There is no absolute want of power in a business corporation to bind itself as a surety or guarantor. The power may not only be expressly granted, but there may be circumstances under which such a contract will be within its implied powers. The only general rule that can be stated is that the power will be implied whenever it is reasonably necessary or is usual in the conduct of its business, or reasonably necessary or proper in order to accomplish any particular power expressly conferred.[1]

bb. Contract to Increase Trade or Business. — A guaranty or contract of suretyship by a corporation is not within its powers merely because it will result in increased trade or business, for, as has been shown,[2] a contract not within the legitimate business of a corporation is not authorized because it will be beneficial. There are some decisions to the contrary, but they are opposed to the weight of authority.[3]

1. General Rule as to When the Power Will Be Implied — *United States.* — Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47; Mississippi, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392; Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335; Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98, 13 Am. & Eng. R. Cas. 658; Eastern Townships Bank *v.* St. Johnsbury, etc., R. Co., 40 Fed. Rep. 423; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381.

California. — Low *v.* California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629.

Georgia. — Mercantile Trust Co. *v.* Kiser, 91 Ga. 636.

Indiana. — Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

Nebraska. — Thomas *v.* City Nat. Bank, 40 Neb. 501.

New York. — Arnot *v.* Erie R. Co., 67 N. Y. 315; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 10.

Washington. — See Wheeler *v.* Everett Land Co., 14 Wash. 630.

2. See *supra*, this section, *Benefit to Corporation from Contract.*

3. Railroad Companies — Guaranteeing Dividends on Stock of Steamship Company. — In the case of Colman *v.* Eastern Counties R. Co., 10 Beav. 1, Lord Langdale, M. R., held that the Eastern Counties Railway Company, organized for the purpose of operating a railway running from London to the eastern coast of England, had no power to guarantee the dividends upon the stock of a steamship corporation organized for the purpose of transporting passengers from the terminus of the railroad company to Holland and the Continent. "Ample powers," he said, "are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by their acts; but it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind. * * * To pledge the funds of this company for the purpose of supporting another company, engaged in a hazardous speculation, is a thing which, according to the terms of this Act of Parliament, they have not a right to do."

Guaranty of Dividend on Elevator Stock. — In Memphis Grain, etc., Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798, 30 Am. & Eng. R. Cas. 522, a railroad corporation was empowered by its charter "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it was incorporated," and given "such additional powers as might be convenient for the due and successful execution of the powers granted." It was held that it could not, as an inducement for a subscription to its stock by an elevator corporation, guarantee a certain dividend on the elevator stock.

Manufacturing and Trading Corporations — Guaranty to Secure Sales. — In Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. Rep. 360, it was held that a corporation organized to make iron work for mining plants had no power to guarantee the performance of another's contract for the erection of a mining plant on the ground that the guaranty would secure a sale of the iron work used in the plant. "The stockholders of the corporation," said Taft, J., "had the right, in making their investments, to rely upon it that no part of the funds of the corporation, whose stockholders they were becoming, should be risked in the business of another corporation, over which they should have no control. The restriction by the state was that the manufacturing business in which they were to engage should be carried on through the sole agency of the corporation which they were forming." *Compare* Holmes *v.* Willard, 125 N. Y. 75, *infra.*

So, in Filon *v.* Miller Brewing Co., (Supreme Ct.) 15 N. Y. Supp. 57, it was held that a brewing company could not become surety for the payment of the rent of a hotel by the lessee, though the lessee agreed to buy his beer from the company if it would do so, as the guaranty was not within the scope of its business. And see Koehler *v.* Reinheimer, 20 Misc. Rep. (N. Y. Supreme Ct.) 62. See *contra*, Fuld *v.* Burr Brewing Co., (C. Pl.) 18 N. Y. Supp. 450; Winterfield *v.* Cream City Brewing Co., (Wis.

cc. Aiding Enterprise of Another. — Ordinarily a corporation cannot lend its credit to aid a separate and distinct enterprise of another corporation or person,[1] but such power may be implied if the other enterprise is necessary to enable the corporation to carry on its business.[2]

dd. Power under Authority to Aid Another. — And a corporation, whether for constructing and operating a railroad, or for any other purpose, if authorized by its charter to aid another corporation in a particular enterprise, may lend its credit to such other corporation by guaranteeing its bonds, or otherwise.[3]

ee. Guaranty as Consideration for Purchase, Lease, or Other Contract. — It also seems safe to say that whenever a corporation is authorized by its charter to purchase or lease the property of any corporation or person, it may guarantee the obligations of the latter as a consideration for the purchase or lease.[4] The

1897) 71 N. W. Rep. 101; Standard Brewery *v.* Kelly, 66 Ill. App. 267.

Cases to the Contrary. — In addition to the cases just cited above there are other cases opposed to those referred to above.

In Wheeler *v.* Everett Land Co., 14 Wash. 630, it was held that a corporation formed to carry on the business of manufacturing and dealing in lumber had the implied power to become surety on the bonds of building contractors, in the absence of any express prohibition, as it appeared that it was customary for such corporations to enter into such contracts in order to get business. Though the special circumstances may perhaps distinguish this case, it appears to be opposed to the numerous cases decided in other jurisdictions.

Guaranty of Expenses of Fair or Festival, etc., to Attract Business. — In Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543, it was held that neither a railroad company nor a manufacturing and trading company has the power to guarantee payment of the expenses of a festival or fair, though strangers might thereby be attracted to the place, and the business of the corporation greatly increased, as this was considered a risking of the funds of the corporation in a business foreign to its purposes. See also Tomkinson *v.* South-Eastern R. Co., 35 Ch. Div. 677.

There are several cases, however, in other jurisdictions, holding in effect that such a guaranty is within the implied powers of a corporation, as it would be usual and proper for a natural person to adopt such a method of attracting customers.

It was held, in Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234, that it is within the power of a corporation organized to "conduct a general hotel business," to subscribe to a fund to establish a military encampment which would be likely to attract strangers requiring hotel accommodation. And see State Board of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407.

1. Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. Rep. 360. See particular reference to these cases in the preceding note.

2. Guaranty to Procure Railroad Necessary to Business. — Thus in Mercantile Trust Co. *v.* Kiser, 91 Ga. 636, it was held that where it is essential to the successful prosecution of its business by a large sawmill corporation that a short line of railway penetrating the country from which its supply of timber is to be drawn shall be constructed and operated, and this enterprise is undertaken by a railway corporation which issues bonds for the purpose of raising funds with which to construct the railway, the interest on these bonds may, before they are negotiated, be guaranteed by the sawmill corporation.

Guaranty to Procure Goods Necessary for Business. — And in Holmes *v.* Willard, 125 N. Y. 81, there is a dictum to the effect that a corporation dealing in manufactured goods and needing them for sale may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods; and that this aid may be extended by a loan of its own money, or it may take his notes and by its credit raise money thereon, and advance such money, looking for reimbursement out of the goods to be manufactured and delivered to it.

3. Guaranty under Authority to Aid, etc. — Thus a railroad company authorized to aid another in the construction of its road, may guarantee bonds of the other as a means of raising money for such purpose. See Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 10. See also Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. Rep. 433, 43 U. S. App. 550.

4. Guaranty as Consideration for Purchase, Lease, etc. — In Low *v.* California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629, it was held that a railroad company with power to lease the road of another company had the power to guarantee the bonds of the lessor. The court said in this case: "Had a natural person taken this lease and made the contract of guaranty now before us, there is no room to doubt that it would be held valid; and this being so, the exercise of the power by the corporation must be upheld, unless, by its very nature, it is a power which a corporation cannot exercise. There is no sufficient reason deducible from the character of such a corporation, and the business in which it engages, why the corporation may not, for a valid consideration, guarantee the payment of a debt, which it may directly contract to pay; why the corporation may not, upon a sufficient consideration, make a conditional as well as an abolute promise of payment." See also Eastern Townships Bank *v.* St. Johnsbury, etc., R.

same would seem to be true of any other authorized contract by a corporation in which the guaranty by it would be usual or proper if it were a natural person.[1]

ff. Guaranty on Negotiation or Sale of Bonds, Notes, etc. — A corporation owning bonds, notes, or other evidences of debt, with power to negotiate or sell the same, may, on doing so, guarantee their payment for the purpose of increasing their value.[2]

gg. Guaranty to Procure Payment of Debts. — And perhaps, if a person is

Co., 40 Fed. Rep. 423; Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y. Supreme Ct.) 193. And see Opdyke *v.* Pacific R. Co., 3 Dill. (U. S.) 55; Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 24 Am. & Eng. R.Cas. 34.

Incorporation of Partnership. — So, when a partnership is incorporated and the corporation takes the property of the firm, it has the power to assume or guarantee the liabilities of the firm. Waterman's Appeal, 26 Conn. 96; McLellan *v.* Detroit File Works, 56 Mich. 579. See also Baxter *v.* Washburn, 8 Lea (Tenn.) 1.

1. Other Contracts. — There is no direct authority for this proposition, but it seems to be clearly deducible from the decisions.

United States. — In Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98, 13 Am. & Eng. R. Cas. 658, a railroad company, whose road extended across the state of Wisconsin from Lake Michigan to the Mississippi river, was authorized by its charter to make such contracts with any other person or corporation as the management of the road, and the convenience and the interests of the corporation, and the conduct of its affairs, might require, and was authorized by the general laws of the state to make with any other railroad company whose road terminated on the eastern shore of Lake Michigan any contract that might enable them to run their roads in connection with each other in such manner as they should deem most beneficial to their interests, and to build, construct, and run such steamboats or vessels as they might deem necessary to facilitate the business of such company or companies. It was held that the corporation had the power to contract with the proprietors of steamboats running on the lakes from its eastern terminus to Buffalo, for the carriage of passengers and freight in connection with its railroad, and, as one of the terms of such contract, to guarantee that the gross earnings of each boat should amount to a certain sum.

So in Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335, where a land company was expressly given power to acquire mining and timber lands and work the same, and to acquire rights of way to export its products, together with all the powers necessary to the use and enjoyment of the powers expressly granted, and was authorized in furtherance of such powers to consolidate, either permanently or temporarily, with any railroad company, it was held that the land company could acquire stock of the railroad company and guarantee its bonds and dividends on its preferred stock, in order to secure the construction of the railroad for the purposes of its business. See also Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47.

Connecticut. — Where a board of water commissioners, made a corporation for the purpose of supplying a city with water, and authorized to do any acts necessary or convenient for accomplishing that purpose, agreed with S. that if he would erect and keep a boarding house for their workmen they would guarantee him a specified number of boarders, it was held that the agreement, if necessary and convenient for accomplishing the purpose of the grant, was one that the corporation had power to make. Smith *v.* Water Com'rs, 38 Conn. 208.

Indiana. — In Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104, a railroad company had been authorized to make any contract with any other railroad company which its directors might deem proper "for the transportation of freight and passengers, or for the use of its road;" it was held that the first mentioned company might execute notes or bills to pay the expenses of altering the gauge of the other company's road to enable either to transport freight and passengers over it in the former's cars.

New York. — See also Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 10, where a guaranty by one railroad company of the obligations of another company was sustained under somewhat similar circumstances.

2. Guaranty on Negotiation or Sale of Bonds, etc. — *United States.* — Mississippi, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392; Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47; People's Bank *v.* National Bank, 101 U. S. 181; Rogers L. & M. Works *v.* Southern R. Assoc., 34 Fed. Rep. 278; Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335, 22 U. S. App. 267.

A railroad company having power to issue its own bonds in order to make its road, may guarantee the bonds of cities and counties which have been lawfully issued, and are issued as the means of accomplishing the same end. Mississippi, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392. And see Bonner *v.* New Orleans, 2 Woods (U. S.) 135.

Indiana. — Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457.

Kansas. — Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 24 Am. & Eng. R. Cas. 34.

Nebraska. — Thomas *v.* City Nat. Bank, 40 Neb. 501.

New Jersey. — Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 11 Rv. & Corp. L. J. 97, 35 Am. & Eng. Corp. Cas. 388.

New York. — Arnot *v.* Erie R. Co., 67 N. Y. 315, *affirming* 5 Hun (N. Y.) 608.

South Carolina. — Dabney *v.* State Bank, 3 S. Car. 124.

indebted to a corporation, and a guaranty by it is necessary to procure the payment of the indebtedness, power to enter into a guaranty will be implied.[1]

hh. Corporation as the Real Principal. — If, in fact, a corporation is the real principal in a contract, the fact that the form of the contract is such that it appears as surety or guarantor, or as otherwise lending its credit, does not render the contract *ultra vires*.[2]

ii. Express Authority to Enter into Contract of Guaranty or Suretyship. — If the charter of a corporation, or a statute, expressly authorizes it to enter into a guaranty, the provisions of the statute, if any, as to the form and mode of entering into the contract, must be strictly followed and all prescribed prerequisites must be observed.[3]

jj. Surety and Guaranty Companies. — In recent years corporations have been created for the express purpose and business of becoming surety or guarantor for the benefit of others. Such a corporation, of course, has power to enter into contracts of suretyship and guaranty; but its power in this respect is limited by the terms of its charter.[4]

(5) *Issue of Accommodation Paper* — (a) **General Rule that the Power Does Not Exist.** — A corporation, as has been seen, may issue and indorse negotiable bills and notes whenever it is necessary or usual in the course of its authorized business;[5] but by the overwhelming weight of authority, a corporation has no power to issue or indorse, for the accommodation of others, bills or notes in which it has no interest, unless, as is seldom if ever the case, such power is expressly conferred.[6]

1. Guaranty to Procure Payment of Debt. — This seems to be the effect of *In re* West of England Bank, 14 Ch. Div. 317, 49 L. J. Ch. 400, 42 L. T. 619, 28 W. R. 809, where it was held that the directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers and to act in such manner as might appear to them best calculated to promote the interests of the bank, had, when the formation of another company was of importance to the bank, in order to secure payment of a debt, power to guarantee the payment of interest on debentures of that company issued for the purpose of forming it.

2. Corporation the Real Principal. — Baxter *v.* Washburn, 8 Lea (Tenn.) 1. In this case a person sold land to certain individuals, who obtained a charter of incorporation for mining purposes, and transferred the land to the corporation. Afterwards a new contract was entered into by the vendor, the purchasers, and the corporation, by which the vendor conveyed the land to the corporation absolutely, reciting the payment of the consideration, but retained the purchase notes of the individual purchasers, and the company conveyed the land in trust to secure its bonds for double the amount of the purchase money, and deposited those bonds with the vendor to be sold, and a sufficiency of the proceeds applied to the satisfaction of the purchase notes. It was held that the company was in reality the principal debtor for the land, and the pledge of its bonds binding on it.

3. See Louisville, etc., R. Co. *v.* Ohio Valley Imp., etc., Co., 69 Fed. Rep. 431.

4. Gutzeit *v.* Pennie, 95 Cal. 598; Gans *v.* Carter, 77 Md. 1.

Constitutionality of Statutes.—A statute allowing bonds required by the laws of the state to be executed by surety companies has been held constitutional. Steel *v.* Auditor-Gen., (Mich. 1896) 69 N. W. Rep. 738.

5. See *supra*, this section, *Issue of Negotiable Instruments Generally*.

6. Power as to Accommodation Paper — *United States.* — Johnston *v.* Charlottesville Nat. Bank, 3 Hughes (U. S.) 657; *Ex p.* Estabrook, 2 Lowell (U. S.) 547; National Park Bank *v.* Remsen, 43 Fed. Rep. 226; National Bank of Commerce *v.* Atkinson, 55 Fed. Rep. 465; Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47; Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998. And see West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557.

California. — Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75. And see San Bernardino Nat. Bank *v.* Colton Land, etc., Co., 91 Cal. 124.

Connecticut. — Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 182; Credit Co. *v.* Howe Mach. Co., 54 Conn. 387, 1 Am. St. Rep. 123; Webster *v.* Howe Mach. Co., 54 Conn. 394.

Georgia. — Jacobs Pharmacy Co. *v.* Southern Banking, etc., Co., 97 Ga. 573.

Illinois. — Pick *v.* Ellinger, 66 Ill. App. 570.

Indiana. — Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

Maryland. — Savage Mfg. Co. *v.* Worthington, 1 Gill (Md.) 284.

Massachusetts. — See Bird *v.* Daggett, 97 Mass. 494; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Michigan. — Beecher *v.* Dacey, 45 Mich. 92. And see McLellan *v.* Detroit File Works, 56 Mich. 579; Merchants' Nat. Bank *v.* Detroit Knitting, etc., Works, 68 Mich. 620.

Missouri. — Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299.

New Jersey. — National Bank of Republic *v.* Young, 41 N. J. Eq. 531; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 11 Ry.

(b) **Exceptions to the Rule.** — If a corporation is authorized to lend its credit to another under the rule stated in dealing with the power to enter into contracts of guaranty or suretyship,[1] there seems to be no reason to doubt that it may do so by issuing or indorsing commercial paper;[2] and if a corporation has power to lend money to another, it may raise the money and make the loan by indorsing the other's paper.[3]

(6) *Contracts of Partnership and Joint Contracts* — (a) **General Rule that the Power Does Not Exist.** — By the decided weight of authority a corporation has no power to enter into an ordinary contract of partnership with another corporation or with an individual or individuals, unless such power is expressly conferred upon it by its charter. This is not among the implied powers of any corporation, whether it be a *quasi*-public corporation like a railroad company, or merely a strictly private business corporation like a manufacturing or trading corporation.[4]

& Corp. L. J. 97, 35 Am. & Eng. Corp. Cas. 388; Blake *v.* Domestic Mfg. Co., (N. J. 1897) 38 Atl. Rep. 241.

New York. — See *infra*, this note.

Ohio. — Benedict *v.* Market Nat. Bank, 6 Ohio Dec. 320, 4 Ohio N. P. 231.

Pennsylvania. — Culver *v.* Reno Real Estate Co., 91 Pa. St. 367.

Texas. — South Texas Nat. Bank *v.* La-Grange Oil-Mill Co., (Tex. Civ. App. 1897) 40 S. W. Rep. 328. And see Marshall Nat. Bank *v.* O'Neal, 11 Tex. Civ. App. 640.

New York. — There are a number of direct decisions in New York, and dicta in other cases, to the effect that a corporation cannot issue or indorse paper for the accommodation of another, even for a consideration received by it for the lending of its credit. National Park Bank *v.* German-American Mut. Warehousing, etc., Co., 116 N. Y. 281; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. (N. Y.) 23; Morford *v.* Farmers' Bank, 26 Barb. (N. Y.) 568; Bridgeport City Bank *v.* Empire Stone Dressing Co., 19 How. Pr. (N. Y. Supreme Ct.) 51, 30 Barb. (N. Y.) 421; Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 23 How. Pr. (N. Y. Supreme Ct.) 74. See Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275, 10 Abb. Pr. (N. Y.) 47.

Dictum to the Contrary in New York. — In Martin *v.* Niagara Falls Paper Mfg. Co., 122 N. Y. 165, there is a dictum to the contrary. It is settled law that all the stockholders of a corporation cannot ratify and thereby render valid an act of an officer which is beyond the powers of the corporation. Yet in this case it was said that all the stockholders of a manufacturing corporation could ratify and render binding its notes issued by its president for his accommodation. Brown, J., said: "The general rules of law relating to contracts and property rights apply to corporations as well as to individuals, and the principles of law of agency apply to both alike. The stockholders are the equitable owners of the corporate property, and if the officers or trustees do an unauthorized act or incur indebtedness which would not create a corporate liability, the stockholders may subsequently ratify the acts and validate the originally unauthorized transaction. What they might originally have done, they may do afterwards, and their subsequent assent is equivalent to original authority. And many cases would arise when it would be for the interest of both corporation and stockholders that an unauthorized act of the trustees should be made valid, or when justice and equity would demand that an unauthorized debt should be paid. There was nothing *malum in se* or *malum prohibitum* in the loaning of the credit of the company to Woodruff, and no other rights intervening, the accommodation notes, if they were such, represented transactions which the stockholders were competent to validate and ratify."

This was mere dictum, and none of the cases above cited holding a contrary doctrine were referred to.

Corporations May Be Liable on Accommodation Paper. — It is very generally held that a corporation is liable on accommodation paper in the hands of a *bona fide* purchaser for value. Jacobs Pharmacy Co. *v.* Southern Banking, etc., Co., 97 Ga. 573; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322. See the title ACCOMMODATION PAPER, vol. 1, p. 334.

But this does not make the transaction any the less *ultra vires*. It may be enjoined, for example, or the officers may be liable to the corporation for a loss, or other results may follow. See Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998. And see the title ULTRA VIRES.

1. See *supra*, this section, *Contracts of Suretyship and Guaranty*.

2. Holmes *v.* Willard, 125 N. Y. 75.

3. In Holmes *v.* Willard, 125 N. Y. 75, *affirming* (Supreme Ct.) 5 N. Y. Supp. 610, it was said by Earl, J., that a corporation dealing in manufactured goods and needing them for sale may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods; and this aid may be extended by a loan of its own money, or it may take his notes and by its credit raise money thereon, and advance such money, looking for reimbursement out of the goods to be manufactured and delivered to it.

4. **Contracts of Partnership** — *England.* — Charlton *v.* New Castle, etc., R. Co., 5 Jur. N. S. 1096.

United States. — Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441.

Reason for the Rule. — The reason for the rule is that to permit a corporation to form partnerships would take the management of its affairs, and the power to bind it, out of the hands of the officers and agents contemplated by its charter, and allow it to become bound by the other members of the partnership.[1]

(b) **What Are Contracts of Partnership Within the Rule.** — Whether or not a particular agreement between corporations, or between a corporation and an individual, constitutes a partnership within this rule, must be determined by reference to the law of partnership. It seems safe to say that any agreement by which the property of the parties is to be held in common or managed for the common benefit, and the profits and losses are to be shared, is a contract of partnership, and beyond the powers of a corporation, unless the power to enter into a partnership has been expressly conferred by its charter.[2]

Alabama. — Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

Georgia. — Gunn *v.* Central R., etc., Co., 74 Ga. 509.

Illinois. — Marine Bank *v.* Ogden, 29 Ill. 248; Bishop *v.* American Preservers' Co., 157 Ill. 284, 48 Am. St. Rep. 317; Chicago, etc., R. Co. *v.* Mulford, 162 Ill. 533.

Massachusetts. — Whittenton Mills *v.* Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681.

Missouri. — Aurora State Bank *v.* Oliver, 62 Mo. App. 390.

New Hampshire. — Burke *v.* Concord R. Corp., 61 N. H. 160, 8 Am. & Eng. R. Cas. 552. And see State *v.* Concord R. Co., 62 N. H. 375, 13 Am. & Eng. R. Cas. 94.

New York. — New York, etc., Canal Co. *v.* Fulton Bank, 7 Wend. (N. Y.) 412; People *v.* North River Sugar Refining Co., 22 Abb. N. Cas. (N. Y. Supreme Ct.) 164, 16 Civ. Pro. Rep. (N. Y.) 1, 121 N. Y. 582, 18 Am. St. Rep. 843. *Compare* Catskill Bank *v.* Gray, 14 Barb. (N. Y.) 471.

Pennsylvania. — Boyd *v.* American Carbon-Black Co., 182 Pa. St. 206.

Tennessee. — Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 20 Am. & Eng. Corp. Cas. 478.

Texas. — Sabine Tram Co. *v.* Bancroft (Tex. Civ. App. 1897) 40 S. W. Rep. 837.

See also the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

Cases to the Contrary. — There are several decisions to the contrary, or apparently to the contrary.

In Allen *v.* Woonsocket Co., 11 R. I. 288, a corporation was created under the name of the Woonsocket Company. Nothing in the act of incorporation specified the business to be done, nor did anything in the corporate name suggest it. All the stock was held by a single stockholder. The corporation entered into a partnership with an individual, to be terminated at will by the corporation. It was held that the partnership was not *ultra vires* on the part of the corporation.

In Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant's Ch. (U. C.) 540, several corporations and individuals, engaged in the manufacture and sale of salt, formed an association under an agreement which provided that all the parties should sell all the salt manufactured by them, through trustees of the association, and should sell none except through the trustees. It was held that the association was not *ultra vires* as to such of the contracting parties as were incorporated. See also French *v.* Donohue, 29 Minn. 111.

1. Reason for the Rule. — Whittenton Mills *v.* Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; Gunn *v.* Cent. R. Co., 74 Ga. 509; Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 20 Am. & Eng. Corp. Cas. 478.

In the case last cited it was said: "A partnership and a corporation are incongruous. Such a contract is wholly inconsistent with the scope and tenor of the powers expressly conferred and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation, or one owing duties to the public, such as a common carrier. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation. Now if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts. The whole policy of the law creating and regulating corporations looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken from its stockholders and the authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts."

2. Particular Contracts. — In Burke *v.* Concord R. Corp., 61 N. H. 160, 8 Am. & Eng. R. Cas. 552, two railroad corporations had agreed to run their roads jointly under the control of a general manager to be chosen by both parties, the finances of both corporations to be managed by a joint cashier chosen in like manner. The running expenses of the joint roads were to be paid out of the joint profits, and the net income remaining to be divided between the parties in a specified proportion. It was held that this constituted a partnership agreement, into which the said companies could not enter without express authority by the terms of their charters. *Compare* Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant's Ch. (U. C.) 540.

In Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 20 Am. & Eng. Corp. Cas. 482, a number of manufacturing corporations entered into a contract whereby a committee composed of representatives selected from each corporation

(c) **Ownership of Property in Common.** — Neither the rule that a corporation cannot become a member of a firm nor any other rule of law prevents a corporation from owning personal or real property in common with an individual or with another corporation, and such ownership in common may give rise to joint rights and joint liabilities.[1]

(d) **Ownership and Conduct of Joint Business.** — And it has been held that a corporation may become a co-owner with an individual in a business or enterprise within the scope of its corporate powers, and that the business may be carried on by them jointly.[2]

(e) **Management Intrusted Solely to Corporation.** — It has been held that a corporation has power to enter into a contract with an individual to engage in a single venture which will have the effect of carrying out the objects of its incorporation, and to share the profits and losses, if the entire management of the business contemplated by the contract is intrusted solely to the corporation, as

took complete possession and control of the property and machinery of each company, and managed and operated the same for the common benefit, under an association name, the several corporations sharing the profits and losses in agreed proportions. It was held that this was a contract of partnership between the corporations, and therefore *ultra vires*.

So in Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, a contract by which a number of railway companies turned over their roads and other property to one company for ninety-nine years, the latter company agreeing to operate and maintain the lines and pay each of the companies a certain percentage of the net profits, was held a contract of partnership, and not a lease. See also Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611.

Contracts Between Connecting Carriers — Joint Management. — Corporations engaged in the carriage of persons or goods, either by land or water, and owning connecting lines, have no more power than any other corporation to enter into a partnership agreement for the joint management of their lines. Charlton *v.* New Castle, etc., R. Co., 5 Jur. N. S. 1096; Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441; Burke *v.* Concord R. Co., 61 N. H. 160, 8 Am. & Eng. R. Cas. 552.

Where two separate corporations are created to construct and operate a railroad, they have no power to unite and conduct their roads under one management, sharing the profits and losses of the entire lines. Pearce *v.* Madison, etc., R. Co., 21 How. (U. S.) 441.

Retention of Sole Management by Each. — This does not prevent them, however, from entering into an arrangement as to their traffic, by which each company is authorized to make contracts for carriage over the entire line, and the profits and losses on such business are divided, and under which each company retains the sole management of its own road. Ogdensburgh, etc., R. Co. *v.* Pratt, 22 Wall. (U. S.) 123; Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258; Chicago, etc., R. Co. *v.* Mulford, 162 Ill. 522; Najac *v.* Boston, etc., R. Co., 7 Allen (Mass.) 329; Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; Nashua Lock Co. *v.* Worcester, etc., R. Co., 48 N. H. 339, 2 Am. Rep. 242; Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434. See Burke *v.* Concord R. Co., 61 N. H. 160, 8 Am. & Eng. R. Cas. 552, where the distinction between partnership agreements and such agreements as this is shown.

In Chicago, etc., R. Co. *v.* Ayres, 140 Ill. 644, *affirming* 39 Ill. App. 607, it was held that two or more railway companies whose railways form a continuous line may enter into a joint arrangement for operating their railways as one line, and to become jointly liable for money borrowed to be used in furtherance of the business of such lines.

Employment of Common Manager. — Two railroad corporations whose roads form a continuous line may, by mutual agreement, severally appoint the same person as manager, and run through trains. State *v.* Concord R. Co., 59 N. H. 85. The same rule would apply to corporations organized for other purposes.

For Further Discussion of this Question, see the title CONNECTING CARRIERS, vol. 6, p. 631.

1. Ownership of Property in Common. — Estell *v.* University of South, 12 Lea (Tenn.) 476; DeWitt *v.* San Francisco, 2 Cal. 289.

In the latter case it was said that "the books and cases do not afford any instance in which this right of holding lands as tenants in common, either with each other or with natural persons, is denied to corporations." See also Chattanooga, etc., R. Co. *v.* Davis, 89 Ga. 708, where it was held that a railroad company may contract jointly with individuals in settlement of litigation to which it is a party, and bind itself jointly with them to construct, keep up, and perpetually maintain stock gaps and road crossings across its track on the premises involved in the litigation.

Joint Deposit. — Two corporations may own a deposit in bank jointly, and may maintain a joint action to recover it. New York, etc., Canal Co. *v.* Fulton Bank, 7 Wend. (N. Y.) 412.

2. Joint Business. — Thus in Hackett *v.* Multnomah R. Co., 12 Oregon 124, 53 Am. Rep. 321, it was held that a corporation may be a joint owner of a ferry, if it is not inconsistent with its charter, and as such be entitled to share in its earnings, and to that end have an accounting. See also Calvert *v.* Idaho Stage Co., 25 Oregon 412, in which it was held that a corporation could own and carry on a stage business jointly with an individual.

this is not a general partnership.[1]

(f) **Contracts Imposing Liability of Partner.** — As to third persons, the liability of a partner is frequently imposed, though it was not the intention of the parties sought to be charged to become one, and even though a partnership could not have been made.[2] And a corporation may, in furtherance of the object of its creation, contract with an individual, though the effect of the contract may thus impose upon the company the liability of a partner.[3]

(g) **Express Authority to Form Partnership.** — There is nothing in the nature of a corporation that renders it absolutely impossible to enter into a partnership, and it may do so if, as is sometimes the case, its charter expressly or impliedly confers such power.[4]

(7) *Loaning Money* — (a) **When the Power Will Be Implied.** — A corporation not only has the power to loan money when it is expressly authorized to do so, but, in the absence of express authority, the power will be implied whenever loaning money is reasonably incidental to the transaction of the business for which it was created.[5]

Corporation Organized for the Purpose. — The power is not limited to corporations organized for the purpose of making loans as a business, like banks and loan companies.[6]

Other Corporations. — But it is also to be implied, under some circumstances, in the case of other corporations. While corporations not created for a business of which loaning money is a part, like railroad companies, plank-road and turnpike companies, water companies, insurance companies, manufacturing

1. **Sole Management in Corporation.** — Bates *v.* Coronado Beach Co., 109 Cal. 160. In this case there was a contract between a corporation, organized for the purpose of buying and selling land in a particular locality, and an individual, to buy and sell certain lands and to share the profits and losses. It was held that this contract was within the powers of the corporation.

2. See the title PARTNERSHIP.

3. Cleveland Paper Co. *v.* Courier Co., 67 Mich. 152.

May Incur Liability under Contract of Partnership. — In another part of this work it will be seen that corporations may incur liabilities or acquire rights as partners, though the contract was *ultra vires*. French *v.* Donohue, 29 Minn. 111; Catskill Bank *v.* Gray, 14 Barb. (N. Y.) 471; Cameron *v.* Decatur First Nat. Bank, 4 Tex. Civ. App. 309. See the title ULTRA VIRES.

4. **Charter Authorizing Partnership.** — In Butler *v.* American Toy Co., 46 Conn. 136, a firm engaged in the business of making toys formed a partnership with another firm engaged in the same business for the sale of their goods in New York, under the name of the American Toy Company. Afterwards, in consequence of the death of a member of the first-mentioned firm, the remaining members, with the widow and children of the deceased, procured an act making them a corporation. The preamble stated that the late firm had for many years been engaged in the manufacture of toys, that it had a large amount of real and personal estate used in the business, that the business was profitable, that it was for the interest of all concerned that it should not be discontinued, and that the act of incorporation was sought for the purpose of enabling the parties to carry on the business of the late firm. The act provided that the corporation should have power to carry on the manufacture of toys and engage in trade in connection therewith, and that the property of the firm should be vested in the corporation. The business of the firm and its transactions with the Toy Company had been the same after the death of the deceased member, and were continued in the same manner by the corporation. It was held that the legislature intended to authorize the corporation to continue a member of the Toy Company partnership in place of the firm from which it was formed.

5. **When Power to Loan Money Implied** — *California.* — Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620.

Indiana. — Pancoast *v.* Travelers' Ins. Co., 79 Ind. 172.

Louisiana. — America L. Assoc. *v.* Levy, 33 La. Ann. 1203.

New York. — Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; Farmers' L. & T. Co. *v.* Clowes, 4 Edw. Ch. (N. Y.) 575, 3 N. Y. 470.

North Carolina. — North Carolina R. Co. *v.* Moore, 70 N. Car. 6.

Washington. — Brown *v.* Elwell, 17 Wash. 442.

Wisconsin. — Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 5 Wis. 173.

6. **Banks and Loan Companies.** — Banks and loan companies are generally expressly authorized to make loans and discount promissory notes, bills of exchange, and other evidences of debt. But express authority to loan would not be necessary for either, as the power to loan would be implied in the case of either corporation, and the power to discount in the case of banks, as incidental to the business. See Deloach *v.* Jones, 18 La. 447.

companies, etc., cannot engage in making loans as a business,[1] they may make a loan whenever it is reasonably necessary or proper under the circumstances to enable them to accomplish the objects of their creation.[2]

Power to Loan Implied from Power to Aid. — If a corporation, though not one which is impliedly authorized to loan money, is authorized to aid another corporation in any work or enterprise, it may extend aid by loaning its money.[3]

(b) **When the Power Will Not Be Implied — Express Prohibition.** — A corporation, of course, has no authority to loan money when expressly prohibited.[4]

In the Absence of Express Prohibition. — And even in the absence of an express prohibition, except in the case of corporations like banking and loaning companies, organized for the purpose of loaning money, no general power to loan money as a business is to be implied. In no case has a corporation power to loan money for a purpose foreign to the business authorized by its charter.[5]

1. See *infra*, this section, *When the Power Will Not Be Implied.*

2. See Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620; Cheever *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 478.

Water Companies. — Thus a corporation for the purpose of constructing ditches, or building works and laying pipes to supply the public with water, may find it necessary to make advances in the nature of a loan to a contractor to enable him to construct its works, and such a loan would be authorized. Or it may require an additional supply of water, and may find it necessary to loan money to another company engaged in the construction of ditches and laying pipes which will bring the additional supply. Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 628.

Insurance, etc., Companies.— A corporation authorized to effect insurance upon life, to grant annuities, and to perform and execute trusts, has the power to loan its money in order to invest the same, as an incident of either of such powers. Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339; Farmers' L. & T. Co. *v.* Clowes, 4 Edw. Ch. (N. Y.) 575, 3 N. Y. 470. And see America L. Assoc. *v.* Levy, 33 La. Ann. 1203.

Railroad Companies. — And a railroad company, without express authority, may loan its surplus funds. North Carolina R. Co. *v.* Moore, 70 N. Car. 6. And see, as to railroad companies, Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50. See the title RAILROADS.

Manufacturing and Trading Companies. — And it is held that a manufacturing and trading company has power to loan money to a person dealing with it so as to enable him to carry on a transaction, if such power is necessary or convenient for the successful transaction of its business. Holmes *v.* Willard, (Supreme Ct.) 5 N. Y. Supp. 610, *affirmed* in 125 N. Y. 75.

Other Corporations. — In Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37, a charter giving a corporation power to "acquire and hold estate, real, personal, or mixed, and the same to buy, exchange, sell, and mortgage, transfer, pledge, or otherwise encumber or alienate, as the board of directors of said association may deem expedient," was held to give the power to loan its surplus funds.

Presumption of Authority. — Where a corporation has authority to loan money and take certain securities, the loaning and taking of such securities will be presumed to have been authorized until the contrary appears. Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 621; New York Firemen Ins. Co. *v.* Sturges, 2 Cow. (N. Y.) 664; McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392. See *supra*, this section, *Presumption of Authority or Power.*

3. **Power to Aid.** — Thus where a railroad company was authorized, in its discretion, "to subscribe towards the construction of any lateral, continuing, or connecting road, and acquire an interest therein to an extent not exceeding two-fifths of its estimated cost," it was held that it derived the right to subscribe for or aid in the construction of any connecting road to the extent declared in the act, and under such power might lawfully loan or furnish money to aid in such construction, and take a mortgage or other security therefor. Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

4. See *infra*, this section, *Express Prohibition or Limitation.*

5. **When the Power to Loan Will Not Be Implied** — *England.* — *In re* Coltman, 19 Ch. Div. 64.

Alabama. — Grand Lodge *v.* Waddill, 36 Ala. 313; Waddill *v.* Alabama, etc., R. Co., 35 Ala. 323; Chambers *v.* Falkner, 65 Ala. 448.

Connecticut. — See Platt *v.* Birmingham Axle Co., 41 Conn. 267; New-York Firemen Ins Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100; New-York Firemen Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109.

New York. — Berry *v.* Yates, 24 Barb. (N. Y.) 199; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Fulton Bank *v.* Benedict, 1 Hall (N. Y.) 480; Farmers' L. & T. Co. *v.* Carroll, 5 Barb. (N. Y.) 613.

Wisconsin. — Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank-Road Co., 5 Wis. 173; Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank-Road Co., 7 Wis. 69.

Insurance Companies. — A corporation created for the purpose of engaging in the business of insurance has no power to advance its moneys or obligations to sustain another corporation, whether engaged in a similar or dissimilar business. The authority to reinsure does not justify such transactions. Berry *v.* Yates, 24 Barb. (N. Y.) 199.

Plank-road Companies. — A corporation created for the purpose of building a plank road cannot, unless expressly authorized, make a loan of money to another corporation of like character for the purpose of enabling it to build its road, though the building of the

(c) **Loans to Directors.** — In the absence of express prohibition, there is nothing to prevent a corporation which is authorized to loan money, from loaning to a director or other officer, if the loan is made in good faith; but in some jurisdictions there are statutes expressly prohibiting such a loan.[1]

(d) **Loans to Stockholders.** — The same is true of loans to stockholders. A corporation may loan to a stockholder as well as to a stranger, if not prohibited by its charter.[2]

(e) **Express Prohibition or Limitation.** — Although a corporation is expressly prohibited from loaning money, or restricted in the manner of making loans, the borrower cannot always set up the prohibition to defeat an action to recover the loan;[3] but a loan in violation of the prohibition or limitation is nevertheless *ultra vires*, and may impose liability on the officers or other effects of *ultra vires* acts may follow, and in some jurisdictions such loan is held void.[4]

latter road would be advantageous to the former corporation. Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank-Road Co., 7 Wis. 59.

Other Corporations. — In Chambers *v.* Falkner, 65 Ala. 448, it was held that no power to loan money could be implied from the declared purpose and business of a private corporation chartered by the name of "State Grange of the Patrons of Husbandry of Alabama;" but that, on the contrary, such power was excluded by the declaration that the corporation was not created for pecuniary profit.

And in Grand Lodge *v.* Waddill, 36 Ala. 313, it was held that the Grand Lodge of Freemasons of Alabama had no implied power to loan out its money under a charter giving it power to do "all other things concerning" the moneys and revenues of the corporation, and the power to "have, hold, and receive, possess and enjoy" all moneys which might be bequeathed to it. "The former of those grants," said the court, "should not be understood to authorize the corporation to do anything that it might will with its funds. If so understood, a vague generality would become the warrant of authority to invest in any business or enterprise known to trade or commerce; and a corporation designed to be one of few and limited powers might engage in the most extensive and varied operations. Grants of powers to corporations, unlike the grants of individuals, are to be strictly construed in favor of the government, and against the grantee. * * * The clause granting the power to do all other things concerning the money and revenues being vague and ambiguous, we must not strive to give it the largest operation, but rather to limit it until there shall be no doubt, lest it may have a larger scope than was intended by the legislature. * * * It must be regarded as only conferring an ample discretion over the revenue of the corporation, in carrying out the specified powers conferred upon it and in accomplishing the purposes of its creation. We take a like view of the power to possess and enjoy money bequeathed to the corporation. The money must be enjoyed by the employment of it in exercising the specified powers, and in executing the purposes of the corporation."

Defense of Ultra Vires by Borrower. — Most but not all of the courts have held that a borrower of money from a corporation cannot be allowed to set up the want of authority to make the loan, when sued upon his contract. Ayers *v.* South Australian Banking Co., L. R. 3 P. C. 548; *In re* Coltman, 19 Ch. Div. 64; Kadish *v.* Garden City Equitable Loan, etc., Assoc., 151 Ill. 531, 42 Am. St. Rep. 256, *affirming* 47 Ill. App. 602; Brown *v.* Scottish-American Mortg. Co., 110 Ill. 235; St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Third Ave. Sav. Bank *v.* Dimock, 24 N. J. Eq. 26; Steam Nav. Co. *v.* Weed, 17 Barb. (N. Y.) 378.

This, however, does not render the loan an authorized transaction. It may subject the officers to liability and other results of *ultra vires* acts may follow. And some courts hold an *ultra vires* loan void. See the title ULTRA VIRES.

1. See *infra*, this section, *Express Prohibition or Limitation*. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

2. See *infra*, this section, *Express Prohibition or Limitation*. See the title STOCK AND STOCKHOLDERS.

3. Germantown Farmers Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549. See the title ULTRA VIRES.

4. *In re* Coltman, 19 Ch. Div. 64; *In re* Jaycox, 12 Blatchf. (U. S.) 209, 13 Blatchf. (U. S.) 70; Jaycox *v.* Green, 13 Nat. Bank Reg. 122; National Invest. Co. *v.* National Sav., etc., Assoc., 49 Minn. 517. See *infra*, this section, *Restrictions as to Securities; Limitation as to Amount of Loans*.

Prohibition of Loans to Others than Members. — Corporations organized for the mutual benefit of their members, as building and loan associations, friendly societies, etc., are frequently prohibited from loaning their funds to others than members, and a loan in violation of such a prohibition is clearly *ultra vires*, and in some, though not all, jurisdictions, it is held to be void. *In re* Coltman, 19 Ch. Div. 64. And see the titles BUILDING AND LOAN ASSOCIATIONS, vol. 4, p. 999; ULTRA VIRES.

Prohibition of Loans to Officers. — A loan by a corporation to its directors or other officers in violation of a prohibition in the charter, or in a general law, is clearly *ultra vires*. Most of the courts hold that such statutes are intended for the protection of the corporation, and that an officer who borrows money cannot set up the statute to defeat an action to recover the same. Lester *v.* Howard Bank, 33 Md. 558, 3 Am. Rep. 211; Bowditch *v.* New England Mut. L. Ins. Co., 141 Mass. 292, 55 Am. Rep. 474. See the title ULTRA VIRES.

Other courts, however, have allowed the de-

(f) **What Constitutes a "Loan" of Money.** — To constitute a "loan" of money so as to come within a charter or statutory prohibition against loans, there must be a promise or undertaking that the money will be repaid or returned, with or without compensation for the use of it in the meantime.[1]

(g) **Discounting Paper.** — In the absence of express prohibition, a corporation authorized to loan money may do so by way of discounting commercial paper,[2] but discounting bills of exchange and notes is a banking power, and if corporations other than banking companies are prohibited from exercising banking privileges, they have no power to make loans by way of discount.[3]

(h) **Limitation as to Amount of Loans.** — Sometimes corporations authorized to loan money are prohibited by their charters or some statute from loaning beyond a certain amount.[4] In such case they have no authority to loan in excess of the limit. It is very generally held that a borrower cannot set up the prohibition as a defense in a suit on his contract;[5] but the loan is nevertheless *ultra vires*.

(i) **Rate of Interest.** — Corporations authorized to loan money are as much subject to the usury laws as individuals, though not expressly made so by their charters or by statute, and they cannot loan money in excess of the legal

fense to be interposed. Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460, 42 Am. Rep. 26; Albert *v.* Baltimore, 2 Md. 159.

This prohibition does not prevent a corporation from loaning to another corporation, though a director of the former is also a director of the latter, for the corporation and its officers are separate and distinct persons in the law. Albert *v.* Baltimore, 2 Md. 159.

Prohibition of Loans to Stockholders. — So a loan by a corporation to one of its stockholders in violation of an express prohibition in its charter is *ultra vires* and has been held void. A. C. Nellis Co. *v.* Nellis, 62 Hun (N. Y.) 63. See the title ULTRA VIRES.

1. What Constitutes a "Loan." — See Kent *v.* Quicksilver Min. Co., 78 N. Y. 159; Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 391.

Purchase of Note from Agent. — A corporation organized for the manufacture and sale of musical instruments does not violate a prohibition against engaging in loaning money by purchasing from an agent a note which he has acquired by the sale of an article manufactured by the corporation. Western Cottage Organ Co. *v.* Reddish, 51 Iowa 55.

Money Due to a Bank on Bills of Exchange drawn and accepted by the directors of a company, indorsed by the company and discounted by the bank, the proceeds of which were applied in satisfying an overdrawn account of the company with the bank, and the balance for the benefit of the company, is not due as upon a loan within the meaning of articles of association prohibiting the directors from contracting any loan beyond £500 without the consent of the shareholders. *In re* Cefn Cilcen Min. Co., L. R. 7 Eq. 88, 38 L. J. Ch. 78, 19 L. T. 593. "Borrowing and lending," said Sir John Stuart, V. C., "are things perfectly well understood, and although the procuring of money by means of a bill of exchange confers the same benefit on the person who procures it as if he were to borrow the amount, yet it is impossible to consider transactions upon bills of exchange given in this manner as borrowing and lending within the meaning of the 56th article of the company's articles of association. It has been well decided that the balance due to a bank by a company which keeps an account with it, and has had the benefit of the money, is a debt, but not a loan in the proper sense."

2. Discounting. — See Bright *v.* Mountain City Banking Co., 3 Penny. (Pa.) 478.

3. United German Bank *v.* Katz, 57 Md. 128; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Pratt *v.* Eaton, 18 Hun (N. Y.) 293; New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; New York Firemen Ins. Co. *v.* Sturges, 2 Cow. (N. Y.) 664; North River Ins. Co. *v.* Lawrence, 3 Wend. (N. Y.) 482. See the title BANKS AND BANKING, vol. 3, p. 787.

4. Thus, the National Banking Act limits the liability of one person, corporation, or firm to a national bank to one-tenth part of the amount of the paid-in capital stock of the bank. Rev. Stat. U. S., § 5200. See the title NATIONAL BANKS.

Taking Notes from Old Corporation on Organization of New. — Where a national bank, organized from a state bank under the provisions of the National Currency Act, at the time of its organization took from such state bank, among the discounted notes, one for a larger amount than the national bank was authorized to loan to a single borrower, it was held that such note was not, nor was any note subsequently given in renewal thereof, to be regarded within the meaning of section 29 of said act, as given for money borrowed of the national bank. Allen *v.* Xenia First Nat. Bank, 23 Ohio St. 97.

5. Effect of Prohibited Loan. — Union Gold-Min Co. *v.* National Bank, 96 U. S. 640; Stewart *v.* National Union Bank, 2 Abb. (U. S.) 424; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531; Corcoran *v.* Batchelder, 147 Mass. 541; Allen *v.* Xenia First Nat. Bank, 23 Ohio St. 97; Portland Nat. Bank *v.* Scott, 20 Oregon 421; O'Hare *v.* Titusville Second Nat. Bank, 77 Pa. St. 96; McCartney *v.* Kipp, 171 Pa. St. 644; Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 2 Am. St. Rep. 228. See the titles NATIONAL BANKS; ULTRA VIRES.

rate unless expressly authorized.[1]

(8) *Taking and Enforcing Securities* — (a) **General Rule.** — Whenever a corporation has power to loan money or enter into any other contract by which another becomes or may become indebted to it, and there are no express or implied charter or statutory restrictions, it always has, as an incident thereto, the same power as an individual to take any of the ordinary securities.[2]

(b) **Bonds, Promissory Notes, etc.** — Thus it may take bonds, promissory notes, and other choses in action.[3]

(c) **Mortgage or Deed of Trust on Real Property.** — And it may take a mortgage or deed of trust on real property,[4] though not authorized to purchase or deal in

1. Rate of Interest and Usury. — Alexandria Bank *v.* Mandeville, 1 Cranch (C. C.) 552; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Lincoln Bldg., etc., Assoc. *v.* Graham, 7 Neb. 173; State Bank *v.* Cape Fear Bank, 13 Ired. L. (35 N. Car.) 75; Simonton *v.* Lanier, 71 N. Car. 498; National Bank *v.* Continental L. Ins. Co., 41 Ohio St. 1. See the title USURY.

Limitation in Charter or Statute. — When the rate of interest to be charged by a corporation on loans or discounts is limited by its charter, it cannot stipulate for a higher rate. New Orleans Exchange, etc., Co. *v.* Boyce, 3 Rob. (La.) 307; Clinton, etc,, R. Co. *v.* Kernan, 10 Rob. (La.) 174; State Bank *v.* Stansbury, 8 La. 261; Rock River Bank *v.* Sherwood, 10 Wis. 230; Salina Bank *v.* Alvord, 31 N. Y. 473; Orr *v.* Lacey, 2 Dougl. (Mich.) 230; Manderson *v.* Commercial Bank, 28 Pa. St. 379.

Express Authority to Loan in Excess of Legal Rate. — If there are no constitutional provisions in the way, corporations may, by their charters, or by statute, be exempted from the usury laws and allowed to charge any rate of interest they may agree upon. See Edinburgh L. Assur. Co. *v.* Graham, 19 U. C. Q. B. 581.

But an intention to exempt them from the operation of the usury laws must clearly appear.

In Simonton *v.* Lanier, 71 N. Car. 498, it was held that a statute authorizing a corporation to "lend money upon such terms and rates of interest as may be agreed upon" did not permit the corporation to take more than the ordinary legal rate of interest. *Compare* Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. Car. 298, and Morrison *v.* Eaton, etc., R. Co., 14 Ind. 110.

A charter which grants to an incorporated company the power to contract, without limit, for commissions, in addition to the lawful interest, does not enable the corporation to take usury under the name of commissions. Johnson *v.* Griffin Banking, etc., Co., 55 Ga. 691.

In Edinburgh L. Assur. Co. *v.* Graham, 19 U. C. Q. B. 581, it was held that an exception in a statute (22 Vict., c. 85) which prevents corporations, etc., "heretofore authorized by law to lend or borrow money," from charging more than six per cent. interest, applies only to corporations created for the purpose of lending money, or at least expressly authorized to do so, not to all who by the general law are allowed to lend it.

2. Power to Take Securities — *England.* — Cutbill *v.* Kingdom, 1 Exch. 494, 17 L. J. Exch. 177; Morrison *v.* Glover, 4 Exch. 430, 19 L. J. Exch. 20.

Canada. — Upper Canada Bank *v.* Killaly, 21 U. C. Q. B. 9. See Thompson *v.* Molsons Bank, 16 Can. Sup. Ct. Rep. 664.

Kansas. — Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Louisiana. — Deloach *v.* Jones, 18 La. 447; America L. Assoc. *v.* Levy, 33 La. Ann. 1203.

Maryland. — Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

Minnesota. — Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322.

Mississippi. — Commercial Bank *v.* Nolan, 7 How. (Miss.) 508.

Missouri. — See Detweiler *v.* Breckenkamp, 83 Mo. 45; Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37.

New York. — Mann *v.* Eckford, 15 Wend. (N. Y.) 512; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339; Farmers' L. & T. Co. *v.* Clowes, 4 Edw. Ch. (N. Y.) 575, 3 N. Y. 470.

Wisconsin. — Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

Statement of Rule. — In Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 632, it was said by Valentine, J.: "If it [a corporation] had the right to loan its funds, then it necessarily, and by unavoidable implication, had the right to take security for the repayment of the money thus loaned, and interest. * * * Thus, although the charter contains no express provisions authorizing the taking of notes, mortgages, or other securities, yet by authorizing loans to be made, it does, by the clearest implication, authorize all securities to be taken which are usually taken to secure loans."

Mention of Security as Grant of Power to Take It. — If the charter of a corporation or a subsequent statute expressly mentions a particular security and assumes the existence of the power of the corporation to take the same, it will amount to an implied grant of the power to loan on such security. In Reed *v.* State, 5 Ark. 193, it was held that even if the charter of a bank did not give it power to loan money on bonds as well as bills and notes, such power was granted by a subsequent statute requiring it to charge interest at certain rates on all bonds, notes, or bills discounted and negotiated by it.

3. See *supra*, this section, *Power to Take and Hold Property — Choses in Action.*

4. Mortgage on Real Property — *England.* — Cutbill *v.* Kingdom, 1 Exch. 494.

Alabama. — State *v.* Rice, 65 Ala. 83.

California. — Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620.

Illinois. — U. S. Mortgage Co. *v.* Gross, 93

land. Taking a mortgage on real estate as security for an authorized loan, or as security for any other debt lawfully contracted, is not a dealing in real estate, nor a purchase of real estate, for the mortgage is taken merely as security, and as such is merely an incident to the debt.[1]

(d) **Mortgage or Pledge of Personal Property.** — In like manner, a corporation may take a mortgage or pledge of personal property to secure debts due to it,[2] though not authorized to deal generally in such property.[3]

(e) **Stock in Corporations.** — And by the weight of authority it may take stock in another corporation,[4] or its own stock,[5] as collateral security for loans or debts otherwise due it.

(f) **Enforcing Securities.** — So long as a corporation violates no express restriction, it may take any usual or appropriate steps to realize on the securities taken by it.[6]

Ill. 483; Stevens *v.* Pratt, 101 Ill. 206. And see Commercial Union Assur. Co. *v.* Scammon, 102 Ill. 46.

Indiana. — Peru Bridge Co. *v.* Hendricks, 18 Ind. 11.

Kansas. — Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Kentucky. — Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

Massachusetts. — American Mut. L. Ins. Co. *v.* Owen, 15 Gray (Mass.) 491.

New York. — Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. (N. Y.) 339; Farmers' L. & T. Co. *v.* Clowes, 3 N. Y. 470; Crocker *v.* Whitney, 71 N. Y. 161; Farmers' L. & T. Co. *v.* Clowes, 4 Edw. Ch. (N. Y.) 575, 3 N. Y. 470; Mann *v.* Eckford, 15 Wend. (N. Y.) 512.

Wisconsin. — Clark *v.* Farrington, 11 Wis. 306; Cornell *v.* Hichens, 11 Wis. 368; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

To Secure Notes Given for Stock. — Unless expressly restricted a corporation has the power to take mortgages on real estate to secure notes given for stock. Clark *v.* Farrington, 11 Wis. 306; Andrews *v.* Hart, 17 Wis. 297.

To Secure Performance of Duties by Agent. — And, in the absence of express restrictions a corporation has the implied power to take a mortgage on real estate to secure the faithful performance of the duties of a necessary agent. Peru Bridge Co. *v.* Hendricks, 18 Ind. 11. It was here held that a corporation for the erection and maintenance of a toll bridge may employ a toll gatherer, and take from him a mortgage on real estate to secure the faithful performance of his duties, although not expressly authorized to do so by its charter.

Insuring Mortgaged Property. — A company authorized to make a loan and provide for the security of the same has as an incident the power to provide for insuring property taken as security. Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453.

Executing Power of Sale. — That a corporation may foreclose a mortgage by advertisement under a power of sale therein, see Gage *v.* Sanborn, 106 Mich. 269.

But it has been held otherwise where by statute the person executing the power of sale is required to take an oath, since a corporation cannot take an oath. See *infra*, this section, *Power to Take Oath.*

1. Taking Real Estate Mortgage Not Dealing in Land. — Clark *v.* Farrington, 11 Wis. 306; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

"In such transactions," said Dixon, C. J., in this latter case, "the debt is considered the principal thing, the mortgage the incident. It is the money due to which the mortgagee has the right, and not the land; and unless the mortgagor by his failure to pay renders a compulsory proceeding necessary in order to obtain satisfaction, he never acquires an absolute or controlling interest. A mortgage differs widely from an absolute conveyance of land. For all the purposes of negotiation and trade, it is regarded as mere personalty. It attaches itself to the debt and follows its destinies and ownership. It is beneficially assigned, transferred, released, surrendered, reissued, and revived with the instrument evidencing the debt, and with no other forms or ceremonies than are requisite to do so with the latter."

2. Chattel Mortgage or Pledge. — Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37; State *v.* Rice, 65 Ala. 83; Pittsburgh Locomotive, etc., Works *v.* State Nat. Bank, 21 Int. Rev. Rec. 349, 1 N. Y. W'kly Dig. 332; Upper Canada Bank *v.* Killaly, 21 U. C. Q. B. 9; Commercial Bank *v.* Nolan, 7 How. (Miss.) 508.

3. Taking Chattel Mortgage or Pledge Not Dealing in Goods. — In Bates *v.* State Bank, 2 Ala. 465, where a corporation was prohibited from dealing in goods, wares, and merchandise, it was held that a loan made, secured by a quantity of cotton, which was to be shipped and sold, and the proceeds credited to the debtor on the loan, was not a violation of the charter.

Engaging in Board of Trade Transactions. — In Morris *v.* Dixon Nat. Bank, 55 Ill. App. 298, a corporation authorized to loan money (a national bank) entered into an agreement with a person engaged in buying grain, by which the contracts of sales for future delivery into which such person had entered should be transferred to the corporation as security for past and future advances by it, and the proceeds from the sale of the grain shipped and sold by the corporation for the benefit of such person should be applied to protect his contracts for future delivery. It was held that this did not make the corporation a dealer in board of trade options, so as to make the transactions *ultra vires.*

4. National Bank *v.* Case, 99 U. S. 633. See *infra*, this section, *Power to Take and Hold Stock in Another Corporation.*

5. See *infra*, this section, *Power of Corporation to Acquire and Hold Its Own Stock.*

6. Shipping and Selling Goods. — Delmas *v.* Jones, 18 La. 447. In this case it was held

(g) **Restrictions as to Securities** — *aa.* In General. — Sometimes corporations, or particular corporations, though authorized to loan money, are expressly prohibited from loaning on particular kinds of security, as in the National Bank Act. By the weight of authority a borrower cannot set up the violation of such a restriction in defense of an action to recover a loan, or in order to avoid the security;[1] but the taking of the prohibited security is an *ultra vires* act, and some of the courts hold that the security cannot be enforced.[2]

bb. Real Estate Security. — Thus corporations are sometimes expressly prohibited from loaning money on real estate security.[3]

that a bank, having implied authority to make a loan and take security, could, in the absence of restrictions in its charter, loan money on the faith of a cotton crop, and cause the cotton to be shipped by an agent, to be sold to pay the loan. "The object of the contract," said the court, "was not to convey the cotton to market, but to have it sold after delivery to apply the proceeds thereof to the satisfaction of the debt which it was intended to secure; the bank was not to derive any profit from the transportation of the cotton; it was to be shipped in the name of their cashier and agent, as their property, and consigned for the purposes mentioned in the contract; and the conveying of the cotton to New Orleans was the only means through which the bank was to obtain the full and complete execution of the contract." See also Bates *v.* State Bank, 2 Ala. 465.

1. **Restriction as to Securities.** — *In re* Coltman, 19 Ch. Div. 64; Ayers *v.* South Australian Banking Co., L. R. 3 P. C. 548; Rolland *v.* La Caisse d'Economie Notre Dame de Quebec, 24 Can. Sup. Ct. Rep. 405; Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416, 1 Hughes (U. S.) 101; Mutual L. Ins. Co. *v.* Wilcox, 8 Biss. (U. S.) 203; Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439; National Bank *v.* Whitney, 103 U. S. 99; National Bank *v.* Case, 99 U S. 633; National Bank *v.* Matthews, 98 U. S. 621; Farmington Sav. Bank *v.* Fall, 71 Me. 49; Thornton *v.* National Exchange Bank, 71 Mo. 221; Trenton First Nat. Bank *v.* Gillilan, 72 Mo. 77; Wroten *v.* Armat, 31 Gratt. (Va.) 228; Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549. See the titles National Banks; Ultra Vires.

2. Toronto Bank *v.* Perkins, 8 Can. Sup. Ct. Rep. 603; McDonell *v.* Upper Canada Bank, 7 U. C. Q. B. 252; Lyman *v.* Upper Canada Bank, 8 U. C. Q. B. 354. See Biscoe *v.* Tucker, 11 Ark. 145; New-York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531. See Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549.

Evasion of Prohibition. — Where a corporation is prohibited from loaning money on particular kinds of security, but is permitted to take such securities to prevent loss on a debt previously contracted, it cannot evade the law by making a loan with the understanding that such security shall be given and afterwards taking it. See Merchants' Nat. Bank *v.* Mears, 8 Biss. (U. S.) 161.

Future Advances. — A charter or statute prohibiting the loaning of money on particular kinds of securities prohibits the taking of such securities for future advances. Kansas Valley Nat. Bank *v.* Rowell, 2 Dill. (U. S.) 371; National Bank *v.* Whitney, 103 U. S. 99; Crocker *v.* Whitney, 71 N. Y. 161.

Securities Good in Part. — Where a security is taken in a transaction which is good in part, and the good can be separated from the bad, it may be enforced in so far as it is good. Thus, under the National Banking Act prohibiting national banks from loaning money on real estate security, but permitting them to take such security to prevent loss on a debt previously contracted, it was held that a mortgage on real estate to secure a debt previously contracted, and also to secure future advances, could be enforced as to the former. Kansas Valley Nat. Bank *v.* Rowell, 2 Dill. (U. S.) 371.

3. There is such a prohibition as this in the National Banking Act. See the preceding subdivision. See also the title National Banks.

Assignment of Note Secured by Mortgage. — It is within such a prohibition to loan money on the assignment as collateral security of a note executed by a third person and the borrower, and secured by a mortgage to the borrower, both note and mortgage being assigned. National Bank *v.* Matthews, 98 U. S. 621.

But it has been held that if, in such case, the loan be made upon a note alone, it is not within the prohibition, though the benefit of the mortgage will inure to the loaning corporation by implication of the law, the prohibition not being intended to defeat such a loan nor such a result. National Bank *v.* Whitney, 103 U. S. 99.

Loan on Stock of Corporation Owning Land. — A loan on the stock of a corporation as collateral security is not a violation of such a prohibition, though the property of the corporation whose stock is pledged consists wholly of real estate. Baldwin *v.* Canfield, 26 Minn. 61.

An Indorsement of a Note by a Married Woman, by its terms charging her separate estate with the payment of the note, is not real estate security, within the prohibition. Third Nat. Bank *v.* Blake, 73 N. Y. 260.

Mortgage to Secure Indorser. — In Ft. Dodge First Nat. Bank *v.* Haire, 36 Iowa 443, a national bank refused to negotiate a loan upon the responsibility of a firm, but agreed to and did make the loan upon a note made by one member of the firm to the other and indorsed by the latter to the bank, the maker giving a bond and mortgage upon separate property to secure the indorser against liability upon his indorsement, with an agreement that in case of default the security should inure to the bank. It was held that the bond and mortgage were not within the prohibition of section 28 of the Act of Congress creating national

cc. Prohibition of Loans on Personal Security. — And sometimes loans on mere personal security are prohibited.[1]

dd. Restriction of Power to Loans on Personal Security. — When a corporation authorized to loan money is restricted to loans on "personal" security only, this gives the power to loan on personal property as collateral security.[2]

ee. Specification of Securities as an Exclusion of Others. — If the charter prescribe or specify particular securities for the investment of the corporate funds, this as a general rule excludes the power to loan money on any other security.[3] But the question must depend in all cases upon the intention of the legislature, and the rule cannot apply when a contrary intention appears.[4]

banks, against such banks holding real estate by purchase or mortgage; that the same were, therefore, legal and binding, and might be enforced for the benefit of the bank.

1. See *In re* Coltman, 19 Ch. Div. 64; North River Ins. Co. *v.* Lawrence, 3 Wend. (N. Y.) 482.

Note Secured by Stock. — A loan, when the note of the borrower, payable on demand, is taken, is not a loan on the security of that note. The note is only an evidence of the debt. If stock is hypothecated to secure the payment of the note, the loan will be deemed to have been made upon the stock. U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

2. **"Personal Security."** — It has been so held under the National Bank Act. Pittsburgh Locomotive, etc., Works *v.* State Nat. Bank, 19 Fed. Cas. No. 11198; Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 422; Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47; Baldwin *v.* Canfield, 26 Minn. 43.

In Cleveland *v.* Shoeman, 40 Ohio St. 176, it was held that a corporation (a national bank), authorized "to exercise * * * all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * * by loaning money on personal security," etc., had the power to loan money upon a note or other personal obligation of the borrower, secured by the pledge of a warehouse receipt for merchandise as collateral security. "To render these grants effective," said Dickman, J., "such associations are authorized to exercise such incidental powers as shall be necessary to carry on the kind of banking permitted. A national bank, therefore, empowered to carry on the business of banking 'by loaning money on personal security,' may also exercise all powers incidental thereto. Vested with such authority, we do not think that in making a loan on the personal obligation of the borrower with a warehouse receipt as collateral security thereto, the bank exceeds its statutory powers. It is not to be limited in taking security for discounts and loans to the personal undertaking of the borrower or to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, stock of a corporation, bills of lading, and other personal chattels."

3. **Specification of Particular Securities** — *England.* — *In re* Coltman, 19 Ch. Div. 64.

United States. — *In re* Jaycox, 12 Blatchf. (U. S.) 209; Mutual L. Ins. Co. *v.* Wilcox, 8 Biss. (U. S.) 203.

Alabama. — Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558.

Florida. — Allen *v.* Freedman's Sav., etc., Co., 14 Fla. 418.

Indiana. — Daiy *v.* National L. Ins. Co., 64 Ind. 1.

New York. — Scott *v.* Depeyster, 1 Edw. Ch. (N. Y.) 531; Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31; Davis Sewing Mach. Co. *v.* Best, 30 Hun (N. Y.) 638; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; North River Ins. Co. *v.* Lawrence, 3 Wend. (N. Y.) 482; New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678.

"Bonds and Mortgages on Real Estate." — Thus if the charter of a life insurance company provides that it shall invest its funds in bonds and mortgages on real estate it has no authority to loan money on personal security. North River Ins. Co. *v.* Lawrence, 3 Wend. (N. Y.) 482.

"Personal Security." — And where a statute (as the National Bank Act) authorizes a corporation to loan money on "personal security," it impliedly prohibits a loan on real estate security. National Bank *v.* Matthews, 98 U. S. 625.

Bottomry, Respondentia, and Real Estate Security. — Under a charter authorizing an insurance company to make contracts of insurance and to loan money on bottomry, respondentia, or mortgage of real estate or chattels real, it has no power to loan money on discount of notes. New-York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100.

4. **Legislative Intent Governs.** — The general rule that the evident intention of the legislature, and not the strict letter of the charter, is to govern was applied in National Bank *v.* Continental L. Ins. Co., 41 Ohio St. 1, where it was held that the charter of an insurance company providing that its funds should be invested in loans on "bonds" and mortgages on real estate, etc., did not invalidate, or, it seems, prohibit the loaning upon a note secured by mortgage on real estate. And see Heidmerdinger *v.* United Circle Daughters of Rebecca, 1 Ky. L. Rep. 332.

"Public Stocks or Other Securities." — A charter conferring on a savings corporation the power to invest its funds "in public stocks or other securities" authorizes the loaning of money on bills, bonds, notes and mortgages, as well as stocks, and also the making of loans by way of discount. Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299.

And where a banking institution had power to lend deposits on the public stock of the state or of the United States on bond and mortgage

ff. Taking Securities for Existing Debt. — Statutes prohibiting the loaning of money on particular securities generally contain a proviso allowing such securities to be taken as additional security for debts contracted to the corporation in the course of its dealings,[1] or for debts "previously contracted," [2] or to be taken in order to prevent loss on a debt previously contracted.[3]

(9) *Contracts Incident to Purchase of Real or Personal Property* — (a) **Contract to Purchase.** — Necessarily, whenever a corporation has the power to acquire real or personal property by purchase for the purpose of its business,[4] it has the power to enter into an executory contract to purchase the same;[5] but it can-

or "upon any other securities which should be deemed by the board of directors ample," it was held that it was not limited to the first mentioned securities, but could discount commercial paper. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

"Personal Security and Pledge of Chattels." — In Missouri Loan Bank *v.* How, 56 Mo. 53, power to loan money "upon personal security and the pledge of goods and chattels" was held to authorize a loan on personal security without a pledge of goods and chattels, and not to require both.

1. "Additional Security for Debts Contracted in Course of Dealings." — In Commercial Bank *v.* Upper Canada Bank, 7 Grant's Ch. (U. C.) 250, *affirmed* 7 Grant's Ch. (U. C.) 423, it was held that a statute expressly declaring that a corporation shall not, "either directly or indirectly, lend money, or make advances, upon the security or mortgage of any lands or tenements; * * * provided always that the said corporation may take and hold mortgages on real estate, by way of additional security, for debts contracted to the corporation in the course of their dealings," does not prohibit an advance of money and the taking of a mortgage on land as additional security as contemporaneous acts. The chancellor said: "I cannot deny that upon this construction the statute is open to great abuse, and that when an attempt is made to defeat it there must be considerable difficulty in determining whether the money was advanced upon the land or the mortgage taken as additional security. But that difficulty is not sufficient, in my opinion, to justify an alteration of the plain meaning of the act." See also Montreal Bank *v.* McWhirter, 17 U. C. C. P. 506.

In McDonnell *v.* Upper Canada Bank, 7 U. C. Q. B. 252, the charter of a bank declared that it should not, "directly or indirectly, hold any ships or other vessels." Further on it provided that it should not, "either directly or indirectly, lend money or make advances upon the security, mortgage, or hypothecation, of any lands or tenements, or of any ships or other vessels." After this was a provision: "Provided always, that the said corporation may take and hold mortgages and *hypothèques* on real estate and property in this province, by way of additional security for debts contracted to the corporation in the course of their dealings." It was held that the word "property" in the proviso did not include ships and other vessels, and that the corporation was disabled from holding them for any purpose whatever, whether as security for a pre-existing debt or for present advances.

2. For "Debts Previously Contracted." — In Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370, it was held by Chancellor Kent that a restriction in the charter of a bank against taking a mortgage on real estate except for "debts previously contracted," did not prohibit a loan and the taking of a mortgage as concurrent acts.

A mortgage given to secure the purchase money of property sold at the time is given for a debt "previously contracted," as the price of the property is a debt existing previously to the execution of the mortgage. Western Assur. Co. *v.* Taylor, 9 Grant's Ch. (U. C.) 471.

3. To Prevent Loss on Debts Previously Contracted. — The National Banking Act prohibits a national bank from loaning money on certain securities (shares of its own stock and real estate), but expressly allows it to take such securities in good faith to prevent loss on a debt previously contracted. See Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Ornn *v.* Merchants' Nat. Bank, 16 Kan. 341; Allen *v.* Xenia First Nat. Bank, 23 Ohio St. 97. And see the title National Banks.

Contemporaneous Loans and Future Advances. — Such a provision, it has been held, prohibits the taking of the prohibited security for a loan made contemporaneously, and clearly it prohibits taking such securities for future advances. National Bank *v.* Matthews, 98 U. S. 621; Kansas Valley Nat. Bank *v.* Rowell, 2 Dill. (U. S.) 371; National Bank *v.* Whitney, 103 U. S. 99; Fridley *v.* Bowen, 87 Ill. 151; Matthews *v.* Skinker, 62 Mo. 329, 21 Am. Rep. 425; Crocker *v.* Whitney, 71 N. Y. 161.

Renewal of Debts. — Such a statute does not render it unlawful for a corporation to take the prohibited securities on renewing a note for a loan previously made, or otherwise extending the time of payment of a pre-existing debt. This is within the general exception of such statute allowing the security to be taken for a pre-existing debt, and not the creation of a new debt. Howard Nat. Bank *v.* Loomis, 51 Vt. 349; Farmers', etc , Nat. Bank *v.* Wallace, 45 Ohio St. 152.

In the latter case it was held that a mortgage of real estate executed to a national bank to secure an indebtedness previously contracted for which new notes are given by the debtor, is not in violation of the national banking law prohibiting loans on real estate security, but allowing such security to be taken to prevent loss on a debt previously contracted.

4. See *supra*, this section, *Power to Take and Hold Property*.

5. Authorized Contracts. — Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Old Colony R. Corp. *v.* Evans, 6 Gray

not bind itself by a contract to purchase property, real or personal, for a purpose foreign to its business.[1]

(b) **Terms of Contract.** — Whenever a corporation has the power to purchase real or personal property, or to contract to purchase, it has, in the absence of express restrictions, power to agree to any terms or make any agreements necessary or usual in order to do so.[2]

(10) *Contracts Incident to Sale of Real or Personal Property* — (a) **Contract to Sell.** — In like manner a corporation can lawfully bind itself by a contract to sell its real or personal property whenever it has the power of alienation, but not otherwise.[3]

(b) **Terms of Contract and Mode of Sale.** — And whenever a corporation has the power to sell or contract for the sale of its property, real or personal, it has as an incident thereto, in the absence of express restrictions, the power to agree to any terms and adopt any means that are necessary or usual to effect such purpose.[4]

(11) *Contracts Incident to Leases.* — Generally speaking a corporation authorized to lease property to another, or to take a lease, has the incidental

(Mass.) 25, 66 Am. Dec. 394; State University *v.* Detroit Young Men's Soc., 12 Mich. 158.

1. **Unauthorized Contracts.** — Wilks *v.* Georgia Pac. R. Co., 79 Ala. 180; Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517; State Bank *v.* Niles, 1 Dougl. (Mich.) 401; Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482; Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, 19 Am. Rep. 781.

Thus a Banking Company, as it has no power to acquire land for the purpose of speculation, cannot bind itself by a contract to purchase land for the purpose of selling it again. State Bank *v.* Niles, 1 Dougl. (Mich.) 401.

And a Railroad or Steamboat Company cannot bind itself by a contract to buy grain for the purpose of selling it again. Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655, 19 Am. Rep. 781.

A Manufacturing Company, since it cannot purchase goods to sell them again on speculation, cannot bind itself by a contract to purchase. Day *v.* Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352.

And a Turnpike Company, organized for the purpose of constructing a turnpike and taking tolls, since it cannot establish and maintain stage and transportation lines over the road, or purchase horses and conveyances for such purpose, cannot bind itself by a contract to purchase them. Downing *v.* Mount Washington Road Co., 40 N. H. 230.

2. **Terms of Contracts.** — State University *v.* Detroit Young Men's Soc., 12 Mich. 138. And see Clark *v.* Farmers', etc., Mfg. Co., 15 Wend. (N. Y.) 256.

Particular Terms and Conditions. — Thus, on purchasing goods, a corporation may contract to return them on certain conditions, provided the conditions are not prohibited. Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40.

It is not necessarily *ultra vires* for a corporation having power to purchase and hold land to enter into an executory contract of purchase, by which it is to make payment at any time within one hundred years, paying taxes and interest in the meantime, no right to possession being given until payment is made. The contract would permit payment at any time. State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

Arbitration as to Price. — A power given to a corporation by its charter to agree with a proprietor for the purchase and use of land authorizes an agreement to pay such sum as arbitrators may fix upon. Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83. See also *infra*, this section, *Submission to Arbitration.*

Assumption of Incumbrance. — If a corporation has power to purchase real estate, this includes the power to purchase encumbered real estate, and the power to purchase encumbered real estate necessarily includes the power to assume the incumbrance. Woods Invest. Co. *v.* Palmer, 8 Colo. App. 132. See also Matter of Joint-Stock Companies, 1 De G. J. & S. 29, *reversing* 2 J. & H. 404.

3. See Augusta Bank *v.* Hamblet, 35 Me. 491. See *supra*, this section, *Power to Alienate Property.*

4. **Sales — Particular Terms and Conditions.** — It may agree to any conditions with respect to the price, time of payment, delivery, etc., that are not forbidden by law. Sistare *v.* Best, 88 N. Y. 527.

In De Graff *v.* American Linen Thread Co., 21 N. Y. 124, *reversing* 24 Barb. (N. Y.) 375, a manufacturing corporation had sold a stock of goods in a store belonging to it, agreeing that if the trustees then in office should within a year cease to have the management of the affairs of the company, and in consequence the general trade of the operatives should be diverted from the store to the purchaser's damage, it would repay him a certain sum. It was held that the power to affix conditions with respect to the price was incidental to the power to sell the property, and that the condition was therefore valid.

Sale Through Broker on Exchange. — A bank or other corporation owning stock in a corporation which it has taken for a debt, and which it has the power to sell, may adopt the same measures to sell it as a natural person. Therefore it may employ a broker and sell the same on the stock exchange. Sistare *v.* Best, 88 N. Y. 527.

power to agree to any terms usual in leases.[1]

(12) *Subscriptions to Other Enterprises.* — It has often been held that it is not within the powers of a corporation to subscribe for the purpose of aiding other enterprises, even though it may tend to increase its own business; but on this point there is a direct conflict in the cases. Many courts have held that such power is to be implied whenever such a subscription is necessary, or when it would be usual or proper for a natural person under the circumstances. The conflicting decisions are shown in the note below.[2]

1. Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

Covenant to Repair. — Thus it may enter into a covenant to repair, and other usual covenants. Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

Covenant to Insure. — A corporation with power to lease a building may, in consideration of the lessor's obligation to rebuild in case the building shall be burned down, covenant to keep the same insured. Jacksonville, etc., R. Co. *v.* Hooper, 160 U. S. 514.

Tenancy from Year to Year. — And where a corporation has the power to take a lease, it may hold as tenant from year to year and become bound by holding over. Crawford *v.* Longstreet, 43 N. J. L. 325.

2. **Banking Corporations.** — In Holt *v.* Winfield Bank, 25 Fed. Rep. 812, it was held that a corporation created for the purpose of banking only has no power to subscribe towards the building of a creamery.

Railroad Corporations. — In Tomkinson *v.* South-Eastern R. Co., 35 Ch. Div. 677, it was held that a subscription by a railway company towards the erection of an institute was *ultra vires*, though the establishing of the institute would increase the passenger traffic over its line.

And in Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543, it was held that a railroad company had no power to aid in defraying the expenses of a musical festival, though it would be benefited by an increase of its passenger traffic.

On the other hand, however, in Temple St. Cable R. Co. *v.* Hellman, 103 Cal. 634, it was held that a street railway company had the power to execute a note to the conductor of a baseball park in consideration of his discontinuing his former place of business and establishing a baseball park on a tract of land adjacent to the land of the street railway company, with a view to increase its business. And see State Board *v.* Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702.

Manufacturing and Trading Companies. — In Davis *v.* Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, 3 Am. & Eng. R. Cas. 543, it was also held that a corporation organized for the manufacture and sale of musical instruments could not aid in defraying the expenses of a musical festival in the place where it did business.

In other jurisdictions, however, there are decisions to the contrary, which seem to be better supported in reason and by principle. In Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234, it was held by the Supreme Court of Illinois that a corporation organized to conduct a general hotel business had the implied power to subscribe to a fund to establish a military encampment, which would be likely to attract strangers requiring hotel accommodations. "Power to carry on the hotel business," it was said in this case, "necessarily carries with it, as an incident, the power to adopt and promote all reasonable expedients directly calculated to increase the number of patrons of the hotel, such as advertising, employing agents to solicit patronage, running omnibuses and other vehicles to convey guests to and from the hotel, and other similar expedients. Donations of money to enterprises calculated to bring to the city large numbers of visitors from abroad would seem to fall within the same reason."

And in B. S. Green Co. *v.* Blodgett, 159 Ill. 169, *affirming* 55 Ill. App. 556, it was held that a corporation organized for the purpose of manufacturing and dealing in merchandise could subscribe for the purpose of securing the location of a post-office adjoining its building, where such location would bring its business prominently before the public and increase its customers and sales.

In Steinway *v.* Steinway, 17 Misc. Rep. (N. Y. Supreme Ct.) 43, it was held that a manufacturing company has the power to contribute towards establishing a church, school, free library and free bath for use of its employees.

Land and Town-site Companies. — In Vandall *v.* South San Francisco Dock Co., 40 Cal. 83, where a corporation was organized for the purpose of buying, improving, selling, and otherwise disposing of real estate, it was held that it might properly appropriate a portion of its funds to a railroad running in the neighborhood, for the purpose of increasing the facilities and lessening the cost of transportation to its property. See also, to the same effect, McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262.

And it has been also held that a donation of land by a town-site company for the erection of a university or the establishing of any other business, with a view to enhancing the value of the remaining land, and building up the town, was not *ultra vires*. Whetstone *v.* Ottawa University, 13 Kan. 320; Sherman Center Town Co. *v.* Russell, 46 Kan. 382. So it has been held that a land company owning a large amount of land near a city, but separated from it by a river, had the power to make a contract with a bridge company to pay one-third of the cost of a bridge to connect its land with the city, even though the bridge was to be public property. Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 44 Am. & Eng. Corp. Cas. 604.

Other Corporations. — So in Louisville, etc., R. Co. *v.* Literary Soc. of St. Rose, 91 Ky. 395, it was held that an incorporated literary

(13) *Compromise of Claims or Suits.* — A corporation has the same power as a natural person to enter into an agreement for the compromise of claims and suits by and against it.[1]

(14) *Submission to Arbitration.* — And, although the charter of a corporation does not expressly give it the power to agree to refer matters to arbitration, it has such power as an incident to its power to sue and be sued, and to contract.[2]

(15) *Employment of Agents and Servants* — (a) **Power to Employ.** — By reason of its impersonal nature, a corporation cannot act otherwise than by agents. Therefore, it must have the power to employ agents and servants to do any act that is within its express or implied powers.[3]

Unauthorized Business or Transaction. — But it has no right to employ an agent to act for it in an *ultra vires* business or transaction.[4]

Contract of Apprenticeship. — A corporation may bind itself by a contract of apprenticeship to the same extent as an individual, provided such a contract is not foreign to the business for which it was created.[5]

(b) **Mode of Appointment of Agents** — *aa.* IN GENERAL. — Formerly an agent could only be appointed by an instrument under the corporate seal,[6] and this rule still obtains in *England*, it seems, when the employment is unusual.[7] Ordi-

society, which owned a large farm under authority conferred by its charter, had the implied power to do anything reasonably calculated to add to its value, and therefore, that a subscription by it to aid in building a railroad, which was highly beneficial, and added largely to the value of the property, was not *ultra vires*.

Subscription to Charities. — It is doubtless safe to say that a corporation cannot subscribe to charities, however worthy of encouragement or aid. McCrory *v.* Chambers, 48 Ill. App. 445.

1. **Compromise of Claims and Suits.** — *In re* Norwich Provident Ins. Soc., 8 Ch. Div. 334; Charlotte First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122; Northern Liberty Market Co. *v.* Kelly, 113 U. S. 199; Farmers' Mut. Ins. Co. *v.* Meese, 49 Neb. 861; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217; Moss *v.* Averell, 10 N. Y. 449.

Doubt as to Power. — It can make no difference that the doubt as to the validity of the claim against a corporation, which it compromised, was on the question whether the transaction out of which it arose was within its corporate powers. Farmers' Mut. Ins. Co. *v.* Meese, 49 Neb. 861.

2. **Submission to Arbitration.** — Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83; Remington Paper Co. *v.* London Assur. Corp., 12 N. Y. App. Div. 218; Brady *v.* Brooklyn, 1 Barb. (N. Y.) 584; Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40. See the title ARBITRATION AND AWARD, vol. 2, p. 533.

3. Cincinnati, etc., R. Co. *v.* Clarkson, 7 Ind. 595; Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514; Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. See also the title AGENCY, vol. 1, p. 930.

To Procure Subscribers or Purchasers of Stock. — For the purpose of issuing or selling its stock, a corporation may employ a broker or other agent, where his services are reasonably necessary, and pay him by a commission, or otherwise, for his services. Metropolitan Coal Consumers' Assoc. *v.* Scrimgeour, (1895) 2 Q. B. 604, 14 Rep. 729, *distinguishing In re* Faure Electric Accumulator Co., 40 Ch. Div. 141, 24 Am. & Eng. Corp. Cas. 42. And see Cincinnati, etc., R. Co. *v.* Clarkson, 7 Ind. 595.

To Procure Loan. — So a corporation having authority to borrow money has the power to employ a broker or other agent to procure a loan for it, and to agree to pay him for his services. Arapahoe Cattle, etc. Co. *v.* Stevens, 13 Colo. 534.

In this case an agreement by a corporation to pay a person five thousand dollars for procuring a loan to it of fifteen thousand dollars was sustained.

To Sell Property. — And a corporation having power to sell property may employ a broker to sell it. Sistare *v.* Best, 88 N. Y. 527.

Employment of Attorney. — As an incident to its power to sue and liability to be sued (see *infra*, this section), a corporation has the power to employ an attorney to prosecute and defend suits, and to confess judgment. National Bank *v.* Earl, 2 Okla. 617; U. S. Electric Lighting Co. *v.* Leiter, 19 D. C. 575.

The power to employ an attorney is not limited to suits in which the corporation may be successful, nor is the right of the attorney limited by the character of the questions that may arise in the case, or by the fact that the transaction out of which the suit arose was *ultra vires*. National Bank *v.* Earl, 2 Okla. 617.

4. *In re* Phœnix L. Assur. Co., 1 Hem. & M. 433, 8 L. T. 728, 11 W. R. 984.

In Georg *v.* Nevada Cent. R. Co., 22 Nev. 228, it was held that a railroad company could not lawfully employ a person to report on mines of which its road was the outlet, and that it was not liable to him therefor, though its business was benefited as a direct result of the report.

5. Burnley *v.* Equitable Co-operative, etc., Soc. *v.* Casson, (1891) 1 Q. B. 75, 32 Am. & Eng. Corp. Cas. 30.

6. See *supra*, this section, *Use of Corporate Seal*.

7. See Dyte *v.* St. Pancras, 27 L. T. 342, Austin *v.* Bethnal Green, L. R. 9 C. P. 91.

narily, however, in *England*, and always in the *United States*, unless a particular mode is prescribed by its charter or by statute, a corporation may appoint an agent not only by an instrument under the corporate seal, or by formal resolution, but also by an instrument in writing not under seal, or orally.[1]

bb. Holding Out and Estoppel. — Like a natural person, it may also render itself liable for the acts of a person by holding him out as its agent, and thereby estopping itself to deny his authority.[2]

cc. Ratification. — And it may by ratification render itself liable for the acts of one who has assumed to act as its agent without precedent authority.[3]

(16) *Power to Act as Agent.* — A corporation has the same power as a natural person to act as agent for another, whether for an individual, a firm, or another corporation, if its business is such as to render such a contract necessary or proper.[4] Otherwise the power does not exist. It cannot act as agent for another in a matter or for a purpose foreign to the business for which it was created.[5]

1. *England.* — See Haight *v.* North Brierley Union, El. Bl. & El. 873, 96 E. C. L. 873, 28 L. J. Q. B. 62; Totterdell *v.* Fareham Blue Brick, etc., Co., L. R. 1 C. P. 674; Browning *v.* Great Cent. Min. Co., 5 H. & N. 856, 29 L. J. Exch. 399.

United States. — Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299.

Connecticut. — Savings Bank *v.* Davis, 8 Conn. 191; Beckwith *v.* Windsor Mfg. Co., 14 Conn. 594; Howe *v.* Keeler, 27 Conn. 538.

Delaware. — Bancroft *v.* Wilmington Conference Academy, 5 Houst. (Del.) 577; Vandegrift *v.* Delaware R. Co., 2 Houst. (Del.) 287.

Illinois. — Board of Education *v.* Greenebaum, 39 Ill. 609.

Indiana. — Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359.

Kentucky. — Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

Maine. — Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507; Maine Stage Co. *v.* Longley, 14 Me. 444.

Maryland. — Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

Massachusetts. — Topping *v.* Bickford, 4 Allen (Mass.) 120; Hutchins *v.* Byrnes, 9 Gray (Mass.) 367.

New Hampshire. — Goodwin *v.* Union Screw Co., 34 N. H. 378.

New Jersey. — State *v.* Morris, etc., R. Co., 23 N. J. L. 360; Paret *v.* Bayonne, 39 N. J. L. 559.

New York. — American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

North Carolina. — Buncombe Turnpike Co. *v.* M'Carson, 1 Dev. & B. L. (18 N. Car.) 306.

Pennsylvania. — Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 S. & R. (Pa.) 16.

Tennessee. — Hopkins *v.* Gallatin Turnpike Co., 4 Humph. (Tenn.) 403.

Vermont. — Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

Virginia. — Burr *v.* M'Donald, 3 Gratt. (Va.) 206.

Wisconsin. — Ford *v.* Hill, 92 Wis 188.

For Other Cases, see *supra*, this section, *Form and Manner of Entering into Contract.* And see the title Officers and Agents of Private Corporations.

A Power of Attorney to Confess Judgment executed by a corporation need not be under the corporate seal. Ford *v.* Hill, 92 Wis. 188.

2. **Estoppel.** — Smith *v.* Hull Glass Co., 11 C. B. 897, 73 E. C. L. 897; Badger *v.* Cumberland Bank, 26 Me. 428; Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 400, 33 Am. Rep. 264; Goodwin *v.* Union Screw Co., 34 N. H. 378. See also the title Officers and Agents of Private Corporations.

3. **Ratification.** — Smith *v.* Hull Glass Co., 11 C. B. 897, 73 E. C. L. 897; Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. Rep. 505; Howe *v.* Keeler, 27 Conn. 538; White Water Valley Canal Co. *v.* Hawkins, 4 Ind. 474; Ross *v.* Madison, 1 Ind. 281; Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa 74. And see Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221. See also the titles Agency, vol. 1, p. 930; Officers and Agents of Private Corporations.

4. Killingsworth *v.* Portland Trust Co., 18 Oregon 351, 17 Am. St. Rep. 737, 32 Am. & Eng. Corp. Cas. 33.

Delegation of Power Not Involved. — In the case just cited it was said: "When a corporation is made the agent of another to sell and convey real property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one legal entity or artificial person in the performance of its engagements, and involves no delegation of powers."

National Banks. — Ordinarily a national bank cannot act as agent for another in the sale of notes, stock, or other property. See *infra*, this section. But there may be circumstances under which such power will be implied. Thus, where a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its power to collect the claim out of such collateral notes. Anderson *v.* Grand Forks First Nat. Bank, 5 N. Dak. 451.

Execution of Deed as Attorney in Fact. — A corporation has the power to execute a conveyance of land as attorney in fact of another. Killingsworth *v.* Portland Trust Co., 18 Oregon 351, 17 Am. St. Rep. 737, 32 Am. & Eng. Corp. Cas. 33.

5. Westinghouse Mach. Co. *v.* Wilkinson, 79 Ala. 312.

Banks as Brokers or Agents. — Thus a savings

8. Power to Take and Hold Stock in Another Corporation — *a.* IN GENERAL. — Whether a corporation, not expressly authorized, has the implied power to acquire and hold stock in another corporation, depends on the nature of the corporation, the purposes for which it was created, and the purposes for which the stock is acquired.[1]

b. DOCTRINE IN ENGLAND. — It was formerly held in England that express authority was necessary to authorize one corporation to acquire and hold stock in another;[2] but this doctrine has been abandoned, and it is now held that it may do so without express authority, unless it is expressly prohibited, or the nature of its business renders it improper for it to do so.[3]

c. DOCTRINE IN THE UNITED STATES. — The modern English doctrine, it seems, is followed in Iowa and Maryland,[4] and it may be in other states, but

bank with only the ordinary powers of such a corporation cannot act as broker or agent in buying and selling stock or produce on the stock or produce exchange. Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482.

And a national bank cannot act as agent or broker in the purchase or sale of bonds and stocks on commission. Allentown First Nat. Bank *v.* Hoch, 89 Pa. St. 324; Farmers', etc., Nat. Bank *v.* Smith, 77 Fed. Rep. 129, 40 U. S. App. 690. See the title NATIONAL BANKS.

Manufacturing Corporations as Agent or Broker. — And a manufacturing company has no power, unless it is expressly conferred, to act as agent for another like corporation in making sales of its product. Westinghouse Mach. Co. *v.* Wilkinson, 79 Ala. 312.

Nor has it any power to sell bonds on commission. Peck-Williamson Heating, etc., Co. *v.* Board of Education, (Okla. 1897) 50 Pac. Rep. 236.

Power to Act as Attorney at Law. — A corporation, it seems, cannot itself act as an attorney at law; but it may be of such a nature, or organized for such a purpose, as in the case of an incorporated collecting agency, that it may employ attorneys for another, and recover for fees paid them. Snow *v.* Hall, 19 Misc. Rep. (N. Y. Supreme Ct.) 655.

1. See Ang. & Ames on Corp., § 158. And see Booth *v.* Robinson, 55 Md. 419.

"Whether," said Mitchell, J., in Hill *v.* Nisbet, 100 Ind. 349, "the purchase of stock in one corporation by another is *ultra vires* or not, must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which, under the statute, it might accomplish."

2. Former Doctrine in England. — See Salomons *v.* Laing, 12 Beav. 339; Maunsell *v.* Midland Great Western R. Co., 1 Hem. & M. 130; Great Western R. Co. *v.* Metropolitan R. Co., 32 L. J. Ch. 382, 9 Jur. N. S. 562; Great Eastern R. Co. *v.* Turner, 42 L. J. Ch. 83, L. R. 8 Ch. 149, 27 L. T. 697, 21 W. R. 163; *In re* European Soc. Arbitration Acts, 8 Ch. Div. 704.

3. Present Doctrine in England. — See *In re* Barned's Banking Co., L. R. 3 Ch. 105, 36 L. J. Ch. 732; *In re* Asiatic Banking Corp., L. R. 4 Ch. 252. In the case last cited, Lord Justice Selwyn said on this point: "As to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord Cairns, in the case of Barned's Banking Company, Law Rep. 3 Ch. 105, viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company to do so, having regard to its own constitution, as defined by its memorandum and articles."

In *In re* Financial Corp., 28 W. R. 760, the objects of the company were stated in its memorandum to be the "undertaking, assisting, and participating in financial, commercial and industrial operations and undertakings, both singly and in connection with other persons, firms, companies, and corporations," and doing all things incidental or conducive thereto. It was held that the company was authorized to take unpaid-up shares in another company.

In Green's Brice's Ultra Vires 91, it is stated as the rule in England, that "a corporation may deal in the shares of other corporations, without express power so to do, provided the nature of its business be such as to render such transactions conducive to its prosperity."

Prohibition in Charter. — Of course such a transaction is *ultra vires* if expressly or impliedly forbidden by the charter of the corporation. See Joint Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381.

4. *Iowa.* — Latimer *v.* Citizens' State Bank, (Iowa 1897) 71 N. W. Rep. 225; White *v.* Marquardt, (Iowa 1897) 70 N. W. Rep. 193. In the case last cited, it was held that a mercantile corporation could in the course of its business take stock of another corporation in exchange for goods sold. See also Calumet Paper Co. *v.* Stotts Inv. Co., (Iowa 1895) 64 N. W. Rep. 782. And see the dictum in Howe *v.* Boston Carpet Co., 16 Gray (Mass.) 495.

Maryland. — In Booth *v.* Robinson, 55 Md. 419, it was held not to be *ultra vires* for one steamboat company to buy stock in another similar company, though there was no express authority therefor. "There is nothing," said the court, "in the charter of the steam packet company, or in the nature of its business, that would, in the slightest manner, forbid the exercise of such power; and having money to loan or invest, there would appear to be no good reason why it might not invest in the

the prevailing rule is different. It necessarily follows, from the general rule that a corporation can do no act nor make any contract that is not expressly or impliedly authorized by its charter, that a corporation cannot take or hold stock for a purpose foreign to the business for which it was created and the authority conferred by its charter. And on this principle the weight of authority in the United States is to the effect that one corporation has no power to acquire and hold stock in another, unless such power is expressly conferred, or unless the case is within one of the exceptions hereafter stated.[1]

d. ORIGINAL SUBSCRIPTIONS. — This rule applies to original subscriptions by one corporation for shares of stock in another.[2]

stock of other corporations as well as in any other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose."

1. Prevailing Doctrine in the United States — *United States.* — Pauly *v.* Coronado Beach Co., 56 Fed. Rep. 428. And see Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 342, 48 Am. & Eng. Corp. Cas. 658; Easun *v.* Buckeye Brewing Co., 51 Fed. Rep. 156. And see Wilbur *v.* Stockholders, 18 Nat. Bank Reg. 178, 29 Fed. Cas. No. 17636; Charlotte First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122; Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105; Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. Rep. 414; Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369, 34 U. S. App. 423; McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787; California Bank *v.* Kennedy, 167 U. S. 362.

Alabama. — Commercial F. Ins. Co. *v.* Board of Revenue, 99 Ala. 1, 42 Am. St. Rep. 17; Woods *v.* Memphis, etc., R. Co., 5 Ry. & Corp. L. J. 372, *affirmed* Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, 16 Am. St. Rep. 81.

California. — Knowles *v.* Sandercock, 107 Cal. 629.

Connecticut. — Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Meriden Agency Co., 24 Conn. 159; Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336.

Georgia. — Central R. Co. *v.* Collins, 40 Ga. 582; Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13.

Illinois. — Peshtigo Co. *v.* Great Western Tel. Co., 50 Ill. App. 624; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319.

Kansas. — See Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365.

Louisiana. — New Orleans, etc., Steamship Co. *v.* Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90.

Maine. — Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9.

Missouri. — See Alexander *v.* Jones, 8 Mo. App. 591.

Nebraska. — Bank of Commerce *v.* Hart, 37 Neb. 197, 44 Am. & Eng. Corp. Cas. 690.

New Hampshire. — Pearson *v.* Concord R. Corp., 62 N. H. 537, 13 Am. & Eng. R. Cas. 102.

New Jersey. — Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

New York. — Berry *v.* Yates, 24 Barb. (N. Y.) 199; Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y. Supreme Ct.) 20; Talmage *v.* Pell, 7 N. Y. 328; Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14, 20 Am. & Eng. R. Cas. 637.

Ohio. — Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 26 Am. & Eng. Corp. Cas. 55; Columbus, etc., R. Co. *v.* Burke, 19 Cinc. W'kly L. Bul. 27. See Smith *v.* Newark, etc., R. Co., 8 Ohio Cir. Ct. Rep. 583.

Pennsylvania. — McMillan *v.* Carson Hill Union Min. Co., 12 Phila. (Pa.) 404.

Tennessee. — Marble Co. *v.* Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71.

Washington. — Denny Hotel Co. *v.* Schram, 6 Wash. 134, 36 Am. St. Rep. 137; Denny Hotel Co. *v.* Gilmore, 6 Wash. 153.

"We think it well settled," said Judge Marshall, in Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 26 Am. & Eng. Corp. Cas. 55, "as a result of the decisions in this state, as well as elsewhere, that an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is *ultra vires*, and void."

Corporations May Become Liable upon Such Transactions. — A corporation may incur liabilities and acquire rights by reason of a subscription to or purchase of stock in another corporation. Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369, 34 U. S. App. 423; Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372, 34 U. S. App. 428; Kennedy *v.* California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69; Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351; Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y. Supreme Ct.) 20; Pierson *v.* McCurdy, 33 Hun (N. Y.) 520, *affirmed* 100 N. Y. 608; Wright *v.* Antwerp Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701. See the title ULTRA VIRES.

But the transaction is none the less *ultra vires* by reason of this. See Alexander *v.* Searcy, 81 Ga. 536, 12 Am. St. Rep. 337.

Express Prohibition. — In a number of states there are express statutory or constitutional prohibitions against any corporation taking or holding stock in any other corporation, with certain exceptions; or there are statutes directed at particular corporations. Of course a subscription to or purchase of stock in violation of such a prohibition is *ultra vires*, and cannot be enforced. Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594.

2. Original Subscriptions. — Pauly *v.* Coronado Beach Co., 56 Fed. Rep. 428; Knowles *v.* Sandercock, 107 Cal. 629; Peshtigo Co. *v.* Great Western Tel. Co., 50 Ill. App. 624; New Orleans, etc., Steamship Co. *v.* Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90; Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475; Berry *v.* Yates, 24 Barb. (N. Y.) 199, Denny Hotel Co. *v.* Schram, 6 Wash. 134, 36 Am. St. Rep. 137.

e. Purchase After Incorporation. — And it applies equally to the purchase of shares in a corporation already organized, either from the corporation itself or from the stockholders.[1]

f. Benefit to Corporation. — The mere fact that a corporation will be benefited by its subscription to or purchase of shares in another corporation does not affect the rule.[2]

g. Reason for the Rule. — The reason generally given for the rule is that to permit one corporation to hold stock in another would enable one corporation, through another, to engage in a business foreign to that for which it was created.[3]

h. Corporations Having a Different Nature and Purpose. — The rule has often been applied to corporations having a different nature and organized for a different purpose. Thus it has been applied to a corporation for docking and repairing vessels, and a corporation for owning and navigating them;[4] to manufacturing and trading companies, and railroad, banking, insurance, hotel, or telegraph companies;[5] to banking companies, and insurance or railroad companies;[6] to mining companies and railroad companies,[7] and to

1. Purchase After Incorporation. — Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9; Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 26 Am. & Eng. Corp. Cas. 55.

2. Benefit to Corporation. — Thus a subscription by an iron manufacturing company to the stock of a railroad company is not authorized merely because the construction of the railroad will enable the manufacturing company to get cheaper coal for use in its manufactures. Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 26 Am. & Eng. Corp. Cas. 55. And see further illustrations in the following notes.

3. Reason for the Rule. — "If a corporation," said Walton, J., in Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9, "can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation."

Boynton, J., in Franklin Bank *v.* Commercial Bank, 36 Ohio St. 355, 38 Am. Rep. 594, after stating the general rule against the acquisition by one corporation of stock in another, said: "Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock."

4. Steamship Company and Docking and Repairing Company. — In New Orleans, etc., Steamship Co. *v.* Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90, it was held that as the owning and navigating of steamships was a distinct business from the docking and repairing of such vessels, a corporation formed solely for the latter business could not lawfully engage in the former, and that a subscription, therefore, by such a corporation to the stock of a corporation engaged solely in the former business, was not enforceable.

5. Manufacturing Company and Railroad Company. — Thus in Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 26 Am. & Eng. Corp. Cas. 55, it was held that an iron manufacturing company could not purchase stock in a railroad company.

Manufacturing Company and Banking Company. — Nor can a manufacturing corporation subscribe for or purchase shares in a bank. Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105, 23 Fed. Cas. No. 13,609.

And on the other hand, a corporation organized for the purpose of a savings bank cannot invest its funds in the stock of manufacturing corporations, unless expressly authorized to do so. Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43, 28 Am. Rep. 9.

Lumber Company and Telegraph Company. — A corporation organized for the purpose of carrying on a lumber business has no implied power to subscribe for shares in a telegraph company. Peshtigo Co. *v.* Great Western Tel. Co., 50 Ill. App. 624.

Furniture Company and Hotel Company. — And a corporation formed to manufacture and deal in furniture cannot subscribe for stock in an hotel company. Knowles *v.* Sandercock, [illegible] Cal. 629.

Membership in Mutual Insurance Company. — The rule prohibiting one corporation from becoming a stockholder in others does not prevent a manufacturing company from becoming a member of a mutual insurance company. St. Paul Trust Co. *v.* Wampach Mfg. Co., 50 Minn. 93.

6. Banking Company and Insurance or Railroad Company. — A banking corporation has no power to become a stockholder in an insurance company. Bank of Commerce *v.* Hart, 37 Neb. 197, 44 Am. & Eng. Corp. Cas. 600. Nor in a railroad corporation. Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14.

7. Railroad Company and Mining Company. — A railroad company cannot purchase the stock of a mining company. Columbus, etc., R. Co. *v.* Burke, 19 Cinc. Wkly. L. Bul. 27.

companies organized for various other purposes.[1]

i. CORPORATIONS HAVING A SIMILAR NATURE AND PURPOSE. — The courts, however, do not restrict the rule to corporations having a different nature and purpose. It has also been applied in the case of corporations created for a similar purpose.[2]

j. CORPORATIONS SUBJECT TO LAWS OF DIFFERENT CHARACTER. — Even if it be held in any particular jurisdiction that one corporation may hold stock in another corporation organized for the same purpose, this could only be so where the two corporations are subject to the same or substantially indentical laws and regulations.[3]

k. PURPOSE TO CONTROL OTHER CORPORATION OR PREVENT COMPETITION. — One corporation cannot acquire stock in another for the purpose of controlling it, or to defeat or lessen competition, or create a monopoly, unless the power is expressly granted, or is to be clearly implied from the powers granted. The acquisition of stock for this purpose would be not only *ultra vires*, but also contrary to public policy.[4]

1. Land or Town-site Companies and Manufacturing Companies. — In Pauly *v.* Coronado Beach Co., 56 Fed. Rep. 428, it was held that a corporation organized, as stated in its corporate articles, for the purpose of acquiring a certain piece of land and reselling the same in town lots, and also for the purpose of acquiring "street railroad or other rights and franchises, telegraph, telephone, or other similar franchises, and gas and electric-light franchises, over the said property, or any part thereof," had no authority to subscribe for shares of stock of a manufacturing corporation, and such a subscription was void.

Insurance and Brokerage Company and Savings Bank and Building Association. — And in Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Meriden Agency Co., 24 Conn. 159, it was held that a corporation, organized "to do a general insurance agency, commission and brokerage business, and such other things as are incidental to, and necessary in, the management of that business," had no power to subscribe to the stock of a savings bank and building association.

2. Manufacturing Companies. — Thus in McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787, 37 U. S. App. 586, it was held that the investment of the funds of one manufacturing corporation in the stock of another, as an investment to be held by the buying company, was not within the express or implied powers of the buying corporation, and was an act *ultra vires*, and not validated by the agreement of all the stockholders. And see Marble Co. *v.* Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71.

Railroad Companies. — So it has been held that one railroad company cannot become a stockholder in another. Central R. Co. *v.* Collins, 40 Ga. 582; Hazehurst *v.* Savannah, etc., R. Co., 43 Ga., 13; Pearson *v.* Concord R. Corp., 62 N. H. 537, 13 Am. & Eng. R. Cas. 102; Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y. Supreme Ct.) 20. See also the title RAILROADS.

Mining Companies. — Also, that the special right of a company to own and work mines under its charter does not include the organizing of another company for mining, or the right to purchase stock therein so as to render the corporate assets liable for the result thereof. McMillan *v.* Carson Hill Union Min. Co., 12 Phila. (Pa.) 404, 35 Leg. Int. (Pa.) 163.

Insurance Companies. — And that an insurance corporation cannot subscribe to the capital stock of a mutual insurance company. Berry *v.* Yates, 24 Barb. (N. Y.) 199.

Gas Companies. — So it has been held in the case of gas companies. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319.

3. Corporations Subject to Laws of Different Character. — In Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. Rep. 414, Judge Severens conceding, but not holding, that one corporation might subscribe for stock in another, where the corporations are created by the laws of the same state and subject to the same laws and dominion, or where, though corporations of different states, they are subject to regulations of a substantially identical character, it could not be so where the law of the corporation in which the stock is taken is of a substantially different character, and fails to impose the liabilities and create the obligations imposed by the law of the corporation subscribing for the stock. In this case, under this rule, he held that a Michigan corporation had no power to subscribe for stock in a New Jersey corporation organized for the same purpose, the laws governing the two being different. See also McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787, 37 U. S. App. 586.

4. To Control Other Corporation or Prevent Competition — *United States.* — McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787; Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105; American Preservers' Trust *v.* Taylor Mfg. Co., 46 Fed. Rep. 152.

Georgia. — Central R. Co. *v.* Collins, 40 Ga. 582; Haziehurst *v.* Savannah, etc., R. Co., 43 Ga. 13.

Illinois. — People *v.* Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319.

New Hampshire. — Pearson *v.* Concord R. Corp., 62 N. H. 537.

New Jersey. — Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5.

New York. — People *v.* North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843.

Tennessee. — Mallory *v.* Hanaur Oil Works, 86 Tenn. 598.

l. Subscription or Purchase Through Agent or Trustee. — The rule denying to one corporation the power to hold stock in another cannot be evaded by a corporation by purchasing or subscribing for stock through an agent or trustee.[1]

m. Subscription or Purchase by Stockholders. — But there is nothing to prevent the stockholders in one corporation from subscribing for or purchasing stock in another.[2]

n. Express Grant of Power. — There is nothing in the nature of a corporation to make it absolutely incapable of holding stock in another corporation. And it may acquire, hold, and vote the same, if it is expressly authorized to do so.[3]

o. When the Power Will Be Implied — (1) *In General.* — One corporation has implied power to acquire and hold stock in another corporation when such an investment is reasonable and within the general purposes of the corporation, or when it is a reasonably appropriate way of exercising any particular power granted;[4] provided, of course, such an investment is not

Purpose to Prevent Competition. — There are statutory or constitutional prohibitions in some jurisdictions against allowing any corporation to buy shares of stock in any other corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly. Such a constitutional provision may be necessary to prevent the legislature from allowing such a transaction. Otherwise no express prohibition is required, for without it the transaction would be void as against public policy. See the cases cited above in this note; and the title Trade Combinations and Corporate Trusts.

In Langdon *v.* Branch, 37 Fed. Rep. 449, an insolvent construction company had contracted with a corporation to construct a railroad for it, receiving stock of such corporation as security. The persons who controlled the construction company, instead of beginning work under the contract, transferred all the stock so received to the persons managing another railroad company, whose road had already been constructed and was being operated, the funds used for the purpose belonging to the latter company. The latter road began at the same point as the projected road, and ran in the same general direction, so that when the other road should be completed they would be competing lines. After this the stock and assets of the first mentioned company were managed and controlled by the same persons who controlled the road of the purchasing company. It was held that this was a violation of a constitutional prohibition against the purchase by one corporation of the stock of any other corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or encourage monopoly.

1. Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

2. **Purchase by Stockholders.** — A corporation being a legal person distinct from its individual stockholders, the rule that one corporation cannot subscribe for or purchase stock in another does not prevent the stockholders from one corporation as individuals from purchasing stock in another corporation, even though the purpose be to control it. See Green *v.* Hedenberg, 159 Ill. 489; State *v.* Butler, 86 Tenn. 614.

3. See Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381; Matthews *v.* Murchison, 17 Fed. Rep. 760; Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 54 Fed. Rep. 759; Market St. R. Co. *v.* Hellman, 109 Cal. 571; White *v.* Syracuse, etc., R. Co., 14 Barb. (N. Y.) 559.

Authority to Invest in Stock as Authority to Subscribe. — In Commercial F. Ins. Co. *v.* Board of Revenue, 99 Ala. 1, 42 Am. St. Rep. 17, it was held that a statute which authorized insurance companies to "invest their money in real or personal property, stocks, or choses in action," referred to shares in organized companies, and did not authorize a subscription for stock in a projected corporation.

Particular Statutes — New York. — By the New York statute of 1892 (Laws 1892, c. 688, § 40), it was expressly declared that any corporation except moneyed corporations (banking and insurance corporations) might purchase and hold stock in another corporation engaged in a similar business, and that a corporation holding such stock should possess all the rights and privileges of an individual holder.

This statute applies to railroad corporations, and is not restricted by Laws 1890, c. 565 (the railroad law), which authorized a railroad company to purchase stock of another railroad company, of which it is a lessee. Oelbermann *v.* New York, etc., R. Co., 7 Misc. Rep. (N. Y. Supreme Ct.) 352, 77 Hun (N. Y.) 332.

Retrospective Effect of Statutes. — A statute authorizing one corporation to subscribe for or purchase stock in other corporations ratifies a prior acquisition of stock by a corporation, while a statute existed declaring such acquisition unlawful. *In re* Buffalo, etc., R. Co. (Supreme Ct.) 37 N. Y. Supp. 1048.

4. Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335, 48 Am. & Eng. Corp. Cas. 658; Louisville, etc., R. Co. *v.* Literary Soc. of St. Rose, 91 Ky. 395.

Illustrations. — Thus a manufacturing company may become a member of a mutual insurance company for the purpose of insuring its property. St. Paul Trust Co. *v.* Wampach Mfg. Co., 50 Minn. 93.

And in Louisville, etc., R. Co. *v.* Literary Soc. of St. Rose, 91 Ky. 395, it was held that

expressly prohibited, in which case the rule would be otherwise.[1]

(2) *Implication from Grant of Power to Consolidate, Control, Aid, etc.* — If a corporation is expressly given power to consolidate with or control another particular corporation, or corporation organized for a particular purpose, or to aid or subscribe towards and acquire any interest therein, it may accomplish this by acquiring and holding the stock of such other corporation.[2]

(3) *Investment of Funds.* — Corporations which, from their nature, must keep their funds invested and use the income thereof to carry out the objects of their creation, have the implied power to invest such funds in the stock of other corporations,[3] provided such an investment is not prohibited by their charters,[4] and provided the nature of the corporations is not such as to render

an incorporated literary institution which by its charter had power to contract, and buy and sell real and personal property for the purpose of "sustaining and carrying on said institution of learning, and not otherwise," and which, under the power thus conferred, owned and operated a large and valuable farm, had, by fair implication, the power to do anything reasonably calculated to add to the value of its property or to the value of the large industry thus created; and, therefore, that a subscription by the corporation to aid in building a railroad which was highly beneficial to the institution in various ways, and added largely to the value of the property, was not *ultra vires*.

1. See Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594.

2. Power to Consolidate With or Control. — In Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335, 48 Am. & Eng. Corp. Cas. 658, the charter of a corporation authorized it to acquire land, deal in lumber, and to engage in mining, manufacturing, and transportation, and conferred upon it "all rights and privileges, powers and franchises, necessary to the full use and enjoyment of the powers herein granted," and in the furtherance of such powers the power to "effect a temporary or permanent consolidation with any railroad or transportation company." It was held that this empowered such corporation to acquire the stock of a railroad company, and to guarantee the bonds and preferred stock of such company for the purpose of securing the construction of a road to its property. "The cases last cited," said the court, after referring to a number, "are all of them stronger cases than the one at bar, for in all of them the courts were obliged by construction to go outside and permit the investment of the property of the company in a business not expressly authorized by the charter. Here we keep within the letter of the charter, for here the company has the right to embark its entire capital and risk it all by consolidation with a railway company in the business of building and running a railroad, and we only hold that, having such a power, it has the right to do less than that, and risk only a part of its funds by lending its credit to such a railway company and retaining control of it by owning its entire stock."

So, in Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47, it was held that a land company empowered to form a "temporary or permanent consolidation" with any railroad company, in furtherance of the general powers granted it, had the implied power to acquire all the stock of a railroad company, so as to control the same, if such control was in furtherance of the general powers of the land company. See also Hill *v.* Nisbet, 100 Ind. 341, where authority conferred upon a railroad corporation by statute to buy a railroad, or to consolidate with another corporation owing it, was held to include the power to buy stock in the latter corporation. And see Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365; Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 19 Am. St. Rep. 129.

Power to Subscribe Towards or Aid, and Acquire Interest. — And one corporation, as a railroad company, may subscribe for stock in another under authority to subscribe towards or aid the carrying out of its objects, and to acquire any interest therein. Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50.

Qualification. — But in Columbus, etc., R. Co. *v.* Burke, 19 Cinc. Wkly. L. Bul. 27, it was held that a railway company, under the power to aid another railway in construction by subscribing to its stock, has no power to buy the stock of a completed railway from the stockholders.

Authority to Purchase Property and Franchise. — Express authority conferred upon a corporation, as a railroad company, to purchase the property, rights, and franchises of another corporation, gives it the power to purchase and hold the stock of the latter for the purpose of acquiring its property, rights, and franchises. Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351. And see Wehrhane *v.* Nashville, etc., R. Co., (Supreme Ct.) 4 N. Y. St. Rep. 541.

3. Investment of Funds. — Ang. & Ames on Corp., § 158.

It was said by Greene, C. J., in Hodges *v.* New England Screw Co., 1 R. I. 347, 53 Am. Dec. 624: "There are large classes of corporations in Rhode Island and the other states which may and do rightfully invest their capital in the stock of other corporations; such, for instance, as religious and charitable corporations, and corporations for literary and scientific purposes. So insurance companies may rightfully invest their capital in the stock of other corporations, such as banks and railroads, and the like." And see Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134.

In Talmage *v.* Pell, 7 N. Y. 343, there is dictum of Judge Gardiner to the effect that banking corporations may purchase stocks to deposit with the comptroller as security for their circulating notes, and that they may invest their surplus funds in them.

4. Specification of Investments as an Exclusion of Others. — If particular modes of investment

such an investment improper.

(4) *Taking Stock in Compromise or in Payment of Debts, etc.* — A corporation, though without power to deal in the stock of another corporation, or to purchase such stock as an investment, may take stock in another corporation in order to effect a *bona fide* compromise of contested claims against it with the view to its subsequent sale and conversion into money; and it may, in the same way, take stock in payment and satisfaction of doubtful debts owing to it.[1] But it seems that it cannot take stock for a debt created for the purpose of acquiring it.[2]

(5) *Taking Stock as Collateral Security for Debt.* — No doubt all the courts will allow one corporation to take stock in another as collateral security for a debt previously contracted, in order to prevent loss.[3] And, though there is a decision to the contrary, in so far as this would give one corporation the status of a stockholder in another,[4] by the weight of authority a corporation having authority to loan money or make any other particular contract may take stock in another corporation at the time of the loan or contract as collateral security for repayment of the loan or performance of the contract, even though it did not have the power to purchase such stock as an investment.[5]

of corporate funds are prescribed by the charter, this excludes other modes. See Smith *v.* Alabama L. Ins., etc., Co., 4 Ala. 558; Scott *v.* Depeyster, 1 Edw. Ch. (N. Y.) 531; North River Ins. Co. *v.* Lawrence, 3 Wend. (N. Y.) 482; Mutual L. Ins. Co. *v.* Wilcox, 8 Biss. (U. S.) 203.

1. Taking in Compromise or Payment of Debt. — In such cases the power need not be expressly conferred. It is incidental to the exercise of the legitimate power of compromising claims and collecting debts.

In Charlotte First Nat. Bank *v.* National Exch. Bank, 92 U. S. 128, it was said by Chief Justice Waite, after stating that a national bank had no power to deal in stocks: "In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

Taking to Effect Compromise. — In Charlotte First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122, it was held that a national bank (and the same would be true of other corporations) may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations, it being honestly believed at the time that, by turning the stocks into money under more favorable circumstances than then existed, a loss which would otherwise accrue from the transaction might be averted or diminished. And see Charlotte First Nat. Bank *v.* National Exch. Bank, 39 Md. 600.

Taking in Payment of Debt, on Execution, etc. — *United States.* — Charlotte First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122; Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369, 34 U. S. App. 423; Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105, 23 Fed. Cas. No. 13,609.

Kentucky. — Deposit Bank *v.* Barrett, (Ky. 1890) 13 S. W. Rep. 337.

Massachusetts. — Howe *v.* Boston Carpet Co., 16 Gray (Mass.) 493.

New York. — Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448. See Talmage *v.* Pell, 7 N. Y. 328.

Rhode Island. — Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9.

Effect of Express Prohibition. — An express prohibition against any corporation using any of its funds in the purchase of stock in another corporation does not prohibit it from taking such stock in payment of a debt. Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448.

2. Taking Stock in Payment for Goods. — It has been held that a manufacturing corporation cannot sell goods to another corporation and agree to take payment therefor in stock of the latter, unless it has express authority to do so. Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 26 Am. & Eng. Corp. Cas. 55. See dictum to the contrary in Howe *v.* Boston Carpet Co., 16 Gray (Mass.) 495.

3. See the cases cited in the last note *supra.*

4. Cases Denying Power. — Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594. In this case it was said by Boynton, J., that the result of a corporation's being enabled to engage, through another corporation, in a business different from that for which it was created, would follow none the less certainly "if the shares of stock were received in pledge only, to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is, as to the corporation, a stockholder, and has the right to vote upon the stock." And it was held that a banking corporation lending money on the security of stock in another bank could not be entitled to recognition as a stockholder.

5. Cases Conceding Power — *United States.* National Bank *v.* Case, 99 U. S. 633; Citi-

(6) *Sale of All the Property of One Corporation for Stock in Another* — (a) **To Wind Up Business.** — By the weight of authority a strictly private corporation, as a manufacturing corporation, owing no peculiar duties to the public, has the power to wind up its business and sell its property, if all the shareholders consent,[1] and in doing so it may sell the property to another corporation, and take stock in the latter, with the view of distributing it among its shareholders.[2]

(b) **Continuation of Vendor Corporation.** — But one corporation cannot thus sell out its property to another, and take the latter's stock in payment, where the intention is not to wind up the old corporation, but to continue its existence through the instrumentality of the new.[3]

p. PRESUMPTION AS TO POWER. — As there is a presumption that acts of

zens' State Bank *v.* Hawkins, 71 Fed. Rep. 369, 34 U. S. App. 423; County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. Rep. 161; Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416, 1 Hughes (U. S.) 101, 21 Fed. Cas. No. 12,801.

In County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. Rep. 161, it was held that a *West Virginia* statute forbidding one corporation to subscribe for or purchase the bonds or stock of another corporation, except in payment of a *bona fide* debt, did not preclude advances made by one corporation to another on its bonds and stock as collateral security.

California. — Kennedy *v.* California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69.

Iowa. — A corporation may accept stock in another company as collateral security for signing a note for the latter on which money was obtained for the latter's use, where such a signing is authorized by its charter. Calumet Paper Co. *v.* Stotts Invest. Co., 96 Iowa 147.

New York. — See Talmage *v.* Pell, 7 N. Y. 328; Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y. Supreme Ct.) 20; U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

Canadian Cases. — The Canadian cases turn on particular statutory provisions. See Exchange Bank *v.* Fletcher, 19 Can. Sup. Ct. Rep. 278; Geddes *v.* La Banque Jacques Cartier, 24 L. C. J. 135; Montreal Bank *v.* Geddes, 3 Leg. N. 146.

1. See *supra*, this section, *Power to Alienate Property*.

2. Intent to Wind Up Corporation and Distribute Stock — *United States.* — McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787.

Connecticut. — Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336.

Louisiana. — Leathers *v.* Jauney, 41 La. Ann. 1120.

Massachusetts. — Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490.

Missouri. — Buford *v.* Keokuk Northern Line Packet Co., 3 Mo. App. 159.

New York. — Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448.

But Not Against Dissent of Stockholders. — Elyton Land Co. *v.* Dowdell, 113 Ala. 177.

3. Intent to Continue Corporation and Hold Stock. — McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787, 37 U. S. App. 586; Easun *v.* Buckeye Brewing Co., 51 Fed. Rep. 156; People *v.* Ballard, 134 N. Y. 269; Taylor *v.* Earle, 8 Hun (N. Y.) 1; Frothingham *v.* Barney, 6 Hun (N. Y.) 366. And see Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24; Thomas *v.* West Jersey R. Co., 101 U. S. 71; Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336; People *v.* North River Sugar Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843; Mallory *v.* Hanaur Oil Works, 86 Tenn. 598.

In Byrne *v.* Schuyler Electric Mfg. Co., 65 Conn. 336, the officers of an insolvent corporation transferred all its property to another corporation, which had been organized to continue its business, receiving in payment stock in the new corporation, which was not to be distributed among the stockholders of the old corporation, but was to be held by trustees appointed by its officers. It was held that the transaction was void in the absence of express authority in the charter.

It was said by Lurton, J., in speaking of such a transaction, in McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787, 37 U. S. App. 586: "The avowed object was to continue corporate life and activity through the instrumentality of another corporation. There was to be a corporation within a corporation. Individual activity was to cease, but corporate energy was to be exercised through a living corporation, whose life and functions were to be controlled through the shares held by its corporate creator and master. Forbidden to exercise the very functions for which the breath of corporate life had been breathed into it by the state, there would remain standing only the shell of a corporation, retaining corporate existence only for the purpose of controlling and directing the new corporation in which was invested its corporate capital, and to receive and distribute its aliquot proportion of those earnings as dividends among its own shareholders. The effect of this action of the appellee was to divest itself of the power to exercise the essential and vital elements of its franchise, by a renunciation of the right to engage directly and individually in the very business which it was organized to carry on, and is a disregard of the conditions upon which corporate existence was conferred. The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchise, is contrary to a sound public policy."

a corporation not shown to be *ultra vires* are within its powers, and as there are circumstances under which one corporation may lawfully acquire stock in another, an acquisition of shares in one corporation by another is not to be presumed *ultra vires* where it does not appear under what circumstances the shares are acquired.[1]

9. Power of Corporation to Acquire and Hold Its Own Stock — *a.* DOCTRINE IN ENGLAND. — In England it seems to be settled that corporations, whatever may be the nature of their business, cannot, without express authority in their charters, purchase shares of their own stock, either for the purpose of selling them again or for the purpose of canceling and retiring them.[2]

b. DOCTRINE IN THE UNITED STATES — (1) *That the Power Exists.* — There is nothing in the nature of a corporation that renders it absolutely incapable of holding or dealing in its own stock. And in most states in which the question has arisen it has been held that corporations may purchase, hold, and sell shares of their own stock, provided there is no charter or statutory prohibition in the way, and provided, further, that they act in good faith and without intent to injure or injury to creditors. This seems now to be the prevailing doctrine.[3]

1. **Presumption.** — Evans *v.* Bailey, 66 Cal. 112; Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365; Matter of Rochester, etc., R. Co., 110 N. Y. 119. And see New York Exch. Co. *v.* De Wolf, 5 Bosw. (N. Y.) 594. See also *supra*, this section, *Corporate Powers in General — Presumptions as to Power.*

2. **English Doctrine.** — *In re* London, etc., Exch. Bank, L. R. 5 Ch. 444, 39 L. J. Ch. 598, 18 W. R. 778, *reversing* L. R. 9 Eq. 270; *In re* Marseilles Extension R. Co., L. R. 7 Ch. 161; Trevor *v.* Whitworth, L. R. 12 App. 409, *disapproving In re* Dronfield Silkstone Coal Co., 17 Ch. Div. 76.

In Green's Brice's Ultra Vires 95, it is said: "There is a great difference between dealing in the shares of other companies and in its own. The former is ordinary business, attended only with the usual risks of ordinary transactions, but the latter tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging the market on the part of the corporation itself. Consequently, a corporation, to possess such a power, must have it conferred by the plainest and most explicit language in its constating instruments."

General Power to Deal in Shares. — The power to deal in its own shares is not included in a general power given to a company to deal in shares. *In re* London, etc., Exch. Bank, L. R. 5 Ch. 444.

3. **Doctrine in the United States** — *United States.* — *In re* Republic Ins. Co., 3 Biss. (U. S.) 457; Salem First Nat. Bank *v.* Salem Capital Flour-Mills Co., 39 Fed. Rep. 89.

Alabama. — Cooper *v.* Frederick, 9 Ala. 738.

Georgia. — Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 260.

Illinois. — Fraser *v.* Ritchie, 8 Ill. App. 554; Chicago, etc., R. Co. *v.* Marseilles, 84 Ill. 145, 643; Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220; Clapp *v.* Peterson, 104 Ill. 26; Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150.

Iowa. — Iowa Lumber Co. *v.* Foster, 49 Iowa 25, 31 Am. Rep. 140. In this case the only authority material to the question expressly conferred upon it by its articles was to "purchase and hold, sell or exchange, any real estate or other property that may be deemed desirable in the transaction of its business." It was held to have power to buy shares of its own stock. See also Rollins *v.* Shaver Wagon, etc., Co., 80 Iowa 380, 20 Am. St. Rep. 427.

Kentucky. — See Price *v.* Pine Mountain Iron, etc., Co., (Ky. 1895) 32 S. W. Rep. 267; Jefferson *v.* Burford, (Ky. 1891) 17 S. W. Rep. 855.

Massachusetts. — New England Trust Co. *v.* Abbott, 162 Mass. 148; Dupee *v.* Boston Water Power Co., 114 Mass. 37. And see American Railway Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377; Leland *v.* Hayden, 102 Mass. 542.

Minnesota. — Jones *v.* Morrison, 31 Minn. 140.

New York. — City Bank *v.* Bruce, 17 N. Y. 507. And see Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84; U. S. Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75. *Compare* Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207; Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. (N. Y.) 397.

North Carolina. — Blalock *v.* Kernersville Mfg. Co., 110 N. Car. 99.

Ohio. — See State *v.* Franklin Bank, 10 Ohio 91.

Pennsylvania. — Coleman *v.* Columbia Oil Co., 51 Pa. St. 74; Dock *v.* Schlichter Jute Cordage Co, 167 Pa. St. 370.

Vermont. — Farmers,' etc., Bank *v.* Champlain Transp. Co., 18 Vt. 138. See State *v.* Smith, 48 Vt. 266.

In Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 261, Davies, J., said, in upholding a purchase of its own shares by a bank: "If from the course of business, or the state of things, the capital of the bank cannot be usefully employed in loans, there can, I think, be no objection against the purchase of its own stock. In such purchases a part of the capital stock is withdrawn, but it is represented by the stock purchased; when dividends are declared, the profits of so much of the stock as may have been purchased belong to the remaining stockholders, and is nothing more than the profit to which they would have been entitled if, instead of appropriating so much of the

(2) *That the Power Does Not Exist* — (a) **In General.** — In several states, on the other hand, the power has been denied, and it is held that, in the absence of express authority, a corporation the amount of whose capital stock is fixed or specified in its charter has no power to purchase its own shares, either for the purpose of holding or selling them or for the purpose of canceling and retiring them.[1]

(b) **Reasons for This Doctrine.** — The reasons given for this doctrine are, that such a transaction is not only a fraud upon the creditors who deal with the corporation on the faith that the capital is paid up, and a fraud upon and violation of the contract with stockholders who do not consent, but it is also a violation of the charter.[2]

capital to the purchase of stock, it had been used for making loans."

And in Clapp *v.* Peterson, 104 Ill. 26, it was held in substance that "private corporations may purchase their own stock in exchange for money or other property, and hold, re-issue, or retire the same, if it is done in entire good faith, and the exchange is of equal value, and is free from all fraud, actual or constructive, and if the corporation is not insolvent or in process of dissolution, and the rights of creditors are not affected thereby."

In Dupee *v.* Boston Water Power Co., 114 Mass. 37, it was held that a corporation chartered with power to purchase and hold water power created by the erection of dams, and to hold real estate, may, when its water privileges can no longer be profitably used, and when by contract with the commonwealth it has extinguished its water power, lawfully sell its lands; may receive its own stock in payment therefor. "In the absence of legislative provision to the contrary," said the court, "a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers."

Character of Corporations. — Most of the cases in which this doctrine has been applied related to financial and commercial corporations, but it has also been applied in the case of manufacturing corporations. Fraser *v.* Ritchie, 8 Ill. App. 561.

Corporation Cannot Vote Shares. — A corporation, where it can and does hold shares of its own stock, cannot be one of its own stockholders in the full sense of that term. It cannot directly or indirectly, as through a trustee, vote such stock at corporate meetings. American Railway Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377. See the title STOCKHOLDERS.

1. Denial of Power — *California.* — San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655.

Connecticut. — Crandall *v.* Lincoln, 52 Conn. 94, 52 Am. Rep. 560.

Kansas. — German Sav. Bank *v.* Wulfekuhler, 19 Kan. 65; Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

Missouri. — St. Louis Carriage Mfg. Co. *v.* Hilbert, 24 Mo. App. 338.

New Hampshire. — Currier *v.* Lebanon Slate Co., 56 N. H. 262.

Ohio. — Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 275, 43 Am. Rep. 425. And see Morgan *v.* Lewis, 46 Ohio St. 1; Hubbard *v.* Riley, 3 Cinc. W'kly L. Bul. 434; Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. Rep. 518; Shaw *v.* Ohio Edison Installation Co., 19 Cinc. Wkly. L. Bul. 292.

Payment for Goods in Stock of Manufacturing Company. — In St. Louis Carriage Mfg. Co. *v.* Hilbert, 24 Mo. App. 338, it was held that a manufacturing corporation had no power to sell its goods and take payment therefor in its own shares.

2. Reasons for Doctrine Denying Power. — Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 32; Sutherland *v.* Olcott, 95 N. Y. 100.

"The legal capital stock of a corporation is that fixed by its charter, or by authority derived from the legislature. A corporation has no implied authority to increase or diminish its capital stock." Sutherland *v.* Olcott, 95 N. Y. 100.

Protection of Creditors — Trust Fund Doctrine — Fraud. — Some of the courts base the doctrine on the ground that the capital stock of a corporation is a trust fund for the benefit of creditors. "The capital stock of a corporation," says Thompson, "being a trust fund for creditors, the general rule, in the absence of an enabling statute, is that a corporation cannot employ its funds in purchasing its own shares, thus distributing its capital among its shareholders to the manifest detriment of its creditors." 2 Thomp. Corp., § 2054. And see Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Wood *v.* Dummer, 3 Mason (U. S.) 308. See also the title STOCKHOLDERS.

The so called "trust fund" doctrine, however, has been very much restricted by late decisions in most of the states, and in some of the states it has been virtually repudiated, and the rule cannot safely be placed on this ground. It may be said that such a transaction is a fraud upon existing creditors, and upon subsequent creditors who deal with the corporation without actual or constructive notice of the purchase of its stock. But this reason would not hold good where there is no actual fraud, nor actual injury to creditors.

Protection of Stockholders. — The rule is also stated to be for the protection of stockholders as well as creditors, as each stockholder has the right to insist that the capital stock shall remain and not be distributed to any other stockholder, and that to purchase the shares of one or more stockholders without the consent of the others, and to pay therefor out of the funds of the company, would be a fraud upon him. This reason, however, would not hold good where all the stockholders consent.

Violation of Contract with State — Excess of Powers Conferred. — The only reason for the rule which can be applied in all cases is, that the purchase of its shares by a corporation is not an incident to its business, nor within the

(c) **Conditional Sale by Corporation Not a Purchase.** — Want of authority in a corporation to purchase its own stock does not prevent a conditional sale of its own stock by it.[1]

c. Good Faith in Making Purchase. — Even in those states in which the power is recognized, it is held that the transaction must be in good faith and not for any fraudulent or wrongful purpose. If it is carried out for the purpose of defrauding or prejudicing the other stockholders, or a portion of them, or if it will have such effect, or if it is for any other fraudulent or wrongful purpose, it is unauthorized.[2]

d. Intention to Injure or Injury to Creditors. — In no jurisdiction can the power of a corporation to purchase its own shares be sustained if the purchase is made with the intention to injure its creditors or to defeat them in the collection of their claims, or if it has such effect.[3]

e. Good Faith Immaterial if Creditors Are Prejudiced. — And where creditors are in fact prejudiced by the corporation's purchasing its own stock, the purchase is not rendered valid by the fact that it was made in good faith and without any intention to defraud, nor by the fact that at the time the indebtedness was not known to the stockholders.[4]

f. Express Prohibition. — In some jurisdictions corporations, or particular kinds of corporations, are expressly prohibited from taking and holding shares of their own stock except in certain cases. Of course, a corporation cannot lawfully acquire and hold its own shares in the face of such a prohibition.[5]

g. Gift or Bequest of Shares to Corporation. — In the absence of

purpose of its creation, and a number of the courts place it on this ground. See Trevor *v.* Whitworth, L. R. 12 App. 409; German Sav. Bank *v.* Wulfekuhler, 19 Kan. 65; State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258; Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 275, 43 Am. Rep. 425; Morgan *v.* Lewis, 46 Ohio St. 1.

In Crandall *v.* Lincoln, 52 Conn. 99, 52 Am. Rep. 560, Carpenter, J., said: "The statute fixing the minimum number of shares and their par value determined, as far as practicable, the minimum value of the capital stock, and it was clearly the intention of the legislature that it should be no less. The number of shares, therefore, could not be reduced, and the value of all the shares diminished, except by legislative authority. If the trustees could purchase stock with the capital of the corporation, they could of their own authority reduce the number of shares and correspondingly diminish the aggregate value of all the shares. Again, if they may purchase any of the stock, they may purchase all of it, and thus divide all the stock among the stockholders."

1. Conditional Sale by Corporation. — In Vent *v.* Duluth Coffee, etc., Co., 64 Minn. 307, the plaintiff had purchased from the defendant corporation a number of shares of its capital stock, by an agreement which provided that at the end of a certain time he could, at his option, return the stock and receive back the purchase-price. Plaintiff exercised the option, offered to return the stock, and demanded the purchase-price. In an action to recover such price it was held that the agreement was in the nature of a conditional sale, with an option to the purchaser to revoke or rescind, and, as between the plaintiff and defendant, the rights of creditors not being involved, the agreement by the defendant to receive back the stock and pay back the price thereof was not *ultra vires*.

2. Chicago, etc., R. Co. *v.* Marseilles, 84 Ill. 643; Price *v.* Pine Mountain Iron, etc., Co., (Ky. 1895) 32 S. W. Rep. 267.

3. Injury to or Intent to Injure Creditors — *Connecticut.* — Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560.

Illinois. — Clapp *v.* Peterson, 104 Ill. 26; Commercial Nat. Bank *v.* Burch, 40 Ill. App. 505, 141 Ill. 519, 33 Am. St. Rep. 331.

New York. — And see Gillet *v.* Moody, 3 N. Y. 479.

North Carolina. — Marshall Foundry Co. *v.* Killian, 99 N. Car. 501, 6 Am. St. Rep. 539; Heggie *v.* People's Bldg., etc., Assoc., 107 N. Car. 581.

Pennsylvania. — Columbian Bank's Estate, 147 Pa. St. 422.

Illustration. — In Commercial Nat. Bank *v.* Burch, 40 Ill. App. 505, 141 Ill. 519, 33 Am. St. Rep. 331, it was held that the purchase from one of its stockholders of its own stock by a corporation, through the exchange of its property of equal value, though made in good faith and without any element of fraud, there not being anything in the apparent condition of the company to interfere with the making of the exchange, will not be allowed where it injuriously affects a creditor of the company, even though the fact of the indebtedness was not at the time established or known to the stockholder. And see the titles Stock; Stockholders.

4. Clapp *v.* Peterson, 104 Ill. 26; Commercial Nat. Bank *v.* Burch, 40 Ill. App. 505, 141 Ill. 519, 33 Am. St. Rep. 331.

5. National Banks. — There is such a prohibition in the National Banking Act against the purchase of its own shares by a national bank. South Bend First Nat. Bank *v.* Lanier, 11

an express prohibition, a corporation may accept a gift or bequest of shares of its own stock.[1]

h. TAKING SHARES IN PAYMENT OF DEBTS. — In those jurisdictions in which it is held that a corporation has no power to purchase its own shares, a corporation could not take its own shares in payment of a debt, unless such a transaction were reasonably necessary to prevent loss. In all jurisdictions, however, a corporation may take its own shares in payment of a debt due to it from a stockholder in order to avoid loss.[2]

i. TAKING SHARES AS COLLATERAL SECURITY. — Perhaps in those jurisdictions in which it is held that a corporation has no power to purchase its own shares, a corporation cannot take its own shares as collateral security for a debt contracted at the time. But in all jurisdictions it may take them as collateral security for a pre-existing debt due to it, in order to protect itself from loss.[3]

j. TAKING SHARES ON COMPROMISE WITH STOCKHOLDERS. — So where there is a *bona fide* dispute between a corporation and a stockholder as to an indebtedness, whether the indebtedness be on a subscription, or for a loan, or on any other contract, the corporation may compromise with the stockholder and take his shares in pursuance of the compromise.[4]

Wall. (U. S.) 369. See the title NATIONAL BANKS.

1. Gift or Bequest. — See Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19, 46 Am. Dec. 183.

2. Taking Shares in Payment of Debt — *United States.* — Chillicothe Branch of Ohio State Bank *v.* Fox, 3 Blatchf. (U. S.) 431.

Alabama. — Governor *v.* Baker, 14 Ala. 652.

Connecticut. — Crandall *v.* Lincoln, 52 Conn. 100, 52 Am. Rep. 560, *per* Carpenter, J.

Maryland. — Williams *v.* Savage Mfg. Co., 3 Md. Ch. 452.

New Hampshire. — Currier *v.* Lebanon Slate Co., 56 N. H. 262.

New York. — *Ex p.* Holmes, 5 Cow. (N. Y.) 426; Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. (N. Y.) 407.

Ohio. — Taylor *v.* Miami Exporting Co., 6 Ohio 218; Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 275, 43 Am. Rep. 425; Morgan *v.* Lewis, 46 Ohio St. 1.

Vermont. — State *v.* Smith, 48 Vt. 266.

Washington. — Yeaton *v.* Eagle Oil, etc., Co., 4 Wash. 185; Barto *v.* Nix, 15 Wash. 563.

Ground of Exception. — In those states in which the doctrine that a corporation has no implied power to purchase its own shares obtains, this exception is recognized because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt. *Per* Owen, C. J., in Morgan *v.* Lewis, 46 Ohio St. 6.

Forfeiture of Shares for Nonpayment of Calls. — A corporation may forfeit shares of a stockholder for nonpayment of calls, and thereby acquire the stock, if this remedy is given it by statute. See the title STOCKHOLDERS.

Express Prohibition or Limitation. — The power of a corporation to take shares of its own stock in payment of a debt may be prohibited or limited. For example, it is limited in the National Banking Act (Rev. Stat. U. S., § 5201), where, though a national bank is authorized to take shares to prevent loss on a debt previously contracted, it is provided that the shares so acquired must be sold or disposed of at public or private sale within six months from the time they are acquired. See Charlotte First Nat. Bank *v.* National Exch. Bank, 39 Md. 600; Union Nat. Bank *v.* Hunt, 7 Mo. App. 42, 76 Mo. 439. And see the title NATIONAL BANKS.

3. Taking as Collateral Security. — German Sav. Bank *v.* Wulfekuhler, 19 Kan. 65; Williams *v.* Savage Mfg. Co., 3 Md. Ch. 452. See *Ex p.* Holmes, 5 Cow. (N. Y.) 426.

Express Prohibition. — This power is sometimes expressly denied or limited. Thus in the National Banking Act (Rev. Stat. U. S., § 5201) a national bank is expressly prohibited from lending money "on the security of the shares of its own capital stock," unless such security shall be necessary to prevent loss upon a debt previously contracted in good faith, and even in the latter case the stock must be sold or disposed of at public or private sale within six months.

Rights and liabilities may arise out of a loan in violation of the prohibition. National Bank *v.* Stewart, 107 U. S. 676; Walden Nat. Bank *v.* Birch, 130 N. Y. 221.

But the taking of such security is nevertheless *ultra vires.* South Bend First Nat. Bank *v.* Lanier, 11 Wall. (U. S.) 369; Feckheimer *v.* National Exch. Bank, 79 Va. 80. See the title NATIONAL BANKS.

When a national bank purchases its own stock to protect itself from loss upon a debt, it is bound to sell the stock within six months, and may sell on credit and take the purchaser's note, with the stock sold as collateral to secure it, provided this is done in good faith. Union Nat. Bank *v.* Hunt, 76 Mo. 440.

4. Taking on Compromise with Stockholders. — See Matter of Agriculturist Cattle Ins. Co., 3 DeG. J. & S. 41; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43; *In re* Norwich Provident Ins. Soc., 8 Ch. Div. 334; New Albany *v.* Burke, 11 Wall. (U. S.) 96; Morgan *v.* Lewis, 46 Ohio St. 6, dictum of Owen, C. J.; State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258; Berks, etc., Turnpike Road *v.* Myers, 6 S. & R. (Pa.) 12, 9 Am. Dec. 402.

Indebtedness for Loans. — The power to take

k. PURCHASE THROUGH AGENT OR TRUSTEE. — Where a corporation has no power to purchase and hold its own shares, it cannot evade the law by purchasing and holding them through agents or trustees.[1]

l. EFFECT OF PURCHASE OF ITS OWN SHARES BY CORPORATION. — The purchase of its own shares by a corporation, whether the purchase be authorized or be *ultra vires*, does not have the effect of merging and extinguishing the shares, unless such be the intention, but they merely remain in suspension, and may be again issued.[2]

10. Powers with Respect to Application to the Legislature — *a.* POWER TO APPLY IN GENERAL. — There are a number of decisions in England on the power of corporations to apply to Parliament. The question is not of importance in the United States. The rules to be deduced from the English cases are, that corporations may apply and join in applications to Parliament for the passage of acts changing or adding to their powers.[3]

b. PAYMENT OF EXPENSES. — But they cannot do so at the expense of the corporation. This would be a misapplication of its funds.[4]

c. APPLICATION FOR UNAUTHORIZED PURPOSE. — And a corporation cannot promote applications to Parliament not made directly and *bona fide* by

stock in compromise with a stockholder is not limited to the compromise of disputes arising out of indebtedness on subscriptions. It exists where the indebtedness is for a loan to the stockholder. State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258.

Compromise of Other Disputes. — And it applies to a compromise of disputes arising out of other transactions. Thus in Morgan *v.* Lewis, 46 Ohio St. 1, on the question whether a person was still liable as a stockholder in a corporation where the corporation had taken his shares, the alleged stockholder offered to prove that he originally became a stockholder by receiving from the corporation its stock in exchange for his interest in a furnace of which he was principal owner; that thereafter, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase, and contentions arose among them; that he was blamed by many of them for having induced the company to make the purchase, and was requested to take the furnace back and transfer to the company the stock he had received for it; that to settle such contention and dissatisfaction he complied with this request, transferred his stock to the company, and accepted therefor a deed for the furnace. It was held that the evidence was admissible. Owen, C. J., said: "We have no disposition to call in question the general and well recognized principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon a want of power, rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due to it, has long been recognized in this state. This has been recognized as an exception supposed to rest upon the necessity of avoiding loss. Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 279, 43 Am. Rep. 425. It is, nevertheless, a relaxation of the general rule. It is, of course, because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt, that the exception is recognized. If the same or a like necessity of avoiding loss should arise in any of the transactions of the company, it could not, with any show of reason, be contended that the application of this principle of necessity should be limited by any iron rule to the case of taking stock for an otherwise hopeless debt."

1. Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560. And see Daniell's Case, 22 Beav. 46; Munt's Case, 22 Beav. 57; Eyre's Case, 31 Beav. 177.

2. **Ultra Vires Purchase.** — In San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, it was held that the purchase by a banking corporation of its own shares, though *ultra vires*, did not extinguish the stock so as to prevent its return by the corporation to the vendor upon a rescission of the contract; but that the only effect of the transaction was to reduce the amount of the subscribed capital stock, leaving the corporation free to issue again the same number of shares to any one desiring to subscribe for its capital stock.

Authorized Purchase. — The same is true where the purchase is authorized. Chillicothe Branch of Ohio State Bank *v.* Fox, 3 Blatchf. (U. S.) 431. See Williams *v.* Savage Mfg. Co., 3 Md. Ch. 452; Com. *v.* Boston, etc., R. Co., 142 Mass. 146; American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377; City Bank *v.* Bruce, 17 N. Y. 507; State *v.* Smith, 48 Vt. 266. See the title STOCK.

3. **Power to Apply.** — Green's Brice's Ultra Vires 288, 303; Stevens *v.* South Devon R. Co., 13 Beav. 48; Lancaster, etc., R. Co. *v.* North-Western R. Co., 2 Kay & J. 303, 25 L. J. Ch. 223; Ware *v.* Grand Junction Water Works Co., 2 R. & M. 470; Great Western R. Co. *v.* Rushout, 5 De G. & Sm. 290; Astley *v.* Manchester, etc., R. Co., 2 De G. & J. 403; *In re* London, etc., R. Arrangement Act, L. R. 5 Ch. 671.

4. **Payment of Expenses.** — Green's Brice's Ultra Vires 303, 304; Great Western R. Co. *v.* Rushout, 5 De G. & Sm. 290; Vance *v.* East Lancashire R. Co., 3 Kay & J. 50, *per* Page-Wood, V. C.; Stevens *v.* South Devon R. Co., 13 Beav. 48; Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1; Simpson *v.* Denison, 10 Hare 51.

itself or its constituted agents for its own proper purposes.[1]

d. CONTRACTS ON ASSUMPTION OF SUCCESS. — It seems to have been held that they cannot make contracts or enter into other transactions on the assumption that the application will be successful; but this is doubtful.[2]

e. EXPRESS AUTHORITY. — Applications to Parliament may be expressly authorized, even at the corporate expense, by insertion of the power in the constating instruments.[3]

f. RESISTING APPLICATIONS BY OTHERS. — Corporations may resist applications by others to Parliament, where the direct object or result is or will be the curtailment of their own powers or enterprise.[4]

g. AGREEMENTS COLLATERAL TO APPLICATIONS. — Bribes, of course, and agreements savoring of such nature, to procure the passage of an Act of Parliament, or to buy off opposition, are illegal and *ultra vires*.[5] But a corporation may enter into agreements to buy off or prevent opposition by private persons having a *locus standi* to oppose an application to Parliament, the agreement not being to buy off the mere personal influence of the opposer, but to remove his ground of objection, as in the case of a railroad company, by purchasing his land, paying for probable injuries, etc.[6]

11. Power to Take Oath. — In the nature of things, a corporation, being impersonal, cannot take an oath,[7] and it follows that it cannot do an act when the person doing it is required to take an oath, and no delegation of authority is allowed.[8] Generally, however, when a corporation is granted powers enjoyed

1. Unauthorized Purpose. — Green's Brice's Ultra Vires 315; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775, 21 L. J. C. P. 23; Macgregor *v.* Dover, etc., R. Co., 18 Q. B. 618, 83 E. C. L. 618, 22 L. J. Q. B. 69; Lyde *v.* Eastern Bengal R. Co., 36 Beav. 10; Hill *v.* Manchester, etc., Water Works, 2 B. & Ad. 544, 22 E. C. L. 135, 5 B. & Ad. 886, 27 E. C. L. 219; Norwich *v.* Norfolk R. Co., 4 El. & Bl. 397, 82 E. C. L. 397; Maunsell *v.* Midland Great Western R. Co., 1 Hen. & M. 130; Spackman *v.* Lattimore, 3 Giff. 16.

Breach of Trust. — " Corporations which possess their property under conditions, express or implied, constituting a trust in respect of such property, may not apply to Parliament in breach of the trust so imposed upon them." Green's Brice's Ultra Vires 310. See Atty.-Gen. *v.* Norwich, 16 Sim. 225, *affirmed* 21 L. J. Ch. 139; Atty.-Gen. *v.* Guardians of Poor, 17 Sim. 6; Atty.-Gen. *v.* Eastlake, 11 Hare 205; Atty.-Gen. *v.* Andrews, 2 Mach. & G. 225, 20 L. J. Ch. 467; Atty.-Gen. *v.* West Hartlepool Imp. Com'rs, L. R. 10 Eq. 152. *Per contra*, Reg. *v.* Liverpool, 21 W. R. 674, 28 L. T. 500.

2. Green's Brice's Ultra Vires 305; Vance *v.* East Lancashire R. Co., 3 Kay & J. 50. *Compare* Hattersley *v.* Shelburne, 31 L. J. Ch. 873. And see *supra*, this section, *Powers with Respect to Contracts — In General*.

3. Green's Brice's Ultra Vires, 307; Lyde *v.* Eastern Bengal R. Co., 36 Beav. 10.

4. Green's Brice's Ultra Vires, 309.

5. Agreements Collateral to Applications — When Illegal. — Green's Brice's Ultra Vires, 317; Shrewsbury *v.* North Staffordshire R. Co., L. R. 1 Eq. 593; Scottish North-Eastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 408; Russell *v.* Wakefield Water Works Co., L. R. 20 Eq. 474; Gage *v.* Newmarket R. Co., 7 Ry. Cas. 168, 16 Jur. 1136, 21 L. J. Q. B. 398, 18 Q. B. 457, 83 E. C. L. 457; Preston *v.* Liverpool, etc., R. Co., 5 H. L. Cas. 605, 2 Jur. N. S. 241, 25 L. J. Ch. 421; Taylor *v.* Chichester, etc., R. Co., 39 L. J. Exch. 217, L. R. 4 H. L. 628, *reversing* decision of Exchequer Chamber, L. R. 2 Exch. 356, 36 L. J. Exch. 201, 16 L. T. N. S. 703, 16 W. R. 147, which *reversed* the decision of the Exchequer, 4 H. & C. 409, 14 L. T. N. S. 437.

6. When Legal and Authorized. — Green's Brice's Ultra Vires, 319; Shrewsbury *v.* North Staffordshire R. Co., L. R. 1 Eq. 593; Simpson *v.* Howden, 3 Myl. & C. 97; Petre *v.* Eastern Counties R. Co., 1 Ry. Cas. 462; Taylor *v.* Chichester, etc., R. Co., L. R. 4 H. L. 628; Scottish North-Eastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 416, *per* Lord Wensleydale; Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331. *Compare* Webb *v.* Direct London, etc., R. Co., 1 DeG. M. & G. 521; Stuart *v.* London, etc., R. Co., 1 DeG. M. & G. 721. *Compare* Preston *v.* Liverpool, etc., R. Co., 5 H. L. Cas. 605, 25 L. J. Ch. 421, 2 Jur. N. S. 241. See Doane *v.* Chicago City R. Co., 51 Ill. App. 353.

But the agreement must " relate to the subject matter of the act," and be "within its contemplated provisions, or the additional powers or enterprise intended to be conferred or authorized by it." Green's Brice's Ultra Vires, 323. See Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331.

If the agreement meets this requirement it is not invalid by reason of the fact that the subject matter thereof is not within the provisions of the act as finally passed. Green's Brice's Ultra Vires, 326; Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331.

7. Yonge *v.* Mobile, etc., R. Co., 31 Ala. 422; Alabama, etc., R. Co. *v.* Oaks, 37 Ala. 694; Frostburg Mut. Bldg. Assoc. *v.* Lowdermilk, 50 Md. 175.

8. In Yonge *v.* Mobile, etc., R. Co., 31 Ala. 422, it was held that a statute authorizing a

by individuals, and an oath is required in the exercise of such powers, it may be made by its duly authorized agent.[1]

VIII. Liabilities of Corporations — 1. Liability on Contracts. — The liability of a corporation on contracts depends upon several considerations.

a. Power to Contract — (1) *Express Contracts.* — It depends, in the first place, upon the question whether the corporation had the power, in the sense of authority, to enter into the particular contract. The power of corporations to contract, together with the mode of entering into contracts, has been fully considered elsewhere in this article.[2]

(2) *Implied and Quasi Contracts.* — Ordinarily, corporations are liable to the same extent as natural persons on contracts implied by reason of the acceptance of goods, services, etc. This question, also, is treated in a preceding section.[3]

b. Authority of Officers and Agents. — The liability of corporations on contracts also depends upon the authority of its officers and agents, for it is only liable on contracts which they were expressly or impliedly authorized to make on its behalf, or which, when made without authority, it has afterwards ratified. These questions are considered in another part of this work.[4]

c. Liability in the Case of Ultra Vires Contracts. — In many cases a corporation may be liable on *ultra vires* contracts. This question also is treated under another title.[5]

2. Liability for Torts — *a.* Scope of Treatment. — It is the purpose to treat here only generally of the liability of corporations for torts, that is, of the question whether they can be held liable at all for wrongful acts and omissions of their agents.

Questions Treated Elsewhere. — Their liability, in so far as it depends upon whether the particular act or omission was within or outside of the authority of the agent, is shown in another part of this work.[6] Their liability for acts and omissions in the course of an *ultra vires* business or transaction is also treated elsewhere.[7]

b. Old Doctrine. — It was at one time thought that a private corporation could not commit torts, or be held liable for the wrongful acts of its officers or agents.[8]

Reason for the Old Doctrine. — This doctrine was based upon the ground that the charter of a corporation conferred no power to do wrongful acts, and that all

plaintiff to establish the correctness of his claim by his own oath, where the amount in controversy did not exceed a certain sum, unless the defendant should deny upon oath the truth of the facts proposed to be sworn to by the plaintiff, did not apply to actions against corporations aggregate. And see Alabama, etc., R. Co. *v.* Oaks, 37 Ala. 694.

Power of Sale in Mortgage. — In *Maryland* a statute providing for the sale of premises under a power contained in a mortgage authorized a sale "by the mortgagee or any other person * * * named therein." It required the person making the sale to give bond and to report the sale under oath to the court. It was held that the statute imported a natural person and not a corporation as the depositary of the power of sale, and that a corporation mortgagee could not delegate the power to an agent not named in the mortgage as the depositary of the power. Frostburg Mut. Bldg. Assoc. *v.* Lowdermilk, 50 Md. 175; Queen City Perpetual Bldg. Assoc. *v.* Price, 53 Md. 397.

The power in such a case could be exercised by an agent of the corporation, if named in the mortgage. Chilton *v.* Brooks, 71 Md. 445.

1. **Remedy by Attachment.** — Thus corporations have the same right as natural persons to resort to the remedy by attachment, though the statute requires an oath to procure the writ. The oath may be made by its duly authorized agent. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 423. See *infra*, this title, *Actions By and Against Corporations.*

2. See *supra*, this title, *Powers with Respect to Contracts.*

3. See *supra*, this title, *Powers with Respect to Contracts — Form and Manner of Entering into Contracts.*

4. See the title Officers and Agents of Private Corporations.

5. See the title Ultra Vires.

6. See the title Officers and Agents of Private Corporations.

7. See the title Ultra Vires.

8. See Orr *v.* U. S. Bank, 1 Ohio 36, 13 Am. Dec. 588.

torts were therefore *ultra vires*, and the torts of the officers or agents as individuals, and not of the corporation.

c. MODERN DOCTRINE — (1) *In General.* — The old doctrine, however, has long since been exploded, and it is now well settled that a corporation is liable to substantially the same extent as a natural person for the wrongful acts and omissions of its officers and agents.[1]

1. Modern Doctrine — *England.* — Smith *v.* Birmingham, etc., Gas Light Co., 1 Ad. & El. 526, 28 E. C. L. 140, 3 N. & M. 771; Yarborough *v.* Bank of England, 16 East 6; New Brunswick, etc., R., etc., Co. *v.* Conybeare, 9 H. L. Cas. 711.

United States. — Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202; Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 645; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, *affirming* 3 N. Mex. 109.

Alabama. — South, etc., R. Co. *v.* Chappell, 61 Ala. 527; Jordan *v.* Alabama, G. S. R. Co., 74 Ala. 85, 49 Am. Rep. 800.

Arkansas. — Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

California. — Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672 (on rehearing, 47 Cal. 207).

Colorado. — Western Union Tel. Co. *v.* Eyser, 2 Colo. 141, *reversed* on another point in 91 U. S. 495, note.

Connecticut. — Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Georgia. — McDougald *v.* Bellamy, 18 Ga. 432; Scofield Rolling Mill Co. *v.* State, 54 Ga. 635.

Illinois. — St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; Northwestern R. Co. *v.* Hack, 66 Ill. 238.

Indiana. — Indianapolis, etc., R. Co. *v.* Anthony, 43 Ind. 183; American Express Co. *v.* Patterson, 73 Ind. 430.

Iowa. — Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391; Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 60 Am. Rep. 786. See Wales *v.* Muscatine, 4 Iowa 302.

Kansas. — Western News Co. *v.* Wilmarth, 33 Kan. 510; Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 59 Am. Rep. 571.

Louisiana. — Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367; Ware *v.* Barataria, etc., Co., 15 La. 169, 35 Am. Dec. 189; Rabassa *v.* Orleans Nav. Co., 5 La. 461, 25 Am. Dec. 200.

Maine. — Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39, 10 Am. L. Reg. N. S. 33.

Maryland. — Carter *v.* Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311.

Massachusetts. — Thayer *v.* Boston, 19 Pick. (Mass.) 516, 31 Am. Dec. 157; Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.) 465; Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169; Nims *v.* Mt. Hermon Boys' School, 160 Mass. 177; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Hewett *v.* Swift, 3 Allen (Mass.) 420.

Michigan. — Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426.

Mississippi. — New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395.

Missouri. — Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 579, 4 Am. Rep. 353; Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413; Alexander *v.* Relfe, 74 Mo. 495; Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293, *affirming* 2 Mo. App. 565.

Nebraska. — Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 41 Neb. 374.

New Hampshire. — Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287.

New Jersey. — State *v.* Morris, etc., R. Co., 23 N. J. L. 360; Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659; Vance *v.* Erie R. Co., 32 N. J. L. 334, 90 Am. Dec. 665; New York, etc., R. Co. *v.* Haring, 47 N. J. L. 137, 54 Am. Rep. 123; McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606; Evening Journal Assoc. *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392.

New York. — Hay *v.* Cohoes Co., 3 Barb. (N. Y.) 42, *affirmed* 2 N. Y. 159, 51 Am. Dec. 279; Beach *v.* Fulton Bank, 7 Cow. (N. Y.) 485; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Cohen *v.* Dry Dock, etc., R. Co., 69 N. Y. 170; Fishkill Sav. Inst. *v.* National Bank, 80 N. Y. 162, 36 Am. Rep. 595.

North Carolina. — Hussey *v.* Norfolk Southern R. Co., 98 N. Car. 34, 2 Am. St. Rep. 312; Peebles *v.* Patapsco Guano Co., 77 N. Car. 233, 24 Am. Rep. 447; Hussey *v.* Norfolk Southern R. Co., 98 N. Car. 34, 2 Am. St. Rep. 312. See Meares *v.* Wilmington, 9 Ired. L. (31 N. Car.) 73, 49 Am. Dec. 412.

Ohio. — Goodloe *v.* Cincinnati, 4 Ohio 500, 22 Am. Dec. 764; Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82; Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

Oregon. — Oliver *v.* North Pac. Transp. Co., 3 Oregon 84.

Pennsylvania. — Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 S. & R. (Pa.) 15, 8 Am. Dec. 675; Fenton *v.* Wilson Sewing Mach. Co., 9 Phila. (Pa.) 189; Pittsburg, etc., R. Co. *v.* Donahue, 70 Pa. St. 119; Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508.

Rhode Island. — Glavin *v.* State Hospital, 12 R. I. 411, 34 Am. Rep. 675, 9 Cent. L. J. 329.

South Carolina. — Main *v.* North Eastern R. Co., 12 Rich. L. (S. Car.) 82, 75 Am. Dec. 725; Redding *v.* South Carolina R. Co., 3 S. Car. 1, 16 Am. Rep. 681.

Tennessee. — Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783; Hutchinson *v.* Western, etc., R. Co., 6 Heisk. (Tenn.) 634; Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

Texas. — Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

(2) *Wilful Acts of Agents.* — Formerly it was thought that neither a corporation nor any other principal could be held liable for the wilful acts of its agents.[1] But this doctrine is no longer recognized. It can make no difference that the act was wilful, if the agent was acting in the course of his employment.[2]

(3) *Necessity for Authority under Seal.* — It is not necessary that authority to do the act in the course of which the tort was committed shall have been conferred upon the agent by an instrument under the corporate seal, unless the act was one for which authority could not have been given except under seal.[3]

(4) *Particular Torts* — (a) **Trespass upon Real or Personal Property.** — It is well settled that a corporation is liable for a trespass upon the lands of another committed by its officers or agents in the course of their employment.[4] And

Vermont. — Lyman *v.* White River Bridge Co., 2 Aik. (Vt.) 255, 16 Am. Dec. 705.

Wisconsin. — Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

Statement of Modern Doctrine. — "It is objected," said Tilghman, C. J., in Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 S. & R. (Pa.) 17, 8 Am. Dec. 675, "that the present action is not on contract, but on tort, and a very refined argument is brought forward to prove that a corporation cannot be guilty of tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorized by its charter. But the charter does not authorize it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of laborers who have no property to answer the damages recovered against them. It is much more reasonable to say that when a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed, with respect to torts, the opinion of the courts seems to have been more uniform than with respect to contracts. For it may be shown that from the earliest times to the present corporations have been held liable for torts."

1. Wilful Acts of Agents. — See M'Manus *v.* Crickett, 1 East 106; Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315.

2. *England.* — Green *v.* London General Omnibus Co., 7 C. B. N. S 290, 97 E. C. L. 290.

Arkansas. — Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

Connecticut. — Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Illinois. — Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, etc., R. Co. *v.* Dickson, 63 Ill. 151, 14 Am. Rep. 114.

Indiana. — Indianapolis, etc., R. Co. *v.* Anthony, 43 Ind. 183; American Express Co. *v.* Patterson, 73 Ind. 430; Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519, 50 Am. Rep. 102.

Iowa. — McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Maine. — Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Missouri. — Eckert *v.* St. Louis Transfer Co., 2 Mo. App. 36.

Nevada. — Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New York. — Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597, *affirming* 3 Hun (N. Y.) 329; Mott *v.* Consumers' Ice Co., 73 N. Y. 543.

North Carolina. — Tate *v.* Greensboro, 114 N. Car. 416, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 252, 253.

South Carolina. — Redding *v.* South Carolina R. Co., 3 S. Car. 1, 16 Am. Rep. 681.

Tennessee. — Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

Wisconsin. — Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388; Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

See the titles AGENCY, vol. 1, p. 930; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

3. Necessity for Seal. — Smith *v.* Birmingham, etc., Gas Light Co., 1 Ad. & El. 526, 28 E. C. L. 140, 3 N. & M. 771.

This question will be considered in dealing with the liability of corporations for torts, as dependent upon the authority of the agent. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. See also *supra*, this title, *Powers with Respect to Contracts — Employment of Agents and Servants.*

4. Trespass upon Land — Old Doctrine. — In the older authorities it was laid down that trespass would not lie against a corporation aggregate by its corporate name, as a capias and exigent would not lie against it. Thorp, Justice, 22 Ass. 67; Doe *v.* Woodman, 8 East 228, *per* Lawrence, J.; 4 Com. Dig., Franchise, F. 19, 6 Vin. Abr., Corporations, K. 22; P. 2, Bro. Abr., Corporations 43.

And there are cases in the United States to the same effect. Orr *v.* U. S. Bank, 1 Ohio 36, 13 Am. Dec. 588; Foote *v.* Cincinnati, 9 Ohio 31, 34 Am. Dec. 420.

Modern Doctrine. — This doctrine, however, has long since been abandoned, both in England and in the United States; and it is now well settled that a corporation aggregate is as fully liable as an individual for a trespass committed by its agents under authority from it, express or implied, and that authority to commit the trespass need not be under the corporate seal.

England. — Maund *v.* Monmouthshire Canal Co., 4 M. & G. 452, 43 E. C. L. 237, 5 Scott N.

the same is true of a trespass upon the goods or personal property of another.[1]

Ejectment and Trespass for Mesne Profits. — Ejectment also lies against a corporation, though it proceeds on the theory of a trespass.[2] And trespass may be maintained for mesne profits.[3]

(b) **Trover and Conversion.** — And it is equally liable in trover for the conversion of the property of another by its officers or agents in the course of their employment.[4]

(c) **Assault and Battery and False Imprisonment.** — It is also well settled that a corporation may be held liable for trespass upon the person. Corporations are held liable to the same extent as an individual would be for assault and battery committed by their agents in the course of their employment,[5] and for false

R. 457, 2 Dowl. N. S. 113, C. & M. 606, 41 E. C. L. 330.

Delaware. — Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411.

Florida. — Edwards *v.* Union Bank, 1 Fla. 159.

Illinois. — Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43. See Lasher *v.* Wabash Nav. Co., 14 Ill. 85, 56 Am. Dec. 494 .

Indiana. — Crawfordsville, etc., R. Co. *v.* Wright, 5 Ind. 252; Sunnyside Coal, etc., Co. *v.* Reitz, 14 Ind. App. 478.

Kansas. — Western Union Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. Rep. 159.

Kentucky. — Underwood *v.* Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260.

Massachusetts. — Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574.

Michigan. — Bath *v.* Caton, 37 Mich. 199, 6 Rep. 336.

Missouri. — Ullman *v.* Hannibal, etc., R. Co., 67 Mo. 118.

New York. — Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, 31 Am. Dec. 313; Dater *v.* Troy Turnpike, etc., Co., 2 Hill (N. Y.) 629.

Pennsylvania. — McCready *v.* Guardians of Poor, 9 S. & R. (Pa.) 94, 11 Am. Dec. 667.

South Carolina. — Main *v.* North Eastern R. Co., 12 Rich. L. (S. Car.) 82, 75 Am. Dec. 725.

Vermont. — Lyman *v.* White River Bridge Co., 2 Aik. (Vt.) 255, 16 Am. Dec. 705.

1. Trespass on Personal Property. — Yarborough *v.* Bank of England, 16 East 6; Maund *v.* Monmouthshire Canal Co., 4 M. & G. 452, 43 E. C. L. 237, 5 Scott N. R. 457, 2 Dowl. N. S. 113, C. & M. 606, 43 E. C. L. 330; Limpus *v.* London General Omnibus Co., 1 H. & C. 526, 32 L. J. Exch. 34; Mears *v.* London, etc., R. Co., 11 C. B. N. S. 850, 103 E. C. L. 850, 31 L. J. C. P. 220; Edwards *v.* Union Bank, 1 Fla. 159; Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333.

2. Ejectment. — Dater *v.* Troy Turnpike, etc., Co., 2 Hill (N. Y.) 629.

3. Trespass for Mesne Profits. — McCready *v.* Guardians of Poor, 9 S. & R. (Pa.) 94, 11 Am. Dec. 667.

4. Trover and Conversion — *England.* — Yarborough *v.* Bank of England, 16 East 6; Duncan *v.* Surrey Canal Co., 3 Stark. 50, 14 E. C. L. 159; Giles *v.* Taff Vale R. Co., 2 El. & Bl. 822, 75 E. C. L. 822. See Tattan *v.* Great Western R. Co., 2 El. & El. 844, 105 E. C. L. 844, 29 L. J. Q. B. 184, 6 Jur. N. S. 800, 8 W. R. 606.

Illinois. — German Nat. Bank *v.* Meadowcroft, 95 Ill. 124, 35 Am. Rep. 137, 2 Nat. Bank Cas. 462.

Massachusetts. — Foster *v.* Essex Bank, 17 Mass. 503, 9 Am. Dec. 168.

Nebraska. — Rich *v.* State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382, 2 Nat. Bank Cas. 284.

New York. — Beach *v.* Fulton Bank, 7 Cow. (N. Y.) 485; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; Fishkill Sav. Inst. *v.* National Bank, 80 N. Y. 162, 36 Am. Rep. 595.

5. Assault and Battery — Old Doctrine. — In some of the older authorities it was said that an action for assault and battery would not lie against a corporation aggregate. The reason given was that it had no body to give or receive an injury. "A corporation," said Blackstone, "can neither maintain nor be made defendant to an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten, in its body politic." 1 Bl. Com. 476.

And, in Vin. Abr., title Corporations, P. 2, Z 2, the same doctrine is laid down. The doctrine was so laid down in the Year Books. See 21 Edw. IV., 4, 7, 12. See also to the same effect Bro. Abr., title Corporations 63; 1 Kyd on Corp. 71.

The old doctrine was recognized and followed by the *Ohio* court in Orr *v.* U. S. Bank, 1 Ohio 36, 13 Am. Dec. 588.

And there is a dictum to the same effect in Childs *v.* State Bank, 17 Mo. 215.

Modern Doctrine — *England.* — The old doctrine was repudiated and overthrown in England in the leading case of Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 2 Eng. L. & Eq. 406, where it was held that trespass would lie against a corporation for an assault committed by its servants if authorized by it to do the act, the corporation being responsible for the act of its servant, and that such authority need not be given by an instrument under the corporate seal. And this doctrine is now well settled, both in England and in the United States. See also, in England, Chilton *v.* London, etc., R. Co., 16 M. & W. 212; Bayley *v.* Manchester, etc., R. Co., L. R. 7 C. P. 415, 3 Moak 308, *affirmed* L. R. 8 C. P. 148; Moore *v.* Metropolitan R. Co., L. R. 8 Q. B. 36; Seymour *v.* Greenwood, 7 H. & N. 355, 30 L. J. Exch. 327.

United States. — Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, *affirming* 3 N. Mex. 109; Pendleton *v.* Kinsley, 3 Cliff. (U. S.) 416.

California. — Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

imprisonment.[1]

(d) **Wrongful Act or Neglect Causing Death.** — The statutes in the various states giving a right of action for death caused by the wrongful act or neglect of any person are held to give a right of action against private corporations, as well as against natural persons, though they may not be expressly mentioned.[2]

(e) **Nuisances.** — It may be laid down as a general principle that a corporation is liable to the same extent as an individual for a public or private nuisance created or maintained by its agents.[3] The effect of authority in the charter

Connecticut. — Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Georgia. — Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216.

Illinois. — St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Arasmith *v.* Temple, 11 Ill. App. 39.

Indiana. — Indianapolis, etc., R. Co. *v.* Anthony, 43 Ind. 183.

Iowa. — McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kentucky. — Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

Louisiana. — Ware *v.* Barataria, etc., Co., 15 La. 169, 35 Am. Dec. 189.

Maine. — Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39; Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

Maryland. — Perry *v.* House of Refuge, 63 Md. 22, 52 Am. Rep. 495.

Massachusetts. — Moore *v.* Fitchburgh R. Corp., 4 Gray (Mass.) 465; Hewett *v.* Swift, 3 Allen (Mass.) 420; Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311; Coleman *v.* New York, etc., R. Co., 106 Mass. 160; Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200; Holmes *v.* Wakefield, 12 Allen (Mass.) 580, 90 Am. Dec. 171.

Missouri. — Travers *v.* Kansas Pac. R. Co., 63 Mo. 421.

New Jersey. — Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659; New York, etc., R. Co. *v.* Haring, 47 N. J. L. 137, 54 Am. Rep. 123.

New Mexico. — Denver, etc., R. Co. *v.* Harris, 3 N. Mex. 109, *affirmed* 122 U. S. 597.

New York. — Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Jackson *v.* Second Ave. R. Co., 47 N. Y. 274, 7 Am. Rep. 448; Shea *v.* Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480.

Ohio. — Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78; Pittsburg, etc., R. Co. *v.* Slusser, 19 Ohio St. 157; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

South Carolina. — Redding *v.* South Carolina R. Co., 3 S. Car. 1, 16 Am. Rep. 681; Palmer *v.* Charlotte, etc., R. Co., 3 S. Car. 580, 16 Am. Rep. 750.

Tennessee. — Springer Transp. Co. *v.* Smith, 16 Lea (Tenn.) 498.

Texas. — Hays *v.* Houston, etc., R. Co., 46 Tex. 272.

Wisconsin. — Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

1. False Imprisonment — *England.* — Chilton *v.* London, etc., R. Co., 16 M. & W. 212; Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 15 Jur. 297, 2 Eng. L. & Eq. 406; Goff *v.* Great Northern R. Co., 3 El. & El. 672, 107 E. C. L. 671, 30 L. J. Q. B. 148, 7 Jur. N. S. 286, 3 L. T. 850; Moore *v.* Metropolitan R. Co., L. R. 8 Q. B. 36.

Alabama. — Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560.

Indiana. — American Express Co. *v.* Patterson, 73 Ind. 430; Pennsylvania Co. *v.* Weddle, 100 Ind. 138; Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519, 50 Am. Rep. 102.

Kansas. — Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 59 Am. Rep. 571.

Louisiana. — Ware *v.* Barataria, etc., Co., 15 La. 169, 35 Am. Dec. 189.

Maryland. — Carter *v.* Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311.

Missouri. — Woodward *v.* St. Louis, etc., R. Co., 85 Mo. 142. *Contra*, Childs *v.* State Bank, 17 Mo. 213.

New York. — Lynch *v.* Metropolitan El. R. Co., 24 Hun (N. Y.) 506, 90 N. Y. 77, 43 Am. Rep. 141, 12 Am. & Eng. R. Cas. 119.

Texas. — Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162.

2. Death by Wrongful Act. — South-Western R. Co. *v.* Paulk, 24 Ga. 356; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391; Chase *v.* American Steamboat Co., 10 R. I. 79; Fleming *v.* Texas Loan Agency, 87 Tex. 238; Lynch *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1895) 32 S. W. Rep. 776. See the title DEATH BY WRONGFUL ACT.

3. Nuisance — *England.* — Reg. *v.* Stephens, L. R. 1 Q. B. 702.

United States. — Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317.

Alabama. — Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

Georgia. — Pike County *v.* Griffin, etc., Plank Road Co., 9 Ga. 475.

Illinois. — Snell *v.* Buresh, 123 Ill. 151.

Maine. — Burbank *v.* Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400.

New Hampshire. — Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53.

New Jersey. — Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1; McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

New York. — Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 57 Am. Rep. 701; First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79.

Ohio. — Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82.

Tennessee. — Franklin Turnpike Co. *v.* Crockett, 2 Sneed (Tenn.) 263.

See *infra*, this section, *Liability to Indictment.*

to do an act is elsewhere shown.[1]

(f) **Infringement of Patents, Copyrights, and Trade-Marks.** — It is also liable for infringement of a patent by its agents.[2] And the same must be true of the infringement of copyrights and trade-marks.[3]

(g) **Other Wrongful Acts.** — And it may be said generally that an action on the case will lie against a corporation for any wrongful act by its agents, expressly or impliedly authorized by it, if under the same circumstances it would lie against a natural person for the act of his agents.[4]

(h) **Negligence.** — Not only are corporations liable for positive torts, like trespass, assault and battery, etc., but they are also liable for negligence, whether it be a wrongful omission to act at all, or the doing of a lawful act in a wrongful manner.[5]

Neglect of Corporate Duty. — An action on the case will lie against a corporation for neglect of a corporate duty imposed by its charter, by reason of which another is injured.[6]

1. **Authorized Acts.** — As to the effect of authority conferred by the charter, as preventing an act from constituting a nuisance, see *infra*, this section, *Authority in Charter*.

2. **Infringement of Patents, etc.** — Betts *v.* Neilson, L. R. 3 Ch. 441; York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30; Kneass *v.* Schuylkill Bank, 4 Wash. (U. S.) 14; Poppenhusen *v.* New York Gutta Percha Comb Co., 2 Fisher Pat. Cas. 62. And see Bliss *v.* Brooklyn, 4 Fisher Pat. Cas. 596. See the title PATENTS.

3. See the titles COPYRIGHT, *ante*; TRADE-MARKS.

4. **Overflowing Land.** — An action lies against a corporation for putting obstructions in a stream or doing other acts, and thereby overflowing another's land. Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 S. & R. (Pa.) 15, 8 Am. Dec. 675; Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82; Hooker *v.* New-Haven, etc., Co., 14 Conn. 146, 36 Am. Dec. 477.

Neglect of Corporate Duty. — For the decisions on this point, see *infra*, this section, *Liability for Negligence*.

5. **Liability for Negligence** — *England.* — Gibson *v.* Inglis, 4 Campb. 72; Parnaby *v.* Lancaster Canal Co., 11 Ad. & El. 223, 39 E. C. L. 54, 3 Nev. & P. 523, 3 Per. & Dav. 162; Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686, L. R. 1 H. L. 93; Harrison *v.* Great Northern R. Co., 3 H. & C. 231, 10 Jur. N. S. 992, 33 J. L. Exch. 266, 12 W. R. 1081, 10 L. T. 621; Bayley *v.* Wolverhampton Water-works Co., 6 H. & N. 241; Smith *v.* London, etc., Docks Co., L. R. 3 C. P. 326, 37 L. J. C. P. 217; Winch *v.* Conservators, L. R. 7 C. P. 458, *affirmed* L. R. 9 C. P. 378; Weld *v.* Gas-Light Co., 1 Stark. 189, 2 E. C. L. 78; Burrows *v.* March Gas, etc., Co., L. R. 7 Exch. 96. See Foreman *v.* Canterbury, L. R. 6 Q. B. 214.

United States. — Carlisle First Nat. Bank *v.* Graham, 100 U. S. 699; Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468.

Alabama. — South, etc., R. Co. *v.* Chappell, 61 Ala. 527; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Kansas City, etc., R. Co. *v.* Sanders, 98 Ala. 293; Kansas City, etc., R. Co. *v.* Phillips, 98 Ala. 159.

Colorado. — Western Union Tel. Co. *v.* Eyser, 2 Colo. 141, *reversed* on another point in 91 U. S. 495, note.

Delaware. — Wilson *v.* Rockland Mfg. Co., 2 Harr. (Del.) 67.

Illinois. — Illinois Cent. R. Co. *v.* Downey, 18 Ill. 259; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260.

Maine. — Brown *v.* South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484; Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

Massachusetts. — Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35; Nims *v.* Mt. Hermon Boys' School, 160 Mass. 177; Newcomb *v.* Boston Protective Dept., 151 Mass. 215.

New Hampshire. — Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 17, 72 Am. Dec. 287.

New York. — Hayes *v.* New York Cent., etc., R. Co., 9 Hun (N. Y.) 63; Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Townsend *v.* Susquehanna Turnpike Co., 6 Johns. (N. Y.) 90; Drew *v.* Sixth Ave. R. Co., 1 Abb. App. Dec. (N. Y.) 556; Ireland *v.* Oswego, etc., Plank Road Co., 13 N. Y. 526; Lannen *v.* Albany Gas-light Co., 44 N. Y. 459, *affirming* 46 Barb. (N. Y.) 264.

North Carolina. — Purcell *v.* Richmond, etc. R. Co., 108 N. Car. 414, 10 Ry. & Corp. L. J. 35.

Ohio. — Dunn *v.* Brown County Agricultural Soc., 46 Ohio St. 93, 15 Am. St. Rep. 556.

Oregon. — Oliver *v.* North Pac. Transp. Co., 3 Oregon 84.

Pennsylvania. — Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Pittsburg, etc., R. Co. *v.* Donahue, 70 Pa. St. 119; Pennsylvania R. Co. *v.* Patterson, 73 Pa. St. 491.

Rhode Island. — Butcher *v.* Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626.

Tennessee. — Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

Vermont. — Davis *v.* Lamoille County Plank Road Co., 27 Vt. 602.

West Virginia. — Miller *v.* Coal Co., 31 W. Va. 836.

6. **Neglect of Corporate Duty.** — Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686, L. R. 1 H. L. 93; Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35. *Compare* Atkinson *v.* Newcastle, etc., Water-works Co., 2 Exch. Div. 441, where it was held that, as a statute re-

(i) **Torts Involving a Mental Element** — *aa.* In General. — The liability of a corporation for the wrongful acts and omissions of its officers and agents is not limited to torts in which there is no mental element, but extends to torts involving a specific intent to defraud, and torts involving the element of malice.[1]

bb. Fraud and Deceit — (*aa*) *Doctrine in England.* — In *England* there has been much conflict of opinion as to whether a corporation can be held bound by or liable for the fraud and false representations of its officers and agents.

Action Against Corporation for Damages. — Eminent English judges have expressed the opinion that an action for deceit will not lie against a corporation for the frauds of its agents.[2] But the contrary has been held in a number of cases; and the recognized English authorities state that such an action will lie.[3]

Defense on the Ground of Fraud. — It also seems to be settled that when a corporation sues at law on a contract, the other party may set up the fraud of its officers or agents to defeat a recovery thereon.[4]

In Equity. — There are several cases in equity in which it seems to have been held broadly that corporations are not liable for nor bound by the frauds and misrepresentations of their officers and agents.[5]

Rescission of Contract for Fraud. — But it may now be regarded as settled that a corporation is bound by the fraud and false representations of its officers and agents, inducing a person to contract with the corporation, when the other party sues to rescind the contract, or sets up the fraud to defeat enforcement of the contract by the corporation.[6]

quiring a water company to keep a certain pressure of water in its pipes for use in case of fires prescribed a penalty for failure to do so, its failure to comply with the statute did not make it liable to one whose house was burned by reason thereof. See also Gibbs *v.* Liverpool Docks, 1 H. & N. 439, 3 H. & N. 164.

1. See the cases cited in the following notes.

2. **Fraud — Doctrine in England — Action at Law for Damages.** — See Abrath *v.* North-Eastern R. Co., L. R. 11 App. 247; Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145.

In the case last cited the lord chancellor said (p. 158): "If a person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally." And in the same case Lord Cranworth said (p. 167): "An attentive consideration of the cases has convinced me that the true principle is that these corporate bodies through whose agents so large a portion of the business of the country is now carried on may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrong-doers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."

3. **Action Will Lie.** — Mr. Brice states that "corporations are, at common law, liable to an action for damages for the frauds and misrepresentations of their agents in the due course of their employment." Green's Brice's Ultra Vires, 335. And he is sustained by a number of cases. See Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; Mackay *v.* Commercial Bank, L. R. 5 P. C. 394. See also Kennedy *v.* Panama, etc., Royal Mail Co., L. R. 2 Q. B. 589; Denton *v.* Great Northern R. Co., 5 El. & Bl. 860, 85 E. C. L. 860; Thompson *v.* Bell, 26 Eng. L. & Eq. 536.

"Strictly speaking," said Lord Cranworth, in Ranger *v.* Great Western R. Co., 5 H. L. Cas. 86, "a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."

4. **Suits by Corporations — Fraud as a Defense.** — See National Exch. Co. *v.* Drew, 2 Macq. H. L. Cas. 103; Western Bank *v.* Addie, L. R. 1 H. L. Sc. 157, *per* Lord Chelmsford; Ayre's Case, 25 Beav. 513; *Re* Life Assoc., 34 Beav. 639.

5. **In Equity.** — Bernard's Case, 5 DeG. & Sm. 283; Matter of Hull, etc., L. Assur. Co., 2 De G. & J. 275; Matter of Joint-Stock Companies, 4 DeG. & J. 575; *Ex p.* Sheffield, 1 Johns. 451, 28 L. J. Ch. 325; Duranty's Case, 26 Beav. 268.

6. **Rescission of Contract.** — New Brunswick, etc., R., etc., Co. *v.* Conybeare, 9 H. L. Cas. 740; Western Bank *v.* Addie, L. R. 1 H. L. Sc. 157; Oakes *v.* Turquand, L. R. 2 H. L. 325. See Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72. See the title Rescission.

(*bb*) *Doctrine in the United States.* — Formerly there was some doubt in the United States as to the liability of a corporation for fraud. But it is now well settled, both at law and in equity, that a corporation is bound by and liable for the frauds and false representations of its officers and agents to the same extent as an individual, if they were acting within the general scope of their authority.[1]

cc. Malicious Wrongs — (*aa*) *In General.* — At one time it was thought that a corporation aggregate, by reason of its impersonal nature, could not be guilty of a malicious wrong, because it could not entertain malice.[2] But this doctrine, like other doctrines as to the liability of corporations for torts, has been exploded. It is now well settled, in all jurisdictions perhaps, that a corporation may be liable for the malicious wrongs of its agents in the course of their employment, just as a natural person may. Though, in the nature of things,

In Western Bank *v.* Addie, L. R. 1 H. L. Sc. 157, Lord Chelmsford said: "Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents."

1. Rule in United States — *United States.* — Nevada Bank *v.* Portland Nat. Bank, 59 Fed. Rep. 338; Breyfogle *v.* Walsh, 80 Fed. Rep. 172, 53 U. S. App. 30; Butler *v.* Watkins, 13 Wall. (U. S.) 456.

Alabama. — Rives *v.* Montgomery South Plank Road Co., 30 Ala. 92.

Georgia. — Scofield Rolling Mill Co. *v.* State, 54 Ga. 635.

Indiana. — Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290.

Maryland. — Tome *v.* Parkersburg Branch R. Co., 39 Md. 36.

Missouri. — Alexander *v.* Relfe, 74 Mo. 495.

New Jersey. — Candy *v.* Globe Rubber Co., 37 N. J. Eq. 175.

New York. — Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 507; New York, etc. R. Co. *v.* Schuyler, 34 N. Y. 30; Cragie *v.* Hadley, 99 N. Y. 131, 52 Am. Rep. 9; Fifth Ave. Bank *v.* Forty-second St., etc., R. Co., 137 N. Y. 231, 33 Am. St. Rep. 712.

North Carolina. — Peebles *v.* Patapsco Guano Co., 77 N. Car. 233, 24 Am. Rep. 447.

Pennsylvania. — Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508.

Texas. — Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Texas Consol. Compress, etc., Assoc. *v.* Dublin Compress, etc., Co., (Tex. Civ. App. 1896) 38 S. W. Rep. 404.

Wisconsin. — McClellan *v.* Scott, 24 Wis. 81.

Illustrations. — In Peebles *v.* Patapsco Guano Co., 77 N. Car. 233, 24 Am. Rep. 447, the agent of a guano company falsely represented to a purchaser of guano that a spurious article was the genuine Patapsco guano, of which the corporation was manufacturer. It was held that such representation must be taken as the corporation's act, and that the purchaser could recover from the company the damages caused by the deceit.

In Cragie *v.* Hadley, 99 N. Y. 131, 52 Am. Rep. 9, the deceit was the acceptance by a bank cashier of a deposit at a time when the bank was hopelessly insolvent, and on the last day it continued its business. It was held that this was such a fraud as entitled the depositors to reclaim the drafts deposited or the proceeds.

In Erie City Iron Works *v.* Barber, 106 Pa. St. 125, Trunkey, J., said: "As a corporation can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent done within the ostensible scope of his authority, and while transacting the business of the principal, than where the principal is a natural person. However, the same rule applies alike to natural and artificial persons. The purchaser can maintain an action of deceit against the innocent principal when the fraud of the agent has been committed within the scope of his authority, and where the principal has benefited by it. In this respect it makes no difference whether the principal be a corporation or an individual."

Frauds of Agent Not in Course of Employment. — The great difficulty in determining the liability of a corporation for fraud is in ascertaining whether it was committed by its agent in the course of his employment. This question will be treated at length in another part of this work. See the title Officers and Agents of Private Corporations.

2. Old Doctrine — *England.* — In Stevens *v.* Midland Counties R. Co., 10 Exch. 352, Alderson, B., expressed the opinion that an action for malicious prosecution would not lie against a corporation aggregate. "It must be shown," he said, "that the defendant was actuated by a motive in his mind, and a corporation has no mind." And see dissenting opinions of Bramwell, B., in Henderson *v.* Midland R. Co., 20 W. R. 23.

United States. — In McLellan *v.* Cumberland Bank, 24 Me. 566, Whitman, C. J., expressed doubt as to whether corporations could be liable for malicious acts, but it was unnecessary to decide the question. Their non-liability was expressly declared in Childs *v.* State Bank, 17 Mo. 213, and Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560; but both of these cases have since been overruled. See *infra*, the following note.

it cannot itself entertain malice, the malice of its agents may be imputed to it.[1]

1. Modern Doctrine — *England.* — Green *v.* London General Omnibus Co., 7 C. B. N. S. 290, 97 E. C. L. 290; Whitfield *v.* South Eastern R. Co., El. Bl. & El. 115, 96 E. C. L. 115; Henderson *v.* Midland R. Co., 20 W. R. 23; Edwards *v.* Midland R. Co., 6 Q. B. Div. 287, 43 L. T. 694.

"The whole course of the authorities," said Erle, C. J., "from the case of Yarborough *v.* Bank of England, 16 East 6, down to Whitfield *v.* South Eastern R. Co., El. Bl. & El. 115, 96 E. C. L. 115, shows that an action for a wrong will lie against a corporation where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on — that a corporation, having no soul, cannot be actuated by a malicious intention — is more quaint than substantial." Green *v.* London General Omnibus Co., 7 C. B. N. S. 302, 97 E. C. L. 302.

Canada. — Tench *v.* Great Western R. Co., 32 U. C. Q. B. 452.

United States. — Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202; Copley *v.* Grover, etc., Sewing Mach. Co., 2 Woods (U. S.) 494.

Alabama. — Jordan *v.* Alabama G. S. R. Co., 74 Ala. 85, 49 Am. Rep. 800, *overruling* Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560.

California. — Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672, on rehearing 47 Cal. 207.

Connecticut. — Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Georgia. — Howe Mach. Co. *v.* Souder, 58 Ga. 64.

Iowa. — McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Louisiana. — Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367.

Maryland. — Carter *v.* Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311.

Massachusetts. — Fogg *v.* Boston, etc., R. Corp., 148 Mass. 513, 12 Am. St. Rep. 583; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468.

Michigan. — Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426.

Minnesota. — Aldrich *v.* Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84.

Mississippi. — Williams *v.* Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494.

Missouri. — Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413.

In Childs *v.* State Bank, 17 Mo. 213, it was directly held that a banking corporation could not be held liable for malicious prosecution and false imprisonment, on the ground that it had "no mind, heart, or soul, to be put into motion by malice."

In Gillett *v.* Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653, it was said that this dictum was too broad; and, while it was held that corporations were not liable for malicious prosecutions instituted by their agents, it was conceded that they might be liable for malicious wrongs.

In Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413, both of these cases were *overruled*, and it was established in Missouri that corporations are liable for malicious prosecutions, as well as for other malicious wrongs.

New Jersey. — Vance *v.* Erie R. Co., 32 N. J. L. 334, 90 Am. Dec. 665; McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606; Evening Journal Assoc. *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392.

Ohio. — Pittsburgh, etc., R. Co. *v.* Slusser, 19 Ohio St. 157; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

South Carolina. — Palmer *v.* Charlotte, etc., R. Co., 3 S. Car. 580, 16 Am. Rep. 750.

Tennessee. — Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783.

Wisconsin. — Craker *v.* Chicago, etc , R. Co., 36 Wis. 657, 17 Am. Rep. 504.

And see the other cases cited in the following notes.

Reasons for Modern Doctrine. — In Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439, it was said in reference to an action against a bank for bringing a vexatious suit: "The objection to the remedy of this plaintiff against the bank in its corporate capacity is not so much that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort which essentially consists in motive and intention. The claim is, that as a corporation is ideal only it cannot act from malice, and therefore cannot commence and prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one; they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action, and still to claim that although the acts were those of the bank the intention was only that of the individual directors, is a distinction too refined, we think, for practical application."

And in Maynard *v.* Fireman' Fund Ins. Co., 34 Cal. 56, 91 Am. Dec. 672, Currey, C. J., said, in speaking of the liability of a corporation for libel: "The claim for immunity to associations of men constituting bodies corporate is that corporations are mere legal entities which can only be conceived of and apprehended as existing in abstract contemplation; and that being mere legal entities, they are utterly incapable of malevolence, and are without the power to will good or evil. If it be conceded that a corporation in its nature and essence exists in idea only, it must be admitted that in its manifested power there is always to be recognized the guiding and controlling hand

(*bb*) *Libel.* — Thus corporations have repeatedly been held liable in damages for libel published by their agents in the course of their employment.[1]

(*cc*) *Slander.* — It has been held that a person cannot commit slander by agent, and by reason of this doctrine it is said that a corporation, which must necessarily act by agents only, cannot commit slander, or be liable for a slander by its agents.[2] It is not at all clear, however, that the courts would now so hold.[3]

(*dd*) *Malicious Interference with Another's Business.* — A corporation is liable for a malicious interference by its agents in another's business, provided the interference was in the course of their employment.[4]

of human intelligence, which is the agency by means whereof its purposes are carried into effect. It is argued that a corporation with certain defined powers and privileges, and no implied powers, cannot do a wrong of the nature of that complained of, because the commission of such wrong by the representative authority of the body politic and corporate is not within the scope of the objects and purposes of the corporation, and therefore the stockholders, who may have had no malice toward the plaintiff and no immediate agency in the publication of the alleged libel, should not be required to respond in damages for the wrong done by the directors. This argument carried to every legitimate consequence would result in entire immunity to a corporation for all wrongs which might be committed by its officers, agents and servants; because the objects and purposes of a corporation, ascertained from the organic law of its being, do not embrace the right and privilege of committing torts. But the cases are numerous showing that for acts done by the agents of a corporation, *in delicto*, as well as *in contractu*, in the course of its business, and in their employment, the corporation is responsible, as an individual is responsible under similar circumstances. * * * The directors are the chosen representatives of the corporation, and constitute, to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do an injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."

1. Libel — *England.* — Whitfield *v.* South Eastern R. Co., El. Bl. & El. 115, 96 E. C. L. 115; Henderson *v.* Midland R. Co., 20 W. R. 23. See Lawless *v.* Anglo Egyptian Cotton, etc., Co., L. R. 4 Q. B. 262, 10 B. & S. 226.

Canada. — Tench *v.* Great Western R. Co., 32 U. C. Q. B. 452.

United States. — Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202.

California. — Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672 (on rehearing 47 Cal. 207).

Georgia. — Howe Mach. Co. *v.* Souder, 58 Ga. 64.

Louisiana. — Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367; Hawkins *v.* New Orleans Printing Pub. Co., 29 La. Ann. 134.

Massachusetts. — Fogg *v.* Boston, etc., R. Corp., 148 Mass. 513, 12 Am. St. Rep. 583.

Michigan. — Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447, 7 Am. L. Reg. N. S. 462; Bacon *v.* Michigan Cent. R. Co., 55 Mich. 224.

Minnesota. — Aldrich *v.* Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84; Hewitt *v.* Pioneer-Press Co., 23 Mich. 178, 23 Am. Rep. 680.

Missouri. — Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293, *affirming* 2 Mo. App. 565.

New Jersey. — McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606; Evening Journal Assoc. *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; Hoboken Printing, etc., Co. *v.* Kann, 59 N. J. L. 218.

New York. — Samuels *v.* Evening Mail Assoc., 9 Hun (N. Y.) 288.

See the title LIBEL AND SLANDER.

2. Slander. — In Townshend on Slander and Libel, § 265, it is said: "As a corporation can act only by or through its officers or agents, and as there can be no agency to slander, it follows that a corporation cannot be guilty of slander; it has not the capacity for committing that wrong." *Citing* Maloney *v.* Bartley, 3 Campb. 210; Hecker *v.* De Groot, 15 How. Pr. (N. Y. Supreme Ct.) 314. See also dictum in Childs *v.* State Bank, 17 Mo. 213.

3. It is settled that a corporation may be held liable for false representations made by its agents. See *supra*, this section, *Fraud and Deceit.*

And there seems to be no reason why they should not be held liable for a slander if the words are expressly authorized by the corporation. There are dicta to the effect that they would be liable. Gilbert *v.* Crystal Fountain Lodge, 80 Ga. 284, 12 Am. St. Rep. 255. And see Behre *v.* National Cash-Register Co., (Ga. 1897) 27 S. E. Rep. 986; Dodge *v.* Bradstreet Co., 59 How. Pr. (N. Y. Supreme Ct.) 104; Hussey *v.* Norfolk Southern R. Co., 98 N. Car. 34, 2 Am. St. Rep. 312. See also the title LIBEL AND SLANDER.

4. Interference with Another's Business. — Green *v.* London General Omnibus Co., 7 C. B. N. S. 290, 97 E. C. L. 290; Merrills *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682.

In Green *v.* London General Omnibus Co., 7 C. B. N. S. 290, 97 E. C. L. 290, an action was brought by the proprietor of an omnibus line, running in the streets of London, against a corporation running a rival line, for maliciously interfering with his business. The declaration alleged that the servants of the defendant wrongfully, vexatiously, and maliciously drove its horses and vehicles against those of the plaintiff, and otherwise interfered. It was held that the action could be maintained.

(*cc*) *Malicious Prosecution.* — It is also well settled that it may be liable for malicious prosecution of another for a crime,[1] and for malicious prosecution of civil actions or proceedings, as for malicious attachment, malicious suing out of an injunction, etc.[2]

dd. Conspiracy. — And it may be liable in damages for actionable conspiracy.[3]

ee. False Return to Writs. — A corporation may be liable for a false return to a writ of mandamus;[4] and it would seem that it may be liable for a false return to any other writ, where a natural person would be liable.

(5) *Liability for Exemplary Damages.* — Since the fraud, malice, oppression and gross negligence of its officers and agents may be imputed to a corporation, it would seem to follow necessarily that a corporation may be liable for exemplary damages for a wrong committed by its officers or agents under such circumstances, and while acting within the scope of their employment. And so it has repeatedly been held.[5] The courts do not agree as to the cir-

1. Criminal Prosecution — *England.*—Edwards *v.* Midland R. Co., 6 Q. B. Div. 287, 43 L. T. 694.

United States. — Blunk *v.* Atchison, etc., R. Co., 38 Fed. Rep. 311; Copley *v.* Grover, etc., Sewing Mach. Co., 2 Woods (U. S.) 494.

Alabama. — Jordan *v.* Alabama G. S. R. Co., 74 Ala. 85, 49 Am. Rep. 800, (*overruling* Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560).

Indiana. — Pennsylvania Co. *v.* Weddle, 100 Ind. 138; Indiana Bicycle Co. *v.* Willis, (Ind. App. 1897) 48 N. E. Rep. 646.

Louisiana. — See Hewett *v.* New Orleans, etc., R. Co., 28 La. Ann. 685.

Maryland. — Carter *v.* Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311.

Massachusetts. — Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Krulevitz *v.* Eastern R. Co., 140 Mass. 573.

Michigan. — Turner *v.* Phœnix Ins. Co., 55 Mich. 236.

Mississippi. — Williams *v.* Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494.

Missouri. — Boogher *v.* Life Assoc. of America, 75 Mo. 319, 42 Am. Rep. 413 (*overruling* Childs *v.* State Bank, 17 Mo. 213, and Gillett *v.* Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653); Woodward *v.* St. Louis, etc., R. Co., 85 Mo. 142.

Nevada. — Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

New Jersey. — Vance *v.* Erie R. Co., 32 N. J. L. 334, 90 Am. Dec. 665.

New York. — Morton *v.* Metropolitan L. Ins. Co., 34 Hun (N. Y.) 366, *affirmed* 103 N. Y. 645; Manasha *v.* Royal Ben. Soc., 21 Misc. Rep. (N. Y. Supreme Ct.) 474, *affirming* (City Ct.) 46 N. Y. Supp. 1096, 20 Misc. Rep. (N. Y.) 732.

North Carolina. — Hussey *v.* Norfolk Southern R. Co., 98 N. Car. 34, 2 Am. St. Rep. 312.

Pennsylvania. — Fenton *v.* Wilson Sewing Mach. Co., 9 Phila. (Pa.) 189.

Tennessee. — Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783.

See the title Malicious Prosecution.

2. Civil Action or Proceeding — *Alabama.* — Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529.

Connecticut. — Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Kansas. — Western News Co. *v.* Wilmarth, 33 Kan. 510; Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 59 Am. Rep. 571.

Michigan. — Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426.

Missouri. — Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505.

Texas. — See Emerson *v.* Skidmore, 7 Tex. Civ. App. 641.

3. Conspiracy. — Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 106 N. Y. 669, 8 N. Y. St. Rep. 876, 12 N. E. Rep. 825, *affirming* 38 Hun (N. Y.) 637; Dodge *v.* Bradstreet Co., 59 How. Pr. (N. Y. Supreme Ct.) 104. See generally the title Conspiracy, vol. 6, p. 830.

4. False Return to Writ of Mandamus. — In Argent *v.* St. Paul's, referred to in Yarborough *v.* Bank of England, 16 East 6, an action was sustained against a corporation for making a false return to a writ of mandamus.

5. Exemplary Damages — *United States.* — Denver, etc., R. Co. *v.* Harris, 122 U. S. 597; Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101; Barron *v.* Baltimore, 7 Pet. (U. S.) 243; Livingston *v.* Moore, 7 Pet. (U. S.) 551; Beale *v.* Railway Co., 1 Dill. (U. S.) 568.

Alabama. — Alabama G. S. R. Co. *v.* Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; Alabama G. S. R. Co. *v.* Frazier, 93 Ala. 45; Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529.

California. — Turner *v.* North Beach, etc., R. Co., 34 Cal. 594; Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657. *Compare* Wardrobe *v.* California Stage Co., 7 Cal. 118, 68 Am. Dec. 231.

Colorado. — Western Union Telegraph Co. *v.* Eyser, 2 Colo. 141 (*reversed* in 91 U. S. 495, note, on the ground that the circumstances of the particular case did not warrant such damages).

Connecticut. — Merrills *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682.

Georgia. — Gasway *v.* Atlantic, etc., R. Co., 58 Ga. 216.

Illinois. — Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 353; Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Arasmith *v.* Temple, 11 Ill. App. 39.

Indiana. — Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1, 92 Am. Dec. 276.

Kansas. — Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 426; Kansas Pac. R. Co. *v.* Kessler, 18 Kan. 523; Western News Co. *v.* Wilmarth,

cumstances under which the wrongful conduct of an agent will render his principal liable in exemplary damages; and the same conflict exists as to the liability of corporations for the acts of their agents.[1]

(6) *Authority in Charter* — (a) **Effect in General.** — The legislature may, in the absence of constitutional restrictions, confer the power to do acts which, without such authority, would constitute a trespass, nuisance, or other wrong; and it has repeatedly been said that it will not be liable as a wrongdoer merely because, in the careful and *bona fide* exercise of the power so conferred, it caused damage to another; that the remedy of the latter, where there are no constitutional restrictions on the power of the legislature in this respect, is only such, if any, as may be provided by the statute.[2]

33 Kan. 510; Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 59 Am. Rep. 571.

Maine. — Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39; Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

Maryland. — Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277; Philadelphia, etc., R. Co. *v.* Larkin, 47 Md. 155, 28 Am. Rep. 442.

Mississippi. — New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395; Pullman Palace-Car Co. *v.* Lawrence, 74 Miss. 782.

Missouri. — Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201; Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17.

Nevada. — Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New Hampshire. — Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

New York. — Cleghorn *v.* New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375.

North Carolina. — Purcell *v.* Richmond, etc., R. Co., 108 N. Car. 414, 10 Ry. & Corp. L. J. 35.

Ohio. — Pittsburg, etc., R. Co. *v.* Slusser, 19 Ohio St. 157; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

South Carolina. — Palmer *v.* Charlotte, etc., R. Co., 3 S. Car. 580, 16 Am. Rep. 750; Hart *v.* Charlotte, etc., R. Co., 33 S. Car. 427.

Tennessee. — Haley *v.* Mobile, etc., R. Co., 7 Baxt. (Tenn.) 239; Louisville, etc., R. Co. *v.* Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640; Louisville, etc., R. Co. *v.* Guinan, 11 Lea (Tenn.) 98, 47 Am. Rep. 279; Springer Transp. Co. *v.* Smith, 16 Lea. (Tenn.) 498,

Texas. — Hays *v.* Houston, etc., R. Co., 46 Tex. 272; International, etc., R. Co. *v.* Garcia, 70 Tex. 207.

Wisconsin. — Hinckley *v.* Chicago, etc., R. Co., 38 Wis. 194; Bass *v.* Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437.

1. See the title EXEMPLARY DAMAGES.

2. Authority from Charter — *England.* — British Cast Plate Manufacturers *v.* Meredith, 4 T. R. 794; Boulton *v.* Crowther, 2 B. & C. 703, 9 E. C. L. 227; Whitehouse *v.* Birmingham Canal Co., 27 L. J. Exch. 25; Hammersmith, etc., R. Co. *v.* Brand, L. R. 4 H. L. 171; Metropolitan Board of Works *v.* McCarthy, L. R. 7 H. L. 243; Sutton *v.* Clarke, 6 Taunt. 29; Duncan *v.* Findlater, 6 Cl. & F. 894; Dunn *v.* Birmingham Canal Nav., L. R. 7 Q. B. 244; Pilgrim *v.* Southampton, etc., R. Co., 7 C. B. 226, 62 E. C. L. 226.

United States. — Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166. See Northern Transp. Co. *v.* Chicago, 99 U. S. 635.

Connecticut. — Burroughs *v.* Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64.

Delaware. — Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411.

Massachusetts. — Stevens *v.* Middlesex Canal, 12 Mass. 466; Rowe *v.* Granite Bridge Corp., 21 Pick. (Mass.) 348. See Stowell *v.* Flagg, 11 Mass. 364.

New York. — Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42; Steele *v.* Inland Lock Nav. Co., 2 Johns. (N. Y.) 283; Conhocton Stone Road Co. *v.* Buffalo, etc., R. Co., 3 Hun (N. Y.) 528.

Pennsylvania. — Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Woodward *v.* Webb, 65 Pa. St. 254; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Monongahela Nav. Co. *v.* Coons, 6 W. & S. (Pa.) 101; Henry *v.* Pittsburgh, etc., Bridge Co., 8 W. & S. (Pa.) 85; Susquehanna Canal Co. *v.* Wright, 9 W. & S. (Pa.) 9, 42 Am. Dec. 312; Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. (Pa.) 71.

Vermont. — Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Hatch *v.* Vermont, etc., R. Co., 25 Vt. 49.

See the titles DAMNUM ABSQUE INJURIA; NUISANCES.

Statements of the Rule. — "No action at common law lies on behalf of a man who sustains a private injury by the execution of powers given by an act of parliament, those powers being exercised with judgment and caution." *Per* Lord Truro, C., in London, etc., R. Co. *v.* Bradley, 3 Macn. & G. 341.

"If the thing done is within the statute, it is clear that no compensation can be afforded for any damages sustained thereby, except so far as the statute itself has provided it, and this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act." Duncan *v.* Findlater, 6 Cl. & F. 907.

"It is against principle that when something is authorized to be done by an act of parliament, no action can be maintained for the consequences of its being done in the ordinary way. If it is not so done, it is a question of negligence." *Per* Pollock, C. B., in Whitehouse *v.* Birmingham Canal Co., 27 L. J. Exch. 25.

Injury to Land. — In Stevens *v.* Middlesex Canal, 12 Mass. 466, a suit was brought against a canal company, which had constructed its works in such a manner that the water oozed through the banks and injured the

Cases Limiting This Doctrine. — It is difficult to say how far this doctrine extends. Some courts have limited it to public corporations engaged in the exercise of powers for the benefit of the public. They have held that it does not apply to private corporations exercising powers for their own private purposes, and that the legislative authority does not exempt them from liability for injury to the property of others, even when they have used due care to avoid injury, though it may exempt them from criminal responsibility.[1]

plaintiff's meadow. No proof was offered to show that the defendants had done anything not authorized by their act of incorporation, nor that they had been guilty of any negligence or any default in the manner of making or maintaining the canal. The court held that as the legislature had, in that case, provided another mode of redress, the action would not lie. "When the legislature," it was said, "authorizes an act, the necessary and natural consequence of which is damage to the property of another, he who does the act cannot be complained of as a trespasser or wrongdoer."

Use of Dangerous Agencies. — A corporation may be authorized to use dangerous agencies and appliances in the conduct of its business, and it has been held that, in such a case, it will not be liable for damages caused by such use, provided it uses due care and diligence to avoid injury to others. Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708. See the title EXPLOSIVES.

Damages from Operation of Railroad. — The emission of sparks from the stack of a locomotive is not in itself illegal, and it has been held that the loss of property adjacent to a railroad from the sparks, apart from misuse, is *damnum absque injuria*. Burroughs *v.* Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64; Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 447; Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92; Michigan Cent. R. Co. *v.* Anderson, 20 Mich. 244; Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22. See the title FIRES BY RAILROADS.

A statute may impose liability for damages caused by fires set by locomotives, and other consequential damages, without regard to negligence. See Lyman *v.* Boston, etc., R. Co., 4 Cush. (Mass.) 288; Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92.

Where the legislature authorizes a corporation to operate a steam railroad, and it does so in a careful manner, it is not liable for damage caused to adjoining landowners by reason of unavoidable noise, smoke, or vibration from passing trains, or from the fact that their premises may be overlooked from the trains as in the case of elevated railroads, or that they may otherwise be put to inconvenience and impeded or hindered in the enjoyment of their property. Glasgow Union R. Co. *v.* Hunter, L. R. 2 H. L. Sc. 78; Hammersmith, etc., R. Co. *v.* Brand, L. R. 4 H. L. 171; Penny *v.* Southeastern R. Co., 7 El. & Bl. 660, 90 E. C. L. 660, 3 Jur. N. S. 958, 26 L. J. Q. B. 225; Caledonian R. Co. *v.* Ogilvy, 2 Macq. H. L. Cas. 229. See the title RAILROADS.

In Caledonian R. Co. *v.* Ogilvy, 2 Macq. H. L. Cas. 229, a company was authorized to lay down a railway across a public thoroughfare, and to place gates across the highroad to prevent persons from passing along the road at the time when it would be dangerous by reason of trains being near at hand. It was held that a person who had been delayed and impeded in his journey along the highroad by reason of the necessary closing of the gates, had no right of action against the railroad company for the injury he had sustained. It was also held that the owner of an estate had no right of action against the company for laying down its railway across a turnpike road close to the entrance of his estate, by means whereof he was impeded and hindered in going from and returning to his house, and his horses were frightened and became ungovernable from the noise of the trains.

1. Limitations of Doctrine. — Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Sinnickson *v.* Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 247; Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1; McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508; Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235; Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462. See the title NUISANCES.

Illustrations and Statements of This Doctrine. — In Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117, a railroad company was authorized to make a tunnel in the streets of a city, both by the legislature and the city, and yet it was held liable for injury to the property of an abutting lot owner, notwithstanding due care in doing the work. The court said: "As against the municipal government, in the careful exercise of its right and power to grade, change and improve the street, there could be no cause of action for any unavoidable injury done; but as against the appellants, a private corporation, in nowise connected with the municipal government, obtaining authority to use the streets in an extraordinary manner, for its own private purposes and profit, the case is quite different. As against such party, the owner of a plot of ground, with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and state legislature, to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable. If, as we have seen, the injury

Strict Construction of Charter. — And it has frequently been held that authority to do acts which would otherwise be a nuisance, or constitute any other wrong against another, will never be implied, unless the intention of the legislature to grant it is clear. Grants of power in this respect are strictly construed.[1]

(b) **Excess or Abuse of Authority.** — To exempt the corporation from liability in any case, three requisites must concur. The act must be (1) within the authority conferred; (2) without negligence; and (3) in good faith.

aa. Excess of Authority. — If the corporation goes beyond or aside from the authority conferred upon it, it will be liable for resulting damage. And it will be equally liable if it fails to follow the mode and observe the essential formalities and restrictions as to time prescribed by the legislature for the exercise of the powers conferred.[2]

be produced by the careless or negligent exercise of the authority, then there can be no question of the liability; but if due care be exercised, and the injury is the natural or inevitable result or consequence of the doing the act authorized to be done, then, in a case like the present, the party doing the act and producing the injury must indemnify the sufferer. That there was no negligence or want of care in doing the work, is no answer in a case like this."

In Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462, it was held by the Supreme Court of *New York* that an act authorizing one to build a dam on his own land, upon a creek or river which was a public highway, merely protected him from indictment for a nuisance. "If," said the court, "there had been no express provision in the act for the payment of damages, the defendant would still have been liable to pay them. * * * The effect of the grant is merely to authorize the defendant to erect a dam, as he might have done if the stream had been his own, without grant. In such a case, he would have been responsible in damages for all the injury occasioned by it to others."

Remote and Consequential Damage. — It has been held by the *New Jersey* court that, while the owner of property may recover for injury thereto caused by the erection of works by a private corporation under legislative authority, the injury must be the natural and direct result of the act itself, and not a consequence resulting from the fears, prejudices, passions, or caprices of the public. In Bordentown, etc., Turnpike Road *v.* Camden, etc., R., etc., Co., 17 N. J. L. 314, it was held that, as the charter of the Camden and Amboy Railroad and Transportation Company authorized the use of steam engines upon its road, the company was not responsible for the injury or disturbance resulting from the use of such engines near the road of a turnpike company previously incorporated, unless the right to use such engines was exercised in an extraordinary and unlawful manner not contemplated or warranted by the legislature.

1. Charter to Be Strictly Construed — *England.* — Truman *v.* London, etc., R. Co., 25 Ch. Div. 423; Hill *v.* Metropolitan Asylum Dist., 4 Q. B. Div. 433, L. R. 6 App. 193.

United States. — Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317.

Connecticut. — Hooker *v.* New-Haven, etc., Co., 14 Conn. 146, 36 Am. Dec. 477.

Illinois. — Snell *v.* Buresh, 123 Ill. 151.

Indiana. — Eward *v.* Lawrenceburgh, etc., R. Co., 7 Ind. 711.

Massachusetts. — Coolidge *v.* Williams, 4 Mass. 140.

New Hampshire. — Hooksett *v.* Amoskeag Mfg. Co., 44 N. H. 105; Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Amoskeag Mfg. Co. *v.* Goodale, 46 N. H. 53.

New Jersey. — Thompson *v.* Paterson, etc., R. Co., 9 N. J. Eq. 526; Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754.

New York. — Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 491.

See the title Statutes.

Statements of the Rule. — In Coolidge *v.* Williams, 4 Mass. 144, it was said that private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication.

And, in Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 57 Am. Rep. 701, it was held that the statutory sanction which will justify an injury to private property by a railroad corporation, without making compensation therefor, and without the consent of the owner, must be express, or given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury. It was also held that where the terms of a statute giving authority to such a corporation are not imperative, but permissive, this does not confer license to commit a nuisance, although what is contemplated by the statute cannot be done without. And see Snell *v.* Buresh, 123 Ill. 151.

Illustration. — In Hooker *v.* New Haven, etc., Co., 14 Conn. 146, it was held that a grant of authority by the legislature to a corporation to construct a canal does not give any right to cause an overflow upon the lands of another, without responding in damages for the injury.

2. Excess of Authority. — Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574; Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1. See also Dodd *v.* Salisbury, etc., R. Co., 33 L. T. 254, 311.

Thus a Water-works Company, authorized to lay pipes, etc., and construct works, for the

bb. Negligence. — A special power conferred upon a corporation by the legislature must be exercised with due care. If it is exercised negligently the corporation will be liable for the resulting damage.[1]

cc. Bad Faith. — The power must also be exercised in good faith for the purposes for which it was conferred. If exercised in bad faith, and for other purposes, it will be unauthorized, and the statute will furnish no protection.[2]

(c) **Constitutional Restrictions.** — Of course, in order to furnish a justification and protection to the corporation, the statute must be constitutional.[3] In the *United States*, it is very generally provided by the constitutions of the various states that private property shall not be taken for public use without just compensation. To injure property to such an extent as to deprive the owner of the ordinary use of it is to take it, within the meaning of this restriction, and the legislature, therefore, when there is such a provision, cannot authorize an act resulting in injury to private property, and deprive the person injured of his right to sue therefor and recover his damages.[4]

purpose of supplying a certain territory with water, exceeds its authority if it undertakes to lay pipes to carry water beyond such limits. Cardiff *v.* Cardiff Water Works Co., 5 Jur. N. S. 953. See the title Water Companies.

A water works company, authorized to build an aqueduct under land in constructing its works, exceeds its authority in taking or using the land to obtain a supply of water in any other way. Simpson *v.* South Staffordshire Water Works Co., 4 De G. J. & S. 679, 24 L. J. Ch. 380.

So, Railroad Companies cannot escape liability for damages caused by constructing or operating their road outside of or beyond the line authorized, or by operating it in a different mode from that authorized. Great Western R. Co. *v.* May, L. R. 7 H. L. 283; Atty.-Gen. *v.* Mid-Kent R. Co., L. R. 3 Ch. 100; Eversfield *v.* Mid-Sussex R. Co., 3 De G. & J. 286, 28 L. J. Ch. 107; Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574. See the title Railroads.

And a railroad company authorized to construct its road by tunneling, exceeds its authority in substituting an open cut. Atty.-Gen. *v.* Mid-Kent, etc., R. Co., L. R. 3 Ch. 100. See also Lamb *v.* North London R. Co., L. R. 4 Ch. 522; Raphael *v.* Thames Valley R. Co., L. R. 2 Ch. 147.

Street Railway Companies. — Atty.-Gen. *v.* Toronto St. R. Co., 15 Grant's Ch. (U. C.) 187. See also the title Street Railways.

Restrictions as to Time. — The corporation in exercising special powers conferred upon it must observe restrictions, if any, as to time. Hedges *v.* Metropolitan R. Co., 28 Beav. 109.

Eminent Domain. — The rule stated in the text most frequently arises in cases in which a corporation is seeking to acquire lands, or justify damage to land, under the power of eminent domain conferred by the legislature. See the title Eminent Domain.

1. Negligence — *England.* — Coe *v.* Wise, L. R. 1 Q. B. 711, 7 B. & S. 831, 37 L. J. Q. B. 262; Weld *v.* Gas-Light Co., 1 Stark. 189, 2 E. C. L. 78.

Maryland. — Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

New Jersey. — Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243.

New York. — Steele *v.* Inland Lock Nav. Co., 2 Johns. (N. Y.) 283; Boughton *v.* Carter, 18 Johns. (N. Y.) 405; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42. And see Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634.

Pennsylvania. — Schuylkill Nav. Co. *v.* McDonough, 33 Pa. St. 73; Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161.

Vermont. — Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363.

Illustration. — Though a turnpike company has the right to repair its road, so as to prevent injury from the effects of rains or freshets, yet in the exercise of this right it must take care not to injure the owners of the adjoining land. It has no right to turn the water which washes the road on to the land of a private person; and if damage arises to the owner of the adjoining land, in consequence of want of care and negligence in this respect, he may have an action on the case, to recover the damages he has sustained. Boughton *v.* Carter, 18 Johns. (N. Y.) 405. See the title Turnpikes.

Degree of Care Required. — The law in conferring upon a corporation the right to use an element of danger, protects the corporation except for the abuse of its privilege, but in proportion to its danger will arise the degree of caution and care it must use. Great danger demands higher vigilance and more efficient means to secure safety. Thus it is the duty of railroad companies running their engines close to buildings, to use the utmost vigilance and foresight to avoid injury, and to control their engines carefully, to adopt every known safeguard, and to avail themselves from time to time of every approved invention to lessen their danger. Frankford, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708. See also Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178. And see the title Railroads.

2. Bad Faith. — See Dodd *v.* Salisbury, etc., R. Co., 33 L. T. 254, 311.

3. Hamilton County *v.* Cincinnati, etc., Turnpike Co., Wright (Ohio) 603.

4. Constitutional Restrictions — *United States.* — Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166.

Connecticut. — Hooker *v.* New Haven, etc., Co., 14 Conn. 146, 36 Am. Dec. 477.

(7) *Corporations for Public Charity.* — The *Massachusetts* court has held that a corporation for maintaining a general hospital for public charity, having no capital stock nor provision for making profits, deriving its funds merely from public and private charities, and holding them in trust for sustaining the hospital, etc., is not liable for injury to a free patient, caused by the negligence of its agent, or by the unauthorized assumption of one of its attendants to act as surgeon, if it used due care in selecting its agents. And there has been a decision in *Maryland* to the same effect.[1] A contrary decision was made

Massachusetts. — Thacher *v.* Dartmouth Bridge Co., 18 Pick. (Mass.) 501; Stevens *v.* Middlesex Canal, 12 Mass. 466.

New Hampshire. — Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147.

New Jersey. — Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1.

See the title EMINENT DOMAIN.

"In the declaration of rights, prefixed to our constitution," said the court, in Stevens *v.* Middlesex Canal, 12 Mass. 466, "it is provided that private property shall not be taken and appropriated to public uses without compensation to the owner. So that if the legislature should, for public advantage and convenience, authorize any improvement, the execution of which would require or produce the destruction or diminution of private property, without affording, at the same time, means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law, against those who should cause the injury, for his damages. For, although it might be lawful to do what the legislature should authorize; yet to enforce the principles of the constitution for the security of private property, it might be necessary to consider such a legislative act as inoperative, so far as it trenched upon the rights of individuals."

In Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335, Mr. Justice Depue said: "The destruction of private property, either total or partial, or the diminution of its value by an act of the government directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitutional provision. * * * The injuries to which immunity from responsibility attaches are such only as arise incidentally from acts done under a valid act of the legislature, in the execution of a public trust for the public benefit, by persons acting with due skill and caution within the scope of their authority. If the injury be direct, or the work be done for the benefit of an individual or corporation, with private capital and for private emolument, the principle which absolves the parties from liability to action at the suit of persons injured does not apply, even though the public be incidentally benefited by the improvement."

In declaring that private property shall not be taken without recompense, said the court, in Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, the constitution secures to owners not only the possession of property, but also those rights which render possession valuable. "Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property."

1. Corporations for Public Charity — *Massachusetts.* — McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529. In this case a hospital patient sued the corporation for unskilful surgical treatment by a house pupil, a functionary similar to a surgical interne. There was no evidence of any want of care in selecting the house pupil, and the court held that without such evidence the action could not be maintained, and at the same time strongly intimated an opinion that it could not be maintained even with such evidence, for the reason that the corporation could not be held to have agreed to do more than furnish hospital accommodations, which the plaintiff had had, and also for the further reason that any judgment recovered against the corporation could only be satisfied out of funds which, being dedicated to the charity, could not be lawfully used to pay it.

In Newcomb *v.* Boston Protective Dept., 151 Mass. 215, it was held that the Boston Protective Department, incorporated for the protection of life and prevention of fires in the city of Boston, without capital stock or income other than that derived from compulsory assessments upon all the insurance companies, whether connected with it or not, doing business in the city, was a private corporation for diminishing the cost of fire insurance in the city to insurers, and was liable for the negligence of its servants, and not a public charity, although in saving property it did not discriminate between that insured and uninsured, and might, if it did not interfere with the city fire department, enter buildings and assist at fires, and have the right of way in the streets.

Maryland. — In Perry *v.* House of Refuge, 63 Md. 20, 52 Am. Rep. 495, it was held, *citing* the Massachusetts case first referred to above, that the House of Refuge, founded for the care, custody, and reformation of convict, vagrant, and incorrigible youths, being a charitable organization, was not liable for damages for an assault by one of its officers on an inmate.

by the *Rhode Island* court.[1] And this decision seems to be supported by the *English* cases.[2]

3. Liability under Penal Statutes. — Whether or not corporations are liable under statutes commanding or forbidding certain acts under a penalty, depends upon the intention of the legislature, to be ascertained from the language and purpose of the statute.

Doctrine Requiring Express Mention of Corporations. — In some of the cases it seems to have been held in effect that, since statutes imposing a penalty are to be strictly construed, they do not apply to corporations unless they are made to do so in express terms, or by the clearest implication.[3]

1. Doctrine Holding Such Corporations Liable — *Rhode Island.* — Glavin *v.* State Hospital, 12 R. I. 411, 34 Am. Rep. 675. In this case, the plaintiff who had been for some weeks a paying patient in the Rhode Island hospital, brought an action against the hospital for damages, alleging severe injuries caused by the unskilfulness and negligence of the surgical interne, a house officer of the hospital. At the trial, a verdict for the defendant was directed by the presiding judge on the ground that the hospital, being a public charity, was exempt for reasons of public policy from the liability charged. On exceptions by the plaintiff, it was held that, in the absence of legislative provisions granting such exemption, the exemption could not be allowed, public policy requiring that the duty assumed should be faithfully performed. It was further held that although the attendant physician and surgeons could not be considered the servants of the hospital, yet the hospital, was responsible for the exercise of reasonable care in selecting them; that the surgical internes acting as surgeons under the rules of the hospital held the same relation to the hospital as the attendant surgeons; and that where the hospital rules required the interne to summon an attendant surgeon, the interne was the agent of the hospital for this purpose, and the hospital was liable for his omissions or negligence. It was also held that the general trust funds of a charitable corporation are liable to satisfy a judgment in tort recovered against it for the negligence of its officers or servants.

2. England. — The Massachusetts court, in the case above cited, referred to Holliday *v.* St. Leonard, 11 C. B. N. S. 192, 103 E. C. L. 192, decided by the Court of Common Bench in 1861, as authority for the point that the corporation was not liable to be sued for the tort of the house pupil without proof of negligence in selecting him. The doctrine announced in Holliday *v.* St. Leonard, 11 C. B. N. S. 192, 103 E. C. L. 192, was that a corporate or *quasi*-corporate body or board, having a public trust or duty to discharge gratuitously, is not liable for the torts of its servants or employees if it is personally without fault. This decision, however, has been qualified or impugned by later cases. See Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686, L. R. 1 H. L. 93; Foreman *v.* Canterbury, L. R. 6 Q. B. 214; Coe *v.* Wise, L. R. 1 Q. B. 711, 5 B. & S. 440, 117 E. C. L. 440. These cases hold that a board or body having work to do for the public gratuitously, are liable for the torts of their servants or employees, the same as a private business corporation, provided they have funds or are in receipt of an income out of which a judgment against them can be satisfied. See also Winch *v.* Conservators, L. R. 7 C. P. 458, L. R. 9 C P. 378.

The Leading Case is Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686, decided in the House of Lords in 1865. The action was against a *quasi*-corporate board charged with the duty of keeping certain docks in order, and authorized in consideration thereof to collect tolls and dock rates. The board had no interest in the tolls and rates, being bound to expend them on the docks or in the payment of a debt incurred in building them. A vessel belonging to the plaintiff was injured in entering the docks in consequence of neglect to keep them fit for navigation. The House of Lords decided that the action for the injury would lie against the board, the plaintiff being entitled to indemnity out of the public fund. Mr. Justice Blackburn, after advisement, delivered the unanimous opinion of all the judges who heard the case. The opinion was that such corporations, though acting without reward, are in their very nature substitutions, on a large scale, for individual enterprise, and that in the absence of anything in the statutes which create them showing a contrary intent, it must be held that their liability was intended to be, to the extent of their corporate funds, the same as that of individual owners of similar works. He also remarked that, if the true interpretation of the statute is that it casts a duty on the corporation, not only to construct the works, but also to use reasonable skill and care in their construction and in their maintenance for use, there is nothing illogical in holding that those who are injured by a neglect of the duty may maintain an action against the corporation, and be indemnified out of the funds vested in it by the statute.

3. Penal Statutes — Whether Corporations Are Included. — In Benson *v.* Monson, etc., Mfg. Co., 9 Met. (Mass.) 562, it was held that a corporation was not liable to the penalty imposed by a statute on the owner, agent, or superintendent of a manufacturing establishment, for employing children under the age of twelve years in laboring more than ten hours in a day in such establishment. "The provisions of acts imposing penalties," said Dewey, J., "are not to be extended, by construction, beyond their obvious meaning and intent, as manifest upon the face of the statute. Corporations are not, in terms, included in the statute on which this action is brought."

In Cumberland, etc., Canal Corp. *v.* Portland, 56 Me. 77, it was held that an action could not be maintained against a corporation

Contrary Doctrine. — But the better opinion is against such a view and to the effect that penal statutes are applicable to corporations, as well as to natural persons, if their language and purpose show an intention to include them. Though corporations may not be mentioned, the word "person" or "persons" will include them, if they are within the spirit and purpose of the statute.[1]

4. Liability to Indictment — *a.* IN GENERAL. — It seems to have been thought at one time that a corporation was not liable to indictment.[2] But if such a doctrine was ever recognized, it has long since been exploded. It has been shown that a corporation may be liable for the torts of its officers and agents. The same is true to some extent of their criminal acts. A corporation, being impersonal, cannot be imprisoned, but it may be punished by fine or by forfeiture of its charter.[3]

b. NONFEASANCE. — It has long been settled that corporations are liable to indictment for nonfeasance. A corporation owing a duty to the public, as to repair a bridge, or turnpike, or public road, etc., may be indicted and fined if it fails to do so and thereby causes a public nuisance.[4]

under a statute imposing a penalty upon "any person or persons" who should "wilfully, maliciously, or contrary to law," take, remove, break down, etc., a canal, or any works connected with it, and declaring further that "such offender or offenders" should be further liable to indictment and fine.

And in Androscoggin Water Power Co. *v.* Bethel Steam Mill Co., 64 Me. 441, it was held that an action of debt was not maintainable against a corporation under a statute imposing a penalty upon "any person" who should take, carry away, or otherwise convert to his own use, etc., any logs suitable to be sawed or cut into boards, etc. In this case, however, the court was influenced by a subsequent section of the statute, declaring that any person who should do the acts specified should be deemed guilty of larceny, which, since a corporation cannot be guilty of felony, was thought to show that the whole statute was intended to apply to natural persons only.

1. See *supra*, this title, *Definition, General Nature, and Distinctions.*

Cases Holding that Corporations Are Included. — In Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 60 Am. Rep. 786, it was held that a private corporation was liable under a statute imposing a penalty on any "person" who should sell intoxicating liquors to a person in the habit of becoming intoxicated. "Corporations," it was said, "are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute." See the title INTOXICATING LIQUORS.

In Hotchkiss *v.* Samuel Cupples Wooden-Ware Co., 53 Fed. Rep. 1018, it was held that a corporation may be held liable under the Act of Congress imposing a penalty for marking an unpatented article with the word "patented," when done by an officer or agent acting within the scope of his authority. See also Pharmaceutical Soc. *v.* London, etc., Supply Assoc., L. R. 5 App. 857; McDaniel *v.* Gate City Gas-Light Co., 79 Ga. 58; St. Louis, etc., R. Co. *v.* Ryan, 56 Ark. 245. And see *infra*, this section, *Liability to Indictment — Statutory Crimes.*

2. Lord Holt is reported to have said that "a corporation is not indictable, but the particular members of it are." Anonymous, 12 Mod. 559.

3. **Penalty.** — If the penalty prescribed for the act be both fine and imprisonment, then so far as the punishment cannot, from the nature of the offender, be carried out, the statute is of course inoperative, but the inability to punish by imprisonment does not prevent punishment by fine. Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 201.

4. **Indictment for Nonfeasance** — *England.* — Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 187; Lyme Regis *v.* Henley, 3 B. & Ad. 77, 23 E. C. L. 32; Rex *v.* Hendon, 4 B. & Ad. 628, 24 E. C. L. 128; Rex *v.* West Riding, 2 East 342; Rex *v.* West Riding, 7 East 588; Rex *v.* Stratford-upon-Avon, 14 East 348; Reg. *v.* Wilts, 1 Salk. 359; Reg. *v.* Cluworth, 1 Salk. 359; Rex *v.* Sheffield, 2 T. R. 106.

Arkansas. — Texas, etc., R. Co. *v.* State, 41 Ark. 488.

Kentucky. — Louisville, etc., R. Co. *v.* Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205; Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 197; Paducah, etc., R. Co. *v.* Com., 80 Ky. 147, 10 Am. & Eng. R. Cas. 318.

Maine. — State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586.

Massachusetts. — Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242.

New Hampshire. — State *v.* Concord R. Co., 59 N. H. 85.

New Jersey. — State *v.* Godwinsville, etc., Macadamized Road Co., 49 N. J. L. 266, 60 Am. Rep. 611; New York, etc., R. Co. *v.* State, 50 N. J. L. 303, *affirmed* 53 N. J. L. 244; State *v.* Society, etc., 42 N. J. L. 504, *reversed* on another point 44 N. J. L. 502.

New York. — Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.) 161; Susquehannah, etc., Turnpike Road Co. *v.* People, 15 Wend. (N. Y.) 267; Syracuse, etc., Plank Road Co. *v.* People, 66 Barb. (N. Y.) 25; People *v.* Albany Corp., 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

Pennsylvania. — Delaware Div. Canal Co. *v.* Com., 60 Pa. St. 367, 100 Am. Dec. 570; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192.

Tennessee, — Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523. 75 Am. Dec. 778; State *v.* Barksdale, 5 Humph. (Tenn.) 154; State *v.*

c. MISFEASANCE IN GENERAL — **Old Doctrine.** — A few of the courts, while conceding that a corporation could thus be indicted for nonfeasance, have held that it could not be indicted for misfeasance.[1]

Modern Doctrine. — This doctrine, however, has not been recognized to any extent, and it is now virtually settled that no such distinction can be made. It has repeatedly been held that a corporation is liable to indictment for nuisances created by the positive act of its officers or agents in the course of their employment, as by the obstruction of a highway or navigable river, as well as for those created by nonfeasance; and it may be liable for other positive offenses than the creation of a nuisance.[2]

Murfreesboro, 11 Humph. (Tenn.) 217; Nashville, etc., Turnpike Co. *v.* State, 96 Tenn. 249, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 267, 279; White's Creek Turnpike Co. *v.* State, 16 Lea (Tenn.) 24. See Simpson *v.* State, 10 Yerg. (Tenn.) 525. See also Dyer County *v.* Railroad Co., 87 Tenn. 712, *overruling* Chesapeake, etc., R. Co. *v.* State, 16 Lea (Tenn.) 300; Memphis, etc., R. Co. *v.* State, 87 Tenn. 746.

West Virginia. — State *v.* Monongahela River R. Co., 37 W. Va. 108.

In Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 187, it was held that a corporation aggregate could be indicted for disobedience to an order of justices requiring it to execute works pursuant to a statute.

Failure to Repair Highway. — In Susquehannah, etc., Turnpike Road Co. *v.* People, 15 Wend. (N. Y.) 267, it was held that a turnpike road company is liable to indictment at common law for suffering its road to be out of repair. See also Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.) 161.

Many of the other cases cited *supra* in this note are to the same effect.

Failure to Light Bridge. — In Com. *v.* Central Bridge Corp., 12 Cush. (Mass.) 242, it was held that a provision in the charter of a toll-bridge corporation, that the bridge should "at all times be kept in good, safe, and passable repair," required the company to light the bridge if necessary to make it safe and convenient for passage at night, and that an indictment would lie for failure to do so.

Failure of Railroad Company to Give Signals. — In Louisville, etc., R. Co. *v.* Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205, it was held that it was the duty of a railroad company to cause signals to be given where the safety of travelers on intersecting roads demanded that a warning should be given of approaching trains, and that a habitual failure to give such signals or warnings was an indictable nuisance.

Failure to Remove Unwholesome Basin or Pool. — In People *v.* Albany Corp., 11 Wend. (N. Y.) 539, it was held that, where the corporation of a city had power to direct the excavating, deepening, or cleansing of a basin connected with a river, and neglected to take the necessary measures in that respect after such basin had become foul by the aggregation of mud and other substances, so that the water was corrupted and the air infected by noisome and unwholesome stenches, and a nuisance was thus created, an indictment would lie against it.

The Want of Funds affords no legal excuse to a corporation for nonperformance of duties to the public resulting in a nuisance. By accepting their charter they impliedly engaged to fulfil all the duties thereby imposed. A neglect of those duties subjects them to an indictment; and their poverty as a corporation is no more a defense than the poverty of an individual is a defense to an action for a breach of contract or to an indictment for a crime. Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.)174.

1. Indictment for Misfeasance — Old Doctrine — *Maine.* — In State *v.* Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38, it was held that a milling and manufacturing corporation was not liable to indictment for nuisance caused by the erection of a dam across the Penobscot river. A corporation, it was said, "can neither commit a crime or misdemeanor by any positive or affirmative act, or incite others to do so, as a corporation." This case has been *overruled.* See the Maine cases cited in the note following.

Indiana. — This view was also taken by the Indiana court in State *v.* Ohio, etc., R. Co., 23 Ind. 362, where it was held that an indictment could not be maintained against a railroad company for misfeasance.

It is now otherwise in Indiana by express statutory provision. See State *v.* Baltimore, etc., R. Co., 120 Ind. 298.

The Indiana statute providing that a corporation may be indicted for maintaining a public nuisance applies to nuisances created prior to its adoption as well as to those afterwards maintained. State *v.* Louisville, etc., R. Co., 86 Ind. 114, 10 Am. & Eng. R. Cas. 286.

Virginia. — The same ruling was made in Virginia, in Com. *v.* Swift Run Gap Turnpike Co., 2 Va. Cas. 362, where it was held that a turnpike company could not be indicted for obstructing a highway by digging it up and placing stones and dirt therein.

2. Modern Doctrine as to Misfeasance — *England.* — Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 58 E. C. L. 315; Reg. *v.* Scott, 3 Q. B. 543, 43 E. C. L. 858, 2 G. & D. 729, 3 Ry. Cas. 187; Rex *v.* Medley, 6 C. & P. 292, 25 E. C. L. 403; Reg. *v.* United Kingdom Electric Tel. Co., 2 B. & S. 647, note *a*, 110 E. C. L. 647, note *a*; Reg. *v.* Longton Gas Co., 2 El. & Bl. 651, 105 E. C. L. 651.

United States. — U. S. *v.* Baltimore, etc., R. Co., 7 Am. L. Reg. N. S. 757.

Arkansas. — St. Louis, etc., R. Co. *v.* State, 52 Ark. 51.

Florida. — Savannah, etc., R. Co. *v.* State, 23 Fla. 579; Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 11 Am. St. Rep. 395.

Illinois. — See Chicago, etc., R. Co. *v.* People, 44 Ill. App. 632.

Iowa. — State *v.* Chicago, etc., R. Co., 77 Iowa 442.

Kentucky. — Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 197; Cincinnati R. Co. *v.* Com., 80 Ky. 137, 7 Am. & Eng. R. Cas. 91.

Maine. — State *v.* Freeport, 43 Me. 198; State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586. And see State *v.* Portland, etc., R. Co., 57 Me. 402.

Massachusetts. — Com. *v.* Newburyport Bridge, 9 Pick. (Mass.) 142; Com. *v.* Nashua, etc., R. Corp., 2 Gray (Mass.) 54; Com. *v.* Hancock Free Bridge Corp., 2 Gray (Mass.) 58; Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339; Com. *v.* Vermont, etc., R. Corp., 4 Gray (Mass.) 22. See Com. *v.* Boston, etc., R. Co., 135 Mass. 550.

Mississippi. — See Lee Mut. F. Ins. Co. *v.* State, 60 Miss. 395.

New Hampshire. — Boston, etc., R. Co. *v.* State, 32 N. H. 215.

New Jersey. — State *v.* Morris, etc., R. Co., 23 N. J. L. 360; Warren R. Co. *v.* State, 29 N. J. L. 353; Central R. Co. *v.* State, 32 N. J. L. 220; New York, etc., R. Co. *v.* State, 50 N. J. L. 303, *affirmed* 53 N. J. L. 244; State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260. *Compare* State *v.* Godwinsville, etc., Macadamized Road Co., 49 N. J. L. 266, 60 Am. Rep. 611.

North Carolina. — See State *v.* Roanoke R., etc., Co., 109 N. Car. 860.

Pennsylvania. — Delaware Div. Canal Co. *v.* Com., 60 Pa. St. 367, 100 Am. Dec. 570; Northern Cent. R. Co. *v.* Com., 90 Pa. St. 300; Com. *v.* Lehigh Valley R. Co., 165 Pa. St. 162.

South Dakota. — State *v.* Clark First Nat. Bank, 2 S. Dak. 568.

Tennessee. — State *v.* Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; State *v.* Louisville, etc., R. Co., 91 Tenn. 445; Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523, 75 Am. Dec. 778.

Vermont. — State *v.* Vermont Cent. R. Co., 27 Vt. 103.

Washington. — State *v.* Paggett, 8 Wash. 579.

West Virginia. — State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

Statements of the Rule. — In Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 58 E. C. L. 315, Lord Denman said: "Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If A. is authorized to make a bridge with parapets, but makes it without them, does the offense consist in the construction of the unsecured bridge, or in the neglect to secure it? But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offense and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission."

And it was said by Bigelow, J., in Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury committed by a corporation impossible, because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses."

Illustrations — Obstructions of Highways. — In Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 58 E. C. L. 315, 10 Jur. 755, a railroad company was held indictable for cutting through and obstructing a highway in constructing its road.

And in State *v.* Morris, etc., R. Co., 23 N. J. L. 360, it was held that an indictment could be maintained against a railroad company for constructing and maintaining a building and leaving cars in a public highway.

Many of the other cases cited *supra* in this note are to the same effect.

Railroad in Hands of Receiver. — An indictment cannot be sustained against a railroad company for a nuisance in the obstruction of a highway by the stoppage therein of the trains upon the railroad, while it is under the sole management of a receiver, appointed by the court of chancery, over whose acts the company have no control. State *v.* Vermont Cent. R. Co., 30 Vt. 108. See the title RECEIVERS (OF RAILROADS).

Pollution of Waters and Watercourses. — In Rex *v.* Medley, 6 Car. & P. 292, 25 E. C. L. 403, an indictment was sustained against a gas company for nuisance in so conducting its works as to convey large quantities of noisome liquids, arising from the manufacture of gas, into the river Thames, whereby the water was polluted and fish destroyed.

And in State *v.* Portland, 74 Me. 268, 43 Am. Rep. 586, it was held that a municipal corporation is liable to an indictment if it so constructs its public sewers that the outfalls thereof create a public nuisance, noisome, and prejudicial to the public health, provided the accumulations of filth thence proceeding are not promptly re-

Disorderly House. — It may be indicted for keeping a disorderly house.[1]

Permitting Gaming. — Or for permitting gaming in its premises.[2]

Lotteries. — And there seems to be no reason to doubt that it would be liable to indictment for maintaining a lottery in violation of law.[3]

Other Positive Offenses. — As will be seen in the following sections, indictments have also been sustained against corporations for libel, for taking usury, and for breach of the Sunday laws.[4]

d. Offenses Involving Elements of Malice, Criminal Intent, or Personal Violence. — As has been shown elsewhere under this title, corporations are liable civilly for assault and battery and other torts of their agents in the course of their employment, involving the element of personal violence, and also for torts involving the element of malice, and they may be liable for exemplary damages.[5] Some of the courts have shown a tendency in the late cases to extend this doctrine to criminal prosecutions.[6] So far as actual authority goes, however, the doctrine is limited to torts, and a corporation cannot be indicted for offenses involving the element of personal violence, as assault and battery, nor for offenses involving the element of malice or criminal intent.[7] They cannot be indicted for felony, for the punishment is inappli-

moved. See also Reg. *v.* Bradford Nav. Co., 6 B. & S. 631, 118 E. C. L. 631.

Issuing Unstamped Papers. — In U. S. *v.* Baltimore, etc., R. Co., 7 Am. L. Reg. N. S. 757, it was held by the circuit court of the United States for the District of West Virginia that a corporation was liable to indictment for the act of its officer or employee in issuing, without the proper stamps, papers which the law required to be stamped, with intent to evade the provisions of an Act of Congress.

1. State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260. See the title Disorderly Houses.

2. Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 197. In this case an indictment was sustained against an agricultural society for permitting gaming on its fair grounds. *Compare* State *v.* Sullivan County Agricultural Soc., 14 Ind. App. 369.

3. See State *v.* Krebs, 64 N. Car. 604.

4. See *infra*, this section.

5. See *supra*, this section, *Liability for Torts.*

6. **Malicious Offenses, Assaults, etc.** — Mr. Wharton says that no good reason can be assigned why the same acts, for which these bodies are subject to civil suit, may not equally be the basis of criminal proceedings when they result in injury to the public at large. 1 Whart. Crim. Law, § 87.

This statement seems to have been approved by the *New Jersey* court in State *v.* Passaic County Agricultural Soc., 54 N. J. L. 263, where it was said by Judge Van Syckel that "in these days, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution."

"There are crimes," said the *Kentucky* court in a late case, "of which, from their very nature, as perjury for example, they cannot be guilty. There are crimes to the punishment for which, for a like reason, they cannot be subjected, as in the case of felony; but wherever the offense consists in either a misfeasance or a nonfeasance of duty to the public, and the corporation can be reached for punishment as by a fine and the seizure of its property, precedent authorizes and public policy requires that it should be liable to indictment." Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 200.

Libel. — In State *v.* Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663, an indictment was maintained against a corporation for libel. And see the dictum in Brennan *v.* Tracy, 2 Mo. App. 544. See also observations of Lord Blackburn, in Pharmaceutical Soc. *v.* London, etc., Assoc., L. R. 5 App. 870, 49 L. J. Q. B. 736, 28 W. R. 957, 43 L. T. 389, *dissenting* from the remarks of Bramwell, L. J., 49 L. J. Q. B. 338, 28 W. R. 608, 42 L. T. 569.

"The very basis of the action for libel or for malicious prosecution," said the *New Jersey* court, "is the evil intent, the malice, of the party defendant. It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public." State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260. See the titles Libel and Slander; Malicious Prosecution.

Sabbath Breaking. — In State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803, it was held that a corporation could be indicted under a statute for sabbath breaking; and Judge Green, after a review of the decisions, and reference to the tendency of the courts to extend the liability of corporations for torts, expressed a doubt as to the statement in some of the cases and text-books that a corporation cannot be indicted for any offense which derives its criminality from evil intention, or for assaults and other offenses against the person. See the title Sunday.

7. See Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 187, *per* Patteson, J.; Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339; Delaware Div. Canal Co. *v.* Com., 60 Pa. St. 367, 100 Am. Dec. 570.

cable; nor, in the nature of things, could they be guilty of perjury.[1]

e. STATUTORY CRIMES. — It would seem clear that corporations should be regarded as persons within the meaning of a statute making certain acts by "any person" a crime, if they are within the purpose of the statute; and so it has been held.[2] There is authority, however, against this view, on the ground that penal statutes are to be strictly construed.[3]

Death by Wrongful Act. — While a corporation could not be indicted for murder or manslaughter, there are statutes in some states giving a remedy by indictment against corporations to recover a fine for death caused by their wrongful act or neglect, the recovery being for the benefit of the wife or children of the deceased, or other beneficiaries specified in the statute.[4] The proceeding is criminal in form only.[5]

f. EFFECT OF STATUTORY PENALTY. — The fact that the charter of a corporation prescribes a specific penalty for failure to perform duties to the public imposed upon it does not prevent an indictment, if the charter contains no negative words, nor anything from which it can be inferred that the legislature intended to take away the remedy by indictment.[6]

1. Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 200.

2. **Corporations as "Persons" Within Penal Statutes.** — Hotchkiss *v.* Samuel Cupples Wooden Ware Co., 53 Fed. Rep. 1018; St. Louis, etc., R. Co. *v.* State, 52 Ark. 51; Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 60 Am. Rep. 786. See Pharmaceutical Soc. *v.* London, etc., Assoc., L. R. 5 App. 857. And see *supra*, this section, *Liability under Penal Statutes*.

Taking Usury. — In State *v.* Security Bank, 2 S. Dak. 538, an indictment was maintained against a corporation for usury under a statute declaring that "every person who, directly or indirectly, receives any interest, discount, or consideration upon the loan or forbearance of any money, goods, or things in action, greater than is allowed by law, is guilty of a misdemeanor."

Sunday Laws. — And in State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803, a corporation was held indictable under a statute declaring that if "a person" should be found laboring at any trade or calling on a sabbath day, "he" should be fined, etc. In this case a railroad company was indicted and convicted under the statute for running its cars on the sabbath.

Lord Blackburn. — "I own I have no great doubt myself," said Lord Blackburn, "that the word 'person' may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include both. I have equally no doubt that in common talk, the language of men not speaking technically, a 'person' does not include an artificial person, that is to say, a corporation. Nobody in common talk, if he were asked who is the richest person in London, would answer the London and North-western Railway Company. The thing is absurd. It is plain that in common conversation and ordinary speech a 'person' would mean a natural person; in technical language it may mean the artificial person; in which way it is used in any particular act must depend upon the context and the subject-matter. I do not think that the presumption that it does include an artificial person, a corporation, if that is the presumption, is at all a strong one. Circumstances, and indeed circumstances of a slight nature in the context, might show in which way the word is to be construed in an Act of Parliament, whether it is to have the one meaning or the other. I am quite clear about this, that whenever you can see that the object of the act requires that the word 'person' shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the act accordingly." Pharmaceutical Soc. *v.* London, etc., Assoc., L. R. 5 App. 868.

3. In State *v.* Cincinnati Fertilizer Co., 24 Ohio St. 611, it was held that a corporation was not a person within the meaning of a statute to prevent nuisances and punish persons creating or maintaining them. "Criminal laws," said the court, "are to be construed strictly in favor of the accused. In its primary sense, the word 'person' means a natural person only. I know of no criminal statute in Ohio where the word has been held to apply to a corporation; nor do I know of any case where an attempt has before been made in this state to indict a corporation. We have no common-law crimes in Ohio, and the whole theory and machinery of our administration of criminal law seem adapted only to the prosecution and punishment of natural persons. There is no provision of law for bringing an indicted party into court by summons, or otherwise than by actual arrest of his person. Under such a state of legislation and practice, the legislature could not have intended, in the use of the word 'person,' which is found in almost every criminal law of the state, to authorize an indictment against a corporation for this particular offense, without any special or further provision as to the liability of corporations, or the mode of proceeding against them."

4. See the title DEATH BY WRONGFUL ACT.

5. State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258; Boston, etc., R. Co. *v.* State, 32 N. H. 215.

6. **Effect of Statutory Penalty.** — Susquehan-

g. Effect of Authority in Charter. — A corporation is not indictable for an act authorized by its charter, though the act would be a nuisance in the absence of legislative authority.[1]

Construction of Charter. — But a charter or statute is not to be construed as authorizing the maintenance of what would be a nuisance in the absence of legislative authority, unless the intent to do so is clear.[2]

Excess or Abuse of Authority. — And the charter or statute will furnish no justification if the authority thereby conferred is exceeded or abused.[3] Unnecessary

nah, etc., Turnpike Road Co. *v.* People, 15 Wend. (N. Y.) 267; Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.) 161.

Illustrations. — In Syracuse, etc., Plank Road Co. *v.* People, 66 Barb. (N. Y.) 25, a plank road company was held liable to an indictment at common law for not keeping its road in repair, notwithstanding the provisions of the Plank Road Act authorizing an indictment and conviction for a neglect to repair, upon the complaint of an inspector of plank roads, after an examination and notice to a director of the company.

And in St. Louis, etc., R. Co. *v.* State, 52 Ark. 51, it was held that an act providing for the recovery by civil proceeding of a penalty against railroad companies for failing to construct or keep in repair railway crossings did not repeal a statute which made it a misdemeanor, punishable by indictment, for any person to obstruct a highway by felling a tree across the same, or placing any other obstruction thereon, and that under the latter statute a railway corporation might be indicted for building an embankment across a public highway and failing to keep the same in good condition and repair.

So, in White's Creek Turnpike Co. *v.* State, 16 Lea (Tenn.) 24, it was held that a turnpike company was not protected from indictment for failing to keep its road in repair, by a provision in its charter that if the company failed to keep its road in repair for the space of twenty days, upon information given, a justice of the peace should summon three freeholders, and if, in the presence of said justice, said freeholders should find said road out of repair, the person intrusted with the repair of the road should be subjected to a fine of ten dollars, one half to go to the prosecutor and the other to the county. See also Simpson *v.* State, 10 Yerg. (Tenn.) 525.

1. Legislative Authority in General. — Rex *v.* Pease, 4 B. & Ad. 30, 24 E. C. L. 17; People *v.* Law, 34 Barb. (N. Y.) 502; Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29.

Illustrations. — In Rex *v.* Pease, 4 B. & Ad. 30, 24 E. C. L. 17, an indictment was brought for a nuisance in operating a railroad so near a public highway as to frighten the horses of persons traveling thereon; but as the railroad had been constructed along this route by authority conferred in the charter of the company, and as it did not appear that it could have been made to pass at a greater distance, it was held that the indictment could not be maintained.

In State *v.* Louisville, etc., R. Co., 86 Ind. 114, 10 Am. & Eng. R. Cas. 286, it was held that where the legislature authorizes a railroad company to occupy the streets of a town, such use cannot be deemed to amount to a public nuisance or become an indictable offense; that the grant by the legislature to a railroad company of the right to occupy the streets of a town does not authorize the creation of unreasonable and unnecessary obstructions; but where the company has used care to prevent such obstruction, and has done no more than to make a fair and reasonable use of the rights vested in it, it cannot be indicted for maintaining a nuisance. And see Danville, etc., R. Co. *v.* Com., 73 Pa. St. 29.

2. Construction of Charter. — State *v.* Chicago, etc., R. Co., 77 Iowa 442; State *v.* Freeport, 43 Me. 198.

In Pittsburgh, etc., Bridge Co. *v.* Com., (Pa. 1886) 8 Atl. Rep. 217, it was held that an act of the legislature incorporating a bridge company, while it authorized the company to occupy with its bridges, piers, abutments, approaches, causeways, and walls such land as might be necessary for the completion and maintenance of its bridge, did not authorize it to occupy any part of a public highway for the purpose of storing lumber that might be useful in making repairs on the bridge, when such repairs might happen to become necessary.

General Words in an act of incorporation do not authorize the company to do acts which by the public law are indictable; plain and positive words are necessary to convey such a privilege. Therefore, in State *v.* Krebs, 64 N. Car. 604, it was held that the charter of "the North Carolina Real and Personal Estate Agency," in providing that "the said agency should have the right and power to sell and dispose of any real or personal property placed in their hands for sale in any mode or manner the agency should deem best," did not authorize the agency to sell property by means of lottery.

3. Excess or Abuse of Authority — *England.* — Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 58 E. C. L. 315; Reg. *v.* Scott, 3 Q. B. 543, 43 E. C. L. 858.

Kentucky. — Louisville, etc., R. Co. *v.* Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205.

Maine. — State *v.* Freeport, 43 Me. 198.

Massachusetts. — Com. *v.* Newburyport Bridge, 9 Pick. (Mass.) 142.

Pennsylvania. — Pittsburgh, etc., Bridge Co. *v.* Com., (Pa. 1886) 8 Atl. Rep. 217.

Tennessee. — Memphis, etc., R. Co. *v.* State, 87 Tenn. 746.

Thus, if a railroad company, under authority from a county court giving it license to build its road upon, along, or across public highways upon the express condition that it shall restore such highways to their former state, or to such state as not unnecessarily to impair their usefulness, takes possession of a part of a public highway, and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a

injury to the public will render the corporation liable.[1]

h. EXCESS OF AUTHORITY BY AGENTS. — To subject a corporation to indictment, the acts of its agents for which it is sought to hold it responsible must have been done in the course of their employment. But it is not necessary that they shall have been expressly authorized by the corporation.[2]

5. Liability for Contempt — Old Doctrine. — Formerly it was thought that a corporation could not be held liable for contempt, as, by reason of its impersonal nature, it could not be attached.[3] And there are dicta to this effect in some of the late cases.[4]

Modern Doctrine. — The weight of modern authority, however, is against this doctrine. While a corporation cannot be attached or imprisoned, it may nevertheless be guilty of a contempt in disobeying or violating an order or decree of court, as it may be guilty of a tort or crime, and it may be fined therefor, and its property sequestered.[5]

nuisance, and may be indicted therefor, notwithstanding it has such authority from the county court. State *v.* Monongahela River R. Co., 37 W. Va. 108.

1. Unnecessary Injury. — A bridge across a navigable river may not necessarily be an obstruction to navigation, and if it can reasonably be so constructed as not to interfere with navigation it should be so done. The power conferred must be so exercised that no more injury may be done to the rights of others than is necessary to accomplish the purpose for which it is granted. State *v.* Freeport, 43 Me. 198.

A railroad company must, if possible, construct its road without any inconvenience to the public, but, if this cannot be done, it must be constructed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent the obstruction, the company must rebuild it in a reasonable time, and cannot delay it until their road is completed. Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523, 75 Am. Dec. 778.

2. Authority of Agents. — Rex *v.* Medley, 6 C. & P. 292, 25 E. C. L. 403; Com. *v.* Ohio, etc., R. Co., 1 Grant's Cas. (Pa.) 329.

In State *v.* Louisville, etc., R. Co., 91 Tenn. 445, it was held that a corporation, indicted for obstructing a public road by permitting its train to stand across the road for an unreasonable length of time, could not defend by showing that its servants engaged in the operation of trains were forbidden by its general rules and regulations to permit trains to remain across public roads for an unreasonable time; that for such acts of its servants, done within the scope of their duty, the corporation, though forbidding the acts, was criminally responsible. "Being a corporation," it was said, "it necessarily acts only through its agents. If the obstruction is the act of its agent, it is the act of the corporation, provided the agent did the act in the course and scope of his duty as agent. It is immaterial that the agent was, by rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. If such agent disobeys the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise the public would be required to look alone to subordinates, in general unknown and irresponsible." See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

3. Old Doctrine as to Contempt. — See Mill's Case, T. Raym. 152; Guilford *v.* Mills, 2 Keb. 1. See Rex *v.* Windham, 1 Cowp. 377.

If the officers of a corporation were guilty of a contempt in refusing to obey a writ or order of court, they could be attached and punished. Smith *v.* Butler, Comb. 327. See generally the title CONTEMPT, *ante*, p. 25.

4. See First Cong. Church *v.* Muscatine, 2 Iowa 69; Davis *v.* New York, 1 Duer (N. Y.) 484; Sercomb *v.* Catlin, 128 Ill. 566, 15 Am. St. Rep. 147.

5. Modern Doctrine as to Contempt — *England.* — See Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 187.

United States. — U. S. *v.* Memphis, etc., R. Co., 6 Fed. Rep. 237; Indianapolis Water Co. *v.* American Strawboard Co., 75 Fed. Rep. 972. And see American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. Rep. 937.

California. — Golden Gate, etc., Min. Co. *v.* Superior Ct., 65 Cal. 187; Cowie *v.* Trudeau, *cited* in 21 Am. Rep. 665, note. And see Seventy-Six Land, etc., Co. *v.* Superior Ct., 93 Cal. 139.

Maryland. — McKim *v.* Odom, 3 Bland (Md.) 427.

Massachusetts. — See Jones *v.* Boston Mill Corp., 4 Pick. (Mass.) 597, 16 Am. Dec. 358.

Michigan. — See Detroit, etc., Plank Road Co. *v.* Detroit Citizens' St. R. Co., 97 Mich. 583.

New Jersey. — West Jersey Traction Co. *v.* Camden, 58 N. J. L. 536.

New York. — People *v.* Albany, etc., R. Co., 12 Abb. Pr. (N. Y. Supreme Ct.) 171, 20 How. Pr. (N. Y.) 358; New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; Rochester, etc., R. Co. *v.* New York, etc., R. Co., 48 Hun (N. Y.) 190; Taber *v.* New York El. R. Co., 12 Misc. Rep. (N. Y. Super. Ct.) 460. And see Manhattan Electric-Light Co. *v.* Harlem Lighting Co., 63 Hun (N. Y.) 631, 44 N. Y. St. Rep. 169.

Virginia. — See Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

See generally the title CONTEMPT, *ante*, p. 25.

IX. Actions By and Against Corporations — 1. Capacity to Sue — *a.* In General. — Power to sue in the corporate name is frequently conferred upon corporations by their charters in express terms, but it need not be so. This capacity is one of the necessary incidents of all corporations. They have the same right as natural persons to protect their rights and enforce claims in their favor by judicial process in the corporate name,[1] unless there is an express or implied restriction in their charters.[2]

Statutory Conditions Precedent to Suit. — In some states there are statutes requiring corporations to file certificates or do other acts, as a condition precedent to the right to sue. The effect of a failure to comply with the statutes will be treated in another part of this work.[3]

b. Actions at Common Law — **Real and Possessory Actions.** — Corporations may maintain any common-law action. They may maintain any real or possessory action that a natural person may, to protect their title to real or personal property, or to recover possession thereof, — as ejectment, writ of entry, replevin, etc.[4]

Actions Ex Contractu. — They may maintain assumpsit, general or special, as the case may be, on express or implied contractual obligations; and they may

"Why," said Hogeboom, J., in People *v.* Albany, etc., R. Co., 12 Abb. Pr. (N. Y. Supreme Ct.) 171, 20 How. Pr. (N. Y.) 358, "cannot a corporation be punished for contempt? It is said, because it cannot be attached, that is, personally seized or taken. This shows no sufficient reason. In the former equity practice it sometimes became necessary to order a corporation to answer a bill in chancery. If it refused, it was not strictly attached, as a natural person would be, but a distringas, or writ authorizing a distress upon its property, was issued; this failing, a second and sometimes a third was issued, and, if all these were insufficient, then process of sequestration was issued against it, and its property sequestered for the benefit of the aggrieved party. 1 Barb. Ch. 76. Why may not process of sequestration be issued against it, to punish it for contempt in violating an injunction, as well as contempt in refusing to answer? Why may it not be fined for the contempt, and the fine collected in the ordinary way? Corporations are often indicted for neglect of duty, or for positive misfeasance, and the punishment, upon conviction, is by the imposition of a fine. The punishment by fine for a contempt is one of the usual modes of punishment, and directly recognized by statute. 2 Rev. Stat. 538. So, also, the sequestration of property is recognized among the elementary writers and in adjudicated cases as an appropriate and lawful mode of punishment for a contempt. 2 Barb. Ch. 280; Van Santv. Eq. Pr. 635; People *v.* Rogers, 2 Paige (N. Y.) 103; Lupton *v.* Hescott, 1 Sim. & S. 274."

Officers and Agents. — As to the punishment of officers and agents of corporations for contempt, see the title Officers and Agents of Private Corporations. And see generally the title Contempt, *ante*, p. 25.

1. Capacity to Sue in General — *England.*—Conservators *v.* Ash, 10 B. & C. 349, 21 E. C. L. 97.

United States. — The Camanche, 8 Wall. (U. S.) 448.

Alabama. — Lucas *v.* Georgia Bank, 2 Stew. (Ala.) 147.

Arizona. — Shute *v.* Keyser, (Arizona 1892) 29 Pac. Rep. 386.

Connecticut. — Stratford *v.* Sanford, 9 Conn. 282.

Illinois. — Washtenaw Bank *v.* Montgomery, 3 Ill. 422.

Indiana. — Moore *v.* Wabash, etc., Canal, 7 Ind. 466; Estell *v.* Knightstown, etc., Turnpike Co., 41 Ind. 180.

Maine. — Savage Mfg. Co. *v.* Armstrong, 17 Me. 34, 35 Am. Dec. 227.

Massachusetts. — British American Land Co. *v.* Ames, 6 Met. (Mass.) 391.

Oregon. — Grant County *v.* Lake County, 17 Oregon 453.

Corporations, Said Kyd, "may maintain all such actions as are necessary to assert their rights when invaded, or to give them a recompense for any injury that can be done to them." 1 Kyd on Corp. 185.

Power to "Receive, Hold, and Manage" a fund impliedly gives the power to sue for it. White School House *v.* Post, 31 Conn. 240.

Foreign Corporations. — As to the power of foreign corporations to sue, see the title Foreign Corporations.

In the Federal Courts. — Corporations may sue and be sued in the federal courts, if the conditions as to subject-matter or parties requisite to give such courts jurisdiction exist. See the title United States Courts.

2. Express or Implied Prohibition in Charter. — If the charter of a corporation says nothing about the power to sue, it will be implied; but if the charter provides that suit shall be brought by the trustees or other particular officers, the corporation cannot sue in its own name. Marsh *v.* Astoria Lodge No. 112, 27 Ill. 421.

3. See the title Ultra Vires.

4. Writ of Right. — 1 Kyd on Corp. 185 *citing* the case of All-Souls Colledge *v.* Tamworth, Cro. Eliz. 232, Co. Litt. 341 *b.*

Writ of Entry. — Society, etc., *v.* Wheeler, 2 Gall. (U. S.) 105.

Ejectment. — 1 Kyd on Corp. 187, *citing* 1 Anders 202, 248; Chedington's Case, 1 Coke 153.

maintain debt or covenant in proper cases.[1]

Actions Ex Delicto. — They may also maintain an action *ex delicto* for the redress of wrongs committed against them whenever a natural person could maintain such an action. Thus they may maintain trespass for injury to real or personal property,[2] or, in some jurisdictions, for assault and battery on their servant, resulting in loss of service,[3] or trover for the conversion of goods.[4] And they may maintain an action on the case for other injuries to property or infringement of rights.[5] Thus they may sue for libel,[6] or for a vexatious or malicious suit.[7]

c. REMEDIES IN EQUITY. — Corporations may also resort to equitable remedies, whenever a natural person could do so, to protect or enforce their rights, as to a suit for an injunction, for specific performance of a contract, cancellation or reformation of an instrument, etc.[8] They may maintain a bill of interpleader.[9]

d. REMEDIES IN ADMIRALTY. — They may also maintain libels in admiralty, either *in rem* or *in personam*.[10]

e. STATUTORY REMEDIES — (1) *In General.* — A corporation may resort to statutory as well as common-law remedies. Whenever a remedy is provided by statute, a corporation, if within the purpose and spirit of the statute, may take advantage of it though not expressly mentioned therein. A corporation is a "person," or "creditor," within the meaning of statutes conferring the right upon any "person" or "creditor" to resort to a particular remedy for the enforcement of his rights, if it is within the purpose for which the remedy was provided.[11]

(2) *Attachment and Garnishment.* — The statutes providing a remedy by attachment and garnishment give a corporation the right to sue out an attachment or writ of garnishment though they do not expressly mention corpora-

1. 1 Kyd on Corp. 187, 191; Hardres 486.

Use and Occupation. — A corporation may sue on implied contract for use and occupation. Stafford *v.* Till, 4 Bing. 75, 13 E. C. L. 347.

2. **Trespass.** — Conservators *v.* Ash, 10 B. & C. 349, 21 E. C. L. 97; Tilden *v.* Metcalf, 2 Day (Conn.) 259.

3. **Assault and Battery.** — A corporation, of course, being impersonal, cannot be assaulted or beaten, but its servants may, and if special injury results to the corporation therefrom, as in loss of services, it may maintain trespass therefor. Some courts have held that in such a case the action must be trespass on the case, and not trespass. See 1 Kyd on Corp. 190. See the title MASTER AND SERVANT.

4. **Trover.** — Mather *v.* Trinity Church, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663. See the title TROVER AND CONVERSION.

5. **Action on the Case.** — 1 Kyd on Corp. 187; Stratford *v.* Sanford, 9 Conn. 282.

6. **Libel.** — Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 146; Hahnemannian L. Ins. Co. *v.* Beebe, 48 Ill. 87, 95 Am. Dec. 519; Trenton Mut. L., etc., Ins. Co. *v.* Perrine, 23 N. J. L. 402, 57 Am. Dec. 400; Knickerbocker L. Ins. Co. *v.* Ecclesine, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 9. See the title LIBEL AND SLANDER.

7. **Vexatious or Malicious Suit.** — See South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505. See the title MALICIOUS PROSECUTION.

8. **Remedies in Equity.** — Cole Silver Min. Co. *v.* Virginia, etc., Water Co. 1 Sawy. (U. S.) 470; Newby *v.* Oregon Cent. R. Co., Deady (U. S.) 609; Holmes *v.* Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474. See the titles EQUITY; INJUNCTION; SPECIFIC PERFORMANCE, etc.

9. **Interpleader.** — They may resort to this remedy, for example, when opposing claims are made to a dividend on shares of stock. Salisbury Mills *v.* Townsend, 109 Mass. 115.

10. **In Admiralty.** — The Camanche, 8 Wall. (U. S.) 448. See the titles ADMIRALTY JURISDICTION, vol. 1, p.645; MARITIME LIENS, etc.

Salvage Services. — A corporation may maintain a libel to recover for salvage services rendered by it. The Camanche, 8 Wall. (U. S.) 448. See the title SALVAGE.

11. **Statutory Remedies.**—Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42; Trenton Banking Co. *v.* Haverstick, 11 N. J. L. 171; Union Bank *v.* U. S. Bank, 4 Humph. (Tenn.) 369. See Carpentier *v.* Delaware Ins. Co., 2 Binn. (Pa.) 264.

Suit to Quiet Title. — Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42. See the title CLOUD ON TITLE, vol. 6, p. 149.

Petition in Bankruptcy. — A corporation may, as a creditor, file a petition for a commission in bankruptcy. *Ex p.* Bank of England, 1 Swanst. 10; *Ex p.* Bank of Ireland, 1 Moll. Ch. 261. See the title INSOLVENCY AND BANKRUPTCY.

Suit as Common Informer. — A corporation, it has been held, cannot sue as a common informer under a statute giving "any person or persons" the right to sue. 1 Kyd on Corp. 218; Weavers Co. *v.* Forrest, 2 Stra. 1241, note.

tions; and the affidavit required by the statute may be made by its officers.[1]

f. Exclusion of Common-law by Statutory Remedy. — Where a right is given by statute, and a special remedy is given to enforce the same, this excludes the right to resort to an action at common law. But a common-law action may be maintained to enforce a right existing at common law, notwithstanding the fact that there is also a statutory remedy, provided the common-law remedy is not expressly excluded.[2]

g. Institution and Conduct of Suits. — Suits by corporations must be instituted by proper authority, usually by authority of a majority of the board of directors.[3] And charter provisions as to the manner of suing must be observed.[4] Ordinarily, the suit must be brought in the corporate name, and not in the name of the officers or stockholders.[5] But there may be circumstances, as where the officers wrongfully refuse to sue, under which a stockholder may sue in equity in his own name for the benefit of the corporation.[6]

h. Effect of Insolvency and Dissolution. — Insolvency of a corporation does not render it incapable of suing. But, in the absence of statutory provisions to the contrary, it cannot sue after dissolution, and all suits pending at the time of dissolution abate.[7]

2. Liability to Be Sued — *a.* In General. — The liability to be sued in the corporate name is, like the capacity to sue, an incident of all corporations.[8]

1. **Attachment and Garnishment.** — Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Augusta Bank *v.* Conrey, 28 Miss. 667; Trenton Banking Co. *v.* Haverstik, 11 N. J. L. 171; Union Bank *v.* U. S. Bank, 4 Humph. (Tenn.) 369. See Gordon *v.* Baltimore, 5 Gill (Md.) 231. See the titles Attachment, vol. 3, p. 181; Garnishment.

2. **Exclusion of Common-law Remedy.** — See the title Statutes.

In Huntington, etc., Turnpike Road Co. *v.* Brown, 2 P. & W. (Pa.) 462, the charter of a turnpike company had given it the right to maintain toll gates, and collect tolls, and prescribed a special remedy for their collection. It was held that the company could not maintain assumpsit against a person on an implied contract for use of the road. "It is a rule founded in reason and convenience," said Gibson, C. J., "that every duty created by a statute be enforced specifically by means, where there are any, provided in the statute itself." See also Chestnut Hill Turnpike Co. *v.* Martin, 12 Pa. St. 361.

In subsequent cases, however, the court held that the special remedy did not exclude an action of assumpsit to recover on a special contract for use of the road. Dorman *v.* Pittsburgh, etc., Turnpike Road Co., 3 Watts (Pa.) 126; Beeler *v.* Pittsburgh Farmers', etc., Turnpike Road Co., 14 Pa. St. 162. See also Kidder *v.* Susquehanna Boom Co., 24 Pa. St. 193.

3. **The Authority of Officers and Agents** with respect to bringing suits for and in the name of the corporation is treated in another part of this work. See the title Officers and Agents of Private Corporations.

4. Marsh *v.* Astoria Lodge No. 112, 27 Ill. 421.

5. **Actions by Stockholders** — *United States.* — Bradley *v.* Richardson, 2 Blatchf. (U. S.) 343.

California. — Curtiss *v.* Murry, 26 Cal. 633.

Colorado. — Arkansas River Land, etc., Co. *v.* Farmers' Loan, etc., Co., 13 Colo. 587.

Illinois. — Illinois State Hospital *v.* Higgins, 15 Ill. 185.

Indiana. — Tomlinson *v.* Bricklayers Union No. 1, 87 Ind. 308.

Massachusetts. — Bartlett *v.* Brickett, 14 Allen (Mass.) 62.

New York. — Lucas *v.* Johnson, 8 Barb. (N. Y.) 244; Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31.

North Carolina. — Mauney *v.* High Shoals Mfg. Co., 4 Ired. Eq. (39 N. Car.) 195.

Virginia. — Porter *v.* Nekervis, 4 Rand. (Va.) 359.

Wisconsin. — Button *v.* Hoffman, 61 Wis. 20, 50 Am. Rep. 131.

6. *England.* — Atwool *v.* Merryweather, L. R. 5 Eq. 464, note.

United States. — Dodge *v.* Woolsey, 18 How. (U. S.) 331.

Connecticut. — Allen *v.* Curtis, 26 Conn. 456.

Kansas. — Burnes *v.* Atchison, 48 Kan. 517, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 280.

Massachusetts. — Peabody *v.* Flint, 6 Allen (Mass.) 52.

Rhode Island. — Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

On this point see the title Stockholders. And see also the titles Corporations and Stock and Stockholders in the Encyc. of Pl. and Pr.

7. **Insolvency and Dissolution.** — Carey *v.* Giles, 10 Ga. 9; State Bank *v.* Wrenn, 3 Smed. & M. (Miss.) 791; Miami Exporting Co. *v.* Gano, 13 Ohio 269; Building Assoc. *v.* Anderson, 7 Phila. (Pa.) 106; May *v.* State Bank, 2 Rob. (Va.) 60. See the title Dissolution of Corporations. And see the title Corporations, 5 Encyc. of Pl. and Pr. 96.

8. **Liability to Suit.** — 1 Kyd on Corp. 185.

Arizona. — Shute *v.* Keyser, (Arizona 1892) 29 Pac. Rep. 386.

Colorado. — Breene *v.* Merchants', etc., Bank, 11 Colo. 97.

Connecticut. — McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689.

Illinois. — State University *v.* Bruner, 66 Ill. App. 665.

b. ACTIONS AT COMMON LAW — **Real and Possessory Actions.** — Ejectment and other real and possessory actions will lie against a corporation.[1]

Actions Ex Contractu. — It seems never to have been doubted that actions of debt and covenant could be maintained against a corporation aggregate. Formerly, it was not liable to be sued in assumpsit except in a few cases, for, ordinarily, it could not bind itself by contract not under seal.[2] This doctrine, as was shown in treating of the powers of corporations, has been greatly modified in *England* and *Canada*, and wholly repudiated in the *United States*. Whenever a corporation can be bound by a simple contract, express or implied, under the doctrines there stated, assumpsit, general or special according to the circumstances, will lie against it.[3]

Actions Ex Delicto. — According to the modern doctrine, as has been shown in treating of the liability of corporations for torts, a corporation is liable to substantially the same extent as a natural person for the wrongful acts or omissions of its officers and agents in the course of their employment, and may be sued in any of the ordinary common-law actions *ex delicto*.[4]

Particular Actions Ex Delicto — Trespass. — It was formerly thought that a corporation aggregate could not be sued in trespass, as the process in that action, a capias and exigent, was not applicable; but this view has long since been exploded, and it is now settled that such an action will lie for a trespass on the land, goods, or person of another, committed by the agents of the corporation under circumstances rendering the corporation responsible.[5]

Trover will lie for the conversion of property.[6]

And an Action on the Case will lie against a corporation for libel, malicious prosecution, fraud, or any other wrongful injury to land or goods, or to the person, for which such an action could be maintained against an individual.[7]

Indiana. — Moore *v.* Wabash, etc., Canal, 7 Ind. 466.

Kentucky. — Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174.

Massachusetts. — Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169.

New Hampshire. — Libbey *v.* Hodgdon, 9 N. H. 394.

New York. — Clarissy *v.* Metropolitan F. Dept., 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 352.

Oregon. — Grant County *v.* Lake County, 17 Oregon 453.

Tennessee. — Hutchinson *v.* Western, etc., R. Co., 6 Heisk. (Tenn.) 634.

Vermont. — Day *v.* Essex County Bank, 13 Vt. 97.

Virginia. — Dunnington *v.* Northwestern Turnpike Road, 6 Gratt (Va.) 160.

Actions in Relation to Stock and Subscriptions to Stock. — See the titles STOCK; STOCKHOLDERS.

Venue. — As to the venue of actions against corporations, see the title VENUE in the ENCYC. OF PL. AND PR.

Process in actions against corporations must be served on the proper officer or agent. This subject is very generally regulated by statute. On this question, see the title SERVICE OF PROCESS in the ENCYC. OF PL. AND PR.

Foreign Corporations. — As to suits against foreign corporations, see the title FOREIGN CORPORATIONS.

Federal Courts. — As to the jurisdiction of actions against corporations in the federal courts, see the title UNITED STATES COURTS.

1. Angell and Ames on Corp., § 389; Dater *v.* Troy Turnpike, etc., Co., 2 Hill (N. Y.) 629. See the titles EJECTMENT; REPLEVIN, etc.

2. Breckbill v. Lancaster Turnpike Co., 3 Dall. (Pa.) 496.

3. **Assumpsit.** — Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299; McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689; Underwood v. Newport Lyceum, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260; Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Smith v. First Cong. Meeting house, 8 Pick. (Mass.) 178; Danforth *v.* Schoharie, etc., Turnpike Road, 12 Johns. (N. Y.) 227; Dunnington v. Northwestern Turnpike Road, 6 Gratt. (Va.) 160. See *supra*, this title, *Powers with Respect to Contracts — Form and Manner of Entering Into Contracts.*

4. See *supra*, this title, *Liability for Torts.*

5. **Trespass.** — Maund v. Monmouthshire Canal Co., 4 M. & G. 452, 43 E. C. L. 237; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; Edwards *v.* Union Bank, 1 Fla. 158; Crawfordsville, etc., R. Co. *v.* Wright, 5 Ind. 252; Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574; Bath *v.* Caton, 37 Mich. 199; McCready *v.* Guardians of Poor, 9 S. & R. (Pa). 94, 11 Am. Dec. 667; Main *v.* North Eastern R. Co., 12 Rich. L. (S. Car.) 82, 75 Am. Dec. 725. See *supra*, this title, *Liability for Torts.*

6. **Trover.** — Yarborough *v.* Bank of England, 16 East 6; German Nat. Bank *v.* Meadowcroft, 95 Ill. 124, 35 Am. Rep. 137; Foster *v.* Essex Bank, 17 Mass. 503, 9 Am. Dec. 168; Beach *v.* Fulton Bank, 7 Cow. (N. Y.) 485. See *supra*, this title, *Liability for Torts.* And see the title TROVER AND CONVERSION.

7. **Action on the Case.** — Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169; Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 S. & R. (Pa.) 6. See *supra*, this title, *Liability for Torts.*

c. REMEDIES IN EQUITY. — A corporation is as fully liable to suits in equity as a natural person. Thus, it is liable to a suit for injunction, to a creditor's bill, etc.[1]

d. REMEDIES IN ADMIRALTY. — And it may, in proper cases, be proceeded against in courts of admiralty by libel either *in rem* or *in personam*.[2]

e. MANDAMUS, QUO WARRANTO, AND SCIRE FACIAS — **Mandamus.** — Where a specific duty is imposed upon a corporation by its charter or the general law under which it was formed, performance thereof may be compelled by mandamus, if no other adequate remedy at law is available.[3]

Quo Warranto. — An information in the nature of the ancient writ of quo warranto lies against a corporation at common law to oust it from the illegal use of corporate franchises and powers, or, in some jurisdictions, for abuse thereof.[4] The remedy has been extended by statute.[5]

Scire Facias. — Scire facias will lie against a corporation, and is the proper remedy at common law, to forfeit its charter for nonuser or abuse of corporate powers, if the corporation is a legal existing body, and not merely a *de facto* body illegally assuming corporate powers.[6]

f. STATUTORY REMEDIES — (1) *In General.* — When a remedy is given by statute against any "person" or "persons," or "debtors," and corporations are within the spirit and purpose of the statute, they are to be considered as included, though they may not be expressly mentioned.[7]

(2) *Attachment and Garnishment* — **Attachment.** — Corporations are within the

1. **In Equity.** — See McKim *v.* Odom, 3 Bland (Md.) 425; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1. See the titles EQUITY; INJUNCTION; SPECIFIC PERFORMANCE, etc.

A Creditor's Bill may be maintained against a corporation on the same grounds on which it could be maintained against a natural person. Kittel *v.* Augusta, etc., R. Co., 65 Fed. Rep. 862, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 275. See the title CREDITOR'S BILLS, 5 ENCYC. OF PL. AND PR. 388.

2. **In Admiralty.** — Objection to the liability of corporations to libels in admiralty does not seem to have been raised. The reports, however, are full of cases in which libels have been sustained against them. See the titles ADMIRALTY JURISDICTION, vol. 1, p. 645; MARITIME LIENS, etc.

3. **Mandamus** — *England.* — Rex *v.* Nottingham Old Water Works, 6 Ad. & El. 355, 33 E. C. L. 90; Norris *v.* Irish Land Co., 8 El. & Bl. 512, 92 E. C. L. 512.

United States. — Union Pac. R. Co. *v.* Hall, 91 U. S. 343; Chicago, etc., R. Co. *v.* Crane, 113 U. S. 424.

Alabama. — Medical, etc., Soc. *v.* Weatherly, 75 Ala. 248, 10 Am. & Eng. Corp. Cas. 26.

Connecticut. — State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Georgia. — State *v.* Georgia Medical Soc., 38 Ga. 608; Savannah, etc., Canal Co. *v.* Shuman, 91 Ga. 400, 44 Am. St. Rep. 43, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 289, 291.

Illinois. — Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am Rep. 690.

Maryland. — Firemen's Ins. Co. *v.* Baltimore, 23 Md. 297.

Missouri. — State *v.* Hannibal, etc., R. Co., 86 Mo. 13.

New York. — People *v.* Pacific Mail Steamship Co., 50 Barb. (N. Y.) 280.

Pennsylvania. — Easton *v.* Lehigh Water Co., 97 Pa. St. 554; Com. *v.* Phœnix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184.

See the title MANDAMUS.

4. **Quo Warranto.** — Com. *v.* Lexington, etc., Turnpike Road Co., 6 B. Mon. (Ky.) 397; Reed *v.* Cumberland, etc., Canal Corp., 65 Me. 132; Com. *v.* Commercial Bank, 28 Pa. St. 383; State *v.* Essex Bank, 8 Vt. 489; State *v.* Milwaukee, etc., R. Co., 45 Wis. 579; People *v.* Hudson Bank, 6 Cow. (N. Y.) 217.

5. See the title QUO WARRANTO.

6. **Scire Facias.** — Washington, etc., Turnpike Co. *v.* Maryland, 3 Wall. (U. S.) 210; State *v.* Moore, 19 Ala. 514. See the title SCIRE FACIAS.

7. **Statutory Remedies** — *Alabama.* — Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404.

Connecticut. — Knox *v.* Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33.

Georgia. — South Carolina R. Co. *v.* McDonald, 5 Ga. 531.

Iowa. — Wales *v.* Muscatine, 4 Iowa 306.

Missouri. — St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

Pennsylvania. — Bushel *v.* Commonwealth Ins. Co., 15 S. & R. (Pa.) 173.

Tennessee. — Union Bank *v.* U. S. Bank, 4 Humph. (Tenn.) 369.

Texas. — Fleming *v.* Texas Loan Agency, 87 Tex. 238.

Virginia. — Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

Death by Wrongful Act. — An action lies against a corporation under a statute giving a right of action for death caused by the wrongful act of another. Fleming *v.* Texas Loan Agency, 87 Tex. 238. See *supra*, this title, *Liability for Torts*. And see the title DEATH BY WRONGFUL ACT.

statutes providing a remedy by attachment, though they may not be expressly mentioned in the statute.[1]

Garnishment or Trustee Process. — The statutes allowing garnishment and trustee process sometimes expressly provide for summoning corporations as garnishee or trustee. In the absence of express provision to this effect, some courts have held that corporations are not within the statutes.[2] By the better opinion, however, corporations are to be considered as much within such a statute as natural persons, for they are as much within its purpose and spirit, and the disclosure required by the statute may be made under the corporate seal, or verified by its proper officers, according to the practice.[3]

g. EXCLUSION OF COMMON-LAW BY STATUTORY REMEDY. — As a general rule, when a statute creates a duty and prescribes a remedy for non-performance, the remedy prescribed by the statute is exclusive, and an action at common law will not lie.[4] But if a statute imposes a penalty, or prescribes a remedy, for non-performance of a duty which existed at common law, the statutory remedy is merely cumulative, and does not take away the right of persons injured by non-performance of the duty to bring an action at common law.[5]

h. EFFECT OF INSOLVENCY AND DISSOLUTION — **Insolvency.** — The insolvency of a corporation or its cessation of business does not, in the absence of statutory provisions to that effect, take away the rights of its creditors to sue it, and by the weight of authority it can make no difference that they thereby obtain a preference over other creditors.[6]

1. Attachment — *Colorado.* — Breene *v.* Merchants', etc., Bank, 11 Colo. 97.

Georgia. — South Carolina R. Co. *v.* McDonald, 5 Ga. 531.

Pennsylvania. — Bushel *v.* Commonwealth Ins. Co., 15 S. & R. (Pa.) 173.

Tennessee. — Union Bank *v.* U. S. Bank, 4 Humph. (Tenn.) 369.

2. Garnishment and Trustee Process. — Holland *v.* Leslie, 2 Harr. (Del.) 306; Union Turnpike Road *v.* Jenkins, 2 Mass. 37.

3. *Connecticut.* — Knox *v.* Protection Ins. Co , 9 Conn. 430, 25 Am. Dec. 33.

Iowa. — Wales *v.* Muscatine, 4 Iowa 302; Taylor *v.* Burlington, etc., R. Co., 5 Iowa 115.

Maryland. — Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

Missouri. — St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

New Hampshire. — Libbey *v.* Hodgdon, 9 N. H. 394.

Pennsylvania. — Boyle *v.* Franklin F. Ins. Co., 7 W. & S. (Pa.) 76; Franklin F. Ins. Co. *v.* West, 8 W. & S. (Pa.) 350.

Virginia. — Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 665, 65 Am. Dec. 254.

See the title GARNISHMENT.

4. Exclusion of Common-law by Statutory Remedy. — See Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469.

5. If a statute gives a remedy in the affirmative, without a negative express or implied, for a matter which was actionable at the common law, the party may still sue at the common law, as well as upon the statute, for this does not take away the common-law remedy. Almy *v.* Harris, 5 Johns. (N. Y.) 175; Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469; Norris *v.* Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621. See Susquehanna, etc., Turnpike Road Co. *v.* People, 15 Wend. (N. Y.) 267. And see Pennsylvania, etc., Canal Co. *v.* Graham, 63 Pa. St. 290. See the title STATUTES.

In Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469, it was held that an action at common law would lie against a railroad company for killing a cow, because of its neglect to fence its road, though there was a statute imposing a duty to fence and imposing a penalty — liability for double damages — for failure to do so. "Where the statute," it was said, "creates a special duty, for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided. The latter is only cumulative."

6. Effect of Insolvency — *United States.* — White, etc., Mfg. Co. *v.* Henry B. Pettes Importing Co., 30 Fed. Rep. 864.

Colorado. — Breene *v.* Merchants', etc., Bank, 11 Colo. 97.

Illinois. — Roseboom *v.* Whittaker, 132 Ill. 81.

Missouri. — La Grange Butter Tub Co. *v.* National Bank, 122 Mo. 154, 43 Am. St. Rep. 558; Webb *v.* Midway Lumber Co., 68 Mo. App. 546.

New York. — Varnum *v.* Hart, 119 N. Y. 101.

Texas. — Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., (Tex. Civ. App. 1896) 35 S. W. Rep. 337; Harrigan *v.* Quay, (Tex. Civ. App. 1894) 26 S. W. Rep. 512, 27 S. W. Rep. 897; Florsheim Bros. Dry Goods Co. *v.* Wettermark, 10 Tex. Civ. App. 102.

Wisconsin. — Ballin *v.* Merchants', Exch. Bank, 89 Wis. 278, 46 Am. St. Rep. 834; Ford *v.* Hill, 92 Wis. 188.

Insolvency and Cessation of Business has been held by some courts to prevent adversary proceedings against a corporation by one creditor so as to obtain a preference over others, the assets of a corporation under such circumstances being regarded by these courts as a

Dissolution. — But after dissolution of a corporation, no action can be maintained against it, and pending actions abate, unless there are statutory provisions to the contrary.[1]

3. Reference to Arbitration. — A corporation has, as an incident to its capacity to sue and to be sued, the power to agree to submission to arbitration.[2]

4. Confession of Judgment. — It also, as an incident to its power to sue and be sued, has the power to confess judgment.[3]

5. Execution Against Corporations. — Property of a *quasi*-public corporation that is essential to the performance of its duties to the public cannot be taken in execution and sold under a judgment against it, without an express statutory provision to that effect.[4] The judgment creditor should apply for a receiver and a sequestration of the corporate earnings.[5] The same rule applies to all franchises on account of their intangible character.[6] With these exceptions, corporate property is liable to execution in the same manner as that of individuals.[7]

trust fund for all the creditors, in which they are entitled to share equally.

Tennessee. — Marr *v.* West Tennessee Bank, 4 Coldw. (Tenn.) 471; Levins *v.* W. O. Peeple's Grocery Co., (Tenn. 1896) 38 S. W. Rep. 733; Memphis Barrel, etc., Co. *v.* Ward, (Tenn. 1897) 42 S. W. Rep. 13.

Texas. — Orr, etc., Shoe Co. *v.* Thompson, 89 Tex. 501; Rogers *v.* East Line Lumber Co., 11 Tex. Civ. App. 108; Wright *v.* Euless, 12 Tex. Civ. App. 136.

Washington. — Compton *v.* Schwabacher, 15 Wash. 306.

To prevent proceedings against a corporation under this doctrine, however, it must have ceased to do business. Mere insolvency is not enough. Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 89 Tex. 511; American Nat. Bank *v.* Dallas Tinware Mfg. Co., (Tex. Civ. App. 1897) 39 S. W. Rep. 955.

As to the Right to Prefer Creditors, see generally *supra*, this title, *Power to Alienate Property — Assignment for Benefit of Creditors.*

Cessation of Business. — That a corporation which has simply gone out of business may be sued, see Jones *v.* Spartanburg Herald Co., 44 S. Car. 526.

1. Effect of Dissolution — *United States.* — Selma First Nat. Bank *v.* Colby, 21 Wall. (U. S.) 609; Pendleton *v.* Russell, 144 U. S. 645.

Alabama. — Paschall *v.* Whitsett, 11 Ala. 472.

Connecticut. — National Pahquioque Bank *v.* Bethel First Nat. Bank, 36 Conn. 334.

Delaware. — Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8.

Georgia. — Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; Thornton *v.* Lane, 11 Ga. 459; Terry *v.* Merchants', etc., Bank, 66 Ga. 177. *Compare* Robinson *v.* Lane, 19 Ga. 337.

Kansas. — Eagle Chair Co. *v.* Kelsey, 23 Kan. 632.

Maine. — Bowker *v.* Hill, 60 Me. 172.

Massachusetts. — Thornton *v.* Marginal Freight R. Co., 123 Mass. 32.

Mississippi. — Port Gibson *v.* Moore, 13 Smed. & M. (Miss.) 157.

North Carolina. — Fox *v.* Horah, 1 Ired. Eq. (36 N. Car.) 358, 36 Am. Dec. 48.

Tennessee. — White *v.* Campbell, 5 Humph. (Tenn.) 38.

See the title DISSOLUTION OF CORPORATIONS. And see the title CORPORATIONS, 5 ENCYC. OF PL. AND PR., pp. 97, 98.

2. See *supra*, this title, *Powers with Respect to Contracts — Submission to Arbitration.* And see the title ARBITRATION AND AWARD, vol. 2, p. 533.

3. Power to Confess Judgment. — Shute *v.* Keyser, (Arizona 1892) 29 Pac. Rep. 386, 37 Am. & Eng. Corp. Cas. 61; U. S. Electric Lighting Co. *v.* Leiter, 19 D. C. 575; Stratton *v.* Allen, 16 N. J. Eq. 229. See the title JUDGMENTS AND DECREES.

4. Property Necessary for Performance of Duty to Public — *United States.* — Gue *v.* Tide Water Canal Co., 24 How. (U. S.) 257; East Alabama R. Co. *v.* Doe, 114 U. S. 340.

Indiana. — Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501.

Kentucky. — Louisville Water Co. *v.* Hamilton, 81 Ky. 517, 3 Am. & Eng. Corp. Cas. 421.

Nebraska. — Overton Bridge Co. *v.* Means, 33 Neb. 857, 29 Am. St. Rep. 514.

North Carolina. — Gooch *v.* McGee, 83 N. Car. 59, 35 Am. Rep. 558.

Pennsylvania. — Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278; Foster *v.* Fowler, 60 Pa. St. 27.

Tennessee. — Baxter *v.* Nashville, etc., Turnpike Co. 10 Lea (Tenn.) 488, 4 Am. & Eng. Corp. Cas. 138.

Texas. — Palestine *v.* Barnes, 50 Tex. 538.

5. Remedy in Such Cases — *United States.* — Covington Drawbridge Co. *v.* Shepherd, 21 How. (U. S.) 112.

Kentucky. — Louisville Water Co. *v.* Hamilton, 81 Ky. 517, 3 Am. & Eng. Corp. Cas. 421.

Nebraska. — Overton Bridge Co. *v.* Means, 33 Neb. 857, 29 Am. St. Rep. 514.

Tennessee. — Baxter *v.* Nashville, etc., Turnpike Co., 10 Lea (Tenn.) 488, 4 Am. & Eng. Corp. Cas. 138.

See the title RECEIVERS.

6. Franchise — *United States.* — Gue *v.* Tide Water Canal Co., 24 How. (U. S.) 257.

California. — Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

Indiana. — Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501.

Missouri. — Stewart *v.* Jones, 40 Mo. 140.

New Jersey. — Randolph *v.* Larned, 27 N. J. Eq. 557.

7. Permissible in Other Cases — *United States.*

6. Actions Between Corporation and Stockholders. — A corporation and its stockholders are separate and distinct persons in the eye of the law, and, therefore, each may sue and be sued by the other.[1]

7. Interference and Assistance in Legal Proceedings — When Authorized. — Not only may a corporation bring suit directly in its own name on a cause of action accruing to it; but it may, by employing attorneys or paying costs, interfere and assist in legal proceedings in respect of matters which either directly or indirectly affect itself or its privileges.[2]

When Unauthorized. — But it cannot interfere or assist in any way, or apply the corporate funds, in legal proceedings which do not involve or affect the corporate rights or privileges.[3]

X. VISITATION OF CORPORATIONS — 1. Definition and Purpose. — By "visitation of corporations" is meant the act of examining into their affairs. The person authorized to make such examination is called the visitor. The purpose of visitation is to supervise, direct, and control the management of the corporation.[4]

— Iron City Nat. Bank *v.* Siemens-Anderson Steel Co., 14 Fed. Rep. 150.

Massachusetts. — Peirce *v.* Partridge, 3 Met. (Mass.) 44; Perry *v.* Adams, 3 Met. (Mass.) 51.

Pennsylvania. — Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

Further as to Execution against corporations, see the title EXECUTIONS.

1. Actions By or Against Stockholders. — Waring *v.* Catawba Co., 2 Bay (S. Car.) 109; Henderson *v.* San Antonia, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Wausau Boom Co. *v.* Plumer, 35 Wis. 274. See the title STOCKHOLDERS.

2. When Authorized to Assist or Interfere. — Green's Brice's Ultra Vires, 279.

England. — Breay *v.* Royal British Nurses' Assoc., (1897) 2 Ch. 272, 66 L. J. Ch. 587, 76 L. T. 735; Atty.-Gen. *v.* Norwich, 2 Myl. & C. 428; Reg. *v.* Lichfield, 10 Q. B. 534, 59 E. C. L. 534; 16 L. J. Q. B. 333; Holdsworth *v.* Clifton Dartmouth Hardness, 11 Ad. & El. 490, 39 E. C. L. 153; Reg. *v.* Lichfield, 4 Q. B. 893, 45 E. C. L. 893, 12 L. J. Q. B. 308; Lewis *v.* Rochester, 9 C. B. N. S. 401, 99 E. C. L. 401, 30 L. J. C. P. 169.

Connecticut. — Harbison *v.* First Presb. Soc., 46 Conn. 529, 33 Am. Rep. 34.

Georgia. — Macon *v.* Cummins, 47 Ga. 321.

Maine. — Baker *v.* Windham, 13 Me. 74.

Massachusetts. — Babbitt *v.* Savoy, 3 Cush. (Mass.) 530.

Illustrations. — In Atty.-Gen. *v.* Norwich, 2 Myl. & C. 406, it was held that a municipal corporation is justified in discharging, out of the corporate funds, the expenses of opposing quo warranto informations against individual members of the corporation, when the object of such informations is to impeach the title, or destroy the legal existence of the corporation as a body. See also the title MUNICIPAL CORPORATIONS.

In Harbison *v.* First Presb. Soc., 46 Conn. 529, 33 Am. Rep. 34, it was held that the committee of a religious society had the power to defend, at the cost of the society, against legal proceedings endangering either the existence of the society or its rights of property; and that it could defend therefore against a petition for an injunction forbidding the sale of its pews.

In Breay *v.* Royal British Nurses' Assoc., (1897) 2 Ch. 272, 66 L. J. Ch. 587, 76 L. T. 735, it was held that a corporation publishing a newspaper could lawfully apply its funds in defending its editor in an action of libel brought against the latter for matter published in the paper in the usual course of the corporate business.

3. When Not Authorized. — Green's Brice's Ultra Vires, 281.

England. — Reg. *v.* Leeds, 4 Q. B. 796, 45 E. C. L. 796; Reg. *v.* Bridgewater, 10 Ad. & El. 281, 37 E. C. L. 107; Reg. *v.* Tamworth, 17 W. R. 231, 19 L. T. 433; Pickering *v.* Stephenson, L. R. 14 Eq. 322; Kernaghan *v.* Williams, L. R. 6 Eq. 228.

Wisconsin. — Butler *v.* Milwaukee, 15 Wis. 493.

Illustrations. — In Butler *v.* Milwaukee, 15 Wis. 493, it was held that the city of Milwaukee had no power to employ counsel to aid in criminal prosecutions instituted on behalf of the state against persons who had lately been officers of the city, for crimes committed in the course of or under color of the discharge of their official duties, to the pecuniary damage of the city; and that after such aid had been rendered by counsel in pursuance of such employment, no action would lie against the city to recover compensation therefor. See the title MUNICIPAL CORPORATIONS.

This doctrine is by no means limited to municipal corporations. In Pickering *v.* Stephenson, L. R. 14 Eq. 322, it was applied in the case of a corporation for constructing and operating a railroad, and the directors were restrained from applying the funds of the company in payment of the costs of a prosecution for libel brought by them against a person who had acted as secretary to a committee of the company.

4. Visitation. — See 1 Bl. Com. 480; 2 Kent's Com. 300; Ang. & Ames on Corp., § 684 *et seq.*; Philips *v.* Bury, 2 T. R. 346; Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; Murdock, Appellant, etc., 7 Pick. (Mass.) 303; Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591.

Lord Mansfield said, concerning the tribunal of a visitor: "It is a *forum domesticum*, calcu-

2. By the Founder and His Heirs or Appointees — **Eleemosynary Corporations.** — The visitorial power over private eleemosynary corporations, like schools, colleges, universities, hospitals, etc., vests by implication of law in the founder and his heirs, in the absence of appointment by him. But the founder may appoint others.[1]

Other Corporations. — It is only to these corporations that visitation by private visitors applies. The visitorial power, so called, over public corporations and

lated to determine *sine strepitu* all disputes that arise within [learned bodies]; and the exercise of it is in no instance more convenient than in that of elections. If the learning, morals, and proprietary qualifications of students were determinable at common law, and subject to the same reviews as in legal actions, there would be the utmost confusion and uncertainty; while he who has the right may possibly be kept out of the profits of what is in itself but a temporary subsistence. This power, therefore, being exercised properly and without parade, is of infinite use." Rex *v.* Ely, 1 W. Bl. 82.

1. By Founder and Heirs or Appointees. — 1 Bl. Com. 480, 482; 2 Kent's Com. 301; Angell & Ames on Corp., § 687; Philips *v.* Bury, Skin. 447, 1 Ld. Raym. 5, 2 T. R. 346; Green *v.* Rutherforth, 1 Ves. 462; Atty.-Gen. *v.* Middleton, 2 Ves. 327; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; Allen *v.* McKeen, 1 Sumn. (U. S.) 276; Murdock, Appellant, etc., 7 Pick. (Mass.) 321; Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591; State *v.* Adams, 44 Mo. 570. See the titles SCHOOLS; UNIVERSITIES AND COLLEGES.

In Philips *v.* Bury, 2 T. R. 346, Holt, C. J., said: "Patronage and visitation are necessary consequents one upon another, for this visitatorial power was not introduced by any canons or constitutions ecclesiastical. * * * It is an appointment of law; it ariseth from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behavior of the members that partake of the charity; for it is fit the members that are endowed and that have the charity bestowed upon them should not be left to themselves (for divisions and contests will arise amongst them about the dividend of the charity), but pursue the intent and design of him that bestowed it upon them."

Appointment by Founder. — No technical terms are necessary to assign or vest the visitorial power. It is sufficient if, from the nature of the duties to be performed by particular parties, under the charter, it can be inferred that the founder meant to part with it in their favor. Angell & Ames on Corp., § 687. "In most cases of eleemosynary establishments the founders do not retain this visitatorial power in themselves, but assign or vest it in favor of some certain specified trustees or governors of the institution. It may even be inferred, from the nature of the duties to be performed by the corporation or trustees for the persons interested in the bounty, that the founders or donors of the charity meant to vest the power of visitation in such trustees. * * * Where the governors or trustees are appointed by a charter, according to the will of the founder, to manage a charity (as is usually the case in colleges and hospitals), the visitatorial power is deemed to belong to the trustees in their corporate character." 2 Kent's Com. 301, 302; Philips *v.* Bury, 2 T. R. 346. See also Green *v.* Rutherforth, 1 Ves. 472; Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591.

"The founder may part with his visitatorial power, and vest it in other persons; and when he does so they exclusively succeed to his authority. No technical terms are necessary to assign over or vest the visitatorial power. It is sufficient if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modification or control by the fundamental statutes of the foundation. Now, it is a general rule in the construction of charters that if the objects of the charity are not incorporated, but certain trustees are incorporated to manage the charity, the visitatorial power is deemed to belong to such trustees in their corporate capacity." Allen *v.* McKeen, 1 Sumn. (U. S.) 300.

In Nelson *v.* Cushing, 2 Cush. (Mass.) 530, a testator directed in his will that vacancies in the board of trustees of an academy founded by him should be filled by nominations from themselves, subject to the approval of the selectmen of the town, and provided that the selectmen should at all times have and exercise the right of visitation for the purpose of looking to the security of the funds, and that the interest and income therefrom be applied according to the will. It was held that this conferred general visitorial power upon the selectmen.

Power of Legislature to Remove Visitors. — The founder of a corporation, or the trustees or others appointed to exercise visitorial powers over the corporation, cannot be removed by the legislature, unless such power is reserved in the charter. Allen *v.* McKeen, 1 Sumn. (U. S.) 276.

The state, in founding a private eleemosynary corporation, as a college, for example, could reserve the visitorial power over it. But like a private founder it may part with this power, and when it does so by appointing others, and the charter is accepted, the state cannot afterwards remove them unless it has reserved the power to do so. Allen *v.* McKeen, 1 Sumn. (U. S.) 276; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 640. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

over private business corporations, is in the king or the state.[1]

Extent of Power. — The visitorial power of the founder of an eleemosynary corporation, or of his appointees, is judicial and supreme in all matters relating to the internal management of its affairs.[2] But it is not legislative. He is to judge and act according to the statutes and rules of the corporation.[3]

Interference by Court — General Rule. — It follows that so long as the visitor acts in accordance with the statutes and rules of the corporation there is no appeal from his decision, and the courts cannot interfere.[4]

Excess of Power or Refusal to Act. — But the courts may interfere and restrain him if he exceeds his powers, or compel him if he refuses to act.[5]

In Case of Trust. — And generally, when a trust exists, a court of chancery will intervene under its general jurisdiction over trusts, whenever it is necessary for the carrying out of the same.[6]

1. Corporations Other than Eleemosynary. — Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 433, 17 Am. Dec. 387; State *v.* Adams, 44 Mo. 578. See *infra*, this section, *By the State*.

Ecclesiastical Corporations. — In England the crown is the visitor of the archbishops, the archbishops within their diocese, and the bishops are the visitors of all subordinate ecclesiastical corporations, sole and aggregate. Reg. *v.* Rochester, 17 Q. B. 1, 79 E. C. L. 1.

This visitorial power, said Chancellor Kent, is not like the power of the visitors of eleemosynary corporations. It is a part of the ecclesiastical policy of England, and it does not apply to our religious corporations. 2 Kent's Com. 304. And see Angell & Ames on Corp., § 686. As to the control of the courts over corporations for religious purposes, see the title RELIGIOUS SOCIETIES.

2. Extent of Visitor's Power. — 2 Kent's Com. 301; Philips *v.* Bury, 2 T. R. 346, Skin. 447, 1 Ld. Raym. 5; Allen *v.* McKeen, 1 Sumn. (U. S.) 276; Murdock, Appellant, etc., 7 Pick. (Mass.) 303.

Thus, the visitors may amend and repeal the by-laws and ordinances of the corporation, and remove its officers, correct abuses, and generally superintend the management of the trust. 2 Kent's Com. 302; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

In Bracken *v.* William, etc., College, 1 Call (Va.) 161, 3 Call (Va.) 573, it was held that the visitors of William and Mary College had the power to change the schools and put down professorships. *Compare* Fuller *v.* Plainfield Academic School, 6 Conn. 545.

"The visitor of all eleemosynary corporations is the founder or his heirs, unless he has given the power of visitation to some other person or body, which is generally the case; and to the visitor thus constituted belongs the right and power of inspecting the affairs of the corporation and superintending all officers who have the management of them, according to such regulations and restrictions as are prescribed by the founder in the statutes which he ordains, without any control or revision of any other person or body, except the judicial tribunals by whose authority and jurisdiction they may be restrained and kept within the limits of their granted powers, and made to regard the constitution and general laws of the land." Murdock, Appellant, etc., 7 Pick. (Mass.) 322.

3. 2 Kent's Com. 301; Philips *v.* Bury, Skin. 447, 1 Ld. Raym. 5, 2 T. R. 346; Allen *v.* McKeen, 1 Sumn. (U. S.) 276.

4. Supervision of Visitor Generally Supreme. — Green's Brice's Ultra Vires, 48; 2 Kent's Com. 302.

England. — Rex *v.* Chester, 1 W. Bl. 22; Philips *v.* Bury, Skin. 447, 1 Ld. Raym. 5, 2 T. R. 346; Atty.-Gen. *v.* Foundling Hospital, 2 Ves. Jr. 42; Whiston *v.* Rochester, 7 Hare 532, 13 Jur. 694; Thompson *v.* London University, 33 L. J. Ch. 625, 10 Jur. N. S. 669; Atty.-Gen. *v.* Middleton, 2 Ves. 327.

United States. — Allen *v.* McKeen, 1 Sumn. (U. S.) 276.

Massachusetts. — Murdock, Appellant, etc., 7 Pick. (Mass.) 303.

Michigan. — Cicotte *v.* Anciaux, 53 Mich. 227.

New Jersey. — Mayer *v.* Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519, 35 Am. & Eng. Corp. Cas. 356.

Virginia. — Bracken *v.* William, etc., College, 1 Call (Va.) 161; Bracken *v.* William, etc., College, 3 Call (Va.) 573.

See the title MANDAMUS.

When an Appeal to the Court from the Decision of the Visitors is provided for in the charter or governing statutes of a corporation it is not intended that the court may try the whole merits of the case, and overrule the judgment of the visitors in a matter clearly within their cognizance, but the court is restricted to the determination of the questions, whether the visitors have acted contrary to the charter or statutes, and whether they have exceeded their jurisdiction. Murdock, Appellant, 7 Pick. (Mass.) 322.

5. Excess of Power or Refusal to Act. — Philips *v.* Bury, 2 T. R. 346; Whiston *v.* Rochester, 7 Hare 532, 13 Jur. 694; Green *v.* Rutherforth, 1 Ves. 472; State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408. See the title MANDAMUS.

6. Jurisdiction of Court in Case of Trust. — Whiston *v.* Rochester, 7 Hare 532, 13 Jur. 694; Atty.-Gen. *v.* St. Cross Hospital, 17 Beav. 466; Green *v.* Rutherforth, 1 Ves. 462; *Ex p.* Berkhampstead Free School, 2 Ves. & B. 134; Allen *v.* McKeen, 1 Sumn. (U. S.) 276; Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591; Hodges *v.* New England Screw Co., 1 R. I. 312.

"Where there is a clear and distinct trust, this court administers and enforces it as much where there is a visitor as where there is none.

3. By the State — *a.* In General — **Public Corporations.** — In *England* the visitorial power over public corporations is in the king.[1] In the *United States* it is in the state.[2] It is exercised through the medium of the courts of justice, or through visitors appointed by the legislature.

Private Eleemosynary Corporations. — In the case of private eleemosynary corporations, like schools, colleges, hospitals, etc., on failure of the founder and his heirs or appointees, the visitorial power vests, in *England*, in the king and his successors.[3] In the *United States* it vests in the state.[4]

Private Civil Corporations — Formerly almost all corporations were either public or eleemosynary. There were very few private civil corporations for commercial purposes. The old law of visitation, therefore, does not apply to modern business corporations. The visitorial power over them, as it is sometimes called, is in the state, and is exercised through the medium of its courts.[5]

b. Through the Courts — (1) *In General.* — When the visitorial power over a corporation is in the king or the state, it is ordinarily exercised through the medium of the courts of justice.

In England, it was formerly exercised through the Court of King's Bench, but afterwards through the Court of Chancery.[6]

In the United States, the jurisdiction of the courts to take cognizance of proceedings to control the management of corporations depends largely on statutory provisions. In the absence of such provisions the jurisdiction is at law, not in equity, unless peculiar grounds of equity jurisdiction exist.[7]

This is clear, both on principle and authority. The visitor has a common-law office, and common-law duties to perform, and does not superintend the performance of the trusts which belong to the various officers, which he may take care to see are properly kept up and appointed." *Per* Romilly, M. R., in Atty.-Gen. *v.* St. Cross Hospital, 17 Beav. 435.

" It is now settled that the trustees or governors of a literary or charitable institution, to whom the visitatorial power is deemed to vest by the incorporation, are not placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the Court of Chancery, not as itself possessing a visitatorial power or right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trust, to redress grievances, and suppress frauds. Where a corporation is a mere trustee of a charity, a court of equity will yet go further; and though it cannot appoint or remove a corporator, it will, in case of gross fraud, or abuse of trust, take away the trust from the corporation and vest it in other hands." 2 Kent's Com. 303, 304.

" Where this trust is established, whatever be its object, whatever be the nature of the charity — places of worship, whether of the established religion or not, almshouses or hospitals, colleges, grammar schools, the promulgation of religious or secular doctrines, works of public utility, or any of the very many purposes which have been decided to fall within the spirit if not the letter of 43 Eliz., c. 4, and the like — the Court of Chancery assumes jurisdiction, and causes the trust to be duly observed and carried out." Green's Brice's Ultra Vires, 50.

As to the jurisdiction of courts of equity in this respect, see further the titles, Charities and Trusts for Charitable Uses, vol. 5, p. 893; Equity; Trusts and Trustees.

1. **Public Corporations.** — 1 Bl. Com. 480.

2. 2 Kent's Com. 300 *et seq.*; Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; Lewis *v.* Whittle, 77 Va. 415.

" If the corporation be public, in the strict sense, the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, and its funds and franchises, because the whole interest and franchises are given for the public use and advantage." 2 Kent's Com. 300, 301.

" The visitorial or superintending power of the state over corporations created by the legislature will always be exercised in proper cases, through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers and to correct and punish abuses of their franchises. To this end the courts will issue writs of quo warranto, mandamus, or injunction, as the exigencies of the particular case may require; will inquire into the grievance complained of, and, if the same is found to exist, will apply such remedy as the law prescribes. Every corporation of the state, whether public or private, civil or municipal, is subject to this superintending control, although in its exercise different rules may be applied to different classes of corporations." State *v.* Milwaukee Chamber of Commerce, 47 Wis. 680.

3. **Eleemosynary Corporations.** — Rex *v.* Saint Catherine's Hall, 4 T. R. 233; Atty.-Gen. *v.* Clarendon, 17 Ves. Jr. 491; Atty.-Gen. *v.* Dixie, 13 Ves. Jr. 519; Atty.-Gen. *v.* Price, 3 Atk. 109.

4. See Lewis *v.* Whittle, 77 Va. 415.

5. **Private Civil Corporations.** — 2 Kent's Com. 300; State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408.

6. **Visitation by Courts.** — 1 Bl. Com. 481; Rex *v.* Saint Catherine's Hall, 4 T. R. 233.

7. See cases cited *infra*, this section.

(2) *How Exercised.* — There are two modes, at common law, in which the courts may interfere with and control a corporation and its officers in the management of its affairs, — by writ of mandamus and by information in the nature of quo warranto.[1]

Mandamus. — The writ of mandamus is the proper remedy to compel a corporation or its officers to perform a specific duty imposed upon it or upon them by its charter, if there is no other adequate remedy at law.[2]

Quo Warranto. — An information in the nature of quo warranto is the proper remedy in case of the usurpation or illegal user of corporate franchises, and in case of the illegal occupation of corporate offices.[3]

Equity Jurisdiction — Trusts. — Courts of equity have jurisdiction over eleemosynary corporations for breach of trust, and by the weight of authority over other corporations chargeable with trusts.[4]

Protection of Rights of Stockholders. — Courts of equity also have jurisdiction to interfere and by injunction control and regulate the management of corporations at the suit of a member or stockholder, when such interference is necessary to protect his rights.[5]

Other Cases. — In these cases, however, the court acts by reason of its general equity jurisdiction for want of an adequate remedy at law, and not because it has any visitorial power as such. Except in these cases a court of equity has no jurisdiction to control the management of a corporation, unless it is conferred by statute.[6]

(3) *Extent of Power.* — Whenever a corporation, the visitorial power over which is in the state, to be exercised through the courts, is exceeding or misusing its powers, or refuses to do an act the doing of which is imposed upon it as a duty, the courts will interfere at the suit of the proper party.[7]

c. THROUGH VISITORS APPOINTED BY THE LEGISLATURE. — In the *United States* the visitorial power over public corporations, which is in the state, is vested in the legislative department. It is sometimes exercised by visitors appointed by the legislature.[8]

1. 2 Kent's Com. 304.

2. **Mandamus.** — State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408; State *v.* White, 82 Ind. 278, 42 Am. Rep. 496; Lewis *v.* Whittle, 77 Va. 415; State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670. See *supra*, this title, *Actions By and Against Corporations*. Generally as to this remedy, and the cases in which it will lie, see the title MANDAMUS.

3. **Quo Warranto.** — See *supra*, this title, *Actions By and Against Corporations*. Generally as to this remedy, and the cases in which it will lie, see the title QUO WARRANTO.

4. **Equity Jurisdiction in Case of Trust.** — 2 Kent's Com. 304, 305; Whiston *v.* Rochester, 7 Hare 532, 13 Jur. 694; Green *v.* Rutherforth, 1 Ves. 462; Atty.-Gen. *v.* St. Cross Hospital, 17 Beav. 436. See the title TRUSTS AND TRUSTEES.

5. **Protection of Stockholders.** — See the titles INJUNCTIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Injunction Against Ultra Vires Acts. — It is common practice for a court of chancery, at the suit of a stockholder or member of a corporation, to restrain its officers from doing *ultra vires* acts, or engaging in *ultra vires* transactions. Gregory *v.* Patchett, 33 Beav. 595; Kean *v.* Johnson, 9 N. J. Eq. 401; Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573; Ware *v.* Grand Junction Water Works, 2 Russ. & M. 470; Cunliff *v.* Manchester, etc., Canal Co., 2 Russ. & M. 480, note; Bagshawe *v.* Eastern Counties R. Co., 7 Hare 114; Colman *v.* Eastern Counties R. Co., 10 Beav. 1; Salomons *v.* Laing, 12 Beav. 341, *citing* Foss *v.* Harbottle, 2 Hare 461. See the title ULTRA VIRES.

6. **Other Cases.** — 2 Kent's Com. 304, 305; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 384; People *v.* Ballard, (Supreme Ct.) 3 N. Y. Supp. 845; Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591; Atty.-Gen. *v.* Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624. See the titles EQUITY; INJUNCTION.

7. **Extent of Power.** — See the titles INJUNCTION; MANDAMUS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; QUO WARRANTO; STOCK; STOCKHOLDERS.

8. **Visitors Appointed by Legislature.** — Lewis *v.* Whittle, 77 Va. 415.

Visitors of public corporations appointed by the legislature are under its control, and removable at its pleasure. Lewis *v.* Whittle, 77 Va. 415.

The Governor of the state has no power or control over the visitors of a corporation appointed by the legislature, except such as the legislature may confer upon him. A power conferred upon him merely to fill any vacancy that may occur in a board of visitors "by reason of death, resignation, or otherwise," gives him no power to remove the visitors and appoint others. Lewis *v.* Whittle, 77 Va. 415.

CORPORATORS. (See the title CORPORATIONS; PROMOTERS; STOCKHOLDERS.) — The term "corporator" is sometimes used synonymously with "promoter;" [1] and on the other hand, it has been held equivalent to "stockholder" or "shareholder." [2]

CORPOREAL HEREDITAMENTS. (See the titles ESTATES; INCORPOREAL HEREDITAMENTS; REAL PROPERTY.) — Corporeal hereditaments are such hereditaments as are of a material and tangible nature, such as may be perceived by the senses, consisting wholly of substantial and permanent objects, and may be comprehended under the general denomination of lands only.[3]

CORPSE. — See the titles CEMETERIES, vol. 5, p. 781; DEAD BODIES.

CORPUS COMITATUS. (See BODY, vol. 4, p. 612; and see the title COUNTIES, *post*.) — The body of the county.

1. In Chase *v.* Lord, 77 N. Y. 11, it was held that the *corporators* are the associates, who are the getters-up of the company, and whose functions cease with its organization, and that the term did not include stockholders.

2. **Corporator in the Sense of Stockholder.** — In *In re* Lady Bryan Co., 1 Sawy. (U. S.) 349, a bankrupt act provided that the filing of a petition on behalf of a *corporation* could only be duly authorized by a vote of the majority of the *corporators*. It was held that *corporator*, within the meaning of the act, was one of the constituents or stockholders of the *corporation*.

In Gulliver *v.* Roelle, 100 Ill. 147, it is said: "It can scarcely admit of a doubt that the general and popular meaning of the word *corporator* concurs with the highest lexicographical authority — that it means a member of a corporation; and all know that to be a member of a stock company a person must be a shareholder, or, to be a member of a mutual company, a policy holder. This is so plain that the citation of authority is unnecessary. And there can be no doubt that such is the sense in which the term is used in the second section of article 10 of the constitution of 1848. That section provides: 'Dues from corporations not possessing banking powers or privileges shall be secured by individual liabilities of the corporators, or other means, as may be provided by law.' It is impossible to suppose the body which framed this section ever supposed that holding the persons named in a charter for purposes of organization liable, would afford security to the creditors of these great bodies, transacting annually millions of dollars of business. That body could have intended nothing short of the liability of stockholders, or some other equivalent security." But see dissenting opinion of Chief Justice Dickey (p. 174). See also Shufeldt *v.* Carver, 8 Ill. App. 548.

Policy Holder — Mutual Life Insurance Company. — Policy holders of a mutual life insurance company have been held *corporators*. *In re* Atlantic Mut. L. Ins. Co., 16 Alb. L. J. 453.

3. **Mining Rights.** (See also the title MINES AND MINING CLAIMS.) — Canfield *v.* Ford, 28 Barb. (N. Y.) 336, in which case it was held that a grant to one and his heirs and assigns forever of all mines, ores, minerals, etc., upon certain lands, together with the right to work and carry away the same, was a *corporeal hereditament*.

So in Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760, it was held that the grant of a right to take coal under the grantor's land was a *corporeal hereditament*.

Distinguished from Incorporeal Hereditaments. — *Corporeal hereditaments* consist "of such as affect the senses, such as may be seen and handled by the body; incorporeal are not of sensation, can neither be seen nor handled, are creatures of the mind, and can only exist in contemplation." Barton *v.* Rushton, 4 Desaus. (S. Car.) 384.

CORPUS DELICTI.

By W. A. Brent.

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1. *General Rule — Quantum of Proof*, 862.
2. *Nature of Proof — Direct and Circumstantial Evidence*, 863.
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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles CONFESSIONS, vol. 6, p. 581; *CORROBORATIVE EVIDENCE, post; CRIMINAL LAW; EVIDENCE; and the titles wherein particular crimes are treated; for instance, ADULTERY*, vol. 1, p. 746; *ARSON*, vol. 2, p. 938; *HOMICIDE; LARCENY.*

I. Definition and Elements — Definition. — *Corpus delicti* is a term in criminal law, and means literally the body of the offense or crime charged.[1]

Elements of Corpus Delicti. — The *corpus delicti* is a compound fact made up of two things: first, the existence of a certain act or result forming the basis of the criminal charge; and, second, the existence of criminal agency as the cause of this act or result.[2]

1. Pitts *v.* State, 43 Miss. 472.

Corpus Delicti means the essential substance in law of the offense charged. Zoldoske *v.* State, 82 Wis. 580.

By the *corpus delicti* has always been meant the existence of a criminal fact. Finch, J., in People *v.* Palmer, 109 N. Y. 113, 4 Am. St. Rep. 477. See Abbott, C. J., in Rex *v.* Burdett, 4 B. & Ald. 162, 6 E. C. L. 433.

Corpus delicti means literally the body of the offense or crime, that is, it means the substantial fact that a crime has been committed by some one. In a secondary but slightly abusive sense, the *corpus delicti* is used to denote the dead body itself, in the case of homicide. Brown's L. Dict. The last use involves an error, which, under the ordinary statement of the rule of evidence investigated in this title, may become important. The term should not, therefore, be employed in this sense. "The term *corpus delicti*," said Garoutte, J., in People *v.* Simonsen, 107 Cal. 345, "means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the *corpus delicti*. It would simply establish the *corpus*."

2. **Elements of Corpus Delicti.** — In Best on Evidence (Am. ed. 1883), § 442, it is said: "The *corpus delicti* is made up of two things: first, certain facts forming its basis; and, secondly, the existence of criminal agency as the cause of them."

In Pitts *v.* State, 43 Miss. 472, the same words are used, and Peyton, C. J., continues: "In a case of felonious homicide, it consists of two substantial fundamental facts: first, the fact of the death of the deceased; and, second, the fact of the existence of criminal agency as the cause of the death."

The same rule with regard to homicide is laid down in U. S. *v.* Williams, 1 Cliff. (U. S.) 25; Campbell *v.* People, 159 Ill. 19, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 309; Ruloff *v.* People, 18 N. Y. 179; People *v.* Bennett, 49 N. Y. 137; State *v.* Martin, 47 S. Car. 67; Jackson *v.* State, 29 Tex. App. 458. See also Smith *v.* Com., 21 Gratt. (Va.) 820.

The identity of the deceased and of the accused is not included in the *corpus delicti*. People *v.* Palmer, 109 N. Y. 110, 4 Am. St. Rep. 423. See also Campbell *v.* People, 159 Ill. 9; Laughlin *v.* Com., (Ky. 1896) 37 S. W. Rep. 590; State *v.* Martin, 47 S. Car. 67.

In Evans *v.* Evans, 1 Hagg. Cons. Rep. 35, Lord Stowell said: "I take the rule to be this: If you have a criminal fact ascertained, you may then take presumptive proof to show who did it; to fix the criminal, having then an actual *corpus delicti*."

In Sam *v.* State, 33 Miss. 347, it is said: "The rule with regard to proof of the *corpus delicti*, apart from the mere confessions of the accused, proceeds upon the reason that the general fact, without which there could be no guilt, either in the accused or in any one else, must be established, before any one could be convicted of the perpetration of the alleged criminal act which caused it; as in cases of homicide, the death must be shown; in larceny, it must be proved that the goods were lost by the owner; and in arson, that the house had been burned; for otherwise, the ac-

II. PROOF OF CORPUS DELICTI — 1. General Rule — Quantum of Proof. — According to the elementary rule of evidence in criminal cases, the *corpus delicti* must be established beyond a reasonable doubt; otherwise the accused is entitled to an acquittal.[1]

The Burden of Proof, of course, rests upon the prosecution.[2]

cused might be convicted of murder, when the person alleged to be murdered was alive; or of larceny, when the owner had not lost the goods; or of arson, when the house was not burned. But when the general fact is proved, the foundation is laid, and it is competent to show by any legal and sufficient evidence, how and by whom the act was committed, and that it was done criminally."

Does Not Include Defendant's Criminal Agency. — In some cases, the *corpus delicti* is defined thus: "This *corpus delicti* consists of two things: first, a criminal act; and, second, the defendant's agency in the commission of such act." Lovelady *v.* State, 14 Tex. App. 560; Harris *v.* State, 28 Tex. App. 308, 19 Am. St. Rep. 837; State *v.* Dickson, 78 Mo. 438.

The rule of these cases follows the rubric in Wharton on Criminal Evidence, § 325. This rubric is not in accord with the text, which says only that "the *corpus delicti*, the proof of which is essential to sustain a conviction, consists of a criminal act; and to sustain a conviction, there must be proof of the defendant's guilty agency in the production of such act. With respect to the former of these, it is the established rule that the facts which are the basis of the *corpus delicti* form a distinct ingredient in the case of the prosecution to be established beyond reasonable doubt."

The true rule seems to be that the *corpus delicti* includes the fact of criminal agency on the part of some person, but does not include the identification of the defendant as that person. The latter is a necessary element involved in the case, but is not to be confounded with the *corpus delicti* as that phrase is understood in the law of evidence. Thus Professor Greenleaf says: "The proof of the charge in criminal causes involves the proof of two distinct propositions: first, that the act itself was done; and, secondly, that it was done by the person charged, and by none other; in other words, proof of the *corpus delicti* and of the identity of the prisoner." 3 Greenleaf on Ev., § 30. This passage is *quoted* and *approved* in Carlton *v.* People, 150 Ill. 186, 41 Am. St. Rep. 346.

In People *v.* Palmer, 109 N. Y. 113, 4 Am. St. Rep. 477, Finch, J., says: "A dead body is found with the skull mashed in upon the brain under circumstances which exclude any inference of accident or suicide. There we have direct evidence of the death, and cogent and irresistible proof of the violence; the latter the cause, and the former the effect; both obvious and certain, and establishing the existence of a criminal fact demanding an investigation. These facts proved, the *corpus delicti* is established, although nobody as yet knows, and nobody may ever know, the name or personal identity of the victim. Beyond the death and the violence remain the two inquiries to which the ascertained criminal fact gives rise; who is the slain and who the slayer — the identity of the one and the agency of the other."

In Arson, the *corpus delicti* consists not alone of a building burned, but also of its having been wilfully fired by some reponsible person. Burning by accidental and natural causes must be satisfactorily excluded to constitute sufficient proof of a crime committed. But the circumstances surrounding the fire may be sufficient to show that it was the result of criminal agency. Carlton *v.* People, 150 Ill. 181, 41 Am. St. Rep. 346; State *v.* Jones, 106 Mo. 302. See also the title ARSON, vol. 2, p. 938.

In Burglary, the *corpus delicti* consists of breaking and entering by some person of the dwelling-house of another with intent to commit felony therein. Johnson *v.* Com., 29 Gratt. (Va.) 796. See also State *v.* Munson, 7 Wash. 239.

Rape — Female Under Age of Consent. — Upon a charge of rape upon a female under the age of consent, evidence that the female is pregnant and that the pregnancy had its inception before she attained the age of consent, establishes the *corpus delicti*. Proof of the *corpus delicti* need not connect the defendant with the crime. People *v.* Tarbox, 115 Cal. 57.

1. Proof Beyond Reasonable Doubt. — Lee *v.* State, 76 Ga. 498; Com. *v.* York, 9 Met. (Mass.) 93, 43 Am. Dec. 373; People *v.* Schryver, 42 N. Y. 1, 1 Am. Rep. 480; Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733; Timmerman *v.* Territory, 3 Wash. Ter. 445; State *v.* Parsons, 39 W. Va. 464. See also the titles EVIDENCE; REASONABLE DOUBT.

Province of Court and Jury. — The sufficiency of the proof of the *corpus delicti* is not a question of law for the decision of the court, but a question of fact for the jury to determine; and while the court must decide, in the first instance, whether the evidence advanced is *prima facie* sufficient to go to the jury, the jury are not bound to hold it sufficient as establishing the crime because the court has admitted it. Winslow *v.* State, 76 Ala. 42.

Instruction as to Proof of Corpus Delicti as Separate Fact. — It is important and usual in criminal trials, when there is any doubt of the commission of the crime, for the court, when requested to do so, to instruct the jury in regard to any separation between the circumstances which tend to prove the *corpus delicti* and those which go to identify the accused and to establish his guilt. State *v.* Davidson, 30 Vt. 377, 77 Am. Dec. 312.

2. Burden of Proof. — U. S. *v.* Searcey, 26 Fed. Rep. 435; Territory *v.* Monroe, (Arizona 1885) 6 Pac. Rep. 476; Power *v.* People, 17 Colo. 178; Com. *v.* York, 9 Met. (Mass.) 93, 43 Am. Dec. 373; State *v.* Hogard, 12 Minn. 293; People *v.* Harris, 136 N. Y. 423; State *v.* Hambright, 111 N. Car. 707; State *v.* Baker, 1 Jones L. (46 N. Car.) 267; Hunter *v.* State, 34 Tex. Crim. Rep. 599; Lovelady *v.* State, 14 Tex. App. 545. See also the titles BURDEN OF PROOF, vol. 5, p. 33; CRIMINAL LAW; EVIDENCE.

2. Nature of Proof — Direct and Circumstantial Evidence. — It is the established rule that the facts which form the basis of the *corpus delicti* are to be proved, either by direct evidence or by presumptive evidence of the most cogent and irresistible kind.[1] This rule appears to have been first formulated with regard to cases of homicide,[2] which still form its most important application.[3] It is applicable also to all those crimes wherein the traces or effects are visible, leaving the author undetermined.[4]

Sufficiency of Circumstantial Evidence. — The weight of authority settles the proposition that direct evidence is not necessary to establish the *corpus delicti*,[5] and that circumstantial evidence, provided it is strong and cogent, leaving no room for reasonable doubt, is sufficient.[6] In *New York* it has been determined

When Corpus Delicti Must Be First Proved. — In all trials for crime, the prosecution must prove to the satisfaction of the jury, and beyond a reasonable doubt, the *corpus delicti*, that a crime has been committed, before evidence tending to implicate the party on trial is introduced. This principle has always been regarded as very important in cases involving the life and liberty of the citizen, and is generally strictly observed in the courts. U. S. *v.* Searcey, 26 Fed. Rep. 435; Taylor *v.* State, 101 Ind. 65.

Upon an indictment for murder, where the *corpus delicti* cannot well be proved except by the introduction of evidence tending to show the defendant's guilty connection with the offense, evidence tending to prove both the *corpus delicti* and the defendant's guilt may be introduced at the same time. State *v.* Davis, 48 Kan. 1. See also State *v.* Potter, 52 Vt. 33.

1. Best on Ev. (Am. ed. 1883), § 442. See 3 Greenl. on Ev., § 30.

2. Lord Hale's Statement of the Rule as to Proof of Corpus Delicti. — In 2 Hale's P. C. 290, Lord Hale says: "I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, for the sake of two cases, one mentioned in my Lord Coke's P. C., cap. 104, p. 232, a Warwickshire case. Another that happened in my remembrance in Staffordshire, where A was long missing, and upon strong presumptions B was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon B was indicted of murder, and convicted and executed, and within one year after A returned, being indeed sent beyond sea by B against his will, and so, though B justly deserved death, yet he was really not guilty of that offense for which he suffered."

The case mentioned by Lord Coke was this: An uncle, who had the bringing up of his niece, to whom he was heir-at-law, correcting her for some offense, she was heard to say, "Good uncle, do not kill me;" after which time the child could not be found; whereupon the uncle was committed upon suspicion of murder, and admonished by the justices of assize to find out the child by the next assizes; against which time he could not find her, but brought another child as like her in person and years as he could find, and appareled her like the true child, but on examination she was found not to be the true child; upon these presumptions he was found guilty and executed; but the truth was, the child being beaten ran away, and was received by a stranger, and afterwards when she came of age to have her land, came and demanded it, and was directly proved to be the true child.

3. See the title HOMICIDE.

4. To What Crimes Applicable. — In Best on Evidence (Am. ed. 1883), §§ 441, 442, it is said: "In order to treat the subject [proof of *corpus delicti*] with accuracy, it is to be remarked that, in some offenses, the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving its author undetermined; the former being denominated by foreign jurists *delicta facti transcuntis*, and the latter *delicta facti permanentis*. * * * In the other sort of cases, — *delicta facti permanentis*, or, as they have been sometimes termed, *delicta cum effectu permanente*, — the proof of the crime is separable from that of the criminal. Thus, the finding a dead body, or a house in ashes, may indicate a crime, but does not necessarily afford any clue to the perpetrator."

5. St. Clair *v.* U. S., 154 U. S. 134; U. S. *v.* Williams, 1 Cliff. (U. S.) 21; State *v.* Keeler, 28 Iowa 551; State *v.* Dickson, 78 Mo. 438; Carey *v.* State, 7 Humph. (Tenn.) 499.

In Campbell *v.* People, 159 Ill. 9, it was contended, upon an indictment for homicide, that the fact of the death must necessarily be established by direct or positive evidence, and could not be established by indirect or circumstantial evidence. The court, however, held otherwise, saying: "We are satisfied that the strict rule contended for by the plaintiff in error has been modified by many authorities, and that the weight of authority now is, that all of the elements of the *corpus delicti* may be proved by presumptive or circumstantial evidence." See also State *v.* Martin, 47 S. Car. 67.

6. Proof by Circumstantial Evidence — *England.* — Rex *v.* Burdett, 4 B. & Ald. 123, 6 E. C. L. 416; Rex *v.* Hindmarsh, 2 Leach C. C. 569; Reg. *v.* Burton, 23 L. J. M. C. 52; Reg. *v.* Cheverton, 2 F. & F. 833; Reg. *v.* Dredge, 1 Cox C. C. 235.

United States. — U. S. *v.* Williams, 1 Cliff. (U. S.) 21.

Florida. — Anderson *v.* State, 24 Fla. 139; Holland *v.* State, (Fla. 1897) 22 So. Rep. 298; Joe *v.* State, 6 Fla. 591, 65 Am. Dec. 579.

that, in homicide, one of the two component elements of the *corpus delicti*, namely, the death of the victim and the criminal agency of some one in the death, must be established by direct evidence, and that it is only where there is direct proof of one of these elements that the other can be established by circumstantial evidence;[1] and, by statute, direct evidence of the death is essential.[2] But the statute is not construed to require that the identity of the victim shall be proved by direct evidence.[3]

3. Proof of Corpus Delicti to Render Confessions Admissible. — In the *United States*, a conviction cannot be had on the extra-judicial confession of the defendant, unless corroborated by proof *aliunde* of the *corpus delicti*.[4] A judicial

Illinois. — Campbell *v.* People, 159 Ill. 9; Hronek *v.* People, 134 Ill. 139, 23 Am. St. Rep. 652; Carlton *v.* People, 150 Ill. 181, 41 Am. St. Rep. 346.

Indiana. — Stocking *v.* State, 7 Ind. 326; McCulloch *v.* State, 48 Ind. 109.

Kansas. — State *v.* Winner, 17 Kan. 298.

Kentucky. — Laughlin *v.* Com., (Ky. 1896) 37 S. W. Rep. 590; Johnson *v.* Com., 81 Ky. 325.

Mississippi. — Pitts *v.* State, 43 Miss. 472.

Missouri. — State *v.* Dickson, 78 Mo. 439.

Nevada. — State *v.* Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530; State *v.* Loveless, 17 Nev. 424; State *v.* Cardelli, 19 Nev. 319.

North Carolina. — State *v.* Williams, 7 Jones L. (52 N. Car.) 446, 78 Am. Dec. 248.

Pennsylvania. — Com. *v.* Johnson, 162 Pa. St. 63.

South Carolina. — State *v.* Martin, 47 S. Car. 67.

Texas. — Lovelady *v.* State, 14 Tex. App. 545; Brown *v.* State, 1 Tex. App. 154; Jackson *v.* State, 29 Tex. App. 458; Wilson *v.* State, 43 Tex. 472.

Vermont. — See State *v.* Brink, 68 Vt. 659.

Washington. — State *v.* Munson, 7 Wash. 239, Timmerman *v.* Territory, 3 Wash. Ter. 445.

See also 3 Greenl. Evid., § 30; Wills on Circumstantial Evidence, c. 7, § 1.

Presumption Must Be Strong and Cogent. — It is a fundamental and inflexible rule, of universal obligation, that no person shall be involved in the consequences of guilt without satisfactory proof of the *corpus delicti* either by direct evidence or by cogent and irresistible grounds of presumption. State *v.* Flanagen, 26 W. Va. 116.

Best, J., in Rex *v.* Burdett, 4 B & Ald. 123, 6 E. C. L. 416, says that it is "quite absurd to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. * * * Where presumption is attempted to be raised as to the *corpus delicti* it ought to be strong and cogent."

In Wills on Circumstantial Evidence (6th Am. ed.) 200 it is said: "It is clearly established that it is not necessary that the *corpus delicti* should be proved by direct and positive evidence; and it would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up."

All the Circumstances Combined Must Tend to Positive Proof. — Where the *corpus delicti* is attempted to be shown by circumstantial evidence, it must be so established as to positively exclude all uncertainty or doubt from the minds of the jury. It is not, however, necessary that each particular circumstance must be of this conclusive character, but all combined must produce the same degree of certainty in regard to the *corpus delicti* as positive proof. State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312.

In Poisoning. — Where the crime alleged is murder by poisoning, the *corpus delicti* can only be proved by circumstantial evidence, and to do so it is sufficient to show that such poison as produced the death was immediately at hand, in the dwelling of the accused, easily accessible to him, and kept in a cabinet which was usually unlocked, and that the defendant was fully aware of such facts. Yolaoski *v.* State, 82 Wis. 580.

Corpus Delicti in Larceny. — In order to establish, by circumstantial evidence, the *corpus delicti* in larceny, the circumstances must show that the property was so taken and carried away from the possession of the owner as to constitute such taking and carrying away a felony, and consequently must exclude the hypothesis that the property was fraudulently converted or forcibly seized by the accused. Tyner *v.* State, 5 Humph. (Tenn.) 383. See also Johnson *v.* State, 86 Ga. 90.

1. Ruloff *v.* People, 18 N. Y. 179. But see Campbell *v.* People, 159 Ill. 9.

2. It is provided by the *New York* Penal Code, § 181, that there shall be no conviction in cases of murder or manslaughter, "unless the death of the person alleged to have been killed and the fact of killing * * * as alleged are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt."

3. People *v.* Palmer, 109 N. Y. 110, 4 Am. St. Rep. 423. In the opinion in this case, Judge Finch clearly establishes that the identity of the slain person was never, at common law, required to be established by direct proof, but was always open to indirect or circumstantial evidence.

This whole subject belongs to the law of homicide, and reference is made to that title for a full treatment.

4. Bartley *v.* People, 156 Ill. 234; Heard *v.* State, 59 Miss. 545. See also the title CONFESSIONS, vol. 6, p. 582.

confession, however, though uncorroborated by proof of the *corpus delicti*, is sufficient to sustain conviction. In *England* it has been said that no corroboration is required, even in the case of an extra-judicial confession, but this is perhaps doubtful. This whole subject is fully discussed elsewhere.[1]

CORRECT — CORRECTION, ETC. (See the titles MASTER AND SERVANT; PARENT AND CHILD; SCHOOLS.) — "Correct" as an adjective means right, conformable to truth, free from error;[2] as a verb, "to correct" is the equivalent of "to chastise," "to punish."[3]

CORRESPONDENCE. — See the titles DOCUMENTARY EVIDENCE; LETTERS; LIBEL AND SLANDER.

1. See the title CONFESSIONS, vol. 6, p. 581.
2. Webster's Dict.

Complete and Correct. — In a contract in which it was agreed to "adjust and settle all the mutual accounts pertaining to the aforesaid business, * * * taking the annexed statement of disbursements and collections as *correct* to this date," *correct* was held not to mean "complete." "The meaning and intent of the phrase is not that the schedules should be peremptorily deemed to include all that was to be the subject of adjustment, * * * but that the schedules should be taken to be *correct* as far as they went, and as to the items therein specified." Accordingly, evidence in relation to items not included therein was properly considered by an arbitrator. Adams *v.* Macfarlane, 65 Me. 143.

But in Bailey *v.* Martin, 119 Ind. 108, the certification of a transcript of a judgment as a true and *correct* copy, instead of as a true and complete copy, was held good. The court said: "The point is made that the certificate is insufficient for the reason that the word *correct* is used instead of the word 'complete;' that the certificate should have stated that the transcript of the judgment is 'a true and complete copy.' There is nothing in this objection. The certificates are in proper form and amply good." To the same effect see Yeager *v.* Wright, 112 Ind. 230.

Infancy. — Under an act requiring, in order to charge a person on the ratification of a contract made during infancy, that the subsequent promise or ratification should "be made by some writing signed by the party to be charged therewith," the words, "I certify the account to be *correct* and satisfactory," written at the end of a statement of the account, and duly signed, are not sufficient to charge the party. The expression means merely that the items are properly set out and the sums charged are satisfactory. Rowe *v.* Hopwood, L. R. 4 Q. B. 1. See generally the title INFANCY.

An Application for Life Insurance contained the declaration: "I do hereby declare that the above written particulars are *correct:* * * * and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then * * * the policy shall be absolutely null and void." It was held that the policy could only be avoided by a designedly untrue statement. Fowkes *v.* Manchester, etc., L. Assur., etc., Assoc., 3 B. & S. 917, 113 E. C. L. 917. See generally the title LIFE INSURANCE.

A Mechanic's Lien Law requiring that the notice of the lien must contain a description of the property on which the lien is intended to be enforced, is to be construed no differently from a subsequent statute requiring a *correct* description to be contained in the notice. The court said: "What is meant by a *correct* description? Does it mean a description by metes and bounds, and require the particularity demanded in a deed? The word *correct* is not a technical one. Its obvious meaning in a statute is such description which identifies the individual object intended to be designated." Gordon *v.* South Fork Canal Co., 1 McAll. (U. S.) 521. See generally the title MECHANIC'S LIENS.

3. Under a statute empowering a justice to commit servants, for any misdemeanor, miscarriage, or ill behavior in the service of an employer, to the house of correction, "there to remain and be *corrected*," the *correction* is a necessary part of the sentence, and must be corporal punishment by whipping. Rex *v.* Hoseason, 14 East 605.

Correct Abuses. — For a construction of this phrase in the constitutional provisions to the effect that the legislature shall pass laws to *correct* abuses, see Railroad Commission *v.* Houston, etc., R. Co., 90 Tex. 340; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 318.

House of Correction. — See the title HOUSE OF CORRECTION.

CORROBORATIVE EVIDENCE.

By Theodor Megaarden.

I. Definition, 866.
II. Necessity for Corroborative Evidence, 866.
1. *General Rule*, 866.
2. *Exceptions to the Rule*, 866.

CROSS-REFERENCES.

For matters of Procedure, see the titles in the Encyclopædia of Pleading and Practice, *ANSWERS IN EQUITY PLEADING*, vol. 1, p. 836; *IMPEACHMENT AND CORROBORATION OF WITNESSES*, vol. 10, p. 279.

For other matters of Substantive Law and Evidence related to this subject, see the following titles in this work: ACCOMPLICES, vol. 2, p. 389; *CONFESSIONS*, vol. 6, p. 520; *CUMULATIVE EVIDENCE; DIVORCE; EXECUTORS AND ADMINISTRATORS; INCEST; RAPE; SEDUCTION; TRUSTS AND TRUSTEES; WITNESSES.*

I. Definition. — Technically, corroborative evidence may be defined to be additional evidence proving similar facts, or facts calculated to produce the same results as facts already given in evidence.[1] While distinguished from cumulative evidence in this definition, corroborative evidence is not commonly used in this sense; ordinarily corroborative evidence simply means fortifying evidence, whether it is evidence of different or similar facts, or additional evidence of the same fact.[2]

II. Necessity for Corroborative Evidence — 1. General Rule. — While it is, for obvious reasons, usually desirable to adduce corroborative evidence in proof of every disputed fact, it is a general rule that the evidence of a single witness is in law sufficient to prove any fact in any case, civil or criminal.[3]

2. Exceptions to the Rule — In General. — To this rule there are, however, certain well-established exceptions. In the first place, there are certain cases in which the unsupported testimony of a single witness will not be sufficient in law. Then also there are certain other cases where corroborative evidence, though not absolutely necessary in law, is usually required in practice.

Perjury. — In prosecutions for perjury, the testimony of one witness alone is not sufficient to warrant a conviction, because there is in that case only one oath against another.[4] To prove the falsity of the statement upon which perjury is charged there must be two witnesses,[5] or, according to what is per-

1. **Definition.** — Underhill on Ev. 3.

2. In Gildersleeve *v.* Atkinson, 6 N. Mex. 250, corroborative evidence within the meaning of a statute providing that no party in a suit against an administrator shall obtain a judgment on his own evidence as to matters occurring before the death of the intestate, unless "corroborated by some other material evidence," was defined to be "such evidence as tends in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue."

3. State *v.* McGlothlen, 56 Iowa 544.

4. **One Witness Alone Insufficient.** — Reg. *v.* Muscot, 10 Mod. 193.

5. **Rule Requiring Two Witnesses.** — It appears to have been thought at one time that two wit-

haps the better rule, either two witnesses, or one credible witness supported by such corroborative circumstances as make the evidence for the prosecution sufficient, at least, to overcome the oath of the defendant and the legal presumption of his innocence.[1]

Confessions. — And it is the law in the United States at least, that conviction cannot be had on the extra-judicial confession of the defendant unless corroborated by proof *aliunde* of the *corpus delicti*.[2]

Accomplices. — A notable application of this requirement occurs in criminal cases where conviction is sought upon the testimony of an accomplice. While a conviction may, in the absence of any statute establishing a different rule, be had upon the unsupported testimony of an accomplice, the court may advise the jury to acquit, unless such evidence is corroborated not only as to the circumstances of the offense, but as to the participation in it by the accused.[3]

Treason. — At the Common Law, treason and misprision of treason were sufficiently proved by one credible witness.[4]

Under Statutory and Constitutional Provisions — In England. — But in England it has been provided by statute[5] that, except in certain cases,[6] there must, in prosecutions for high treason, be two witnesses to prove the treason, both of them to the same overt act, or one of them to one and another to another overt act of the same treason, unless the defendant willingly confesses the same.

In the United States. — And it is provided in the Constitution of the United States, and also in the constitutions of most of the states, that no person shall be convicted of high treason, "unless on the testimony of two witnesses to the same overt act, or on confession in open court."[7]

Rape. — At the common law, where the defendant in a criminal case was not permitted to testify in his own behalf, it seems that the testimony of the prosecutrix alone might be sufficient to sustain a conviction for rape.[8] And in some of the United States this has been declared to be the law even now.[9] In other of the states, it has, however, been held that, under statutes making the accused a competent witness, when he avails himself of his right to testify

nesses were necessary to a conviction. Lord Tenterden is said to have entertained this opinion. See Champney's Case, 2 Lew. 258, *per* Coleridge, J.; Rex *v.* Wigley, 2 Lew. 258, note; 3 Russ. Cr. 78; 1 Tayl. Ev., § 959.

1. Rule Requiring Two Witnesses, or One Witness with Corroborating Circumstances — *England.* — Champney's Case, 2 Lew. 258; Reg. *v.* Yates, C. & M. 132, 41 E. C. L. 77; Reg. *v.* Towey, 8 Cox C. C. 328; Reg. *v.* Boulter, 2 Den. C. C. 396; Reg. *v.* Virrier, 12 Ad. & El. 317, 40 E. C. L. 48; Reg. *v.* Gardiner, 2 Moo. C. C. 95; Rex *v.* Mayhew, 6 C. & P. 315, 25 E. C. L. 415; Reg. *v.* Braithwaite, 1 F. & F. 638, 8 Cox C. C. 254; Reg. *v.* Owen, 6 Cox C. C. 105; Reg. *v.* Webster, 1 F. & F. 515; Reg. *v.* Hare, 13 Cox C. C. 174.

United States. — U. S. *v.* Wood, 14 Pet. (U. S.) 440; U. S. *v.* Hall, 44 Fed. Rep. 864.

Kentucky. — Com. *v.* Davis, 92 Ky. 460.

Massachusetts. — Com. *v.* Parker, 2 Cush. (Mass.) 212, Com. *v.* Butland, 119 Mass. 317.

Missouri. — State *v.* Heed, 57 Mo. 252; State *v.* Miller, 44 Mo. App. 159.

Montana. — State *v.* Gibbs, 10 Mont. 213.

Nebraska. — Gandy *v.* State, 27 Neb. 707.

North Carolina. — State *v.* Peters, 107 N. Car. 876.

South Carolina. — State *v.* Hayward, 1 Nott & M. (S. Car.) 546.

Same — Adopted by Statute. — In some states this is declared to be the rule by statute. State *v.* Buckley, 18 Oregon 228; Beach *v.* State, 32 Tex. Crim. Rep. 240; Kitcken *v.* State, 29 Tex. App. 45; Waters *v.* State, 30 Tex. App. 284.

2. See the title CONFESSIONS, vol. 6, p. 520.

3. Corroboration of Accomplices. — Reg. *v.* Stubbs, Dears. C. C. 555; Rex *v.* Wilkes, 7 C. & P. 272, 32 E. C. L. 507; *In re* Meunier, [1894] 2 Q. B. 415; State *v.* Black, (Mo. 1898) 44 S. W. Rep. 340.

For an exhaustive discussion of this matter, see the title ACCOMPLICES, vol. 2, p. 389.

4. Common-law Rule. — 1 Tayl. Ev., § 952, *citing* Foster C. L. 233; McNally Ev. 31; R. *v.* Clare, 28 How. St. Tr. 887, 924; Woodbeck *v.* Keller, 6 Cow. (N. Y.) 120.

5. English Statutory Rule. — 7 and 8 Wm. III., c. 3, §§ 2 and 4. The statutes 1 Edw. VI., c. 12, and 5 Edw. VI., c. 11, contain substantially the same provision.

The rule has been extended to Ireland by the statute 1 and 2 Geo. IV., c. 24.

6. Same — Exceptions. — An exception is made in case of the assassination of the Queen, or an attempt to take her life or to do her bodily harm. 39 and 40 Geo. III., c. 93; 1 and 2 Geo. IV., c. 24, § 2; 5 and 6 Vict., c. 51, § 1.

7. Provision in the United States Constitution. — Const. of the U. S., art. 3, § 3, Rev. Stat. U. S. 25. See Stim. Am. Stat. L., art. 15, § 150.

8. Anonymous, 1 Russ. C. & M. 556.

9. Tway *v.* State, (Wyoming 1897) 50 Pac. Rep. 188.

and clearly and explicitly denies the commission of the offense, the uncorroborated testimony of the prosecutrix is not sufficient to sustain a conviction.[1]

Bastardy — Under Statutes Not Requiring Corroboration. — While the court may refuse to convict in bastardy proceedings on the uncorroborated testimony of the mother if, in the opinion of the court, the circumstances are such as to forbid credit to her testimony,[2] still the absence of corroboration goes only to the question of the credit to be given to her testimony, and where there is no statute requiring corroboration in order to conviction, there need be none.[3]

Statutes Requiring Corroboration. — But in *England*, by statutory enactment, the mother of an illegitimate child must not only be a witness, but her testimony must be corroborated, before a man can be adjudged the putative father or an order of affiliation can be made.[4]

Seduction. — In the absence of any statutory requirement to the contrary, a conviction for seduction may be based upon the uncorroborated testimony of the woman.[5] Statutes have, however, been enacted in a number of states, which require the testimony to be corroborated before a conviction can be had.[6]

Divorce — Testimony of Party. — As a matter of law, a divorce may, if there is no statute to the contrary, be granted upon the uncorroborated testimony of a party.[7] Still corroborative evidence will usually be required in both *England*[8] and the *United States*.[9]

Admissions or Confessions of Party. — The uncorroborated admissions or confessions of a wife, respondent in a divorce suit, should be received with the utmost circumspection and caution, but, if genuine, may be acted upon.[10]

Statutory Requirement of Corroboration in the United States. — It is now provided by statute in many of our states that no divorce shall be granted upon the uncorroborated testimony, admissions, or confessions of the parties to the suit.[11]

To Overcome Answers in Equity. — An answer in equity, so far as it is responsive to the bill, is to be taken as evidence in the suit; and, to overcome it, the complainant must prove his allegations by two witnesses, or by one witness supported by corroborating circumstances.[12]

Whether Required in Actions for Breach of Promise of Marriage. — In *England* it is provided by statute that in actions for breach of promise of marriage the plaintiff cannot recover a verdict upon his or her own testimony, unless it is corroborated by some other material evidence in support of the promise.[13]

Whether Required to Establish a Trust. — It has been held in at least one state that

1. Mathews *v.* State, 19 Neb. 330; Sowers *v.* Territory, (Okla. 1897) 50 Pac. Rep. 257. See the title RAPE.

2. **Testimony of Mother Only Deemed Insufficient.** — In the case of Burke *v.* Burpo, 75 Hun (N. Y.) 568, the circumstances were such as, in the opinion of the court, to forbid credit to the testimony of the mother of the child, and the court refused an order of affiliation.

3. **Corroboration of Mother Not Necessary.** — State *v.* Nichols, 29 Minn. 357; Olson *v.* Peterson, 33 Neb. 358; Robb *v.* Hewitt, 39 Neb. 217; People *v.* Lyon, 83 Hun (N. Y.) 303.

And this has been held to be the rule under a statute (Mont. Code Civ. Pro., § 616) which declares that "the direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact, except perjury and treason." State *v.* Tipton, 15 Mont. 74.

4. **Corroboration Required by Statute.** — 8 and 9 Vict., c. 10, § 6; 35 and 36 Vict., c. 65, § 4; Hodges *v.* Bennett, 5 H. & N. 625, 29 L. J. M. C. 224; Cole *v.* Manning, 2 Q. B. Div. 611. 46 L. J. M. C. 175.

5. People *v.* Wade, (Cal. 1897) 50 Pac. Rep. 841.

6. State *v.* Bell, 79 Iowa 117. See the title SEDUCTION.

7. **Divorce — Corroboration of Party — Necessity For.** — Robbins *v.* Robbins, 100 Mass. 150, 97 Am. Dec. 91; Flattery *v.* Flattery, 88 Pa. St. 27. See F. *v.* D., 4 Swab. & T. 86; H. *v.* P., L. R. 3 P. & D. 126.

8. **Same — In England.** — Brown & P. on Div. (5th ed.) 397; Wills on Ev. 242; Harris *v.* Harris, L. R. 2 P. & D. 77.

9. **Same — In the United States.** — McShane *v.* McShane, 45 N. J. Eq. 341; Palmer *v.* Palmer, 22 N. J. Eq. 88. See the title DIVORCE.

10. Robinson *v.* Robinson, 1 Swab. & T. 362.

11. See 1 Stim. Am. Stat. L., § 6225; Haley *v.* Haley, 67 Cal. 24; Woolfolk *v.* Woolfolk, 53 Ga. 661.

12. See the title ANSWERS IN EQUITY PLEADING, 1 ENCYC. OF PL. AND PR. 836.

13. **Corroboration of Plaintiff in Action for Breach of Promise of Marriage.** — 32 and 33 Vict., c. 68, § 2; Bessela *v.* Stern, 2 C. P. Div. 265, 46 L. J. C. P. 467; Hickey *v.* Campion, 6 Ir. R. C. L. 557; Wiedemann *v.* Walpole, (1891) 2 Q. B. 534, 60 L. J. Q. B. 762.

the testimony of a single witness, unsupported by corroborating circumstances, is insufficient to establish a trust in land.[1]

Transactions with Deceased Persons. — In some states it is provided by statute that transactions with deceased persons cannot be established by the uncorroborated testimony of a party interested.[2]

CORRUGATED. — See note 3.

CORRUPT — CORRUPTION, ETC. (See the titles BRIBERY, vol. 4, p. 907; EMBRACERY; EXTORTION; FRAUD; PUBLIC OFFICERS.) — To corrupt is to debase, to deprave, to pervert, to defile, to entice, to bribe.[4]

1. Corroboration Required to Establish Trust. — Miller *v.* Thatcher, 9 Tex. 482, 60 Am. Dec. 172; Cuney *v.* Dupree, 21 Tex. 211. See also Johnson *v.* Deloney, 35 Tex. 42.

As to the evidence which is necessary to establish a trust, see the title TRUSTS AND TRUSTEES.

2. See Gildersleeve *v.* Atkinson, 6 N. Mex. 250. See also the title EXECUTORS AND ADMINISTRATORS.

3. Corrugated means wrinkled. Day *v.* Stellman, 1 Fisher Pat. Cas. 490; Goodyear *v.* Cary, 4 Blatchf. (U. S.) 272. These were patent cases.

4. Webster's Dict.

Public Offenses. — In State *v.* Ragsdale, 59 Mo. App. 603, the court said: "The word ***corrupt*** or ***corruption*** is variously defined by lexicographers and law writers. ***Corrupt*** is defined in Anderson's Dictionary of Law to mean 'to do an act for unlawful gain.' And the same author defines the word ***corruption*** to be 'an act done with intent to gain advantage not consistent with official duty and the rights of others; something forbidden by law, as certain acts by arbitrators, election or other officers, trustees; a champertous contract; a contract of usury.' In 2 Century Dictionary, 1282, ***corrupt*** is defined to be 'dishonest, without integrity, guilty of dishonesty, involving bribery, or a disposition to bribe or be bribed; as, ***corrupt*** practices, a ***corrupt*** judge.'" In that case it was held that, under a statute providing that every person holding any office of public trust who shall be guilty of wilful and malicious oppression, partiality, misconduct, or abuse of authority in his official capacity or under color of his office, shall be deemed guilty of a misdemeanor, an element of ***corruption*** was not necessary to constitute the offense.

In Wight *v.* Rindskopf, 43 Wis. 351, it is said: "***Corruption*** is a hard word, not always accurately understood; covering a multitude of official delinquencies, great and little. But it is strictly accurate to apply it to any color of influence, of mere relation of any kind, on the administration of justice."

Arbitration — Constructive Corruption. — A statute provided that an award of arbitrators should sustain no reduction unless for ***corruption***, bribery, etc. It was held that the word ***corruption*** should receive its ordinary construction, and could not be taken to include irregular conduct on the part of the arbitrator with no suggestion of any ***corrupt*** motive. Lord Watson said: "I feel bound to protest against the view expressed by some of the Scotch judges in the cases to which we have been referred at the bar, with regard to what they call 'constructive ***corruption***.' I suppose that as well as 'constructive ***corruption***,' you may have 'constructive bribery' and 'constructive falsehood.' The meaning of it appears to be this: that in order to satisfy the ends of justice in dealing with the validity of an award, it is necessary to invoke this constructive principle of which I have, under all circumstances, the greatest distrust; and that for the purpose of doing justice it is necessary to call a man ***corrupt*** who is not ***corrupt*** but honest, to call a man bribed who never listened to an improper suggestion from any quarter, to call a man false who never uttered a falsehood. I do not doubt that ***corruption*** might be inferred from the terms of an award; and it is clear that if Lord Thurlow used the expression 'constructive ***corruption***' in Colquhoun *v.* Corbet, 2 Paton's App. 626, he must have used it in that sense. Even in that case the term is inappropriate, because such ***corruption*** is actual and not constructive." Lord Bramwell said: "My lords, I am entirely of the same opinion, and I desire to express my hearty concurrence in what has been said by my noble and learned friend opposite (Lord Watson) about 'constructive ***corruption***.' I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions." Adams *v.* Great North of Scotland R. Co., (1891) App. 46, 47.

Corrupt Practice Acts. (See also the title ELECTIONS.) — An English statute provided that every person should be deemed guilty of bribery who directly or indirectly, by himself or any other person, gave or procured any money or valuable consideration to or for any voter in order to induce him to vote or refrain from voting, or who ***corruptly*** did any such act as aforesaid. A candidate wrote a letter to out-of-town voters, asking them to come in and vote for him, and promising to pay their traveling expenses. A voter accepted the offer, and his traveling expenses were paid by the candidate. It was held that there was evidence for the jury of the candidate having ***corruptly*** paid money to the voter. Willes, J., said: "In answer to the third question, I am of opinion that there was evidence that the defendant ***corruptly*** paid money to Carter on account of his having voted at the election. I think the word ***corruptly*** in this statute means, not dishonestly, but in purposely doing an act which the law forbids, as tending to ***corrupt*** voters, whether it be to give a pecuniary inducement to vote, or a reward for hav-

CO-SERVANTS. — See the title FELLOW SERVANTS.

COST. (See also PRICE.) — The price paid for an article.[1]

ing voted in a particular manner. Both the giver and the receiver in such a case may be said to act *corruptly*. The word *corruptly* seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being *corrupt*, rather than as part of the definition of the offense. I agree with what was said by the learned judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore *corrupt*. This may exclude cases in which money is given from purely charitable motives, though to a voter; but in the present case no other probable motive besides the vote upon the defendant's side itself appears or can be suggested." Cooper *v.* Slade, 8 El. & Bl. 1161, 92 E. C. L. 1161.

Under the Municipal Corporation Act, 5 & 6 Will. IV., c. 76, § 54, the offense of *corrupting* a voter is complete where the bribe is offered and accepted, and the voter promises to vote in pursuance of the *corrupt* contract, although he may break his promise, or may never have intended to perform it; but where a bribe is offered but not accepted, the offense is that of offering to *corrupt*, and it is for the jury to say whether there was a complete agreement or not. Harding *v.* Stokes, 2 M. & W. 233. "The offense here charged is *corrupting*. The statute says that if any person shall '*corrupt* or procure' any person to vote or forbear voting, etc. * * * Procuring is one thing: it is essential that the vote should be given. *Corrupting* (which word is connected by a disjunctive particle) is another: it seems to me to lie altogether in the act of the party giving the bribe." Henslow *v.* Fawcett, 3 Ad. & El. 51, 30 E. C. L. 24, *per* Lord Denham. See also Sulston *v.* Norton, 3 Burr. 1235.

To *corruptly* treat or do any other thing contrary to the Corrupt Practices Prevention Act, 1854 (17 and 18 Vict., c. 102), does not mean to do it "wickedly, or immorally, or dishonestly, or anything of that sort, but with the object and intention of doing that which the legislature plainly means to forbid." *Per* Blackburn, J., Bewdley, 1 O'M. & H. 19, 19 L. T. 676.

Perjury. (See also the title PERJURY.) — An indictment for perjury averred that the defendant swore "wilfully, knowingly, maliciously, and falsely," but omitted the statutory word *corruptly*. The indictment was held sufficient. The court said: "The first ground of error assigned consists in the omission from the description of the oath [of] the word *corruptly*, whereas it is only charged that the prisoner swore 'wilfully, knowingly, maliciously, and falsely.' We are of opinion that these words necessarily involve *corruptly*. It cannot have been made wilfully, knowingly, maliciously, and falsely, without being *corruptly* done; and it is with that view that the act in the winding up of the indictment is characterized as 'wilful and *corrupt* perjury.'" State *v.* Bixler, 62 Md. 356.

In U. S. *v.* Edwards, 43 Fed. Rep. 67, it was held that an allegation in an indictment for perjury that an oath was *corruptly* taken was not equivalent to an allegation that the oath was wilfully taken. The court said: "But it is contended by the district attorney that the word *corruptly*, used in the indictment, is the equivalent of 'wilfully.' The understanding of the court is that the two words have an entirely different meaning. *Corruptly* means viciously, wickedly. 'Wilfully' means with design, with some degree of deliberation. To say that testimony was *corrupt* is to say that it was wicked or vicious; whereas, to say that it was wilful is to aver that it was given with some degree of deliberation; that it was not due to surprise, inadvertence, or mistake, but to design. The statute uses the word 'wilfully,' and makes it of the essence of the offense; and the court is not persuaded that the averment that a false oath was *corruptly* taken is of the same import as the averment that it was wilfully taken. The court being of the opinion that wilfulness is an essential ingredient for the offense of perjury under section 5392, Rev. Stat., it must be charged in the indictment, or the indictment will be bad."

In State *v.* Stein, 48 Minn. 466, it was held that an allegation in an indictment for perjury that the defendant's testimony was wilfully and *corruptly* false, was equivalent to an allegation that he wilfully and knowingly testified falsely. The court said that *corruptly* had not as broad a meaning as wilfully, but "signifies the doing of an act for unlawful gain, viciously, wickedly. It would be exceedingly difficult to show that one may be *corrupt* without knowledge of it."

Fraudulently and Corruptly — Executors and Administrators. — For the construction of the terms "fraudulently and *corruptly*," as used in statutes of limitation, providing that the statute shall not run in favor of the representative where he has acted fraudulently and *corruptly*, see the titles EXECUTORS AND ADMINISTRATORS; LIMITATION OF ACTIONS.

Corrupt Bargain. — *Re* Kingston Election Case, 30 U. C. C. P. 389. See opinion at length under BARGAIN, vol. 3, p. 853.

1. A Relative Term. — In Herst *v.* De Comeau, 1 Sweeny (N. Y.) 605, the court said: "The term *cost* is a relative one, and differs in its meaning according to the circumstances under which it is used; thus, the *cost* price to an importer is one thing, to a jobber or middle-man another, to a retailer another, and to a purchaser from a retailer still another. In determining what the contracting parties mean by the term, reference must be had to the situation of the parties and the circumstances under which the word is used. Ordinarily, it would refer to the sum which the seller had himself paid for the article; but it may refer to the sum paid to its original producer, or to some one of the numerous holders through whose hands it has passed between the original producer and the immediate seller. To what it is meant to refer by the contracting parties, must be judged of by all the surrounding circumstances."

COSTS. — For a general treatment of this subject, see the title COSTS, 5 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 100; and the references there given. See also such titles in this work as ARBITRATION AND AWARD, vol. 2, p. 689; ATTORNEY AND CLIENT, vol. 3, p. 446; CONTEMPT, *ante*, p. 25; COUNTIES, *post*; DAMAGES; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; HUSBAND AND WIFE; INFANTS; INTEREST; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; RECEIVERS; REFEREES AND REFERENCES; STATES; STATUTES; STENOGRAPHERS; STOCKHOLDERS; TRUSTS AND TRUSTEES; UNITED STATES.

CO-TENANTS. — See the titles JOINT TENANTS AND TENANTS IN COMMON; PARCENARY; PARTITION.

Cost and Costs Distinguished. — A statute provided that where a seaman, who has signed shipping articles, voluntarily absents himself from the vessel, he may be apprehended and delivered to the master, he paying all the ***cost*** of such commitment, and deducting the same out of the wages due to such seaman. It was held that the money paid for the support of a seaman while in jail might be deducted from his wages under this act. The court said: "The word ***costs*** seems to have a technical meaning, and is usually applied to the legal charges of a proceeding; but the word used in the act is ***cost***, and its large and full sense means charge, expense, loss, detriment. In this sense it will cover the item in question. These men were wrong-doers; they violated their contract, and this expense was incurred in consequence of the violation. They are not entitled to any extraordinary indulgence or effort to save them from the consequences of their wrong; but a liberal construction should be given to the act to restrain the mischief intended to be prevented. At all events, it was money paid for them, on their account, without which they would have suffered by the privation of food, and they could not be restored to liberty until it was paid." Brower *v.* The Schooner Maiden, Gilp. (U. S.) 297. See generally the title SEAMEN.

Costs and Market Value. (See also MARKET; VALUE.) — Congress provided that the prices affixed to articles imported should be the true and actual value or ***cost*** thereof at the place of exportation. The court said: "The whole cause turns upon the legislative meaning of the word ***cost***. The district attorney contends that it is synonymous with value, or market price; and the importer, that it means the price [the goods] ***cost*** the individual at the place of exportation. The term is certainly of equivocal meaning, and is sometimes used to express the value of a thing, and sometimes the price paid for it. * * * Upon the whole, then, I think there are stronger reasons for embracing the construction given to this law by the district judge, and fewer inconveniences attending it, than that contended for by the appellant. The decree is, I think, correct upon the merits." Goodwin *v.* U. S., 2 Wash. (U. S.) 498, 503.

The defendant agreed to pay a debt in merchandise, said merchandise to be sold and delivered at not above twenty-five per cent. of the ***cost*** price. The court said: "The plaintiff insists that by the term '***cost*** price' was meant, not the actual ***cost*** of the goods to the defendant, but what, according to fair market rates, they should have ***cost***. I can see nothing whatever, either in the tenor of the note, in the transaction itself, or in the condition and circumstances of the parties, to support this construction; and in the absence of anything indicative of such an intent we are bound to follow the plain literal meaning of the language used. The words '***cost*** price' obviously meant the price paid for the goods by the defendant; and any other interpretation would be strained and unnatural." Buck *v.* Burk, 18 N. Y. 340.

Actual Cost. — In State *v.* Price, 12 Wash. 653, the court said: "The word 'actual' lends no additional significance; 'actual ***cost***' can mean no more than ***cost***." See also ACTUAL, vol. 1, p. 602.

Actual ***cost*** means actual price paid, and not market value. Alfonso *v.* U. S., 2 Story (U. S.) 421.

At the Cost Thereof. — In Gray *v.* Harper, 10 Fed. Cas. No. 5716, 1 Story (U. S.) 574, this phrase in a contract for the sale of books "at the ***cost*** thereof" was construed to mean all the ***cost*** of the copies.

Prime or First Cost. — See PRIME.

Cost, Freight, and Insurance. (See also the title SALES.) — In Ireland *v.* Livingston, L. R. 5 H. L. 406, 41 L. J. Q. B. 204, Blackburn, J., said: "The terms at a price 'to cover ***cost***, freight, and insurance,' payment by acceptance 'on receiving shipping documents,' are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual ***cost*** and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee, which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board, he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the nondelivery is, in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been

COTTAGE. — A cottage is a small dwelling-house.[1]
COTTON. — See note 2.

bought and shipped to him in the ordinary way."

A price C. F. I. does not necessarily include everything up to delivery; and if the contract stipulates that the goods are "to be shipped," those are important words to show that the goods are at the buyer's risk as soon as placed on board, even though the price be quoted C. F. I. Wancke *v.* Wingren, 58 L. J. Q. B. 519; Stroud's Jud. Dict.

1. Doe *v.* Sotheron, 2 B. & Ad. 628, 22 E. C. L. 149. The court in that case said: "A ***cottage*** is a small dwelling-house. Cowell's Int., *Cotagium* (*a*). Any number of ***cottages*** may therefore satisfy the allegation of a number of dwelling-houses; and there is not any repugnance in common speech between calling a dwelling-house a messuage in one instrument and a ***cottage*** in another. A doubt is to be found in some books, whether a fine can be levied of a ***cottage*** *eo nomine*. In practice, ***cottages*** are frequently mentioned in fines; and in West's Symboleography, part 2, fol. 7*b*, it is said: 'By the name of a messuage may pass a curtilage, a garden, an orchard, a dovehouse, a shop, a mill, as parcel of a house. The like of a ***cottage***, a toft, a chamber, a cellar, etc., yet may they be demanded by their single names.' In the Year Book 8 Hen. VI., p. 3, pl. 6, the demand in dower was of the third part of a garden, and a difference of opinion is reported as to whether a person can have a *præcipe quod reddat* of a garden, croft, or ***cottage***; but in the result the writ was held good."

A ***cottage*** has been defined as a little house without land to it. Doe *v.* Hubbard, 15 Q. B. 234, 69 E. C. L. 234; Doe *v.* Sotheron, 2 B. & Ad. 638, note *b*, 22 E. C. L. 151; Coke Litt. 56*b*.

Properly, however, a ***cottage*** seems to have always had a small portion of land attached to it (*fundi ascriptam portiunculam*), as appears also from the terms "cot *land*," "cot *sethland*" (Spelman). And now, according to good authority, by grant of a ***cottage***, a curtilage or garden will pass as included. Emerton *v.* Selby, 2 Ld. Raym. 1015, 6 Mod. 115, 4 Vin. Abr. 582; Shep. Touch. (by Preston) 94.

Tenement. — A testator devised "all those two ***cottages*** or tenements, the one occupied by my son John H.; the other by my granddaughter." It appeared from the evidence that there were two dwelling-houses, or ***cottages***, which had been divided into distinct tenements, the one occupied by the son and another, and the other occupied by the granddaughter and another. It was held that by this devise nothing passed but the tenements actually occupied by the son and the granddaughter. Wightman, J., said: "There is no definition of a ***cottage*** which is inconsistent with the rooms occupied by those persons respectively as separate dwellings being described as ***cottages***, though originally they formed parts of larger ***cottages***. A large dwelling-house or ***cottage*** may be divided into two or more distinct dwelling-houses or ***cottages***, and each part may be so described. A ***cottage***, in Johnson's and other English dictionaries, is said to be 'a small house,' and a house is said to be 'a dwelling place;' so that any small dwelling place may without impropriety of language be described as a ***cottage***." Doe *v.* Hubbard, 15 Q. B. 239, 69 E. C. L. 239.

The defendant, being owner of several houses in St. Catharine's, London, let the rooms out to several families, and for this was indicted on the statute about inmates; but the chief justice ruled it not a case within the statute, for the house was not a ***cottage***, and all the new buildings about town would be liable to the same prosecution, there not being four acres laid to any of them; and he held, further, that the proviso in the statute for market towns would take this case: for in this respect, as far as the houses are contiguous, Wapping is part of the town. Rex *v.* Pattle, 1 Stra. 405.

2. Ginned Cotton. — In Robinson *v.* Mauldin, 11 Ala. 985, it was held that a conveyance of fifty thousand pounds of ***cotton***, to be produced during the present year upon the plantation of the party of the first part, was a conveyance of fifty thousand pounds of ginned or cleaned ***cotton***, and not ***cotton*** as it is gathered from the plant, and from which the seed had not been separated.

For the construction of a promise to pay "out of the proceeds of the first ***cotton*** ginned," see White *v.* Chaffin, 32 Ark. 59.

Cotton in the Seed. — In Norris *v.* State, 50 Ala. 127, it was held that an indictment for burglary, which charged the prisoner with breaking and entering a house in which there was stored at the time ***cotton*** in the seed, without an averment that it was a thing of value, was fatally defective. The court said: "Without inquiry whether the word 'stored' in the indictment is equivalent to either of the words used in the statute, we hold the indictment in this case fatally defective, in not alleging that the ***cotton*** in the seed was a valuable thing, or constituted either goods or merchandise. It may have been worthless matter by having been spoiled."

Cotton Notes. — In Fourth Nat. Bank *v.* St. Louis Cotton Compress Co., 11 Mo. App. 333, ***cotton*** notes were held warehouse receipts, and the transfer of a ***cotton*** note without indorsement was held to convey no greater rights than a transfer of the ***cotton*** would have given. See the title WAREHOUSEMEN.

Produce or Commodity. — The statute did not specifically by name prohibit the traffic in ***cotton***: nor did the bill of indictment aver that the ***cotton*** was a "produce or commodity," words used in the statute, and prohibited from traffic in with a slave. It was held that the indictment was sufficient, as the court is presumed to know the ordinary meaning of words, and is to construe them when used in pleading according to that sense. State *v.* Borroum, 23 Miss. 477.

Cotton or Woolen Waste. — An application for insurance on a stock of goods represented that it was "all of goods usually kept in a country

COUCHANCY. — See LEVANCY AND COUCHANCY.

COULD. — See note 1.

COUNCIL. (See the titles MUNICIPAL CORPORATIONS; ORDINANCES; and see generally LEGISLATURE.) — The word "council" is derived from the Latin word *consilium*, the definition of which is an assembly. Hence the word "council" as used and employed in statutes is usually understood to mean the legislative body in the government of cities or boroughs.[2] The constitutions of some states provide for an advisory body to aid the executive; the body is called the "governor's council."[3]

COUNSEL. (See the title ATTORNEY AND CLIENT, vol. 3, p. 278.) — One who gives advice, especially in legal matters; one professionally engaged in the trial or management of a cause in court; also, collectively, the legal advocates united in the management of a case. As distinguished from attorney, the latter is employed for the management of the mechanical parts of a case,

store," and that there was no ***cotton*** or woolen waste or rags kept in or near the property to be insured. The by-laws, to which the insurance was expressly made subject, provided that no building in which cotton or woolen waste or oily rags were allowed to remain at night should be insured, etc. It was held that the keeping of clean white ***cotton*** rags, if usually forming part of the stock of "a country store," did not avoid the policy. Elliott *v.* Hamilton Mut. Ins. Co., 13 Gray (Mass.) 139. See also the title FIRE INSURANCE.

Revenue Laws. — See Kohlsaat *v.* Murphy, 96 U. S. 153; Fisk *v.* Arthur, 103 U. S. 431; Arthur *v.* Zimmerman, 96 U. S. 125; Steegman *v.* Maxwell, 3 Blatchf. (U. S.) 367. And see the title REVENUE LAWS.

1. Could and Might. (See also MIGHT.) — In an action for personal injuries the trial court was requested to charge that if the train did slack up so that the plaintiff might have gotten off safely, then, although the plaintiff was injured in getting off, the defendant was not liable. The court substituted the words "***could*** get off in safety" for "might have gotten off safely." This was held no error. The Appellate Court said: "The court used the proper term. 'Might' rather implies, was possible, within the limits of chance. ***Could*** more strongly signifies, was able, had the power. Certainly a conductor has not discharged his duty who so checks his speed that it is possible for a passenger to get off safely. But whether I am right or wrong in this criticism or explanation of these two potential mood prefixes which are often indiscriminately used, the difference between the two is hardly potential enough to constitute a legal error sufficient to set aside a verdict, reverse a judgment, and grant a new trial." Western R. Co. *v.* Young, 51 Ga. 493.

2. State *v.* Weeks, 38 Mo. App. 573. And in that case it was held that the words "the city ***council***," used in a petition for a local option election and an order directing such election, *ex vi termini* implied that the ***council*** exercised legislative functions. See generally the title INTOXICATING LIQUORS.

Distinguished from Legislature and Court. — In Whitcomb's Case, 120 Mass. 123, it is said: "The city ***council*** is not a legislature. It has no power to make laws, but merely to pass ordinances upon such local matters as the legislature may commit to its charge, and subject to the paramount control of the legislature. Neither branch of the city ***council*** is a court, or, in accurate use of language, vested with any judicial functions whatever. Nor are its members chosen with any view to their fitness for the exercise of such functions. To allow such a body to punish summarily by imprisonment the refusal to answer any inquiry which the whole body, or one of its committees, may choose to make, would be a most dangerous invasion of the rights and liberties of the citizen." Accordingly it was held in that case that the common ***council*** had no power to commit and punish for contempt. See generally the title CONTEMPT, *ante*, p. 25.

In Long *v.* Taxing Dist., 7 Lea (Tenn.) 136, it is said: "A city ***council***, it has been well said, is a miniature legislature, authorized to legislate for a locality, and their ordinances within the power intrusted have all the force of laws passed by the legislature. But there is a broad distinction between the general power to make laws and the special power of a municipal corporation to enact by-laws. The corporate ***council*** is restrained to such matters, whether specially enumerated or included under a general grant, as are not at variance with the general laws of the state, are reasonable, and adapted to or proper for the purposes of the corporation."

In Com. *v.* Allen, 70 Pa. St. 469, it was held that a ***council*** was not a legislature, and that its members did not have the privileges and immunities of legislators.

Mayor, Alderman, etc. — An English statute provided that certain powers, duties, obligations, and property, pertaining to improvement commissioners, should pass to the ***council***. It was held that by ***council*** were meant the mayor, aldermen, and burgesses acting by the ***council***. Hyde *v.* Bank of England, 21 Ch. Div. 176.

Councilmen. — A statute authorized the election of a certain number of aldermen, who should be known as the city ***council***. An ordinance regulating municipal elections used the word ***councilmen*** instead of "aldermen." It was held that the meaning of the ordinance was the same as if the latter word had been used, and that votes for ***councilmen*** instead of aldermen were not illegal, but should be counted. State *v.* Anderson, 26 Fla. 240.

3. See the titles GOVERNOR; PARDON. See Adams, Petitioner, 4 Pick. (Mass.) 25; Opinion of Justices, 3 Pick. (Mass.) 517.

while a counsel attends to the actual advocating of the cause. In the *United States* the two functions are usually united.[1] To counsel is to advise.[2]

COUNT. (See the title COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS, 5 ENCYC. OF PL. AND PR. 302.) — A count is sometimes considered as synonymous with a declaration, and this was its original signification in the law French; but it is now most generally considered as a part of a declaration, wherein the plaintiff set forth a distinct cause of action.[3] It was originally confined to the declaration in a real action.[4]

In criminal law the word "count" is used when, in one finding by the grand jury, the essential parts of two or more separate indictments, for crimes apparently distinct, are combined; the allegations for each being termed a "count," and the whole an "indictment." And an indictment in several counts, therefore, is a collection of several bills against the same defendant for offenses which on their face appear distinct, under one caption, and found and indorsed collectively as true by the grand jury.[5]

"Counting Upon" a Statute consists in making express reference to it, as by the words "against the form of the statute," or "by force of the statute," "in such case made and provided."[6]

COUNTERCLAIM.—See title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

1. Attorney and Counsel. — The distinction between attorney and *counsel* was maintained for some time in the Supreme Court of the United States, no person being permitted to practice both as attorney and *counsel* in that court. 1 Kent's Com., § 307. The distinction is not now maintained, however. *Ex p.* Garland, 4 Wall. (U. S.) 333, 338.

In Ludlam *v.* Broderick, 15 N. J. L. 271, the court said: "Nor are we to suppose that the legislature intended to use the word *counsel* in this place, in that peculiar and restricted sense in which it is used at Westminster Hall, in distinction from 'attorney.' In our courts a man's attorney is usually his *counsel*, even though he is not a *counsellor* of this court. But in the present case the attorney whose name is appended to the interrogatories is a *counsellor* of this court, and we may judicially take notice of the fact."

In Ingraham *v.* Leland, 19 Vt. 304, it was held that there was no distinction in *Vermont* between being *counsel* and attorney in a cause.

Counsel to Aid District Attorney. (See also the title PROSECUTING ATTORNEY.) — In State *v.* Russell, 83 Wis. 332, it was held that the *counsel* appointed under the *Wisconsin* statute to assist the district attorney in a prosecution for felony must be a member of the bar of that state. The court said: "The word *counsel* in this statute no doubt means the *counsellor* who is associated in the management of a particular cause, or who acts as the legal adviser in reference to any matter requiring legal knowledge and judgment. Bouv. Law Dict., tit. *counsel*. It is generally used of *counsel* in a particular case to distinguish him from the attorney of record; or, as the office means in the Supreme Court of the United States, and in the English practice, he is a *counsellor* at law in contradistinction to an attorney at law. The *counsellor* conducts the trial and presents the law, while the attorney carries on the practical and formal parts of the suit. 1 Kent Com. 307. In the states where these distinctions are disregarded, the one who acts as *counsel*, or of *counsel*, is supposed to have superior knowledge and experience in the law and ability to advise in the conduct of the causes. The *counsellor* is a lawyer of the highest dignity. The law says that the court is authorized to appoint *counsel* 'to assist the district attorney' in cases where he needs assistance. It is at least self-evident that such an assistant must be, first, an admitted lawyer or an attorney at law."

In State *v.* Kent, 4 N. Dak. 577, the court came to a different conclusion, saying: "Does the fact that he was not a member of the bar of this state render him an improper person to participate in a criminal prosecution? This precise question was decided in favor of the contention of *counsel* for the accused in Wisconsin. State *v.* Russell, 83 Wis. 330. But the decision was founded on the wording of the statute of that state authorizing the trial judge to appoint *counsel* to assist in the prosecution. The court held that the word *counsel* meant a member of the bar of that state. We have no such statute in this state."

2. "Counsel or Procure." (See also the title AIDER AND ABETTOR, vol. 2, p. 29.) — A person cannot be indicted under the 24 and 25 Vict., c. 94, § 2, for "*counselling*, procuring, or commanding" another to commit a felony, unless such felony be actually committed by the other person. *Quære*, whether the words "solicit and incite" in an indictment are equivalent to "*counsel*, procure, or command." Reg. *v.* Gregory, L. R. 1 C. C. 77, 10 Cox C. C. 459. One who has authority to prevent an illegal act being done, who chooses to stand by and see it done without exercising his authority, is properly convicted of "aiding, abetting, *counselling*, or procuring" the offense. Howells *v.* Wynne, 15 C. B. N. S. 3, 109 E. C. L. 3.

3. Cheetham *v.* Tillotson, 5 Johns. (N. Y.) 435.

4. Steph. Plead. (5th ed.) 30.

5. Boren *v.* State, 23 Tex. App. 28, *quoting* 1 Bish. Crim. Pro., §§ 421, 422. See, for a full treatment, 10 ENCYC. OF PL. AND PR. 540, title INDICTMENTS.

6. Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 348.

COUNTERFEITING.

By K. D. McKellar.

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CROSS-REFERENCES.

For matters of PROCEDURE, see 5 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 266.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ACCESSORY, vol. 1, p. 257; *ACCOMPLICES*, vol. 1, p. 389; *AIDER AND ABETTOR*, vol. 2, p. 29; *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 250; *CONFESSIONS*, vol. 6, p. 520; *CONSPIRACY*, vol. 6, p. 830; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CRIMINAL LAW; EXPERT AND OPINION EVIDENCE; EXTRADITION; FALSE PRETENSES; FORGERY; INTERNATIONAL LAW; JUDICIAL NOTICE; PENSIONS; RES GESTÆ; SECONDARY EVIDENCE; SENTENCE; VERDICT; WITNESSES.*

I. DEFINITION. — A counterfeit coin, bill, or other obligation made the subject of counterfeiting by statute, may be defined as a false or fraudulent one, made in imitation of the genuine, with intent to defraud.[1] In the cognate offenses of passing, uttering, possessing, etc., counterfeit money, knowledge of its spurious character is an essential element.[2]

Statutes. — This subject is regulated by statutes enacted by Congress and the state legislatures. There are also ample provisions existing in England.

II. DISTINGUISHED FROM FORGERY. — Counterfeiting must be distinguished from forgery in that in the former there must be a resemblance to the coin or other instrument counterfeited;[3] while in forgery no such resemblance is requisite.[4]

III. MAKING COUNTERFEIT MONEY — ELEMENTS OF OFFENSE — 1. In General. — The essential ingredients of the crime of making counterfeit money are: (1) The making of the false or fraudulent coin or other obligation of the government; (2) that it was made in the similitude of the genuine; and (3) that it was made with an intent to deceive.

2. The Making. — It must be averred and proved that the accused made false coin or other money capable of being uttered as genuine.[5]

1. **Counterfeit.** — "That which is made in imitation of something, with a view to deceive, by passing the false for the true." Webster's Dict.

A Counterfeit Coin is one made in imitation of a genuine coin. U. S. *v.* Hopkins, 26 Fed. Rep. 443; U. S. *v.* Bogart, 9 Ben. (U. S.) 314; 2 Bishop Cr. L. (7th ed.), § 289; U. S. *v.* Marigold, 9 How. (U. S.) 560.

"**A Counterfeiter,** in legal parlance, is one who unlawfully makes base coin in imitation of the true metal, or forges false currency, or any instrument of writing, bearing a likeness and similitude to that which is lawful and genuine, with an intention of deceiving and imposing upon mankind." Thirman *v.* Matthews, 1 Stew. (Ala.) 384.

English Statute. — The statute 24 and 25 Vict., c. 99, consolidates the statute law of the United Kingdom against offenses relating to the coin. The first section of the statute defines the terms, "current gold and silver coin," "copper coin," "false or counterfeit coin," "current coin," and "custody or possession," as employed therein.

2. Rev. Stat. U. S., § 5457 *et seq.*, and § 5415 *et seq.*

3. See May's Cr. L., § 94, the title Forgery.

4. May's Cr. Law, § 94, the title Forgery.

5. Rev. Stat. U. S., § 5457, 5414 *et seq.*

False Coin Must Be Made. — The act of counterfeiting is the making of false coin capable of being circulated as genuine. U. S. *v.* Abrams, 18 Fed. Rep. 823; U. S. *v.* King, 5 McLean (U. S.) 208; U. S. *v.* Otey, 31 Fed. Rep. 68.

Trade Dollar. — In the case first cited the defendant was indicted for counterfeiting the trade dollar of the United States, and found guilty. The spurious coins were made of tin and antimony, resembling in shape and design the trade dollar; and the accused intended to coat them with silver before putting them in circulation. On the trial the court instructed the jury "that the prisoner could be convicted if they found that he made the coins with intent to circulate them, and had carried the manufacture so far as to produce coins capable of being uttered as genuine trade dollars, notwithstanding there was evidence that he intended to coat the coins with silver before putting them in circulation." On a motion for a new trial the charge was held correct. The court, by Benedict, J., said: "It is true that in one sense the coins were unfinished; that is to say, they were not finished as the prisoner intended to finish them. But, in another and truer sense, they were finished, for they were capable of being put in circulation as genuine coin. So the jury have found. The ingredients of the offense created by the statute are an act and an intent. The act is

3. The Similitude. — The similitude of the counterfeit to the genuine must be such as would deceive a person using ordinary caution.[1] The question of such similitude is a question for the jury.[2]

making a false coin capable of being circulated as genuine. The intent is an intent to defraud."

Making Few Coins to Test Apparatus. — In Reg. *v.* Roberts, 7 Cox C. C. 39, some apparatus for making counterfeit coin was found in the possession of the accused, but the jury found that it was his purpose to make only a few counterfeit coins in England, with a view of testing the apparatus before sending it abroad. It was held that to make even a few coins in England with that object would constitute the offense of making counterfeit coins within the statute.

Coloring — English Statute. — Bringing to the surface the latent silver in a blank of mixed metal by dipping it in aquafortis, which corrodes the base metal, was a coloring within that statute. Rex *v.* Lavey, 1 East P. C. 166.

Preparing blanks with such materials as when rubbed would make them resemble the genuine coin, was a coloring within 89 William IV., c. 26, before the resemblance had been produced by such friction. Rex *v.* Case, 1 East P. C. 165.

An indictment charging the gilding of sixpences with materials capable of producing the color of gold is good when supported by proof of coloring sixpences with gold. Reg. *v.* Turner, 2 Moo. C. C. 42.

1. Similitude — Sufficient — Ordinary Caution. — The resemblance of the counterfeit to the genuine must be sufficiently strong to deceive persons exercising ordinary caution. U. S. *v.* Morrow, 4 Wash. (U. S.) 733; U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366; U. S. *v.* Abrams, 18 Fed. Rep. 823. But see U. S. *v.* Trout, 4 Biss. (U. S.) 107.

Ordinary Observation. — The imitation or resemblance must be such as to be capable of imposing on persons of ordinary observation. Dement *v.* State, 2 Head (Tenn.) 505. 75 Am. Dec. 747.

Unsuspecting Observation. — It is sufficient if the alleged counterfeit bears such a resemblance or likeness to the genuine as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest. U. S. *v.* Sprague, 48 Fed. Rep. 828; U. S. *v.* Hopkins, 26 Fed. Rep. 443.

Most Ordinary Caution. — If, from incompleteness or clumsiness of manufacture of counterfeit coin, or other obligations made the subject of counterfeiting, men of very ordinary circumspection and intelligence could not be imposed upon by it, there is no ground for the inference that it was designed for fraudulent use. U. S. *v.* Burns, 5 McLean (U. S.) 23.

Insufficient Resemblance. — A paper containing all the words and figures upon a genuine bank bill, but having no other resemblance or likeness to it, cannot be said to be in the similitude of it, within the meaning of the Rev. Stat. of 1840, c. 157, § 5. State *v.* McKenzie, 42 Me. 392.

State Bank Note. — Nor does the note of a duly authorized state bank, now defunct, bear sufficient resemblance to a U. S. Treasury or national bank note to warrant a conviction. U. S. *v.* Stevens, 52 Fed. Rep. 120.

Different Denominations. — In Com. *v.* Smith, 7 Pick. (Mass.) 137, the prisoner was convicted on an indictment under *Massachusetts* statute of 1804, c. 120, § 4, for having in his possession, with an intent to pass the same as true, two counterfeit bills of the denomination of three dollars, in the similitude of bills issued by the Bank of North America, in Rhode Island. It was objected that the similitude was not proved, as it appeared that the bank had never issued bills of that denomination, but the court said that, as the bills had the external appearance of bills issued by the bank, and purported to be signed by the president and cashier, they had the similitude intended by the statute. See also State *v.* Carr, 5 N. H. 367. See also Trice *v.* State, 2 Head (Tenn.) 591.

Exact Similitude. — It is no defense to an indictment under 2 *New York* R. S., § 30, that the pictures of the plate of the prisoner differ from those on the genuine bill; exact similitude is not required even in the operative words of the instrument. It is enough that there is sufficient likeness to satisfy the jury, with other evidence, that the impressions to be struck off with the plate were intended for fraudulent circulation as true ones. People *v.* Osmer, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 242.

But in *South Carolina* it was held that the likeness must be exact. State *v.* Gutridge, 1 Bay (S. Car.) 285.

Uttering a Bank Bill with the Name of a Fictitious Cashier countersigned thereto is not within the *Massachusetts* statute of March 6, 1801; but if uttered with an intent to deceive and defraud is a misdemeanor punishable at common law. Com. *v.* Boynton, 2 Mass. 77.

Forging the Impression of Money on an Irregular Piece of Metal, without finishing it so as to make it current, was an incomplete crime, and not high treason. Rex *v.* Varley, 2 W. Bl. 682.

Omission of Some of the Words or Devices of Genuine Coin. — In U. S. *v.* Bricker, 3 Phila. (Pa.) 426, it was held that a party may be convicted for passing or attempting to pass an imperfect imitation of the federal coin with a guilty intent, and that the omission of some of the words or devices on the true coin will not prevent conviction.

To Make a Round Block Like the Smooth Shilling in circulation, the original impression on which has been effaced by wear, is counterfeiting to the likeness and similitude of the legal and current coin of the realm called a shilling. Rex *v.* Wilson, 1 Leach C. C. 285.

Impression. — To constitute the offense of coining it is not necessary that there should be an impression on the counterfeit, if it resembles the common worn coin. Rex *v.* Welsh, 1 East P. C. 87, 164.

2. Similitude — Question for Jury. — The question as to what is a sufficient similitude to deceive, and what is ordinary caution, are questions to be determined by the jury, who

4. Intention to Deceive. — The crime is not complete unless there is an intention to deceive.[1]

IV. JURISDICTION — 1. Federal Courts. — **The Federal Constitution** provides that Congress shall have the power to coin money and regulate the value thereof, and to provide for the punishment of counterfeiting the securities and current coin of the United States.[2]

The Judiciary Act of 1789 provides that the circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except when this act otherwise provides, or the laws of the United States shall otherwise direct.[3]

The Act of 1825 defined the punishment for passing, uttering, etc., counterfeit coin; but especially provided that "nothing in this act contained shall be construed to deprive the courts of the individual states of the jurisdiction of the law of the several states over offenses made punishable by this act."[4]

Not Exclusive. — From the foregoing statements it appears, therefore, that the jurisdiction of the federal courts is not exclusive;[5] but that it is possible

should weigh all the circumstances attending the particular transaction involved. U. S. *v.* Hopkins, 26 Fed. Rep. 443; U. S. *v.* Morrow, 4 Wash. (U. S.) 733; U. S. *v.* Burns, 5 McLean (U. S.) 23; U. S. *v.* Sprague, 48 Fed. Rep. 828; U. S. *v.* Stevens, 52 Fed. Rep. 120.

It is a question of fact whether or not counterfeit coin was made to resemble the real coin. Rex *v.* Welsh, 1 East P. C. 87, 164; 1 Leach C. C. 364.

In Reg. *v.* Byrne, 6 Cox C. C. 475, it was held that, on an indictment under 2 and 3 William IV., c. 34, § 7, for uttering a false and counterfeit coin, apparently intended to resemble and pass for a piece of the good and legal current coin of the realm, it is a question of fact for the jury whether the coin produced supported the indictment, and if they are of the opinion that the coin was not intended by the maker to pass as a good coin, they should find the defendant not guilty.

1. Intent to Defraud — Innocent Purpose. — It must appear that it was the intention of the party to pass the false coin as genuine. If it be made for any other purpose, though that purpose be not justifiable in a moral point of view, as, for instance, to be used in a magical exhibition, the party must be acquitted. U. S. *v.* King, 5 McLean (U. S.) 208.

May Show Innocent Purpose. — A man who is a worker in these metals may show that he had the article in question, not to use or pass off as currency, but for some other or innocent purpose. A jeweler may use it in his trade; a chemist may experiment in his profession; and an innocent person may show his innocence by any proof that shows the jury that his possession of the spurious article and his use of it were for legitimate purposes. People *v.* Page, 1 Idaho 191.

Intent to Defraud Inferred — When. — If one pass counterfeit money, and another in any way aids and abets in its passage, knowing it to be counterfeit, an intent to defraud may be inferred, and both are guilty. State *v.* Mix, 15 Mo. 153.

The law presumes the intent to be to defraud any person who may suffer a loss by accepting counterfeit money as genuine. U. S. *v.* Shellmire, 1 Baldw. (U. S.) 370.

Intent to defraud is presumed from making counterfeit money, unless such making is explained. U. S. *v.* Abrams, 18 Fed. Rep. 823; U. S. *v.* Otey, 31 Fed. Rep. 68.

Agreement to Take Back No Justification. — Agreement to take back the note is no justification for passing it. Perdue *v.* State, 2 Humph. (Tenn.) 494.

Intent Held Immaterial. — In the case of U. S. *v.* Russell, 22 Fed. Rep. 390, it is said: "The only question is, whether the accused did, in fact, forge or counterfeit such coins as charged against him in the indictment. If he did, he cannot excuse himself by showing what was his intention, or that he did not intend himself to use the coins he so made for fraudulent purposes, or that they should be so used by others." But it is very doubtful, in the light of the authorities, if this is the law. It is quite true that the intent need not be averred in the indictment, if there are other words used which in effect charge a fraudulent intent, and it was perhaps this proposition that misled the court; but there seems to be no question that an innocent purpose may be shown by the proof. See U. S. *v.* Otey, 31 Fed. Rep. 68.

As to the Necessity of Alleging a fraudulent intent, see 5 ENCYC. OF PL. AND PR., p. 270.

2. Const. U. S., art. 1, § 8.

3. Rev. Stat. U. S., § 629.

4. Rev. Stat. U. S., § 5328.

5. 2 Bishop's Cr. Law, § 283; U. S. *v.* Arjona, 120 U. S. 480; Fox *v.* Ohio, 5 How. (U. S.) 410; Campbell *v.* U. S., 10 Law Rep. 400, 4 Fed. Cas. No 2373; U. S. *v.* Marigold, 9 How. (U. S.) 560; People *v.* McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159.

A State Law, punishing the offense of fraudulently passing a counterfeit dollar, is not repugnant to the constitution or any law of the United States. Fox *v.* Ohio, 5 How. (U. S.) 410.

Congress Not Only Not Excluded, but Expressly Reserved and recognized the jurisdiction of the state courts over counterfeiting. *Ex p.* Geisler, 50 Fed. Rep. 411.

Held to Be Exclusive. — The authority for punishing the crime of counterfeiting the coin of the United States rests exclusively in the courts of the United States. State *v.* Brown, 2 Oregon 221.

that it might become so.[1]

2. State Courts. — Under the law as it stands now, there can be no question that in practice state courts have concurrent jurisdiction with the federal courts over the crime of counterfeiting.[2] Indeed, in several of the states

It was also held to be exclusive in the case of Mattison *v.* State, 3 Mo. 421; but this case was *overruled* in a subsequent case in that state (*In re* Truman, 44 Mo. 181), and the Oregon case has never been followed.

The court, in *Ex p.* Houghton, 8 Fed. Rep. 901, says: "The act of passing these counterfeited bills, made punishable under the statute of the state under which the relator was indicted, might, and often would, concur with others to constitute a cheat which would be punishable by laws of the state of long standing, against obtaining money or goods by privy or false tokens. It was upon this ground, that the passing the counterfeited national bank bill was a mere private cheat under the laws of Virginia, that the conviction was upheld by the majority of the court in Jett *v.* Com., 18 Gratt. (Va.) 933." In the case just quoted from, one who had been convicted in a state court of passing counterfeited national bank notes with knowledge of their character, was discharged on habeas corpus.

1. Federal Jurisdiction May Become Exclusive. — The Moses Taylor, 4 Wall. (U. S.) 411; Houston *v.* Moore, 5 Wheat. (U. S.) 1; Martin *v.* Hunter, 1 Wheat. (U. S.) 304; Com. *v.* Fuller, 8 Met. (Mass.) 313, 41 Am. Dec. 509; *Ex p.* Geisler, 50 Fed. Rep. 411; Brigg *v.* Com., 16 Pet. (U. S.) 617; U. S. *v.* Lathrop, 17 Johns. (N. Y.) 4; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122.

In Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, cited above, it was held that the power of Congress did not deprive the states of the right to pass bankrupt laws, provided Congress neglected to do so; but it was also held that the moment Congress exercised the power vested in it by the constitution, by passing a bankrupt law, the various state bankrupt laws were suspended.

2. Jurisdiction of State Courts — *United States.* — *Ex p.* Geisler, 50 Fed. Rep. 411.

Indiana. — Chess *v.* State, 1 Blackf. (Ind.) 198; State *v.* Moore, 6 Ind. 436; Snoddy *v.* Howard, 51 Ind. 411, 19 Am. Rep. 738; Dashing *v.* State, 78 Ind. 357.

Iowa. — State *v.* McPherson, 9 Iowa 53.

Massachusetts. — Com. *v.* Fuller, 8 Met. (Mass.) 313, 41 Am. Dec. 509.

Michigan. — Harlan *v.* People, 1 Dougl. (Mich.) 207.

Missouri. — *In re* Truman, 44 Mo. 181.

Ohio. — Sutton *v.* State, 9 Ohio 133.

South Carolina. — State *v.* Pitman, 1 Brev. (S. Car.) 32, 2 Am. Dec. 645; State *v.* Antonio, 3 Brev. (S. Car.) 562; State *v.* Tutt, 2 Bailey L. (S. Car.) 44, 21 Am. Dec. 508.

Tennessee. — Sizemore *v.* State, 3 Head (Tenn.) 26.

Texas. — Martin *v.* State, 18 Tex. App. 224.

Vermont. — State *v.* Randall, 2 Aik. (Vt.) 89.

Virginia. — Jett *v.* Com., 18 Gratt. (Va.) 933.

Foreign Trade-marks. — In People *v.* Molins, (Gen. Sess.) 7 N. Y. Crim. Rep. 51, it is held that the courts of the state of New York have jurisdiction to try a defendant for counterfeiting a foreign trade-mark that has not been registered; that the Act of Congress (Act of March 3, 1881, 21 Stat. at Large 502), with reference to the counterfeiting of trade-marks used in commerce with foreign nations, refers to trade-marks registered in accordance with the United States statutes.

In Sizemore *v.* State, 3 Head (Tenn.) 26, it was held that, although the offense of counterfeiting the coin of the United States, or of passing it, or keeping it with intent to circulate it, are offenses against the United States, still they are not exclusively cognizable in the federal courts. The federal and state governments are separate and distinct. Both are sovereign in the sphere assigned to them. The coin of the United States is intended for the use of the people of all the states, and there can be no reason in denying to the states the power of protecting their citizens against the debasement of the universal currency, by the punishment of all offenders within their borders, although the same are offenses against the United States, and punishable in the federal courts.

Exclusive Jurisdiction — Upon What Depends. — The fact that jurisdiction in certain cases is given by the constitution does not in itself carry with it, by the mere force of the grant, an exclusive right to the exercise of such jurisdiction. But the character of such right, whether exclusive or concurrent, depends either on the nature of the subject, the express language of the constitution, or the manner in which it has been enforced by legislative action. Statutes for the punishment of counterfeiting were in existence before the formation of the Federal Constitution. Com. *v.* Fuller, 8 Met. (Mass.) 313, 41 Am. Dec. 509.

Congress Has Not Restricted the Right of the States. — If it be granted that where Congress has power over a given subject it can render the same exclusive, it would still be true that the power of the states in this instance is not superseded, for the general government has not, either expressly or impliedly, by its statutes, prevented the punishment by the states. State *v.* McPherson, 9 Iowa 53; *Ex p.* Geisler, 50 Fed. Rep. 411.

State Jurisdiction One of the Reserved or Inherent Powers. — Such power is not granted exclusively to, or exercised exclusively by, the United States, and if neither denied nor so granted, it remains among the reserved or belongs to the inherent powers of the state. Snoddy *v.* Howard, 51 Ind. 411, 19 Am. Rep. 738.

Not Yet Made Exclusive. — Although Congress might, perhaps, by appropriate legislation, render the jurisdiction of the national courts exclusive, still, as it does not appear to have done so, the jurisdiction of state courts is not suspended. *In re* Truman, 44 Mo. 181.

The same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw

persons have been indicted for counterfeiting the current coin of the United States, and no objection was made in the matter of jurisdiction.[1]

V. Subjects of Counterfeiting — 1. In General. — Under the old English statutes gold and silver coins were the only subjects of counterfeiting.[2] Now, in both *England* and the *United States*, every species of money and almost if not every governmental obligation has been rendered the subject of counterfeiting.[3] This branch of the subject resolves itself into (1) what coins, and (2) what bills and other obligations, may be the subjects of counterfeiting.

2. Coins — *a.* Domestic. — Every gold and silver coin, all minor coins, and all gold and silver bars, which have been or hereafter may be coined or stamped at the mints and assay offices of the United States, are embraced within the statutes.[4]

to its commission the penalties denounced by either, as appropriate to its character in reference to each. Fox *v.* Ohio, 5 How. (U. S.) 432; U. S. *v.* Marigold, 9 How. (U. S.) 569; U. S. *v.* Cruikshank, 92 U. S. 542. *Compare* Com. *v.* Fuller, 8 Met. (Mass.) 313, 41 Am. Dec. 509.

1. Miller *v.* People, 3 Ill. 233; State *v.* Collins, 3 Hawks (10 N. Car.) 191; State *v.* Young, 1 Overt. (Tenn.) 230; Peek *v.* State, 2 Humph. (Tenn.) 78; State *v.* Bowman, 6 Vt. 594; Rasmick *v.* Com., 2 Va. Cas. 356.

2. **Subjects of Counterfeiting.** — 4 Blackstone Com. 88, 1 Hawk. P. C. 42.

But mere intent is not a crime. Bevington *v.* State, 2 Ohio St. 160.

Copper Coin. — Before the statute 2 and 3 William IV., c. 34, § 12, uttering or tendering in payment counterfeit copper money was not an indictable offense. Cirwan's Case, 1 East P. C. 182.

Silver Coin. — Nor before that statute was having counterfeit silver in possession with intent to utter it as good an offense. Rex *v.* Heath, R. & R. C. C. 184; Rex *v.* Stewart, R. & R. C. C. 288.

3. U. S. Rev. Stat., § 5457 *et seq.*, and 24 and 25 Vict., cc. 98, 99.

"Counterfeit Tokens of Value"— Canada. — In Reg. *v.* Corey, 33 New Brunsw. 81, it is held that documents or paper writings not counterfeit, but so made or executed as to resemble United States Government notes, are counterfeit tokens of value within the meaning of the Criminal Code 1892, § 479. *Compare* Reg. *v.* Atwood, 20 Ont. Rep. 574.

The Seventy-third Section of the New Jersey Act for the punishment of crimes (Elmer's Dig. 115) applies to counterfeit as well as to genuine "blank and unfinished notes." Stone *v.* State, 20 N. J. L. 401.

4. **Domestic Coins.** — Rev. Stat. U. S., §§ 5457, 5458; Com. *v.* Bond, 1 Gray (Mass.) 564; U. S. *v.* Gardner, 10 Pet. (U. S.) 618; U. S. *v.* Abrams, 18 Fed. Rep. 823, 21 Blatchf. (U. S.) 553; U. S. *v.* Bogart, 9 Ben. (U. S.) 314.

Prohibited Coins Not Capable of Being Counterfeited. — Gold coins not issued by the authority of Congress, nor of any foreign government, but made within the United States, contrary to the Constitution of the United States, although in circulation in Massachusetts, are not "gold coin current by law or usage within this state," the counterfeiting of which or having counterfeits of which with intent to utter, etc., as true, is prohibited by Rev. Stat., c. 127, §§ 15, 16; Com. *v.* Bond, 1 Gray (Mass.) 564.

But the making of such gold pieces is now prohibited by sections 5461 and 5462 of Rev Stat. U. S.

Where the Coins Are Not Entirely Finished. — Where another coating was to be put on them before putting them into circulation, yet the counterfeiter may be convicted. U. S. *v.* Abrams, 18 Fed. Rep. 823.

It Is Not an Offense to Pass a Piece of Metal, apparently gold, but octagonal in form and stamped on one side with the device of an Indian and on the other "1-4 dollar, Cal." U. S. *v.* Bogart, 9 Ben. (U. S.) 314.

To Constitute the Offense of Passing Counterfeit Coin the spurious coin passed must be a representation of a genuine coin. Passing a piece of metal in the shape and size of coin, and representing it on one side, but having merely an advertisement on the other side, and not purporting to be coin, is not counterfeiting, but a false pretense under the statute. Roberts *v.* State, 2 Head (Tenn.) 502. See the title False Pretenses.

Within the Statute, Though Different in Weight and Inscriptions. — Where a coin was similar to a genuine United States coin in size, color, milling, and the devices on both sides, but differed from the genuine in weight and inscriptions, it was held to come under the statute. U. S. *v.* Hargrave, 17 Int. Rev. Rec. 39.

When Punching a Coin May Be Counterfeiting. — In U. S. *v.* Lissner, 12 Fed. Rep. 840, the United States coins in question had had small holes made in them, and these holes had been filled with some base metal and passed by the defendant with knowledge of their condition. Some of the holes had been punched with a sharp instrument, involving no loss of silver; others were made by drilling out an appreciable amount of the silver, though not with any intention of using the silver so removed. The court held that as to those coins where the holes had been plugged with base metal the act of counterfeiting had been committed, because this was making something appear to be a good coin for its apparent value which was not so before; but as to those coins through which holes had been punched with a sharp instrument, thereby crowding the silver into a slightly different shape, but leaving it all in the coin, there was no act of counterfeiting.

Removal of Milling. — A genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one

b. FOREIGN. — It is equally an offense against the statute to counterfeit any foreign gold or silver coins, or minor coins, which now are or may be made current in the United States.[1]

3. Bills and Other Obligations — *a.* DOMESTIC. — Practically not only all paper currency, but every species of governmental obligation, has been made by statute the subject of counterfeiting.[2]

twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin; it was held that the coin was false and counterfeit within the statute 24 and 25 Vict., c. 99, § 9; Reg. *v.* Hermann, 4 Q. B. Div. 284.

Alabama — Time When Coin Current. — In Nicholson *v.* State, 18 Ala. 529, 54 Am. Dec. 168, it is held that the time when the coin, of which a counterfeit is uttered and published, was current by law, usage, or custom in the state, is a material element of the offense denounced by the statute, and should be distinctly stated in the indictment.

1. **Foreign Coins.** — Rev. Stat. U. S., §§ 5457, 5458.

A Spanish Head Pistareen is not the subject of counterfeiting, it not being a coin of Spain made current by law in the United States. U. S. *v.* Gardner, 10 Pet. (U. S.) 618.

The Counterfeiting of Coin Not Current is not punishable under the statute. Rex *v.* Humphrey, 1 Root (Conn.) 53; U. S. *v.* Gardner, 10 Pet. (U. S.) 618; Com. *v.* Bond, 1 Gray (Mass.) 564.

Currency — Question for Jury. — In Fight *v.* State, 7 Ohio, pt. 1, 181, 28 Am. Dec. 626, it was held that an indictment charging that the defendant uttered in payment counterfeit coins, "made and counterfeited to the likeness and similitude of the good, true, and current money and silver coin, currently passing in this state, called Spanish dollars, knowing them to be counterfeit," was good; and that whether or not such coins were current in the state was a question of fact for the jury.

2. **Obligations and Other Securities of the United States,** which include all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon an authorized officer of the United States, and stamps and other representatives of value of whatever denomination, which have or may be issued under any Act of Congress, are the subjects of counterfeiting. Rev. Stat. U. S., §§ 5413, 5414.

Also Letters Patent, Certificates of Entry, bids, proposals, guaranties, official bonds, public records, affidavits, or other writings; military land warrants, military bounty-land warrants, or any duplicate thereof; any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of receiving money from the United States; any abstract or official copy or certificate of the recording, registry, or enrolment of any vessel, or license to vessel, or certificate of ownership, pass, passport, sea-letter, or clearance granted for any vessel, or a permit, debenture, or other official document, granted by an officer of customs; postal money-orders, postage-stamps, stamped envelopes, postal cards, or any die, plate, or engraving therefor. Rev. Stat. U. S., §§ 5415 *et seq.*, 5463 *et seq.*

Trade-marks. — U. S. *v.* Braun, 39 Fed. Rep. 775; People *v.* Molins, (Gen. Sess.) 7 N. Y. Crim. Rep. 51; State *v.* Bishop, 128 Mo. 373; American Fibre Chamois Co. *v.* De Lee, 67 Fed. Rep. 329. See the title TRADE-MARKS.

Dies, Moulds, etc. — Act Feb. 10, 1891, 26 Stat. at L., c. 127, p. 742.

A Check upon a Bank is not a bill of exchange under the New York Counterfeiting Act of 1808, but an order for the payment of money. People *v.* Howell, 4 Johns. (N. Y.) 296.

An Order or Check Drawn by the President of a Branch Bank of the United States on the cashier of the bank at Philadelphia, for the payment of money, is the subject of counterfeiting. U. S. *v.* Shellmire, 1 Baldw. (U. S.) 370. But see U. S. *v.* Turner, 7 Pet. (U. S.) 132; U. S. *v.* Brewster, 7 Pet. (U. S.) 164.

Photographing Treasury Notes. — It is a criminal act, under 13 Stat. at L. 222, to photograph or execute likenesses of United States treasury notes, although the similarity between the photograph and the original is not such that the counterfeit is calculated to deceive the public. *Ex p.* Holcomb, 2 Dill. (U. S.) 392.

Confederate Money. — The passing of a Confederate States note as lawful money to an ignorant man is not the offense contemplated by Rev. Stat. U. S. § 5415, punishing the passing, uttering, or publishing any counterfeit note in imitation of the circulating notes issued by the banking associations acting under the laws of the United States, and it is not an offense thereunder. The offense is that of cheating by a false symbol or token. U. S. *v.* Wilson, 44 Fed. Rep. 751. See the title FALSE PRETENSES.

Note of a Prohibited Banker. — To utter and publish a counterfeit note of a private unauthorized or prohibited banker, knowing it to be counterfeit, is an indictable offense. Butler *v.* Com., 12 S. & R. (Pa.) 237, 14 Am. Dec. 679.

Bills of a Fictitious Bank. — The possession of forged bills purporting to emanate from a certain bank when in fact no such bank existed, with intent to pass them as genuine, was held to be not indictable either at common law or under the *Massachusetts* Act of March 15, 1805. Com. *v.* Morse, 2 Mass. 138.

An Unexecuted Bond, resembling a United States bond, is not an "obligation or other security," within the meaning of Rev. Stat. U. S., § 5430. In the opinion of the court, the words in quotations seem clearly to imply an executed instrument, or at least one which on its face purports to be executed by some one. U. S. *v.* Sprague, 11 Biss. (U. S.) 376.

Nor Is a Military Land Warrant "a certificate, indent, or other public security" of the United States, within section 17, Act of Congress 1825. U. S. *v.* Irwin, 5 McLean (U. S.) 178.

b. FOREIGN. — So, too, the counterfeiting of bills, notes, and other obligations of foreign governments, and the issue of foreign corporations when such issue has been authorized to circulate as money by the government organizing such corporations, has been made punishable.[1]

Treasury Notes — Constitutionality of Statute.— In U. S. *v.* Howell, 11 Wall. (U. S.) 432, § 6 of the Act of Congress of Feb. 25, 1862, to punish the counterfeiting of treasury notes, was assailed as being repugnant in its references to uttering or passing such counterfeit notes. The statute provides that if any person "shall falsely make, forge, counterfeit, etc., any note, bond, coupon, or other security issued under the authority of this act, or heretofore issued under acts to authorize the issue of treasury notes," etc. The objection was that if the note which the party was charged with passing was, in the language of the statute, "issued under the authority of this act," etc., it must necessarily be a valid note, and if it was not so issued, then the passing of the note was not made an offense by the law. But the court negatived the contention, saying that the words "false, forged, and counterfeit" used in the statute imply, when applied to any of the obligations of government mentioned, that it purports to be a genuine instrument, but is not in fact such, and that this implication is allowed by the authorities and good usage.

"Obligation" — "National Currency."—Where the accused was convicted under an indictment charging him with aiding and assisting in the making of plates to be used in printing counterfeit national currency bank notes, and section 11 of the act (13 U. S. Stat., p. 218) did not in terms speak of plates for printing national currency, but by section 13 of the act it was provided "that the words 'obligation or other security of the United States,' used in this act, shall be held to include national currency," but the phrase "obligation or other security of the United States" nowhere appeared in the act, it was held that section 13 referred to the words used separately, and not as a phrase, and that the quotation marks must be disregarded; and that, inasmuch as section 11 of the act used the word "obligation," that word must be held to include national currency, and the accused was rightly convicted. U. S. *v.* Rossvally, 3 Ben. (U. S.) 157.

Notes of Defunct Bank. — The notes of a defunct bank, if in circulation as money, are the subjects of counterfeiting. White *v.* Com., 4 Binn. (Pa.) 418.

Notes Prohibited. — Under a statute prohibiting the circulation of bank bills of a less denomination than ten dollars, unless made payable at one of the banks of the state, the uttering and publishing of counterfeit bills, made in imitation of such prohibited bills, is still indictable. Thompson *v.* State, 9 Ohio St. 354; Com. *v.* Hensley, 2 Va. Cas. 149.

In State *v.* Van Hart, 17 N. J. L. 327, it was held to be an indictable offense in *New Jersey* to utter and publish therein a counterfeit bank note of another state, for two dollars, although the "passing" of any bank note under five dollars, in the state, was prohibited by statute.

Instruments Not Existing at Passage of Law. — The fraudulent attempt to pass a counterfeit treasury note is an offense within the meaning of sections 119 and 124 of the *Kansas* Crimes Act (Comp. Laws, c. 33), although these instruments had no existence at the time of the passage of the law. Riggins *v.* State, 4 Kan. 173.

At Common Law. — An indictment for possessing or uttering a forged bank bill "with intent to defraud" is not maintainable at common law, as descriptive of a common-law cheat, since to constitute such offense some one must have been defrauded or cheated. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168; Com. *v.* Speer, 2 Va. Cas. 65; U. S. *v.* Hargrave, 17 Int. Rev. Rec. 39; State *v.* Grooms, 5 Strobh. L. (S. Car.) 158; Rex *v.* Wheatley, 2 Burr. 1127. See the title FALSE PRETENSES.

Business Cards. — It is unlawful to make and utter business cards in the likeness of a government bond or national bank note; but the penalty denounced by the statute is only recoverable by a *qui tam* action brought by an informer; no provision being made for its recovery at the instance of the government. Rev. Stat. U. S., §§ 5188, 3708; U. S. *v.* Laescki, 29 Fed. Rep. 699.

Changing Figures. — Cutting out the words "one dollar" from the body of a bank note, artfully adjusting blank paper in the space so made, and substituting the figure 5 for the figure 1 where it appears in the margin of the bill, with intent to defraud, is indictable, under section 22 of the Crimes Act (S. & C.'s Stat. 409). Haynes *v.* State, 15 Ohio St. 455; State *v.* Waters, 2 Treadw. (S. Car.) 669.

1. Foreign Bills and Obligations. — Act of Congress, May 16, 1884; U. S. *v.* White, 25 Fed. Rep. 716; U. S. *v.* White, 27 Fed. Rep. 200; U. S. *v.* Arjona, 120 U. S. 479; People *v.* McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159.

The Face, Except the Signature, of a genuine treasury note of the denomination of two hundred milreis of the Empire of Brazil, was held to be the subject of counterfeiting under the Act of May 16, 1884. U. S. *v.* White, 25 Fed. Rep. 716.

Unexecuted Counterfeits. — In the case of U. S. *v.* Williams, 14 Fed. Rep. 550, it was held that an unexecuted counterfeit of "any obligation or other security" of the United States was not the subject of counterfeiting because unexecuted. To the same effect is U. S. *v.* Sprague, 11 Biss. (U. S.) 376. But in U. S. *v.* White, 25 Fed. Rep. 716, an unsigned foreign note was held to be the subject of counterfeiting, because the Act of 1884 not only made the counterfeiting of any note, but "any part thereof" punishable.

Offense Against the Law of Nations. — It is an offense against the law of nations to counterfeit the notes of a foreign bank, or to have plates therefor, and Congress has constitutional power to enact laws punishing the offense. U. S. *v.* Arjona, 120 U. S. 479; U. S. *v.* White, 27 Fed. Rep. 200. See the titles CONSTITUTIONAL LAW, vol. 6; INTERNATIONAL LAW.

Foreign Bank Notes and Bills. — The legisla-

VI. Who May Commit — 1. Husband and Wife. — All persons responsible for their acts may commit the crime of counterfeiting. But when a wife has been jointly indicted with her husband, and the evidence shows that both were jointly engaged in uttering counterfeit money, it will be presumed that she was acting under her husband's compulsion.[1]

2. Parent and Child. — So where coining instruments were found in the house occupied by a man and his wife and a child ten years old, the child was regarded as the tool of his parents, and was acquitted of a felonious possession.[2]

3. Agents. — Proof of passing or attempting to pass counterfeit money by an agent employed by the defendant for that purpose is the same as proving the act to have been done by himself.[3] Agents who do not know the false character of the money counterfeited are not guilty of the offense.[4]

4. Insane or Intoxicated Persons. — Neither is an insane person; nor drunkards, if they were incapable at the time of passing of distinguishing a good coin from a bad one.[5]

5. Aiders and Abettors. — The statutes make aiding and assisting in counterfeiting a substantive offense.[6] So that all who take part in the work in any way whatever, the other elements of the offense being proved, are punishable as if they had done the whole work.[7]

ture of *California* made the counterfeiting of "bank notes and bills" punishable. It was held that these terms included foreign bank notes and bills. People *v.* McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159.

Prohibited Foreign Bank Bills. — Section 1 of the Ohio Act of May 1, 1854 (Swan's Rev. Stat. 116), to prohibit the circulation of foreign bank bills, did not exclude such bills from the operation of section 22 of the Act of July 1, 1835, for the punishment of crimes, but the uttering and publishing false, forged, and counterfeit bank bills of less denomination than ten dollars upon foreign banks as true and genuine was still within the latter law. Thompson *v.* State, 9 Ohio St. 354.

1. Married Women. — Rex *v.* Price, 8 C. & P. 19, 34 E. C. L. 277; Conolly's Case, 2 Lew. C. C. 229; Reg. *v.* M'Ginnes, 11 Cox C. C. 391.

In Reg. *v.* M'Ginnes, 11 Cox C. C. 391, the circumstances were these: At the time of uttering the counterfeit coin for which the defendant was indicted, she was in the company of a man who went by the same name, and who was convicted of the offense at the previous assizes. When the prisoners were arrested the officer addressed the woman as the man's wife, but he denied the fact of the relation in the presence of the woman. Since her commitment she had been confined with child. It was held that, although the woman had not pleaded coverture, and had not claimed to be the man's wife when he denied that she was, it was for the jury to say whether or not there was evidence of the marriage, and in the opinion of the jury there was such evidence, and they acquitted the woman.

In Conolly's Case, 2 Lew. C. C. 229, a wife went from house to house uttering counterfeit money, her husband accompanying her, but remaining outside, and it was held that the wife acted under the husband's compulsion. See the titles Criminal Law; Husband and Wife.

2. Child — Influence of Parents. — Reg. *v.* Booker, 2 Cox C. C. 272. See the titles Criminal Law; Parent and Child.

3. Agents. — U. S. *v.* Morrow, 4 Wash. (U. S.) 733.

4. Reg. *v.* Bannen, 2 Moo. C. C. 309. See the title Criminal Law.

Procuring a counterfeit bank note to be passed by an ignorant boy as a true one was a sufficient passing within the *Massachusetts* statute of 1804, c. 120, § 3. Com. *v.* Hill, 11 Mass. 136.

In Reg. *v.* Bannen, 2 Moo. C. C. 309, the defendant employed a die sinker to make, for a pretended lawful purpose, a die suitable for the making of shillings. The die sinker, suspecting something wrong, informed the officers of the mint, and under their directions made the die, for the purpose of entrapping the defendant. It was held that the die sinker was an innocent agent, and the defendant properly convicted as a principal under 2 and 3 William IV., c. 34, § 10.

5. Intoxicated Persons. — Pigman *v.* State, 14 Ohio 555, 45 Am. Dec. 558. See the titles Criminal Law; Intoxication.

6. Rev. Stat. U. S., §§ 5457, 5458, 5415.

7. Aiders and Abettors. — U. S. *v.* Morrow, 4 Wash. (U. S.) 733; U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366; U. S. *v.* Rossvally, 3 Ben. (U. S.) 157; State *v.* Stetson, Kirby (Conn.) 52; State *v.* Mix, 15 Mo. 153; State *v.* Cheek, 13 Ired. L. (35 N. Car.) 114; May *v.* State, 14 Ohio 462, 45 Am. Dec. 548; Rasnick *v.* Com., 2 Va. Cas. 356; Martin *v.* Com., 2 Leigh (Va.) 745.

Aider Guilty. — If one pass counterfeit money, and another in any way aids and abets its passage, knowing it to be counterfeit, an intent to defraud may be inferred, and both are guilty. State *v.* Mix, 15 Mo. 153.

Guilty as Principal. — Whoever does in fact assist in the counterfeiting, does a part of it, and is as truly the counterfeiter as any one can be who does not execute the whole work alone, and it is immaterial whether he be charged as a sole or joint agent in the matter. State *v.* Stutson, Kirby (Conn.) 52.

Agent. — Proof that the passing of counterfeit money was done by an agent is the same

VII. Possession of Instruments, Counterfeit Coins, Bills, etc. — 1. Instruments. — **At Common Law** it was no offense simply to have in possession counterfeit coin, or instruments for making the same.[1]

as proof that it was done by the defendant. U. S. *v.* Morrow, 4 Wash. (U. S.) 733.

Confederates. — The evidence given was such as to lead to the impression that the defendant and his comrade perfectly understood each other, and were engaged in a common criminal enterprise, and that the act of one was the act of both. It was competent, therefore, for the prosecutor to put any inquiry that would show the part taken by either in the passing and redemption of the bill, to establish the defendant's guilt, to ascertain where the bill was, and its identity. May *v.* State, 14 Ohio 462, 45 Am. Dec. 548.

The three persons formed one party, and appeared to be acting in secret with each other, and all they had seemed to be in common. It was held that all were guilty. State *v.* Cheek, 13 Ired. L. (35 N. Car.) 114.

The Party Accused of Passing or Uttering Counterfeit Paper must be present when the act is done, privy to it, or aiding, consenting, or procuring it to be done. U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366.

One Who Aids and Assists in the Making, Preparing, and Engraving of a Plate intended to be used in printing counterfeit banknotes may be indicted. U. S. *v.* Rossvally, 3 Ben. (U. S.) 157.

To Constitute This Offense it is not necessary that the defendant should actually hand the counterfeit money to the person to whom it was passed. If he approved or assisted, the other defendant being present, he is as much guilty as he who actually manually delivers the money. Thus where two travelers got their horses shod, and one, upon being asked for pay, referred the smith to the other, remarking that he carried their money, and the smith was paid in counterfeit money, and afterwards counterfeit money was found on both, it was held that both were guilty. State *v.* Young, 1 Overt. (Tenn.) 230.

Finishing Up the Coin. — One who brightens base pieces (which are brought to him ready formed, with the impression and appearance of dollars, except that they are of a dark color, like lead, and not then passable), by boiling them in lye, and rubbing them with woolen cloth, and subjecting them to other processes, thereby rendering them, by their resemblance to real dollars, more fit for circulation, is guilty of counterfeiting. He completes the offense, and thereby subjects to the penalties of the act not only himself, but all who acted a part and were present assisting at the transaction from beginning to end, or who did anything thought necessary by themselves to impose on the public, by making the base coin resemble the true. Rasnick *v.* Com., 2 Va. Cas. 356.

Other Instances. — Where two persons are indicted for uttering a counterfeit coin of a certain denomination, having another counterfeit coin of the same denomination in their possession, it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered. If both the pieces are proved to be counterfeit, and it appears that the two persons went to a shop, and that one of them went in and uttered the bad money, having no more in his possession, and the other remained outside, having other pieces of counterfeit money, both may be convicted, the uttering and the possession being both joint. Rex *v.* Skerrit, 2 C. & P. 427, 12 E. C. L. 203.

Where one of two persons in company utters bad coin, and other bad coin is found on the other person, they are jointly guilty of the aggravated offense under 2 and 3 William IV., c. 34, § 7, if acting in concert, and both knowing of the possession. Reg. *v.* Gerrish, 2 M. & Rob. 219.

Where A and B were indicted for uttering a counterfeit coin and having in their possession another at the time, and the uttering was by A alone, in the absence of B, it was held that B was not liable to be convicted with A, although proved to be his associate on the day of uttering, and to have had other bad money on his person for the purpose of uttering; and further, that A could not be convicted of the second offense of having other bad money in his possession on the evidence of his associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering. Rex *v.* Else, R. & R. C. C. 142. *Compare* Reg. *v.* Greenwood, 5 Cox C. C. 521.

In Reg. *v.* West, 2 Cox C. C. 237, the facts were these: The defendants together uttered a counterfeit coin; shortly thereafter they separated and one of them went to a shop and uttered another of the coins, and then the other went to the same place and uttered a third coin of the same kind, but at these second and third utterings neither was proved to have been near the other. It was held that the proof of previous concert would not sustain a count for a joint uttering in either the second or third uttering.

If two jointly prepare counterfeit coin and utter it in different shops, apart from each other, but in concert, and intending to share the proceeds, their respective utterings are the joint utterings of both. Reg. *v.* Hurse, 2 M. & Rob. 360.

If two utterers of counterfeit coin, with a general community of purpose, go different ways, and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. Rex *v.* Manners, 7 C. & P. 801, 32 E. C. L. 743.

Where both are not present at the time of the uttering, the real question is, whether one was so near the other as to help him to get rid of the coin. Reg. *v.* Jones, 9 C. & P. 761, 38 E. C. L. 325.

1. Common Law. — Rex *v.* Heath, R. & R. C. C. 184, *overruling* Sutton's Case, 1 East P. C. 172, 2 Stra. 1074; Dugdale *v.* Reg. 1 El. & Bl. 435, 72 E. C. L. 435; U. S. *v.* Wright, 2 Cranch (C. C.) 68. See also Rex *v.* Fuller, R. & R. C. C. 308; Rex *v.* Wheatley, 2 Burr. 1127; Rex *v.* Munoz, 2 Stra. 1127. *Compare*

State Statutes. — In a number of the states statutes have been passed making it a crime to have in possession any of the various instruments which may be used for counterfeiting.[1]

Federal Statute. — And now there is a federal statute prohibiting the possession without lawful authority of any die, hub, or mould, in any substance, in likeness, as to design or description thereon, of any die, hub, or mould used for coining any genuine coin of the United States, or of any foreign government or corporation.[2]

In England there are statutory enactments of similar import.[3]

Rex *v.* Parker, 1 Leach C. C. 41; Reg. *v.* Roberts, 7 Cox C. C. 39.

1. Possession of Instruments — State Statutes. — Bell *v.* State, 10 Ark. 536; Peoples *v.* State, 6 Blackf. (Ind.) 95; Chamberlain *v.* State, 5 Blackf. (Ind.) 573; Sutton *v.* State, 9 Ohio 133; Miller *v.* People, 3 Ill. 233; State *v.* Griffin, 18 Vt. 198.

Known Possession and Criminal Intent. — To constitute the crime of knowingly having in possession counterfeiting tools, etc., as created by the *California* statute in relation to crimes and punishments, it is not only necessary to prove the known possession by the defendant, but also the criminal intent. People *v.* White, 34 Cal. 183; Com. *v.* Morse, 2 Mass. 138.

Instrument to Make One Side Only. — Under the *Massachusetts* statute, a person having in his possession, with intent to use, or cause or permit the same to be used, an instrument designed to make one side only of a counterfeit coin, is guilty. Com. *v.* Kent, 6 Met. (Mass.) 221.

And the same has been ruled under the *Vermont* statute. State *v.* Griffin, 18 Vt. 198.

In the Massachusetts case it was said that the phrase "adapted for coining," used in the statute, was matter of description, and applied to any instrument capable of being used in the formation of any part of a coin. And in the Vermont case the court said the statute was intended to reach every part of the apparatus for coining, however much more might be necessary to render that part effective.

Applies to the Counterfeiting of Foreign Money. — Under the *California* statute prohibiting the known possession of instruments employed in counterfeiting bank notes and bills, it is equally an offense if the instruments are adapted for counterfeiting foreign banknotes; and a charge that a mere possession and intent to use, though without ability to use, is sufficient to constitute the offense, is proper. People *v.* McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159.

A Pair of Dies — Edges Unlike Genuine. — It does not admit of any reasonable doubt that a pair of dies is an instrument or instruments, within the statute; and being more generally used in coining than any other instrument, is one upon which the act would be most likely to operate frequently. Though only the likeness of the sides of the dollar is impressed on these dies, and not of the edges, yet the verdict of the jury as to similitude will not be overturned. State *v.* Collins, 3 Hawks (10 N. Car.) 191.

Mexican Dollars. — It is indictable to have in possession tools for making Mexican dollars. Harlan *v.* People, 1 Dougl. (Mich.) 207.

Crucible. — In State *v.* Bowman, 6 Vt. 594, it was held that a crucible is not a "tool" or "instrument," within the meaning of § 31 of the statute for the punishment of high crimes and misdemeanors.

Purpose. — Instruments must be had for the purpose of counterfeiting. People *v.* Page, 1 Idaho 102.

Effect of Possession of Instruments. — The fact that various instruments and appliances for coining money, and a quantity of spurious coin, were found in the defendant's possession, may be evidence of a criminal participation in the counterfeiting, unless such possession is satisfactorily explained. U. S. *v.* Burns, 5 McLean (U. S.) 23; U. S. *v.* King, 5 McLean (U. S.) 208; Sutton *v.* State, 9 Ohio 133; U. S. *v.* Craig, 4 Wash. (U. S.) 729.

2. Act of February 10, 1891, Supp. Rev. Stat., p. 889.

3. In England. — Upon an indictment under 2 and 3 William IV., c. 34, § 10, for making a mould "intended to make and impress the figure and apparent resemblance of * * * the obverse side" of a certain coin, it was sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. Rex *v.* Foster, 7 C. & P. 495, 32 E. C. L. 598.

In order to convict a prisoner under the statute of the felony of having in possession a mould upon which was impressed the resemblance or the obverse side of a coin, the jury must be satisfied that, at the time he had it in his possession, the entire obverse side of the coin was impressed upon the mould; a part is insufficient. Rex *v.* Foster, 7 C. & P. 495, 32 E. C. L. 598.

In Reg. *v.* Harvey, 11 Cox C. C. 662, it was held that the defendant being knowingly in possession of the dies, had a sufficient guilty knowledge to constitute a felony, whatever his intention as to their use might be.

In Reg. *v.* Weeks, 8 Cox C. C. 455, the defendant was charged with knowingly, and without lawful authority, having in his custody and possession a mould on which were impressed the figure and apparent resemblance of the obverse side of a half crown. The mould was found in the house of the defendant, who had before this passed a bad half crown, but there was no evidence to show that the half crown had been in the mould. It was held that there was sufficient evidence to go to the jury.

A mould of lead having the stamp of one side of a shilling is a "tool" or "instrument." Rex *v.* Lennard, 2 W. Bl. 807.

Having knowingly in possession a puncheon for the purpose of coining, though that alone without the counter-puncheon would not make

2. Counterfeit Coins, Bills, and Other Obligations. — By statute the possession, knowingly and with intent to defraud, of any counterfeited coin, bill, or other obligation or security, domestic or foreign, is made a crime equally with that of counterfeiting.[1]

the figure, was possessing a "tool" or "instrument" within the meaning of the statute. Ridgeley's Case, 1 East P. C. 171

Also a collar of iron for graining the edges of counterfeit money was held to be an instrument, although it was to be used in a coining press. Rex *v.* Moore, 2 C. & P. 235, 12 E. C. L. 106.

And a press for coinage was a "tool" or "instrument" within that part of 8 and 9 William III., c. 26, which made it treason to have the same knowingly in the party's custody. Bell's Case, 1 East P. C. 169.

A galvanic battery is a machine within the meaning of 24 and 25 Vict., c. 99, § 24. Reg. *v.* Grover, 9 Cox C. C. 282.

Die for Making Stamps — Innocent Purpose. — By section 7 (*c*) of the English Post Office Act 1884, it is provided that a person shall not make, or, unless he shows lawful excuse, have in his possession, any die, plate, instrument, or materials for making, any fictitious stamp. The publisher of a newspaper circulated among stamp collectors and others caused a die to be made for him abroad, from which imitations or representations of a current postage stamp could be produced. The only object for which the die was ordered by him, and was subsequently kept in his possession, was for making, upon the pages of an illustrated stamp catalogue, illustrations in black and white, and not in colors, of the stamp in question, this catalogue being intended for sale as a part of his paper. It was held that the possession of a die for making a false stamp, known to be such to its possessor, was a possession without lawful excuse within the statute, however innocent the use that he intended to make of it. Dickins *v.* Gill, (1896) 2 Q. B. 310.

1. Possession of Counterfeit Coins, etc. — U. S. *v.* Burns, 5 McLean (U. S.) 23; U. S. & King, 5 McLean (U. S.) 208; U. S. *v.* Bicksler, 1 Mackey (D. C.) 341; Gabe *v.* State, 6 Ark. 519; State *v.* Benham, 7 Conn. 414; State *v.* Pierce, 8 Iowa 231; State *v.* Myers, 10 Iowa 448; Clark *v.* Com., 16 B. Mon. (Ky.) 206; Brown *v.* Com., 8 Mass. 71; Sasser *v.* State, 13 Ohio 453; State *v.* Shelton, 7 Humph. (Tenn.) 31; Rev. Stat. U. S., §§ 5457, 5458, 5430, 5431; Supp. Rev. Stat. U. S., p. 429.

Possession of Agent. — Under statute 2 and 3 Wm. IV., c. 34, § 8, in order to convict a person for having in his possession more than three pieces of counterfeit coin, with intent to utter the same, individual possession was not requisite, but it was sufficient if the coin was in the possession of the immediate agent of the person charged. Reg. *v.* Williams, C. & M. 259, 41 E. C. L. 145.

Coin in Secret Place Within Defendant's Knowledge and Control. — To constitute possession with intent to pass, it is not necessary that the prisoner shall have the counterfeited coin in his hands, in his pockets, nor on his person. But if it was in a secret place in the county, within the knowledge and control of the prisoner, this is a possession in the eyes of the law. State *v.* Washburn, 11 Iowa 245.

Possession in One State — To Pass in Another. — Possession of counterfeit bills of a bank in Massachusetts, with intent to pass them in another state, is within the statute of the former state. Com. *v.* Cone, 2 Mass. 132; Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668.

Knowledge of the False Making. — Under the *Massachusetts* statute of 1804, c. 120, knowledge of the false making is not necessary to constitute the offense. Com. *v.* Houghton, 8 Mass. 107; Brown *v.* Com., 8 Mass. 59.

Similar Bills — Possession of Not Less than Ten — Massachusetts Statute. — The Massachusetts statute of 1804, c. 120, § 2, enacted that if any person "shall possess, at any one time," any number "not less than ten, of such" counterfeit bank bills, etc. It was held that if the bills were the issue of banks established within the state, or if they were payable in the state, they were within the statute, although they were of different dates. Com. *v.* Whitmarsh, 4 Pick. (Mass.) 233. But it is essential that the accused not only had the ten bills in his possession on the same day, but also at the same moment. Edwards *v.* Com., 19 Pick. (Mass.) 124.

Parties Acting in Concert — Coin Found in Possession of One. — When counterfeit coin is found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty. Reg. *v.* Rogers, 2 Lew. C. C. 119, 297.

An Unexecuted Instrument. — It is no offense to have in one's possession with intent to use the obligation of a silver mining company, resembling a United States bond, when such obligation is unsigned. U. S. *v.* Williams, 14 Fed. Rep. 550; U. S. *v.* Sprague, 11 Biss. (U. S.) 376, 48 Fed. Rep. 828.

Bills of a Fictitious Bank. — In Com. *v.* Morse, 2 Mass. 138, it was adjudged to be no offense, either at common law or by the *Massachusetts* statute, to have in possession bills of a fictitious bank, with intent to pass them as genuine.

"Minor Silver Coinage." — The minor coins of the United States are the five-cent piece and the three-cent piece, composed of copper and nickel, and the one-cent piece, composed almost entirely of copper, and none of them contain any silver. So that an indictment for counterfeiting "minor silver coinage" sets forth an offense unknown to the law. Silver half-dollars, quarters, dimes, and half-dimes are not "minor silver coinage." U. S. *v.* Bicksler, 1 Mackey (D. C.) 341.

Blank and Unfinished Banknotes. — In *California* the possession of blank and unfinished bank bills is an indictable offense under the statute. People *v.* Ah Sam, 41 Cal. 645.

Evidence of a Fraudulent Sale is competent to support a charge of fraudulent possession under a count in an indictment. U. S. *v.* Biebusch, 1 McCrary (U. S.) 42.

VIII. Uttering and Passing. — To utter or publish is to declare or assert, directly or indirectly, by words or actions, that money is good, with an intention to pass it, or an offer to pass it. To pass or sell is to deliver it to another in payment or exchange. Uttering and publishing, passing and selling, or an attempt to utter, publish, pass, or sell, with knowledge of the spurious character of the counterfeit money, are punishable in the same way that the making of counterfeit money is punishable.[1]

1. Uttering and Passing Counterfeit Coin, etc. — Rex *v.* Franks, 2 Leach C. C. 644; 2 Den. C. C. 78, 484; U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366; State *v.* Horner, 48 Mo. 520; State *v.* Ward, 6 N. H. 529; Cahoon *v.* State, 8 Ohio 537; Com. *v.* Searle, 2 Binn. (Pa.) 339, 4 Am. Dec. 446; Rev. Stat. U. S., §§ 5457 *et seq.* and 5415 *et seq.*

To offer it in payment would be an uttering or publishing; but it is not passed until it is received by the person to whom it is offered. U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366; People *v.* Tomlinson, 35 Cal. 503; McGregor *v.* State, 16 Ind. 9; Com. *v.* Hall, 4 Allen (Mass.) 305; Com. *v.* Searle, 2 Binn. (Pa.) 339, 4 Am. Dec. 446; Perdue *v.* State, 2 Humph. (Tenn.) 494.

Price Agreed Upon — Interference of Police. — Where, on a bargain for the sale of counterfeit money, the price had been agreed upon and the defendant had produced the coin, but the complete transfer was prevented by the appearance of the police, it was held that this did not amount to a "putting off" within 8 & 9 William III., c. 26. Wooldridge's Case, 1 East P. C. 179.

"Passing in Payment" — Virginia Statute. — In U. S. *v.* Venable, 1 Cranch (C. C.) 416, it was held that the delivery of counterfeit money to a person, to be passed off generally for the benefit of the prisoner, is not a passing "in payment" within the Act of Assembly of Virginia of December 19, 1792, whereby the passing of such coin "in payment" was punishable with death.

Pledging Not a Passing. — Pledging a counterfeit note, which was to be redeemed at a future day, is not a "passing" within the meaning of the act of *Tennessee* creating the offense. Gentry *v.* State, 3 Yerg. (Tenn.) 451.

Prohibited Bills. — The passing of counterfeit bills the currency of which is prohibited is not an offense against the statute. Rex *v.* Moffatt, 1 Leach C. C. 431; Rex *v.* Humphrey, 1 Root (Conn.) 53; Gutchins *v.* People, 21 Ill. 642; People *v.* Rathbun, 21 Wend. (N. Y.) 521; People *v.* Wilson, 6 Johns. (N. Y.) 320. See also Com. *v.* Bond, 1 Gray (Mass.) 564. *Compare* Butler *v.* Com., 12 S. & R. (Pa.) 237, 14 Am. Dec. 679; Thompson *v.* State, 9 Ohio St. 354; Com. *v.* Hensley, 2 Va. Cas. 149.

"It cannot, therefore, be a felony to utter and publish, in this state, such a forged bill; because no person can be defrauded, as every person is bound to know that it is unlawful to accept in payment or circulate such a bill." People *v.* Wilson, 6 Johns. (N. Y.) 320, *quoted* in Gutchins *v.* People, 21 Ill. 642. See also Cunningham *v.* People, 4 Hun (N. Y.) 455.

Counterfeit of Coin Not Current. — Under *Missouri* Rev. Code, p. 184, if the genuine coin should, after the counterfeit has been made, go out of circulation, the attempt to pass the counterfeit would still be an offense. State *v.* Shoemaker, 7 Mo. 177.

Merely to Show the Counterfeit, without an offer to pass it, or depositing it for safe keeping, is not an uttering. There must be an intent to pass it as good. But if the counterfeit is delivered to a servant to be sent to a customer, or to a boy for the purpose of having the boy pass it, and the boy does pass it, the offense is committed. U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366.

In Name of Fictitious Person. — Passing a counterfeit note in the name of a fictitious person, or on a bank which never existed, constitutes the offense. It is not necessary that the note, if genuine, should be valid, if on its face it purports to be genuine. U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366.

State Bank Note. — Possession of notes of a duly authorized state bank, now insolvent, with intent to sell or pass them as genuine notes or obligations of the United States, is a crime under U. S. Rev. Stat., § 5430. U. S. *v.* Stevens, 52 Fed. Rep. 120.

Counterfeit Gold Dust. — Simply passing counterfeit gold dust is not an offense under the *Idaho* Code. The uttering must be accompanied by a knowledge of the spurious character of the dust; and, further, it must be the intention of the utterer to deceive the receiver. People *v.* Page, 1 Idaho 189; People *v.* Sloper, 1 Idaho 158.

Knowledge Alleged and Proved. — Knowledge upon the part of the defendant that the obligation passed was false and counterfeit must be alleged and proved. U. S. *v.* Carll, 105 U. S. 611.

Sending False Instrument by Post — Place of Uttering. — Sending a forged or false instrument through a post-office in Tennessee, directed to a person at Washington, D. C., is not an uttering at the latter place. U. S. *v.* Wright, 2 Cranch (C. C.) 296. To the same effect is U. S. *v.* Plympton, 4 Cranch (C. C.) 309.

Gambling with Counterfeit Money. — The staking of counterfeit money at a gambling table, as good money, is an attempt to utter or pass it, and losing it at play is a passing of it under the statute. State *v.* Beeler, 1 Brev. (S. Car.) 482.

Putting Spurious Coin on Store Counter in Attempt to Purchase. — The prisoner went into a store, asked for some coffee and sugar, and in payment put down on the counter a counterfeit shilling; the proprietor of the store said the shilling was a bad one; whereupon the prisoner quitted the store, leaving the shilling, and also the coffee and sugar. This was held an uttering under the statute. Reg. *v.* Welch, T. & M. 409, 2 Den. C. C. 78, 15 Jur. 136, 20 L. J. M. C. 101; 4 Cox C. C. 430.

Giving Counterfeit Money in Charity. — The

IX. KINDRED OFFENSES. — In addition to the kinds of counterfeiting already discussed, the statutes have made the following acts criminal: Importing counterfeit coin, bars, or minor coins, into the United States;[1] the fraudulent mutilation of domestic or foreign coin current here;[2] the debasement of coinage by officers of the mint;[3] the making of coins of original design, of any metal intended for use as money;[4] circulating bills of expired corporations;[5] dealing in counterfeit goods;[6] taking impressions of tools used in

giving of a piece of spurious money in charity is not an uttering, within the statute 2 Wm. IV., c. 34, § 7, although the person may know it to be counterfeit; as in cases of this kind there must be some intention to defraud. Reg. *v.* Page, 8 C. & P. 122, 34 E. C. L. 322.

Payment for Unlawful Intercourse. — But where a person gave a counterfeit coin to a woman with whom he had shortly before had intercourse, it was held to constitute an uttering. Reg. *v.* ———, 1 Cox C. C. 250.

Selling. — Under a statute which makes it an offense to "utter, pass, and publish" counterfeit notes, without requiring in terms that they should be passed as "true," a conviction may be had upon evidence that they were sold as spurious notes with intent that they should be passed to the public as good notes; and it makes no difference that there is another statute which specially provides a punishment for "selling" spurious notes. U. S. *v.* Nelson, 1 Abb. (U. S.) 135; State *v.* Wilkins, 17 Vt. 151; Hopkins *v.* Com., 3 Met. (Mass.) 464; Bevington *v.* State, 2 Ohio St. 160; Wilkinson *v.* State, 10 Ind. 372; Rex *v.* Franks, 2 Leach C. C. 644. *Compare* People *v.* Stewart, 4 Mich. 656; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

Seller Guilty Though Buyer May Not Be. — Under a statute making the sale or barter of counterfeit coin a misdemeanor, a person who knowingly sells spurious coin is indictable, even though the buyer is not aware of the spurious character of the coin. Leonard *v.* State, 29 Ohio St. 408.

Note Not Identified. — If A comes into the store of B and, in the presence of B and a number of clerks, passes upon B a counterfeit note, and B puts the note into his drawer, to which all of his clerks have access, without making a private mark upon the note, A cannot be convicted of uttering the note, because of the uncertainty of its being the same note passed upon B. People *v.* Lewis, 1 Wheel. Cr. Cas. (N. Y.) 181.

Duty upon Receiving Counterfeit Money. — One receiving counterfeit money is bound to use due diligence in ascertaining its character, and in notifying the giver, provided the latter was ignorant of its character, and paid it in good faith. Atwood *v.* Cornwall, 28 Mich. 336, 15 Am. Rep. 219; Raymond *v.* Baar, 13 S. & R. (Pa.) 318, 15 Am. Dec. 603; Curcier *v.* Pennock, 14 S. & R. (Pa.) 56.

1. Importing Counterfeit Coins, etc. — Rev. Stat. U. S., §§ 5457, 5458.

2. Mutilation. — Rev. Stat. U. S., § 5459; U. S. *v.* Lissner, 12 Fed. Rep. 840.

3. Rev. Stat. U. S., § 5460.

4. Rev. Stat. U. S., §§ 5461, 5462.

5. Rev. Stat. U. S., § 5437.

6. Rev. Stat. U. S., § 5434; and Supp. Rev. Stat. U. S., p. 694.

Distribution of Circulars Offering to Sell Counterfeit Money. — By the provisions of section 527 of the *New York* Penal Code, any person who, with intent to defraud, circulates or distributes a circular or letter, or any other written or printed matter, offering for sale counterfeit coin or paper money, or giving, or purporting to give, information where counterfeit coin or paper money can be procured, is punishable by fine or imprisonment, or by both. This section of the code was amended [c. 687, Laws of 1887] so as to include within its provisions every device to which resort can be had for the sale or distribution of counterfeit coin or paper money. In People *v.* Reilly, 51 Hun (N. Y.) 624, the facts were these: The defendant, under an assumed name, called at the place of business of one C., and arranged with the latter to allow letters to be directed to that place for him. Letters were received at the place, addressed to the fictitious name given by the defendant under this arrangement. They each acknowledged receipt of a letter from the person addressed, and were answers to such letters. With the letters were a circular and a newspaper article which had been sent to the writer by the person whose letter he answered, and which were returned in pursuance of a request contained in the circular. The circular contained a proposition to sell money, stating that there was no risk, as the money was perfect, as the accompanying newspaper clipping would show. The newspaper slip purported to contain an account of the loss by the government of certain plates. The defendant received personally one of the above-mentioned letters, and sent another person for letters on other occasions, at which times, however, none were received. The court held the evidence sufficient to convict the defendant under the statute above set out.

In People *v.* Marvin, 79 Hun (N. Y.) 310, it is held that where the circulars on their face showed that they were for the purpose of advertising counterfeit money, the testimony of a witness that he was familiar with the circulars and literature of "green goods" dealers, and the mode in which they conducted their business, and also that the circular set out in the indictment was like those used by persons engaged in such business, did not prejudice the defendant.

Devising Scheme to Sell Counterfeit Money — Use of Mails. — On an indictment under § 5434 of the Revised Statutes of the United States, as amended by Act of March 2, 1889, c. 393, for devising a scheme to sell counterfeit money or counterfeit obligations of the United States by means of communication through the post-office, it is not necessary to prove a scheme to defraud. Streep *v.* U. S., 160 U. S. 128. Here the court said: "The statute, in very words as well as in manifest intent, applies to any person who devises either a scheme to defraud, or a scheme to sell counterfeit money or counterfeit obligations of the

coining, or giving such impressions to another, or having them unlawfully in possession;[1] counterfeiting trade-marks;[2] and many others, for which see the revised statutes.

X. Evidence — 1. In General. — All the essential ingredients of the crime must be proved.

Nature of Proof Varies with Nature of Offense. — But the exact nature of the proof varies with the nature of the offense charged, as whether it be for the making, passing, possessing, etc., of counterfeit money.

Making Counterfeit Money. — Thus, in order to convict for making counterfeit money, it is necessary to prove that the money is false and the defendant made it or aided in the making thereof; that the false money so made by him is in the similitude of the genuine (unless the charge be for making counterfeit money of original design); and that in the making of such false money there was an intent to defraud.[3]

Possession of Counterfeit Money. — To constitute the offense of having counterfeit money in possession, these three facts must conspire and be proved by the prosecution: possession of false money; knowledge that it was counterfeit; and an intent to pass it with a view to defraud.[4]

Passing Counterfeit Money. — So, too, in a prosecution for passing, knowledge of its counterfeit character must be proved.[5]

The Particular Statute upon which the indictment is drawn must always be looked to in order to determine the requisite proof.

United States, provided the scheme is intended to be effected, and is effected, by communications through the post-office. This indictment charged, not a scheme to defraud, but a scheme to sell counterfeit obligations of the United States, and, therefore, no proof of a scheme to defraud was necessary to support it."

1. Rev. Stat. U. S., §§ 5432, 5433.

2. **Trade-marks.** — People *v.* Molins, (Gen. Sess.) 7 N. Y. Crim. Rep. 51. In this case it was held that to render the accused guilty of counterfeiting a trade-mark, the jury must be satisfied beyond reasonable doubt that his act was done with intent to defraud, and to show such intent, that the defendant knew the rights of the party intended to be defrauded; they must also be satisfied that the alleged trade-mark was the exclusive property of the owner alleged in the indictment, and even if valid, that it had not been abandoned by acquiescence in its use by others; and, further, that the alleged trade-mark was capable of appropriation as such. See also U. S. *v.* Braun, 39 Fed. Rep. 775.

3. Rev. Stat. U. S., §§ 5415, 5457, and 5458.

In U. S. *v.* Weikel, 8 Mont. 124, there was no evidence that any counterfeit coin had been made or uttered by the defendant. The coin alleged to have been counterfeited was excluded as evidence, and there was only faint evidence of his conspiring with the other defendants to counterfeit the government coin, aside from his own confession. It was held that the jury should have been instructed to acquit the defendant.

Proof of the Counterfeit Character of the coin must be made; but any person who can distinguish the true from the false is a competent witness. 24 & 25 Vict., c. 99, § 29; People *v.* Stewart, 5 Mich. 243; Crim. Law Consol. Stat. 235; Payson *v.* Everett, 12 Minn. 216; U. S. *v.* Hinman, 1 Baldw. (U. S.) 292; Martin *v.* Com., 2 Leigh (Va.) 745.

Similitude must be proved also. U. S. *v.* Sprague, 48 Fed. Rep. 828.

Coins of Original Design. — See Rev. Stat. U. S., §§ 5461, 5462.

Intent to Pass. — On a charge of counterfeiting, no proof is required of an intent to pass. State *v.* McPherson, 9 Iowa 53.

Insufficient to Convict as Abettor. — Proof that a man occasionally visited coiners; that the rattling of money was occasionlly heard with them; that he was seen counting something when he left them; that on coming to their lodgings, just after the apprehension, he endeavored to escape, and was found to have bad money about him, is not sufficient evidence to implicate him as counseling, procuring, aiding, and abetting the coiners. Rex *v.* Isaacs, 1 Russ. C. & M. 63.

Counterfeiting Other Money. — In State *v.* Odel, 3 Brev. (S. Car.) 552, it is held that, on an indictment for counterfeiting a silver dollar, proof that the defendant had counterfeited other dollars was not admissible.

4. **Possession of Counterfeits.** — Brown *v.* People, 9 Ill. 439; State *v.* Morton, 8 Wis. 352. In the case first cited the trial court instructed the jury that "when the prosecution have proved circumstances sufficient to show that defendant knew the bill was counterfeit, the burden of proof rests upon the defendant to show by proof where he got the bill, and under what circumstances he obtained it, or that he did not intend to pass it as genuine." The appellate court held these instructions erroneous, saying: "Many persons receive counterfeit bills innocently, consequently have them in their possession; they ascertain that they are not genuine, and consequently know it. But if they have no intention to pass the same, how can they be said to be guilty of offense? Yet if the law was as indicated in the instruction, they would be held to be so."

5. **Passing Counterfeit Coin.** — U. S. *v.* Rou-

2. Scienter — *a.* PROOF OF GUILTY KNOWLEDGE IN GENERAL. — The question of guilty knowledge does not always admit of positive proof, but ordinarily must be drawn from circumstances which indicate the secret operations of the mind.[1]

b. PASSING SIMILAR COINS OR BILLS. — On the trial of an indictment for passing a counterfeit bill, knowing it to be such, evidence that the defendant had passed other counterfeit bills, about the same time, to other persons, is admissible to show his knowledge that the bill mentioned in the indictment was counterfeit.[2]

denbush, 1 Baldw. (U. S.) 514; Hopkins *v.* Com., 3 Met. (Mass.) 464; Hutchins *v.* State, 13 Ohio 198; Pigman *v.* State, 14 Ohio 555, 45 Am. Dec. 558; Perdue *v.* State, 2 Humph. (Tenn.) 494; Owen *v.* State, 5 Sneed (Tenn.) 493; State *v.* Morton, 8 Wis. 352.

1. Proof of Guilty Knowledge. — State *v.* Antonio, 3 Brev. (S. Car.) 562.

All Circumstances Showing Guilty Knowledge May Be Proved. — It is lawful to prove that the prisoner attempted to utter the note at different times and places, where it had been suspected and challenged as false; that he declared it to be genuine and true; or that he attempted to secrete himself; or that he avoided the officers; or any other facts of a similar nature tending to evince the guilty knowledge of the prisoner; since by words and actions only can this knowledge be discovered. State *v.* Smith, 5 Day (Conn.) 176, 5 Am. Dec. 132.

Material Fact and Must Be Proved. — The guilty knowledge of the defendant is a material fact, and it is incumbent on the prosecution to prove it. State *v.* Morton, 8 Wis. 352.

Prisoner's Conversation. — Evidence of the prisoner's conversation with one who had passed other counterfeit bills of the same bank, thereby indicating his knowledge of its character, has been held admissible. State *v.* Smith, 5 Day (Conn.) 176, 5 Am. Dec. 132.

Conflicting Statements — Affidavit Made at Previous Term. — For the purpose of showing that the defendant in an indictment for uttering and passing a counterfeit bank bill has made conflicting statements in regard to the person from whom he received it, an affidavit made by him at a previous term, setting forth that an absent witness would testify, if present, that he lent the bill to the defendant, and that so far as he knew the defendant was not aware of its counterfeit character, is admissible. Com. *v.* Starr, 4 Allen (Mass.) 301.

Spurious as Distinguished from Counterfeit Bills — Bills Signed and Unsigned. — In State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168, evidence that the prisoner on the same day, and at the same gambling sitting, passed as genuine spurious, as distinguished from counterfeit, bank bills, and that when arrested he had several such bills, both signed and unsigned, in his possession, was held admissible for the purpose of showing that he knowingly passed the counterfeit bill with the uttering of which he was charged.

Arrest for Passing Bad Money Previously. — In Payson *v.* Everett, 12 Minn. 216, an action to recover the sum paid for an alleged worthless bill, it was held error to admit evidence to prove that the defendant had before passed bad money and had been "taken up for it." The court said: "It had no tendency to show that the bill in question in this action was bad or worthless. Testimony of this nature is sometimes admitted to show guilty knowledge on the part of a party charged with uttering counterfeit money, but not for the purpose of showing that the money uttered was counterfeit." See also People *v.* Stewart, 5 Mich. 243.

Aiders and Abettors. — If it is shown that a conspiracy existed between A and B, and that B, in pursuance thereof, put off such counterfeit bills, these acts of B are as strong evidence against A to prove his knowledge of the bill in question being counterfeit as though he had personally done the same act. State *v.* Spalding, 19 Conn. 233, 48 Am. Dec. 158.

Imperfect Identification. — It is relevant to the question of guilty knowledge to show that on the same evening and in the same town there were other instances of the same offense, even though the person guilty of it could only be identified with the respondent in general appearance. People *v.* Clarkson, 56 Mich. 161.

2. Evidence of Having Passed Similar Bills. — People *v.* Frank, 28 Cal. 507; State *v.* Tindal, 5 Harr. (Del.) 488; Steele *v.* People, 45 Ill. 152; State *v.* McAllister, 24 Me. 139; Com. *v.* Percival, Thach. Cr. Cas. (Mass.) 293; Com. *v.* Bigelow, 8 Met. (Mass.) 235; State *v.* Van Houten, 3 N. J. L. 248, 4 Am. Dec. 407; State *v.* Robinson, 16 N. J. L. 507; State *v.* Houston, 1 Bailey L. (S. Car.) 300; Hendrick *v.* Com. 5 Leigh (Va.) 707.

In State *v.* Twitty, 2 Hawks (9 N. Car.) 248, it was held that such evidence was admissible notwithstanding it might fix upon the defendant other charges besides that on which he was being tried.

For the purpose of proving guilty knowledge, evidence is admissible that the defendant previously passed similar counterfeit coins, although an indictment is pending against him for such passing. Com. *v.* Stearns, 10 Met. (Mass.) 256.

Efforts to Procure Other Counterfeit Money. — Evidence that the prisoner endeavored to engage a person to procure counterfeit money for him; that he inquired whether such person had brought him any; and of declarations that he intended to cultivate the acquaintance of a counterfeiter, and intended to remove to a place near his residence, etc., is admissible as tending to show the *scienter*. Finn *v.* Com., 5 Rand. (Va.) 701.

Sanctioning Wife's Passing. — A witness testified that the defendant's wife had sold him a twenty-dollar counterfeit bill belonging to the defendant, in his absence, and that the defendant was subsequently advised of the transaction and sanctioned it. This was not the bill

c. POSSESSION OF OTHER COUNTERFEIT MONEY. — Evidence that the prisoner had in possession other counterfeit money is admissible to prove the *scienter*.[1]

for which he was indicted, but the transaction took place about the time of the offense alleged. The evidence was admissible to show the *scienter*. Bersch *v.* State, 13 Ind. 434, 74 Am. Dec. 263.

Notes Very Different in Appearance. — Where notes are so different in appearance that the knowledge of one being counterfeit would not be a reasonable ground to believe the other was so, the evidence is not admissible, unless there is some connection between the acts of passing both of them. But evidence of passing a note of another bank, at another time, should be ruled out; and if it is given without objection, the jury will be instructed not to consider it. U. S. *v.* Roudenbush, 1 Baldw. (U. S.) 514. See also Stalker *v.* State, 9 Conn. 341; Morris *v.* State, 8 Smed. & M. (Miss.) 762.

Notes of Same Appearance and Manufacture. — But evidence of passing notes of the same appearance and manufacture, at other times and to other persons, is admissible, if their general resemblance to the one laid in the indictment is such that a person who knew that the one was a counterfeit could not reasonably believe that the others were genuine. Com. *v.* Snell, 3 Mass. 82; Com. *v.* Houghton, 8 Mass. 110.

Subsequent Passing. — It is not competent to show that, two or three days after the transaction in question, the prisoner passed two other counterfeit notes to other persons, the said notes not purporting to have been issued by the same bank as the one laid in the indictment, and the uttering of them being in no way connected with that act. People *v.* Dibble, 5 Park. Cr. Rep. (N. Y. Ct. App.) 28.

In U. S. *v.* Doebler, 1 Baldw. (U. S.) 519, it was said that it is immaterial "if there was an interval, or how long, so that there is any fair ground for presuming the two acts of uttering to have been so connected as to show a scienter in the one charged in the indictment."

Difference in Denomination. — Upon an indictment for uttering counterfeit coin, evidence may be given of a subsequent uttering by the prisoner of counterfeit coin of a different denomination from that mentioned in the indictment, in order to show guilty knowledge. The difference in denomination of the coin goes to the weight of the evidence, but not to its admissibility. Reg. *v.* Foster, Dears. C. C. 456, 1 Jur. N. S. 407, 3 C. L. R. 681, 24 L. J. M. C. 134, 6 Cox C. C. 521.

A Prior Conviction for uttering counterfeit coin cannot be put in evidence to prove *scienter* in a later case. Reg. *v.* Goodwin, 10 Cox C. C. 534. See also Reg. *v.* Martin, 18 W. R. 72, 21 L. T. 469.

Proposition to Pay Off Another's Employees for Sixty Cents on the Dollar. — In Snow *v.* State, 9 West. L. J. 420, 1 Ohio Dec. (reprint) 426, it was held that, on the trial of a party for uttering and publishing a counterfeit banknote on the 19th day of December, 1850, it is not competent for the state, in order to establish guilty knowledge, to offer evidence that some time in the month of October preceding the defendant proposed to a contractor "to pay off his hands for sixty cents on the dollar."

1. Evidence of Possession of Other Counterfeit Money. — U. S. *v.* Noble, 5 Cranch (C. C.) 371; State *v.* Spalding, 19 Conn. 233, 48 Am. Dec. 158; McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510; Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668; People *v.* Molins, (Gen. Sess.) 7 N. Y. Crim. Rep. 51; People *v.* Davis, 21 Wend. (N. Y.) 309; State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168; State *v.* Petty, Harp. L. (S. Car.) 61; State *v.* Williams, 2 Rich. L. (S. Car.) 418, 45 Am. Dec. 741.

On an indictment for uttering forged banknotes evidence may be given on the part of the government that a parcel of counterfeit checks and drafts on other, banks, and others printed on paper not filled up, were found in the defendant's possession. U. S. *v.* Noble, 5 Cranch (C. C.) 371.

Large Quantity of Counterfeit Coin in Possession. — In Rex *v.* Fuller, R. & R. C. C. 308, it was held that having in possession a large quantity of counterfeit coin is evidence of having procured it with intent to utter, unless there are other circumstances to induce a belief that the defendant was the maker.

Similar Forged Order in Possession of Defendant or Accomplice. — The *scienter* may be proved by the fact of similar counterfeit orders being found in the possession of the defendant or of an accomplice in passing them. U. S. *v.* Hinman, 1 Baldw. (U. S.) 292.

Counterfeiting and Passing Must be Proved First. — After evidence that the money was counterfeit, and that the defendant had passed it, it is admissible in order to prove the *scienter* to show that he had in his possession and had attempted to pass other counterfeit notes of the same kind to other persons, the day after he passed those upon which the prosecution was based. Hendrick *v.* Com., 5 Leigh (Va.) 707. See also People *v.* Stewart, 5 Mich. 243. *Compare* Stalker *v.* State, 9 Conn. 341.

Notes Secreted in Prisoner's House. — Proof that other counterfeit notes were found secreted in the prisoner's house and in possession of his wife, at about the time of his arrest, is admissible to show the *scienter*. Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

Similar Coin under Peculiar Circumstances. — Having a large quantity of counterfeit coin in possession, many of each sort being of the same date, and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew the coin was counterfeit and intended to use it. Reg. *v.* Jarvis, Dears. C. C. 552, 1 Jur. N. S. 1114, 25 L. J. M. C. 30, 7 Cox C. C. 532.

Possession Evidence of Intent to Circulate. — Having counterfeit coin in possession is evidence of procuring it with intent to circulate it. Rex *v.* Fuller, R. & R. C. C. 308.

Unfinished Coin Detained as Evidence. — Unfinished counterfeit coin may be detained as evidence to be used on the trial of the person in whose possession it is found, though some one else may claim to be the owner thereof. Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68.

d. Possession of Instruments and Materials. — On an indictment for coining and passing counterfeit money, the possession of instruments for coining or making may be given in evidence to show the guilty knowledge of the defendant.[1] It has been held that, on an indictment for having possession of spurious banknotes with guilty intent, it is not competent to prove that appliances and material for the manufacture of coin were found in the possession of the defendant, in order to show his knowledge of the counterfeit character of the notes, his control and use of the same, or his criminal intent as to their use.[2]

e. When Inferred. — On an indictment for having in possession counterfeit gold dust, the prosecution proved the spuriousness of the dust and an attempt to pass it, and it was held that the guilty knowledge would be inferred.[3]

And the Sheriff May Seize Such Coin, finished or unfinished, found in the possession of a person arrested by him, as a measure of preventive justice. Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68.

Notes Supposed to Be Counterfeit. — Evidence that the defendant had in his possession other notes supposed to be counterfeit is admissible in evidence to show his knowledge of the counterfeit character of the note passed by him. Any circumstances which go to show this knowledge are clearly admissible. State *v.* Petty, Harp. L. (S. Car.) 61.

Possession by the Defendant's Wife of fragments of banknotes, apparently cut for the purpose of making alterations similar to those for which the defendant is indicted, is not competent evidence against him. People *v.* Thoms, 3 Abb. App. Dec. (N. Y.) 571.

Indictment for Passing Counterfeit Coin — Possession of Banknotes. — In an indictment for passing counterfeit coin, evidence of the possession of counterfeit banknotes is not admissible to prove the *scienter*, but the possession of quantities of counterfeit coin of a different denomination from that laid in the indictment is admissible. U. S. Goughnour, 2 Pittsb. (Pa.) 369.

In Lane *v.* State, 16 Ind. 14, it is left undecided whether, on the trial of a party for passing counterfeit gold coin, proof of his having in his possession and attempting to conceal counterfeit banknotes is admissible to establish the *scienter*.

The Possession of Counterfeit Money Five Days After may be given in evidence to show *scienter*. Harrison's Case, 2 Lew. C. C. 118.

Proof Tending to Connect Another Person with the Accused as a Particeps Criminis will not justify the introduction in evidence of counterfeit bills found upon such other party fifty days after the sale charged, though such bills be of the same manufacture as those proved to have been sold by the defendant, there being no evidence of any intercourse or association between the defendant and such other party during the intervening time. Griffin *v.* State, 14 Ohio St. 55.

Contents of Letter Received by Defendant but Not Opened. — On an indictment for having counterfeit bank bills with intent to pass them, knowing them to be false, evidence of previous declarations of the defendant showing that he was then engaged in the business of passing counterfeit money is admissible, but the contents of a letter containing counterfeit money received by him at the post-office, and immediately taken from his possession before he had opened it, cannot be proved. Com. *v.* Edgerly, 10 Allen (Mass.) 184.

1. Possession of Instruments for Coining. — State *v.* Antonio, 3 Brev. (S. Car.) 562.

Having Implements Some Months Before. — Proof that the defendant had counterfeiting implements in his possession some months before is inadmissible. State *v.* Odel, 3 Brev. (S. Car.) 552.

When Offense Is Complete. — The offense is complete when the defendant knowingly has a plate for counterfeiting in his possession, and secretly keeps it. In such cases intent plays no part, and proof of it is unnecessary. Sasser *v.* State, 13 Ohio 453; Sutton *v.* State, 9 Ohio 133.

Implements Need Not Have Been Used. — Upon an indictment for having in possession implements for coining it is not necessary to prove that they have been actually used for making money. Rex *v.* Ridgelay, 1 Leach C. C. 189, East P. C. 171.

Wife's Possession. — The fact of a wife's attempting to break up coining implements at the time of her husband's apprehension, if done with the object of serving him, is no evidence of guilty possession. Reg. *v.* Booker, 2 Cox C. C. 272.

The Presumption in such a case is that the implements are in the possession of the husband, unless it be shown that the wife was acting separately and without her husband's sanction. Reg. *v.* Booker, 2 Cox C. C. 272.

Child's Possession. — Where coining implements were found in a house occupied by a man and his wife and their ten-year-old child, the jury was instructed to acquit the child of a felonious possession. Reg. *v.* Booker, 2 Cox C. C. 272.

2. Bluff *v.* State, 10 Ohio St. 547.

3. People *v.* Page, 1 Idaho 189; People *v.* Sloper, 1 Idaho 158.

Passing Counterfeit to One Acting as Servant of Another. — If the defendant has uttered and passed as true a counterfeit bill to one who in taking it acted simply as the servant of another, having no interest in the transaction, the jury may nevertheless find as a fact an intent to defraud that person, if the defendant did not know him to be a servant and dealt with him as a principal, although the evidence would also support an allegation of an intent

f. RES GESTÆ. — The prosecutor is at liberty to prove the *scienter* by circumstances happening at other times and in relation to other money. He may show the whole conduct of the prisoner at the time of passing the note for which he is indicted, his having in possession or passing other counterfeit notes of the same or a different appearance, everything he said or did at the time, as a part of the *res gestæ*, indicative of his knowledge of the character of the notes he has about him or is passing.[1]

3. **Fraudulent Intent.** — It must be shown by the proof that in making, passing, possessing, etc., the defendant had an intent to defraud.[2]

4. **Existence of Bank.** — Where all the essential ingredients of the crime have been proved, no proof of the existence of the bank upon which the notes are purported to have been drawn is necessary,[3] unless the statute requires it specially, or an intent to defraud some particular bank is charged in the indictment;[4]

to defraud the unknown principal. Com. *v.* Starr, 4 Allen (Mass.) 301.

1. Res Gestæ. — State *v.* Smith, 5 Day. (Conn.) 176, 5 Am. Dec. 132; McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510.

Upon a trial of an indictment charging the defendant and others with passing counterfeit bills, after evidence tending to show that the defendant had supplied the bills to the persons who actually distributed them, the circumstances of the defendant, showing his situation and relations with other persons in whose possession bills from the same plate had been found in large quantities, are admissible in evidence as parts of the *res gestæ*, as showing his facilities for supplying the bills and the commission of the offense. U. S. *v.* Taranto, 74 Fed. Rep. 219.

Evidence of Conversation and Confession. — Where the information is for counterfeiting only, and no money was passed, and the prosecutor has been unable to get hold of any of the money to produce, evidence of what the party said and confessed respecting his making counterfeit coin is proper to be given to the jury. State *v.* Phelps, 2 Root (Conn.) 87; State *v.* Ford, 2 Root (Conn.) 93.

In Reg. *v.* Attwood, 20 Ont. Rep. 574, in the course of conversation between the accused and a detective concerning the purchase of counterfeit money, the former asked the latter whether he had received a letter written by him (the defendant), stating his desire to purchase counterfeit money, and upon the detective showing the defendant the letter, he admitted it was his. It was held that the letter was admissible as forming part of the subject-matter of the conversation. See the titles CONFESSIONS, vol. 6, p. 520; RES GESTÆ.

2. Intent to Defraud. — U. S. *v.* Burns, 5 McLean (U. S.) 23; Hooper *v.* State, 8 Humph. (Tenn.) 93; Williams *v.* State, 9 Humph. (Tenn.) 83; People *v.* Molins, (Gen. Sess.) 7 N. Y. Crim. Rep. 51.

Intent May Be Presumed. — But the intent may be presumed from the passing for value to an innocent person. McGregor *v.* State, 16 Ind. 9.

Presumption Arises from Making. — And so a presumption of an evil or unlawful intent arises when the making of counterfeit coin is established. But this presumption may be rebutted by proof offered by the defendant. State *v.* McPherson, 9 Iowa 53; U. S. *v.* Burns, 5 McLean (U. S.) 23.

In People *v.* Farrell, 30 Cal. 316, the defendant was indicted for having counterfeit coin in his possession with intent to pass the same to defraud F. and others. The evidence tended to prove that the accused had a large amount of counterfeit coin in his possession for the purposes of sale, and that F., acting in concert with the police, approached the defendant and represented to him that he was one of the "brotherhood," and, having gained his confidence, succeeded in purchasing of him counterfeit coin of the nominal value of fourteen hundred dollars. The price was paid and the coin was delivered. It was insisted that the evidence introduced had no tendency to prove the indictment, but the court said: "It may be true that this evidence does not tend to prove an intent on the part of the defendant to defraud Fargo, but that it manifests an intent to defraud or aid in defrauding 'others' there can be no question."

Effect of Indictments Pending. — In order to prove the criminal intent, the state may show that about the time the bill was passed the defendant uttered other counterfeit bills on the same bank; and the fact that indictments are pending against the defendant, or that they have been tried, will not affect the admissibility of the evidence. McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510.

Acquittal. — Or that he has been acquitted upon such indictments; but it goes to weaken the testimony. State *v.* Houston, 1 Bailey L. (S. Car.) 300.

See also *supra*, this title, *Making Counterfeit Money — Elements of Offense — Intention to Deceive.*

3. Proof of Existence of Bank. — U. S. *v.* Mitchell, 1 Baldw. (U. S.) 366; McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510; Jones *v.* State, 11 Ind. 360; Kennedy *v.* Com., 2 Metc. (Ky.) 36; State *v.* Hayden, 15 N. H. 355; People *v.* Chadwick, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 163; People *v.* Peabody, 25 Wend. (N. Y.) 472; People *v.* Davis, 21 Wend. (N. Y.) 310; Com. *v.* Smith, 6 S. & R. (Pa.) 568; State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678.

4. Statute Requiring. — If the statute requires the allegation that the bank was a duly incorporated bank, such fact must be proved. Benson *v.* State, 5 Minn. 19.

Charging Fraud upon Some Particular Bank. — And so when the intent is charged to have been to defraud a certain bank, or the banks purporting to have issued the notes, proof of

and then proof of only the most general character is requisite.[1]

5. Production of Counterfeits at Trial. — The counterfeit coins, bills, or other subjects of counterfeiting must be produced on the trial,[2] or their absence must be satisfactorily accounted for.[3]

the existence of the bank must be given, and the bank shown to be a real body. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168; People *v.* Peabody, 25 Wend. (N. Y.) 473. See also Com. *v.* Simonds, 11 Gray (Mass.) 306; Com. *v.* Whitemarsh, 4 Pick. (Mass.) 233; Com. *v.* Houghton, 8 Mass. 107; Com *v.* Carey, 2 Pick. (Mass.) 47; State *v.* Van Hart, 17 N. J. L. 327; State *v.* Twitty, 2 Hawks (9 N. Car.) 248; State *v.* Ward, 2 Hawks (9 N. Car.) 443; Sasser *v.* State, 13 Ohio 453; White *v.* Com., 4 Binn. (Pa.) 418; Murray *v.* Com., 5 Leigh (Va.) 720; State *v.* Morton, 8 Wis. 352. *Compare* State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444. And see 5 ENCYC. OF PLEADING AND PRACTICE 290.

1. People *v.* Davis, 21 Wend. (N. Y.) 309; People *v.* Peabody, 25 Wend. (N. Y.) 472.

Proof that the Bank Is Known and Acting as a Corporate Company, and as such issues bills which come within the statute, is sufficient in *California*. People *v.* McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159.

Uttering an Admission of Existence of Bank. — Uttering as true a note purporting to be issued by a bank is an admission by the utterer of the existence of the bank sufficient to prove its existence in the absence of evidence to the contrary. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

Proof by Reputation. — Proof of incorporation by reputation has been held sufficient. People *v.* Ah Sam, 41 Cal. 645. But see State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

Parol Evidence. — On a prosecution for passing a counterfeit bill in imitation of those issued by a certain bank, parol evidence is admissible to show that the person whose name is appended to the bill as president of the bank was in fact president. State *v.* Smith, 5 Day (Conn.) 176, 5 Am. Dec. 132.

But parol evidence was held inadmissible in *Tennessee* to prove the existence of the bank. Trice *v.* State, 2 Head (Tenn.) 591.

Actual Existence Sufficient. — Under the *Wisconsin* statute it is unnecessary to show the legal existence of the bank by which the bill alleged to be counterfeited purports to have been issued, or its authority to issue such bills. But it is sufficient to show its actual existence by proving that it has a place of business; that it has bills issued and in general circulation, etc. State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678.

2. Production of Counterfeits at Trial. — State *v.* Orsborn, 1 Root (Conn.) 152; Smith *v.* Holebrook, 2 Root (Conn.) 45.

3. Kirk *v.* Com., 9 Leigh (Va.) 627; Pendleton *v.* Com., 4 Leigh (Va.) 694, 26 Am. Dec. 342. See also the title SECONDARY EVIDENCE.

In Com. *v.* Bigelow, 8 Met. (Mass.) 235, it was held that the defendant's conversation respecting a bill which he had passed, if made after passing the bill, was not admissible to prove the fact that the bill was counterfeit without the production of the bill itself, or without proof of its destruction, or that it was in the possession or control of the accused.

In State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678, for the purpose of showing the defendant's guilty knowledge, the state introduced witnesses to show that he had passed other counterfeit bills of the same denomination on the same bank as the counterfeit bill laid in the indictment. The evidence was objected to on the ground that the bills about which the witnesses were interrogated were not produced in court; and it was insisted that, in order to render this testimony in regard to passing other bills admissible, those bills should have been produced in court if within the reach of the prosecution, or notice must have been given to the defendant to produce them, and he must have failed to do so after it appeared that they were in his possession. The court held that this position was sound, and stated the correct rule of evidence on the point.

On the trial of an indictment for having in possession counterfeit banknotes, the defendant cannot be compelled to furnish evidence against himself by producing the notes; nevertheless the contents of the notes cannot be proved by parol evidence unless notice to produce them has been given according to the rule of practice in civil cases. Armitage *v.* State, 13 Ind. 441.

Evidence may be given that the defendant destroyed the notes to prevent their being produced. State *v.* Ford, 2 Root (Conn.) 93.

On the trial of a person charged with passing counterfeit notes, it is competent to prove that he has passed other counterfeit paper, without producing it, if it be out of the jurisdiction of the court. Reed *v.* State, 15 Ohio 217.

In People *v.* Lagrille, 1 Wheel. Cr. Cas. (N. Y.) 412, the court laid down the following rules of evidence: First, that evidence of passing other forged bills of the same description, or showing the same in the possession of the prisoner, and notice, may be given in evidence to prove the *scienter*, if such bills be produced in court; second, that evidence to the same effect may be given by parol, if it be proved that such notes are destroyed; third, that the like evidence may be given by parol, if it be shown that such notes are in the prisoner's possession, giving him notice to produce such notes; fourth, that it is inadmissible to give in evidence other notes of a different denomination, unless such notes be produced to the court.

Coin Lost while Witness Testifying. — In Reg. *v.* Robinson, 10 Cox C. C. 107, the defendant was charged with uttering a medal resembling in size, figure, and color a half sovereign. At the trial the medal was produced by a witness, who stated that it was the same in diameter as a half sovereign, and somewhat similar in color, that on the obverse side was the head of the Queen, similar to that on a half sovereign, but that the legend was different. When about to describe the reverse, the coin accidentally dropped and was lost. The medal had not been shown to the jury, and secondary evidence was not given of what was on the

6. Competency of Witnesses — *a.* ACCOMPLICES. — The jury should be instructed that it is unsafe to convict on the uncorroborated evidence of accomplices.[1]

b. PERSONS NOT OFFICERS OF BANK. — Persons other than officers of banks are competent witnesses to prove that a bill which purports to have been drawn on a certain bank is a counterfeit.[2]

c. EXPERTS. — Experts may be permitted to testify to the false character of the bills, without requiring proof that there is a bank in existence issuing genuine bills of which those in question might be counterfeits.[3]

7. Judicial Notice. — The courts will take judicial notice of the legal coins of the United States, including those made current by Act of Congress, and, it seems, of paper currency; therefore the existence of these coins need not be proved.[4]

reverse. It was held that there was evidence to go to the jury that the medal resembled in figure a current coin.

1. Accomplice. — Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668. In this case it is held that, the evidence of accomplices being unsupported, it is unsafe, because of its corrupt and suspicious source, to convict upon it without confirmation. The court should advise the jury to acquit; but if upon the whole evidence the jury should feel convinced beyond a reasonable doubt that the defendant is guilty, their verdict will not be disturbed.

Such Evidence Unsupported — Insufficient. — The evidence of an accomplice showing that he received the counterfeit coin charged in the indictment from the defendant, unsupported by corroborating evidence connecting the defendant with the coin described, is insufficient to sustain a verdict of guilty. State *v.* Pepper, 11 Iowa 347. See Reg. *v.* Rogers, 2 Moo. C. C. 85; Reg. *v.* Williams, C. & M. 259, 41 E. C. L. 145.

For a Full Discussion of this question, see the title ACCOMPLICES, vol. 1, p. 398.

Feigned Accomplice. — The rule that a defendant cannot be convicted of a criminal offense on the testimony of an accomplice, unless the same is corroborated, does not apply to a feigned accomplice. People *v.* Farrell, 30 Cal. 316.

Act of One, Act of All. — If there is a concert of action between two or more to pass a counterfeit note, or any joint or concurrent action in passing it, the act of one is evidence against the other, and the possession of counterfeit notes by one is the possession of all. U. S. *v.* Hinman, 1 Baldw. (U. S.) 292; Martin *v.* Com., 2 Leigh (Va.) 745. See the title CONSPIRACY, vol. 6, p. 830.

2. Persons Not Officers of the Bank. — State *v.* Carr, 5 N. H. 367; State *v.* Woodruff, Tappan (Ohio) 58; State *v.* Tutt, 2 Bailey L. (S. Car.) 44, 21 Am. Dec. 508; State *v.* Anderson, 2 Bailey L. (S. Car.) 565; State *v.* Hooper, 2 Bailey L. (S. Car.) 37, *denying* State *v.* Petty, Harp. L. (S. Car.) 59. See also Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; State *v.* Lawrence, Brayt. (Vt.) 78.

No one is competent to testify as to the genuineness of a signature who is not acquainted with the signer's handwriting from seeing him write, or from frequently seeing specimens of it, or from a comparison before the jury of the questionable handwriting with specimens produced, admitted, or clearly proved to be not only genuine, but not got up for the occasion. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

But a bill may be proved to be counterfeit by the person who knows the signatures of the president and cashier by having seen the bills in circulation. Tharpee *v.* Gisburne, 2 C. & P. 21, 12 E. C. L. 8; Greaves *v.* Hunter, 2 C. & P. 477, 12 E. C. L. 225; Com. *v.* Carey, 2 Pick. (Mass.) 47; State *v.* Carr, 5 N. H. 367; Furber *v.* Hilliard, 2 N. H. 480; Johnson *v.* Daverne, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; State *v.* Allen, 1 Hawks (8 N. Car.) 6, 9 Am. Dec. 616; Com. *v.* Smith, 6 S. & R. (Pa.) 568; State *v.* Ravelin, 1 D. Chip. (Vt.) 295; Martin *v.* Com., 2 Leigh (Va.) 745.

A witness acquainted with the handwriting of the president of the bank will be permitted to prove the falsity of the signatures to the bill. State *v.* Stalmaker, 2 Brev. (S. Car.) 1.

A witness is competent to prove that a note is counterfeit, who has been for ten years employed as cashier of a bank, and in that capacity has received and passed away a great number of the notes of the bank, without ever having had one returned as a counterfeit, and who swears that he believes he could readily distinguish between a genuine and a counterfeit note, not only from the handwriting of the signature, but also from the paper, engraving, and general appearance of the note. State *v.* Harris, 5 Ired. L. (27 N. Car.) 287.

In People *v.* Badger, 1 Wheel. Cr. Cas. (N. Y. Ct. Sess.) 543, it was held that, in order to prove the signatures alleged to be forged, the testimony of those who have seen the parties write, or have corresponded with them, must be given. In the absence of such evidence, the testimony of brokers and others well acquainted will be received.

3. Experts. — Jones *v.* State, 11 Ind. 357; Johnson *v.* State, 2 Ind. 652. See also Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

Merchants and Others. — The testimony of merchants and others who are in the habit of receiving, scrutinizing, and paying away banknotes is competent to prove them counterfeit. Watson *v.* Cresap, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572.

Bankers. — Bankers are also competent. Atwood *v.* Cornwall, 28 Mich. 336, 15 Am. Rep. 219.

For a Full Discussion of this topic, see the title EXPERT AND OPINION EVIDENCE.

4. Judicial Notice. — U. S. *v.* King, 5 McLean (U. S.) 208; U. S. *v.* Burns, 5 McLean (U. S.) 23.

3. **Evidence in Defense.** — When a *prima facie* case has been made out by the prosecution, it is competent for the defendant to rebut it. This he can do by facts and circumstances tending to show that he supposed the bill or coin was genuine; that it was so in fact; or that he resorted to the ordinary and approved sources of information to ascertain its character, and the like.[1]

XI. **PUNISHMENT.** — **In Ancient and Mediæval Times** counterfeiting was deemed a treason, sometimes high and sometimes petit, and was punishable accordingly.[2]

In Modern Times, in both England and the United States, it is regulated in all of its various phases by statute, which of course fixes its punishment.[3]

At Common Law in England counterfeiting the king's money was treason and a felony; but passing, uttering, etc., and, it seems, counterfeiting foreign coin current there, were only misdemeanors.[4]

Now in England, by Statute, it is a felony to counterfeit current coin of any kind.[5]

At Common Law in the United States, if it was a crime at all, counterfeiting was only a misdemeanor.[6]

Present State of the Law. — But it is now regulated entirely by statutes, the state statutes usually declaring it to be a felony,[7] and the federal statutes making it a misdemeanor only.[8]

National Banks. — National courts will judicially take notice of all national banks. U. S. *v.* Williams, 4 Biss. (U. S.) 302. See also State *v.* Randall, 2 Aik. (Vt.) 89.

See, for a Full Discussion, the title JUDICIAL NOTICE.

1. Evidence in Rebuttal. — State *v.* Morton, 8 Wis. 352.

"Counterfeit Detector." — Proof that the defendant examined a "counterfeit detector," to see whether the bill was genuine or not, is admissible in defense. State *v.* Morton, 8 Wis. 352.

Received in Ordinary Course of Business. — That the defendant received the money in the ordinary course of business is a good defense to a charge of having counterfeit money in possession. U. S. *v.* Kenneally, 5 Biss. (U. S.) 122.

Good Character may also be shown as evidence of his intention. U. S. *v.* Kenneally, 5 Biss. (U. S.) 122. See also the title CHARACTER (IN EVIDENCE).

Drunkenness of the accused at the time of the passing of the alleged counterfeit bill is a proper matter to be submitted to the jury, and should have its just weight in determining whether the defendant knew the bill to be counterfeit. Pigman *v.* State, 14 Ohio 555, 45 Am. Dec. 558.

But drunkenness is no defense if the defendant was possessed of his reason and was capable of knowing whether the bill passed by him was good or bad. U. S. *v.* Roudenbush, 1 Baldw. (U. S.) 514.

Intent to Pass in Another State is no defense. See Com. *v.* Cone, 2 Mass. 132; Com. *v.* Davis, 11 Gray (Mass.) 4.

Entire Consideration. — To constitute a sale or exchange within the statute, the fact that the defendant did not receive a consideration for a transfer of the entire interest in the bill is no defense. State *v.* Fitzsimmons, 30 Mo. 236.

Genuine Bills of the Particular Denomination. — Nor is it a defense that genuine bills of the denomination charged were never issued by the bank. State *v.* Fitzsimmons, 30 Mo. 236; Trice *v.* State, 2 Head (Tenn.) 591. See Com. *v.* Whitmarsh, 4 Pick. (Mass.) 233.

2. By a Law of the Emperor Constantine false coiners were declared guilty of high treason, and were condemned to be burned alive. 2 Code Theod., *De Falsa Moneta*, l. 9.

In Athens they were punished capitally. In England, before the time of Edward III., counterfeiting was considered petit treason; in Edward III.'s reign it was made high treason. 4 Bl. Com. 84, 88.

3. 24 and 25 Victoria, c. 98, 99; Rev. Stat. U. S., §§ 5415, 5457, 5458. And see the various state statutes.

4. 1 Hawk. P. C., §§ 55, 56; East Cr. L., c. 4, § 26; Fox *v.* Ohio, 5 How. (U. S.) 410; U. S. *v.* Field, 16 Fed. Rep. 778.

5. 24 and 25 Vict., c. 99.

6. May's Cr. Law, § 94; Wilson *v.* State, 1 Wis. 184.

7. See various state statutes. Harman *v.* State, 11 Ind. 311; Murray *v.* Com., 13 Met. (Mass.) 514; State *v.* Knight, Tayl. (3 N. Car.) 65.

Hard Labor. — By the *Pennsylvania* statute punishment at hard labor may be inflicted upon one convicted of passing a counterfeit note of a bank of another state. Lewis *v.* Com., 2 S. & R. (Pa.) 551.

8. U. S. *v.* Coppersmith, 4 Fed. Rep. 198; U. S. *v.* Yates, 6 Fed. Rep. 861; U. S. *v.* Wynn, 9 Fed. Rep. 886; U. S. *v.* Petit, 11 Fed. Rep. 58; U. S. *v.* Field, 16 Fed. Rep. 778, and note, which see specially; and *In re* Wilson, 18 Fed. Rep. 33; Miller *v.* People, 3 Ill. 233; Wilson *v.* State, 1 Wis. 184.

Importing — Constitutional Power to Punish. — Congress has the constitutional power to punish the crime of passing, or bringing into the United States with intent to pass, counterfeit coin. U. S. *v.* Marigold, 9 How. (U. S.) 560; People *v.* White, 34 Cal. 183.

COUNTERPART. (See the title DEEDS.) — A counterpart is one of two corresponding copies of a written instrument. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts.[1] A counterpart is, properly, executed by the grantee only, and is not strictly the same as a duplicate.[2]

COUNTER SECURITY. — See the titles SUBROGATION; SURETYSHIP.

COUNTERSIGN. (See also SIGN.) — To countersign an instrument is to sign what has already been signed by a superior; to authenticate by an additional signature. The term usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing to which it is affixed, and denotes a complete execution of the paper.[3]

1. 2 Bl. Com. 296; 1 Steph. Com. 483.

2. Doe *v.* Smith, 8 Ad. & El. 255, 35 E. C. L. 387. See DUPLICATE.

3. People *v.* Brie, 43 Hun (N. Y.) 327; Fifth Ave. Bank *v.* Forty-second St., etc., R. Co., 137 N. Y. 240, in which case it was held, where the defendant's secretary and transfer agent *countersigned* and sealed a certificate of stock, and put it in circulation, that he declared in the most formal manner that it had been properly executed by the defendant, and that every essential requirement of law and by-laws had been performed to make it the binding act of the company. The court in that case said: "It is very clear that under the regulations adopted by the defendant, and pursuing the mode of procedure which it had prescribed, the final act in the issue of a certificate of stock was performed by its secretary and transfer agent, and that when he *countersigned* it and affixed the corporate seal and delivered it with the intent that it might be negotiated, it must be regarded, so long as it remained outstanding, as a continuing affirmation by the defendant that it had been lawfully issued, and that all the conditions precedent upon which the right to issue it depended had been duly observed. Such is the effect necessarily implied in the act of *countersigning*. This word has a well-defined meaning both in the law and in the lexicon. To *countersign* an instrument is to sign what has already been signed by a superior, to authenticate by an additional signature, and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing to which it is affixed, and it denotes the complete execution of the paper. (Worcester's Dict.) When, therefore, the defendant's secretary and transfer agent *countersigned* and sealed this certificate and put it in circulation, he declared in the most formal manner that it had been properly executed by the defendant, and that every essential requirement of law and of the by-laws had been performed to make it the binding act of the company."

A statute of Missouri provided for the auditing and allowance of two classes of claims, one including claims on file in the office of the quartermaster-general, denominated irregular claims, including generally quartermasters' supplies; the other including claims, such as the one in question, of officers and soldiers of the militia for services rendered during the war. The act provided for the allowance of the first class of claims by a commission, of which the quartermaster-general was a member, and directed that they should be certified by the acting quartermaster-general of the state. It authorized the acting paymaster-general to examine such of the latter class of claims as were on file in his office, and provided that when he should find them correct and just he should allow the same and indorse his allowances thereon; and required a duplicate of each claim allowed, to be filed in his office. It then directed that "he shall issue a certificate of state indebtedness for the amount allowed thereon, which certificate shall be signed by the governor and *countersigned* by the acting paymaster-general, and shall read as follows:" A form of certificate was then given, which at its foot contained on the left side the word *countersigned*, followed by a space for the name, which space was followed by the words "acting quartermaster-general of Missouri." At the left lower corner of the cretificate in question was the following signature: "J. D. Grafton, Acting Paymaster-General." It was held, that as there was a direct conflict between the mandatory provisions of the act and the form prescribed to carry them into effect, the court would construe the act so as to carry into effect the intent of the legislature displayed in it, and so as to require that the officer whose duty it was made to examine the claim upon which the certificate was issued should sign and authenticate the certificate. The court said: "The makers, in the common acceptation of the term, of the certificate were the governor and the quartermaster-general. The acting paymaster-general was required to *countersign* the instrument so signed by the other officers, when, and then only, it became a completed instrument. In the making of the paper itself the part taken by the acting paymaster-general was auxiliary and subordinate to the previous signatures of the governor and of the quartermaster-general. To *countersign* is to sign what has already been signed by a superior, to authenticate a writing." People *v.* Brie, 43 Hun (N. Y.) 317.

COUNTIES.

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CROSS-REFERENCES.

For matters of PROCEDURE, *see the title* COUNTIES, vol. 5, ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 294.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles in this work:* ADVERSE POSSESSION, vol. 1, p. 878; BOARDS OF HEALTH, vol. 4, p. 596; BRIDGES, vol. 4, p. 918; CLERKS OF COURTS, vol. 6, p. 132; CORONERS, *ante*, p. 598; COUNTY COMMISSIONERS, *post*; COUNTY-SEAT, *post*; COURTS, *and references there given*; ELECTIONS; HIGHWAYS; HOUSES OF

REFUGE AND CORRECTION; INSANE ASYLUMS; JUSTICE OF THE PEACE; LIMITATION OF ACTIONS; MUNICIPAL AID; MUNICIPAL CORPORATIONS; MUNICIPAL SECURITIES; POOR AND POOR LAWS; PRISONS; PROSECUTING ATTORNEY; PUBLIC OFFICERS; SCHOOLS; SHERIFFS, MARSHALS, AND CONSTABLES; TAXATION; TOWNS AND TOWNSHIPS; ULTRA VIRES; VAGRANCY.

I. Definition and General Characteristics. — A county is one of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; a local organization which, for the purpose of civil administration, is invested with certain functions of corporate existence.[1]

1. Definition — *United States.* — Vincent *v.* Lincoln County, 30 Fed. Rep. 749; Levy Ct. *v.* Coroner, 2 Wall. (U. S.) 501; Laramie County *v.* Albany County, 92 U. S. 307; Washer *v.* Bullitt County, 110 U. S. 564; Sherman County *v.* Simons, 109 U. S. 735.

Alabama. — *Ex p.* Selma, etc., R. Co., 45 Ala. 732; Barbour County *v.* Horn, 48 Ala. 657; Edmondson *v.* DeKalb County, 51 Ala. 105; Commissioners' Ct. *v.* Moore, 53 Ala. 25; Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Chambers County *v.* Lee County, 55 Ala. 534; Marengo County *v.* Coleman, 55 Ala. 605; Simpson *v.* Lauderdale County, 56 Ala. 64; Stanfill *v.* Court of County Revenue, 80 Ala. 290; Dunn *v.* Court of County Revenues, 85 Ala. 144.

Arkansas. — Granger *v.* Pulaski County, 26 Ark. 39; State *v.* Dorsey County, 28 Ark. 378; Henry *v.* Steele, 28 Ark. 455; Loftin *v.* Watson, 32 Ark. 414. See also Pulaski County *v.* Reeve, 42 Ark. 54.

California. — Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130; Price *v.* Sacramento County, 6 Cal. 255; Pattison *v.* Yuba County, 13 Cal. 184; People *v.* Burr, 13 Cal. 343; People *v.* Myers, 15 Cal. 33; Crowell *v.* Sonoma County, 25 Cal. 313; People *v.* McGuire, 32 Cal. 143; Sharp *v.* Contra Costa County, 34 Cal. 284; People *v.* Sacramento County, 45 Cal. 692; People *v.* McFadden, 81 Cal. 498, 15 Am. St. Rep. 66; Whittaker *v.* Tuolumne County, 96 Cal. 100; Skelly *v.* Westminster School Dist., 103 Cal. 658; Kahn *v.* Sutro, 114 Cal. 316.

Colorado. — Stermer *v.* La Plata County, 5 Colo. App. 379; Hockaday *v.* County Com'rs, 1 Colo. App. 372.

Connecticut. — Ward *v.* Hartford County, 12 Conn. 404.

Georgia. — Scales *v.* Ordinary, 41 Ga. 225.

Illinois. — Sangamon County *v.* Springfield, 63 Ill. 71; Symonds *v.* Clay County, 71 Ill. 355; Will County *v.* People, 110 Ill. 511; Harris *v.* Whiteside County, 105 Ill. 445.

Indiana. — State *v.* Buckles, 8 Ind. App. 282; Jasper County *v.* Allman, 142 Ind. 573; Edwards *v.* Jagers, 19 Ind. 413; Fulton County *v.* Rickel, 106 Ind. 503; Vigo County *v.* Daily, 132 Ind. 73.

Iowa. — Hull *v.* Marshall County, 12 Iowa 142; Jefferson County *v.* Ford, 4 Greene (Iowa) 367.

Kansas. — Beach *v.* Leahy, 11 Kan. 23; State *v.* Pawnee County, 12 Kan. 426; Pfefferle *v.* Lyon County, 39 Kan. 432.

Maine. — Emerson *v.* Washington County, 9 Me. 88.

Maryland. — McKim *v.* Odom, 3 Bland (Md.) 407; School Com'rs *v.* School Com'rs, 35 Md. 201; Talbot County *v.* Queen Anne's County, 50 Md. 245; Daly *v.* Morgan, 69 Md. 465.

Michigan. — Wayne County *v.* Detroit, 17 Mich. 401.

Minnesota. — Goodnow *v.* Ramsey County, 11 Minn. 31; Guilder *v.* Dayton, 22 Minn. 366; State *v.* McFadden, 23 Minn. 40; State *v.* Parker, 25 Minn. 215; Dosdall *v.* Olmstead County, 30 Minn. 96, 44 Am. Rep. 185.

Mississippi. — Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

Missouri. — Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Reardon *v.* St. Louis County, 36 Mo. 555; Abernathy *v.* Dennis, 49 Mo. 468; Ray County *v.* Bentley, 49 Mo. 236; Opinon of Supreme Ct. Judges, etc., 55 Mo. 295; Barton County *v.* Walser, 47 Mo. 189; State *v.* Laughlin, 75 Mo. 166

Nebraska. — Woods *v.* Colfax County, 10 Neb. 555; Olive *v.* State, 11 Neb. 13.

Nevada. — Morgan *v.* Eureka County, 9 Nev. 360.

New Hampshire. — Wooster *v.* Plymouth, 62 N. H. 208; Merrimack County *v.* Grafton County, 63 N. H. 551.

New York. — People *v.* Stout, 23 Barb. (N. Y.) 338; Albrecht *v.* Queens County, 84 Hun (N. Y.) 399; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

North Carolina. — McCormac *v.* Robeson County, 90 N. Car. 445; Dare County *v.* Currituck County, 95 N. Car. 189; Manuel *v.* Cumberland County, 98 N. Car. 9; Armstrong *v.* Dalton, 4 Dev. L. (15 N. Car.) 570.

North Dakota. — Barrett *v.* Stutsman County, 4 N. Dak. 175.

Ohio. — Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 96; State *v.* Dudley, 1 Ohio St. 452; Hamilton County *v.* Mighels, 7 Ohio St. 109; Finch *v.* Board of Education, 3 Ohio St. 37, 27 Am. Rep. 414.

Oregon. — Grant County *v.* Lake County, 17 Oregon 453, *citing* 4 Am. and Eng. Encyc. of Law 347.

Pennsylvania. — Com. *v.* Brice, 22 Pa. St. 214, 60 Am. Dec. 79; Russel *v.* Reed, 27 Pa. St. 166; Chester County *v.* Brower, 117 Pa. St. 655, 2 Am. St. Rep. 713; Williams *v.* Controllers, 18 Pa. St. 277.

South Carolina. — Carolina, etc., R. Co. *v.* Tribble, 25 S. Car. 264.

A Quasi Corporation. — It has been said that in *England* a county is not a corporation, but merely a convenient division of the kingdom, comprising a number of *quasi* corporations, such as parishes, hundreds, or wapentakes, for judicial and representative purposes, in which the king, in his executive character, is represented by the *vicecomes*, or sheriff, on whom in process of time the civil administration has almost wholly devolved.[1] In the *United States*, while it is true that a county is a political or civil division of the state, created for public and governmental purposes only, yet it is very generally invested by the statutes of the different states with corporate capacity to enable the more effectual accomplishment of these purposes.[2] But in this country counties are not corporations in the fullest sense of the term,[3] and they are commonly called *quasi* corporations.[4]

South Dakota. — Malloy *v.* Brewer, 7 S. Dak. 587.

Tennessee. — Stewart *v.* Roberts, 1 Yerg. (Tenn.) 389; Winston *v.* Tennessee, etc., R. Co., 1 Baxt. (Tenn.) 73; Maury County *v.* Lewis County, 1 Swan (Tenn.) 236.

Texas. — Whitaker *v.* Dillard, 81 Tex. 365; Hughes *v.* Dubbs, 84 Tex. 505.

Utah. — Salt Lake County *v.* Golding, 2 Utah 324.

Virginia. — Fry *v.* Albemarle County, 86 Va. 199, 19 Am. St. Rep. 879; Norfolk, etc., R. Co. *v.* Smyth County, 87 Va. 525; Wade *v.* Richmond, 18 Gratt. (Va.) 583.

Wisconsin. — School Directors *v.* School Directors, 81 Wis. 434; State *v.* Cunningham, 81 Wis. 515.

Counties are public corporations or *quasi*-corporations created by the state as a means of exercising a portion of its political power by local administration, on which are imposed a part of the sovereign authority and duty to insure domestic tranquillity and promote the general welfare within the territorial limits to which they are assigned. Chambers County *v.* Lee County, 55 Ala. 537.

Counties are local subdivisions of a state created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. Hamilton County *v.* Mighels, 7 Ohio St. 119.

A county is a political division and denominated a *quasi* corporation. It assumes on itself some of the duties of the state in a partial or detached form, and is to be considered in the light of an auxiliary of the government and as a secondary and deputy trustee of the people. Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 303; Barton County *v.* Walser, 47 Mo. 202.

Organization for Judicial Purposes Only Not a County. — It has been held that the judicial power exercised within a county is but one incident attaching to a county organization, and that it is impossible, from the very nature of a county, that it can exist alone for judicial purposes. Matter of Executive Communication, 14 Fla. 320.

Counties Palatine. — A county palatine was a term applied to certain counties in England, Chester, Lancaster, and Durham, and two other counties which were abolished as counties palatine in the time of the Tudors. The name "palatine" was derived from *a palatio*, because the owners of such counties had therein *jura regalia* as fully as the king himself; but none of these counties palatine now remain in the hands of the subject, Chester having been united to the crown by Henry III., and Durham by statutes 6 and 7 Wm. IV., c. 19 (A. D. 1837), and Lancaster by statute 1 Henry VII. (A. D. 1485). 1 Bl. Com. 117–119; 1 Steph. 120–123; 1 Minor's Inst. 54.

Counties Corporate. — Counties corporate are certain cities and towns in England to which has been granted by the crown the privilege of being governed by their own officers, and not by those counties in which they are situated. 1 Bl. Com. 120; 1 Steph. Com. 123, 124.

Parishes. — In *Louisiana* the divisions of the state corresponding to counties are called parishes. Police Jury *v.* McCormack, 32 La. Ann. 624.

Derivation of the Term. — The term "county," *comitatus*, is derived from *comes*, the count of the Franks, that is, the earl or alderman (as the Saxons called him) of the shire, to whom the government of it was intrusted. 1 Black. Com. 116.

1. English County Not a Corporation. — Russell *v.* Devon County, 2 T. R. 667; Eastman *v.* Clackamas County, 32 Fed. Rep. 24.

2. In United States Counties Invested with Corporate Capacity. — May *v.* Mercer County, 30 Fed. Rep. 246; James *v.* Conecuh County, 79 Ala. 304; State *v.* Buckles, 8 Ind. App. 282; Chester County *v.* Brower, 117 Pa. St. 647, 2 Am. St. Rep. 713; Greenville County *v.* Runion, 9 S. Car. 3. See also statutes of the various states.

3. Counties Not Corporations in Fullest Sense. — Askew *v.* Hale County, 54 Ala. 642, 25 Am. Rep. 730; Hamilton County *v.* Mighels, 7 Ohio St. 116; Heigel *v.* Wichita County, 84 Tex. 392, 31 Am. St. Rep. 63. *Compare* Chester County *v.* Brower, 117 Pa. St. 647, 2 Am St. Rep. 713.

In Hamilton County *v.* Mighels, 7 Ohio St. 116, the court said: "Neither a county nor the board of commissioners of a county is a corporation proper. It is at most but a local organization which, for purposes of civil administration, is invested with a few functions characteristic of a corporate existence."

Counties are not corporations in the fullest sense of that term. They are commonly called *quasi* corporations. They are created by the state for the purpose of government. Their functions are political and administrative, and their powers are rather duties imposed than privileges granted. Heigel *v.* Wichita County, 84 Tex. 392, 31 Am. St. Rep. 63.

4. Counties Commonly Called Quasi Corpora-

Not a Private Corporation. — While counties are to some extent created for the interest, advantage, and convenience of the people residing within their territorial boundaries, and the better to enable the government to extend to them the protection to which they are entitled, and the more beneficently to exercise over them its power,[1] they are not in any respect business corporations for private purposes or for pecuniary profit.[2] They exist only for public and governmental purposes, and are sometimes called public as distinguished from private corporations.[3]

Not a Municipal Corporation. — For the purposes of general designation, it is not uncommon to use the term "municipal corporations" in a sense including *quasi* corporations, such as counties, to distinguish public or political corporations from those which are termed private.[4] But a county is not, in a strict

tions — *United States.* — Madden *v.* Lancaster County, 65 Fed. Rep. 191.

Alabama. — Chambers County *v.* Lee County, 55 Ala. 537; Marengo County *v.* Coleman, 55 Ala. 605; Dunn *v.* Court of County Revenues, 85 Ala. 148.

California. — Price *v.* Sacramento County, 6 Cal. 255; People *v.* Sacramento County, 45 Cal. 692; People *v.* McFadden, 81 Cal. 489, 15 Am. St. Rep. 66.

Colorado. — Denver *v.* Dunsmore, 7 Colo. 328; County Ct. *v.* Schwarz, 13 Colo. 291; Stermer *v.* La Plata County, 5 Colo. App. 379.

Illinois. — Hedges *v.* Madison County, 6 Ill. 570.

Iowa. — Soper *v.* Henry County, 26 Iowa 264.

Kansas. — State *v.* Pawnee County, 12 Kan. 426.

Kentucky. — Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225.

Massachusetts. — Riddle *v.* Merrimack River Locks, etc., 7 Mass. 169.

Mississippi. — Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

Missouri. — Lincoln County *v.* Magruder, 3 Mo. App. 314; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Reardon *v.* St. Louis County, 36 Mo. 555; Ray County *v.* Bentley, 49 Mo. 236; Webb *v.* Lafayette County, 67 Mo. 353; Clark *v.* Adair County, 79 Mo. 536.

Nebraska. — Woods *v.* Colfax County, 10 Neb. 552.

New Mexico. — Donalson *v.* San Miguel County, 1 N. Mex. 263.

North Carolina. — White *v.* Chowan County, 90 N. Car. 438.

Ohio. — Gallia County *v.* Holcomb, 7 Ohio, pt. i, 233; Hamilton County *v.* Mighels, 7 Ohio St. 115; Carder *v.* Fayette County, 16 Ohio St. 353.

Pennsylvania. — Chester County *v.* Brower, 117 Pa. St. 647, 2 Am. St. Rep. 713.

See also Sherman County *v.* Simons, 109 U. S. 735.

Counties are not in the strict legal sense municipal corporations; they are sometimes called *quasi* corporations, and this designation distinguishes them on the one hand from private corporations aggregate, and on the other from municipal corporations proper, such as cities and towns, organized under charters and special statutes, and invested with more and special powers, and endowed with more of the functions of corporate life. White *v.* Chowan County, 90 N. Car. 438.

In Askew *v.* Hale County, 54 Ala. 642, 25 Am. Rep. 730, the court said: "It [a county] is a *quasi* corporation in the exercise of its corporate powers, and a governmental auxiliary in the exercise of the governmental powers intrusted to it."

Quasi-Municipal Corporations. — In some cases counties have been referred to as *quasi*-municipal corporations. Cook County *v.* Lowe, 23 Ill. App. 651; Johnson County *v.* Searight Cattle Co., 3 Wyoming 800; State *v.* Tyler, 14 Wash. 495.

1. Askew *v.* Hale County, 54 Ala. 641, 25 Am. Rep. 730.

2. **Not Private Corporations.** — Eagle *v.* Beard, 33 Ark. 501; Jefferson County *v.* Ford, 4 Greene (Iowa) 367.

3. **Sometimes Called Public Corporations** — *Alabama.* — Chambers County *v.* Lee County, 55 Ala. 537; James *v.* Conecuh County, 79 Ala. 304.

Illinois. — Sangamon County *v.* Springfield, 63 Ill. 71; Coles *v.* Madison County, 1 Ill. 160.

Kansas. — Shawnee County *v.* Carter, 2 Kan. 115.

Minnesota, — McDougal *v.* Hennepin County, 4 Minn. 184.

New Jersey. — Murphy *v.* Chosen Freeholders, 57 N. J. L. 245.

New York. — People *v.* Ingersoll, 58 N. Y. 11, 17 Am. Rep. 178.

North Carolina. — Mills *v.* Williams, 11 Ired. L. (33 N. Car.) 558.

Oregon. — Raley *v.* Umatilla County, 15 Oregon 172, 3 Am. St. Rep. 142.

Pennsylvania. — Chester County *v.* Brower, 117 Pa. St. 647, 2 Am. St. Rep. 713.

4. **Sometimes Called Municipal Corporations** — *United States.* — Laramie County *v.* Albany County, 92 U. S. 307; Tippecanoe County *v.* Lucas, 93 U. S. 108; Mount Pleasant *v.* Beckwith, 100 U. S. 524.

Alabama. — Dunn *v.* Court of County Revenues, 85 Ala. 144.

Maryland. — Talbot County *v.* Queen Anne's County, 50 Md 245.

Minnesota. — Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503; Dowlan *v.* Sibley County, 36 Minn. 430.

Mississippi. — Sutton *v.* Police Board, 41 Miss. 236.

Missouri. — State *v.* Leffingwell, 54 Mo. 458.

See also Lincoln County *v.* Luning, 133 U. S. 529.

In considering a provision in the constitution of *Missouri* forbidding the creation of corporations by special act, "except for municipal

technical sense, a municipal corporation.[1]

County and Municipal Corporation Distinguished. — Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties are superimposed upon the inhabitants thereof by the sovereign and paramount authority of the state. Moreover, a municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.[2]

Divisions of Counties. — **In England** a county is divided into an indefinite number of hundreds, which are again subdivided into tithings or towns. In some counties there are intermediate divisions made up of three or four hundreds, called lathes in Kent, and rapes in Sussex. Where a county is composed of three of these lathes or rapes, they are called trithings, which in the county of York, by an easy corruption, became "ridings."[3]

In the United States the counties of a state are very generally divided into an indefinite number of townships or towns.[4] A full discussion of these county

purposes," it is said that a corporation for municipal purposes is either a municipality, such as a city or town, created expressly for local self-government, with delegated legislative powers, or it might be a subdivision of the state for governmental purposes, such as a county. State *v.* Leffingwell, 54 Mo. 458.

In *Alabama* it has been said that the phrase "municipal corporation" is used in two distinct senses in the state constitution, as it often is in common parlance, and seems quite obvious. In its more general sense it may be made to include both towns and counties and other public corporations created by government for political purposes. In its more common and limited signification, however, it embraces only incorporated villages, towns, and cities. Dunn *v.* Court of County Revenues, 85 Ala. 146.

Chapter 686 of the *New York* Laws of 1892 declares counties to be municipal corporations. Godfrey *v.* Queens County, 89 Hun (N. Y.) 18. But in Albrecht *v.* Queens County, 84 Hun (N. Y.) 399, the court said that counties, while the statute may make them municipal corporations, are something more than corporations. They are political divisions of the state, so recognized in the constitution and beyond the power of the legislature to abrogate. See also Hughes *v.* Monroe County, 147 N. Y. 50; People *v.* Stout, 23 Barb. (N. Y.) 341.

1. Not Municipal Corporations in Strict Sense. — See cases in note 4, p. 901.

2. County and Municipal Corporation Distinguished. — Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Stermer *v.* La Plata County, 5 Colo. App. 379; Hamilton County *v.* Mighels, 7 Ohio St. 110; Fry *v.* Albemarle County, 86 Va. 195, 19 Am. St. Rep. 879.

"A radical error, fatal to the argument, is in treating the county as a municipal corporation. It has corporate characteristics, but it is not a municipal corporation, though often so termed. It is an involuntary political or civil division of the state, created by statute to aid in the administration of government. It is in its very nature, character, and purposes public, and a governmental agency or auxiliary rather than a corporation. Whatever of power it possesses, or whatever of duty it is required to perform, originates in the statute creating it. It is created mainly for the interest, advantage, and convenience of the people residing within its territorial boundaries, and the better to enable the government to extend to them the protection to which they are entitled, and the more beneficently to exercise over them its powers. All the powers with which the county is intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state. If these were not committed to the county, they must be conferred on some other governmental agency. The character of these powers, so far as counties in this state are concerned, are all for the purposes of civil and political organization. The levy and collection of taxes, the care of the poor, the supervision and control of roads, bridges, and ferries, the compensation of jurors attending the state courts, and the supervision of convicts sentenced to hard labor as a punishment for many violations of the criminal law, it is the general policy of the state to intrust to the several counties, and are all but parts of the power and duty of the state. These powers could be withdrawn by the state, in the exercise of its sovereign will, and other instrumentalities or agencies established and clothed with them." Askew *v.* Hale County, 54 Ala. 641, 25 Am. Rep. 730.

3. Division of Counties in England. — 1 Bl. Com. 116.

4. Division of Counties in the United States. — See the statutes of the various states.

subdivisions will be found in another portion of this work.[1]

II. Origin and History. — The idea of a government by means of counties comes down from the remotest period of Anglo-Saxon history. It was imported to the American colonies with the common law, and entered naturally and of course into the framing of all their colonial government, from whence it passed by easy transition and necessary consequence into the government of the states.[2]

III. Creation and Organization — **1. Source of Creation.** — Counties are created by the sovereign power of the state,[3] and, unlike municipal corporations proper, they are created without the particular solicitation, consent, or concurrent action of the people who inhabit them.[4]

Creation by Organic Law. — Sometimes new counties are created by the state constitution.[5]

Creation by Legislature. — But ordinarily this power is vested in the legislative branch of the government, limited and regulated as it may be by the organic law.[6]

By Special Enactment. — Accordingly, in the absence of constitutional restrictions, the legislature may by special enactment create counties by naming them and describing their boundaries.[7]

Under General Laws. — Or it may provide for their creation by general laws.[8]

Provision for Organization. — In the same way, it may provide by special enact-

1. See the title Towns and Townships.

2. **Origin and History of Counties.** — Eagle *v.* Beard, 33 Ark. 497. See also the preceding section.

3. **Counties Created by State.** — Askew *v.* Hale County, 54 Ala. 641, 25 Am. Rep. 730; Chambers County *v.* Lee County, 55 Ala. 537; McCormac *v.* Robeson County, 90 N. Car. 444. See also Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414.

4. **Creation Without Consent of Inhabitants.** — Askew *v.* Hale County, 54 Ala. 641, 25 Am. Rep. 730; Stermer *v.* La Plata County, 5 Colo. App. 379; McCormac *v.* Robeson County, 90 N. Car. 444; Hamilton County *v.* Mighels, 7 Ohio St. 109; Williamsport *v.* Com., 84 Pa. St. 499, 24 Am. Rep. 208.

5. **Creation by Organic Law.** — School Com'rs *v.* School Com'rs, 35 Md. 201.

6. **Creation by Legislature.** — Laramie County *v.* Albany County, 92 U. S. 308; Mount Pleasant *v.* Beckwith, 100 U. S. 524; Askew *v.* Hale County, 54 Ala. 641, 25 Am. Rep. 730; McCormac *v.* Robeson County, 90 N. Car. 444.

In McCormac *v.* Robeson County, 90 N. Car. 444, Merrimon, J., said: "Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the government, limited and regulated as it may be only by the organic law."

In People *v.* Westchester County, 147 N. Y. 15, the court said: "The constitution vests in the senate and assembly the legislative power of the state (Constitution, art. 3, § 1), and the power to divide counties or towns and to erect new counties and towns, or to change their boundaries, is legislative in its character, and is conferred upon the senate and assembly by the general grant of legislative power." Rumsey *v.* People, 19 N. Y. 46.

In *Mississippi* the constitution of the state enables the legislature to create new counties and alter the boundaries of existing ones. Portwood *v.* Montgomery County, 52 Miss. 527. But in this case the court said: "Without an express grant of power in the constitution, it would have been entirely competent for the legislature to form new counties and alter the boundaries of others at its pleasure."

In *Florida* it was held at one time that a new county, with all the rights and privileges of a county, could not be created under the constitution. Matter of Executive Communication, 14 Fla. 320.

But by art. 8, § 3, of the constitution of Florida, adopted in 1885, it was provided that the legislature shall have power to establish new counties and change county lines.

For Further Discussion of limitations imposed on the legislature by the organic law, see *infra*, this title, *Alteration of Boundaries*.

7. **Creation by Special Enactment.** — People *v.* McFadden, 81 Cal. 489, 15 Am. St. Rep. 66; People *v.* Glenn County, 100 Cal. 419; Grand County *v.* Larimer County, 9 Colo. 268; State *v.* Piper, 17 Neb. 614.

In *California* it has been held that an act creating and providing for the organization of a new county is not within the prohibition of the constitution against special and local legislation. People *v.* Glenn County, 100 Cal. 419; People *v.* McFadden, 81 Cal. 489, 15 Am. St. Rep. 66.

In *Nebraska* it was held that a special act of the legislature which provided that certain territory, the boundaries of which were given, should be designated Harlan County, and appointed certain persons as commissioners, and required them within thirty days to call an election for the purpose of electing county officers and selecting a site for the county seat, was not in conflict with the constitution which inhibits the conferring of corporate powers by special act. State *v.* Piper, 17 Neb. 614. See generally the title Statutes.

8. **Creation under General Laws.** — Jasper County *v.* Spitler, 13 Ind. 235; Behr *v.* Willard, 11 Neb. 601. See also McCormac *v.* Robeson County, 90 N. Car. 441.

ment [1] or by general law [2] for the future organization of the county through the intervention of the governor or some other existing agency, or by some agent specially appointed.

2. Mode of Establishing and Determining Boundaries. — Counties are laid out and the boundaries established as directed by the legislature.[3] Thus by statute in *Texas* it is provided that, before any county in the state not already organized as a land district under existing laws shall be recognized as such, the county court shall cause the boundary lines of the county to be surveyed and marked, and the field notes and map of such survey duly recorded and returned to the general land offices, as provided in the act.[4] The duty of determining and establishing such boundaries may be imposed on the courts,[5] or on commissioners [6] appointed for the purpose.

3. When Creation and Organization Complete — **When County Created.** — It has been held that a county may, for certain purposes at least, exist without a government, and hence may be said to be created as distinguished from organized.[7] Thus where, by statute, a county was segregated from the

1. Special Enactment Providing for Organization. — People *v.* McGuire, 32 Cal. 140; State *v.* Blasdel, 6 Nev. 40.

2. Provision for Organization by General Laws. — Jasper County *v.* Spitler, 13 Ind. 235; State *v.* Pawnee County, 12 Kan. 426; Behr *v.* Willard, 11 Neb. 601; Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106; State *v.* Cook, 78 Tex. 406. See also Keating *v.* Marble, 39 Kan. 370; Lumpkin *v.* Muncey, 66 Tex. 313.

3. Boundaries Established as Directed by Legislature. — San Bernardino County *v.* Reichert, 87 Cal. 287; Union County *v.* Essex County, 43 N. J. L. 396; Chatham County *v.* Thorn, 117 N. Car. 211

For a discussion of the rules of construction to be applied, see the title BOUNDARIES, vol. 4, p. 756.

County Lines Run by Public Authority Conclusive. — In Board *v.* Head, 3 Dana (Ky.) 489, it was held that the boundary lines of counties are matters of public concern, and when they have been run and their position ascertained by public authority, the actual line, though it may vary from the descriptive boundary designated in the statute, must be conclusively binding upon all private individuals and county officers until a different position is given to it by public authority.

Line Adopted by People in Locality. — In Ahrens *v.* Fiedler, 43 N. J. L. 400, it was held that until reliable marks can be found to indicate where the statutory line should be run, the safest guide will be the line as hitherto practically established by the people in the locality.

4. Marsalis *v.* Creager, 2 Tex. Civ. App. 368.

Rule Not Applicable to Alteration of Boundary Lines Between Old Counties. — Where a portion of territory was detached from Trinity county and attached to Polk county, it was held that the detached territory became absolutely and unconditionally a part of Polk county upon the approval of the act, and this without reference to whether the line by which the act designated the detached territory was actually run upon the ground or not. Trinity County *v.* Polk County, 58 Tex. 321. The court in this case said: "There is nothing in the proposition that appellee could not assume municipal control over the attached territory until the lines designated in the act had been run and defined. The several provisions of the statute, as well as decisions referred to by appellant as supporting that proposition, have reference solely to the creation and organization of new counties."

5. Establishing Boundaries by Courts. — Kaufman County *v.* McGaughey, 11 Tex. Civ. App. 551.

Right of County Court to Make a Second Survey. — But in Jones *v.* Powers, 65 Tex. 213, it was held that under all the laws made for the purpose of furnishing a method by which the lines of a county may be actually established upon the ground, if the lines have once been definitely fixed upon the ground by an actual survey made, reported, and approved, as required by the statute, a county court has no power to direct another survey to be made, and thereby establish a boundary line different from the one established at some former period; and that it is only when it may appear to the county commissioners' court or to the commissioner of the general land office that the boundary or part of the boundary of a county "is not sufficiently definite and well defined, that action to make it definite is authorized."

6. Establishing Boundaries by Special Commissioner. — Union County *v.* Essex County, 43 N. J. L. 396; Chatham County *v.* Thorn, 117 N. Car. 211.

Commissioners Not to Be Enjoined. — Accordingly it has been held that where commissioners have been appointed to locate a county line between two counties according to an original survey, an injunction will not lie to restrain such commissioners, on the ground that if the lines are located according to the survey being made by them the plaintiff county will sustain irreparable damage by losing territory and financial support, such commissioners being regarded as the agents of the legislature. Chatham County *v.* Thorn, 117 N. Car. 211. See also San Bernardino County *v.* Reichert, 87 Cal. 287.

Surveyor-General. — In San Bernardino County *v.* Reichert, 87 Cal. 287, the county lines were established by the surveyor-general of the state.

7. When County Is Created. — Carleton *v.* People, 10 Mich. 250; State *v.* Blasdel, 6 Nev. 40;

other portions of a territory, its boundaries defined, and a name given to it, the county was held to be created and in existence from that moment, for the purpose of bringing into being the offices pertaining to an organized county, though the county was at the time unorganized and the offices were consequently vacant.[1]

When Organization Is Perfected. — A county completely organized has been held to signify a county having within itself the necessary means for performing its functions independently of any other county, with its lawful offices and machinery for carrying out the powers and performing the duties belonging to that class of corporate bodies.[2]

Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106.

"Established" County — Minnesota. — In State *v.* McFadden, 23 Minn. 40, the court said: "An established county, in the constitutional sense, is a territorial subdivision of the state, with certain prescribed boundaries, designated and set apart by legislative authority for the erection and creation of an organized county, with the powers and incidents pertaining to a *quasi* corporation of that character, whenever, in the judgment of the legislature, it shall contain the requisite population for that purpose. The manifest object sought in the establishment of such counties, in advance of settlement, is to secure to each a territorial area of sufficient size, and with suitable boundaries, to accommodate, when settled, its entire population; to obtain efficient county governments; and to avoid the evils supposed to be incident to their formation out of sparsely settled districts, under the influence of local considerations, having reference rather to the interests of some town site, expectant the advantages of a county seat, than the well-being of the whole." See also State *v.* Parker, 25 Minn. 221.

1. Carleton *v.* People, 10 Mich. 250; Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106.

Where a new county had, by statute, been segregated from the other portions of a territory, its boundaries defined, and its name given to it, it was held that the county was, by this act, created and brought into existence, and that the county offices pertaining to a county when organized were from that time existing offices to be filled in a manner provided by law, and that, when the offices were filled, the officers were at least *de facto* officers. Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106.

Statute Not to Take Effect Until Future Day. — But where a legislature created a new county, and in the act provided that it should not take effect until a future day mentioned, it was held that an appointment by the executive of the commonwealth to an office for such county, before such day, was void. Com. *v.* Fowler, 10 Mass. 290.

In some instances, the term "creation" has been used in the sense of organization. See the note following.

2. When Organization Complete. — People *v.* McGuire, 32 Cal. 140; State *v.* McFadden, 23 Minn. 40; State *v.* Parker, 25 Minn. 215; People *v.* Maynard, 15 Mich. 463; McCullough's Appeal, 34 Pa. St. 248; Ryan *v.* Evans, 49 Tex. 364.

Thus it has been held that an act purporting to organize a new county out of territory detached from an old one, but which contains no organized townships, and no provision for any is made, is inoperative and void, as without such townships there can be no legal election and no means of organizing. People *v.* Maynard, 15 Mich. 463.

"The fact that it was declared that 'a new county,' with certain boundaries, 'is hereby established,' did not have the effect to create a county; because in the same declaration it was contemplated and provided that certain things should be done, in organizing it, which were necessary to be done in order to separate its territory from the jurisdiction of the two counties from which it was taken, and give it a distinct identity as a county, a body corporate, constituting one of the civil and political divisions of the state." Ryan *v.* Evans, 49 Tex. 364.

A Statute of Indiana, authorizing the formation of new counties, provided that, "from the time said [county] boundaries are established, said new county shall be, to all intents and purposes, an organized county, with all the rights and privileges that, under the law, appertain to organized counties." Milk *v.* Kent, 60 Ind. 232. The court, commenting upon the above statute, said: "But the establishment of the boundaries is the first, or nearly the first, step to be taken in the process of the organization of a new county. After that, the county seat is to be established and the county offices to be filled. When the boundaries are established merely, there is no place provided by law for holding courts, and no clerk or sheriff. It is clear that, when nothing more has been done than the establishment of the boundaries of a new county, no action could be brought therein in a circuit court. We must construe the clause of the statute above set out as relating to the rights of the new county as an organized political body, and not as affecting the question of jurisdiction of courts. The jurisdiction of Jasper county over the subject of the action continued, therefore, after the boundaries of the new county had been established."

Under Kansas Statute. — Under chapter 24 Comp. Laws of Kansas of 1885, p. 256, providing that "the governor shall appoint three persons, citizens of said unorganized county, to act as commissioners, and one to act as county clerk, to whom he shall cause to be delivered the duplicate returns aforesaid, one to act as sheriff, and, when the election precincts shall have been established, at least one justice of the peace in each election precinct, and shall designate and declare the place chosen by the greatest number of legal voters to be

4. De Facto Organization. — It is well settled that a county having an existence in fact and acting under color of law may constitute a *de facto* corporation.[1]

Not Subject to Collateral Attack. — Such *de facto* corporation, if not questioned by the state, cannot be collaterally drawn in question by private parties.[2]

Legislative Recognition of De Facto Organization. — It has been laid down as a well-settled rule, that when a legislature has full power to create a county, its act recognizing as valid a *de facto* county operates to cure all defects in steps leading up to the organization, and makes a *de jure* out of what before was a *de facto* organization.[3] Thus where the records of a county organization were regular, formal, and valid upon their face, and the executive had recognized the organization as valid, it has been held that it was a *de facto* organization, notwithstanding the proof of fraud and irregularities therein, and was rendered a *de jure* organization by an act detaching it from an organized county to which, for judicial purposes, it had theretofore been attached.[4]

Organization Unauthorized by Constitution. — Moreover, it has been held that, although the original organization of a county was without the authority of the constitution, it was a validly organized county, where it appeared that the statute creating it was not void upon its face, and the records of the organization were regular and valid, and its validity was recognized by the state officials and by the legislature.[5]

the temporary county seat, and from and after the qualification of the county officers appointed under this act, the said county shall be deemed to be duly organized," it has been held that, after the county officers appointed by the governor had qualified, a county was, by the express terms of the statute, duly organized. Keating *v.* Marble, 39 Kan. 370. See also State *v.* Sillon, 21 Kan. 207.

Under Nebraska Statutes, it has been held that, upon the holding of an election for county and precinct officers, pursuant to the call of the special commissioners appointed by the governor for the purpose of organizing a new county, and the canvassing of the votes cast at such election by such special commissioners, such county is "permanently organized according to law." Behr *v.* Willard, 11 Neb. 601.

1. Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106.

Under Statutes in South Dakota providing that "whenever the voters of any unorganized county in this territory shall be equal to fifty or upwards, and they shall desire to have said county organized, they may petition the governor, setting forth that they have the requisite number of voters to form a county organization, and request him to appoint the officers specified in the next section of this act," and further, that "whenever the voters of any unorganized county in the territory shall petition the governor as provided in the preceding section, and the said governor shall be satisfied that such county has fifty legal voters, it shall be the duty of the governor, and he is hereby authorized, to appoint three persons, residents thereof, county commissioners for such county, who shall hold their office until the first general election thereafter, and until their successors shall be elected and qualified," it was held that the commissioners appointed by the governor were *de facto* commissioners, and that, they having appointed the other county officers of said county, the organization was at least a *de facto* county organization. Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106.

2. De Facto Counties Not Subject to Collateral Attack. — Matter of Short, 47 Kan. 250. See also Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106.

For a discussion of inquiries into the constitutionality of county organizations, see *infra*, this article, *Alteration of Boundaries*.

In *Kansas* it has been held that where a county has been organized under valid laws, and is acting as a county under valid laws, and a judgment is rendered in such county or by virtue of proceedings commenced in such county against an individual, providing for his imprisonment because of his having committed a public offense in such county, and under the judgment he is imprisoned, such individual cannot, in a proceeding in *habeas corpus*, attack the validity of the existence of such county upon the ground merely that "the plats, field notes, and records of the original government survey, now on file in the office of the auditor of state, in the state capitol," show that the county, as originally created by the legislature, and as afterwards organized and as now existing, contains only four hundred and thirty and one-half square miles in area, while the constitution requires that no county shall be organized with a less area than four hundred and thirty-two square miles. Matter of Short, 47 Kan. 250.

3. Legislative Recognition of De Facto Counties. — Comanche County *v.* Lewis, 133 U. S. 202; State *v.* Pawnee County, 12 Kan. 426; State *v.* Harper County, 34 Kan. 304; State *v.* Robertson, 41 Kan. 200. See also State *v.* Sillon, 21 Kan. 207; State *v.* Parker, 25 Minn. 215.

4. Comanche County *v.* Lewis, 133 U. S. 202; State *v.* Pawnee County, 12 Kan. 426; State *v.* Harper County, 34 Kan. 304; State *v.* Robertson, 41 Kan. 200.

5. Recognition by State of Unconstitutional Organization. — Riley *v.* Garfield Tp., 54 Kan. 463.

Where No De Facto Organization Exists. — But where, at the time of the act seemingly recognizing the county as organized, no organization, either *de facto* or otherwise, exists, such recognition cannot have the effect to create a valid county organization.[1]

5. Judicial Notice of Counties. — The courts will take judicial notice of the names,[2] location,[3] boundaries and area [4] of counties, and of their existence at least when created by special statute.[5]

IV. ALTERATION OF BOUNDARIES — 1. Power of Legislature. — Subject to the limitations imposed by the federal and state constitutions, the state legislature has authority to extend or limit the boundaries of a county,[6] to divide it into

Long Acquiescence. — In Rumsey *v.* People, 19 N. Y. 42, it was said that an act for an organization of a county will not be declared void for supposed constitutional objections after its existence has been recognized for years by all departments of the government except the judicial, and successive sessions of the legislature have acted upon the assumption of its constitutional existence, admitting members whose right to sit depended upon the validity of such organization, and it has entered into the whole structure and operation of government.

1. Recognition in Absence of De Facto Organization. — State *v.* Ford County, 12 Kan. 441; Comanche County *v.* Lewis, 133 U. S. 202.

2. Judicial Notice of Names of Counties. — Overton *v.* State, 60 Ala. 73.

3. Judicial Notice of Location of Counties. — *Ex p.* Carr, 22 Neb. 535.

4. Judicial Notice of Boundaries and Area. — Jasper County *v.* Spitler, 13 Ind. 235; Woods *v.* Henry, 55 Mo. 560.

5. Judicial Notice of Creation. — Buckinghouse *v.* Gregg, 19 Ind. 401.

In *Iowa* it has been held that courts will take judicial notice of the organization of counties within the state. Pitts *v.* Lewis, 81 Iowa 51; Ellsworth *v.* Nelson, 81 Iowa 57.

In *Indiana* it has been held that courts will not take judicial notice of the time of the division of counties and the erection of new ones by county commissioners under the general law, but the time of the erection of a new county by such process, where it becomes material touching a question of jurisdiction, must be proved. Buckinghouse *v.* Gregg, 19 Ind. 401. In this case, however, it was intimated that judicial notice will be taken of the creation and organization of a county by special statute.

In State *v.* Ruth, 21 Kan. 587, the court said: "Will the court, in the absence of evidence, take judicial notice of the date of the organization of new counties? Doubtless the court takes judicial notice of the fact that in the eastern portion of the state there are counties duly organized, and with all the machinery of the law and courts in full operation, and that the western portion is composed of unorganized territory; but whether it will take notice of the time when any particular county passes from an unorganized to an organized condition is doubtful. Such passage dates not from any proclamation from the governor, nor from any action of the executive, but 'from and after the qualification of the officers appointed' by the governor."

6. Extension or Abridgment of Boundaries. — Laramie County *v.* Albany County, 92 U. S. 308; Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 86; Chicago, etc., R. Co. *v.* Langlade County, 56 Wis. 621; State *v.* Forest County, 74 Wis. 610.

Addition of Portion of County to Another. — The legislature may change the line between two counties by adding to one county a described and defined portion of another. *Ex p.* Upshaw, 45 Ala. 234; Walker *v.* Griffith, 60 Ala. 361; Drummond *v.* State, 61 Ala. 64; Duncombe *v.* Prindle, 12 Iowa 1; Walters *v.* Richardson, 93 Ky. 374; Pool *v.* Brown, 98 Mo. 675; Eureka County *v.* Lander County, (Nev. 1890) 24 Pac. Rep. 871, 21 Nev. 144.

Thus where the boundary line between two counties was changed so that certain real estate formerly lying in one county was transferred to another county, it was held, in an action to determine to which county taxes on the real estate in question belonged, that the legislature had the power to make such change of boundary. Eureka County *v.* Lander County, (Nev. 1890) 24 Pac. Rep. 871.

Parishes — Louisiana. — In State *v.* Williams, 29 La. Ann. 779, it was held that the legislature may, within constitutional limits, change the boundaries of parishes by detaching a portion of territory from one parish and attaching it to another.

In Massachusetts it has been held that the legislature has full constitutional power to change the boundary lines of counties by transferring one entire town from one county to another, or by erecting a new county by setting off any number of entire towns from one or from several counties and forming them into a new county, for all purposes of civil and criminal jurisdiction of courts, and for all other purposes for which counties are by law established in this commonwealth, except that of constituting senatorial districts. Opinion of Justices, 6 Cush. (Mass.) 578. The court in this case said: "We have confined this answer to the case of transferring an entire town, because we suppose this fully answers the question intended to be put by the senate. The difficulties, both as to the jurisdiction of courts and the rights, duties, and obligations of individuals as inhabitants of a county, which would arise from an attempt to include part of a town in one county and part in another for general county purposes, would be so great and so obvious that we have supposed it was not contemplated by the senate, and, therefore, we have not thought it necessary to form or express any opinion upon this question."

two or more,[1] or to consolidate two or more into one,[2] or even to abolish the county altogether, according as the public interest and public justice may in the legislative discretion require, without the consent of the people or corporation to be thereby affected.[3] This power results from the very character and object of a county organization.[4]

Change of County Boundaries by Extension of City Boundaries. — In the absence of constitutional restriction the legislature has power to extend the boundaries of a city so as to include territory belonging to a county, and the fact that the taxpayers of the county may have the burden of taxation increased, or the creditors may have their security lessened by the reduction of the value of the subjects of taxation, or that the inhabitants in the annexed district may be subject to heavier taxation, will not alter the rule.[5]

2. Constitutional Limitations — *a.* IN GENERAL. — But the power of the legislature in respect to the alteration of county boundaries is, as in all other cases, subject to the limitations imposed by the organic law.[6]

b. REQUIREMENT OF SUBMISSION OF QUESTION TO POPULAR VOTE. — Constitutional provisions exist in some of the states requiring the legislature to submit the question of alteration of boundary to a popular vote.

Texas and Iowa. — Thus the constitutions of Texas and Iowa provide that no part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted in such manner as may be provided by law to a vote of the electors of both counties, and shall have received a majority of those voting on the question in each.[7]

Nebraska. — Similarly the constitution of Nebraska provides that no county shall be divided or have any part stricken therefrom without first submitting the question to a vote of the people of the county, nor unless a majority of the legal voters of the county voting on the question shall vote for the same; [8] and

1. Division of County into Two or More. — Laramie County *v.* Albany County, 92 U. S. 307; Chambers County *v.* Lee County, 55 Ala. 534; Currituck County *v.* Dare County, 79 N. Car. 565. See also Coles *v.* Madison County, 1 Ill. 154.

2. Consolidation of Counties. — Duncombe *v.* Prindle, 12 Iowa 1.

3. Abolishing County. — Laramie County *v.* Albany County, 92 U. S. 308; Howard County Div., 15 Kan. 194; State *v.* Hamilton, 40 Kan. 323; Bass *v.* Fontleroy, 11 Tex. 698.

A Statute of Tennessee abolishing a county, and restoring its territory to the other counties from which it was formed, was held to be void under the state constitution, which placed specific restrictions on the formation of new counties from territory segregated from the old, but gave no authority to abolish an old county entirely. James County *v.* Hamilton County, 89 Tenn. 237.

4. State *v.* McFadden, 23 Minn 40.

5. Change of County Boundaries by Extension of City Boundaries. — Wade *v.* Richmond, 18 Gratt. (Va.) 583.

For further discussion of this question, see the title MUNICIPAL CORPORATIONS.

6. Implied Constitutional Restriction. — Under a provision of the constitution of *Louisiana* that the number of representatives in the assembly of the state should not be more than ninety-eight, and that each parish should have at least one representative, it was held that an act creating a new parish from an existing parish was unconstitutional, the old parish having but one representative, and the total number of representatives in the assembly at that time aggregating ninety-eight. Adams *v.* Forsyth, 44 La. Ann. 130.

Enumeration of Counties in Constitution. — In Wade *v.* Richmond, 18 Gratt. (Va.) 583, it was held that the mere fact that the counties and cities of the commonwealth were named and enumerated in the constitution did not constitute them such component and structural parts of the body politic as to prevent the legislature from extending the boundaries of the city over a portion of territory belonging to a county, for municipal purposes, but not for purposes of voting and representation.

7. Submission of Question of Alteration of Boundaries to Vote — Texas — Iowa. — Trinity County *v.* Polk County, 58 Tex. 321; Duncombe *v.* Prindle, 12 Iowa 2.

In Arkansas it has been held that the power to change county lines is inherent in the legislature, subject to express constitutional restrictions, and the consent of a majority of the voters in the part taken off is required only in the case of new counties to be formed out of portions of old ones. Reynolds *v.* Holland, 35 Ark. 56.

8. Nebraska. — Art. 10, § 1, Nebraska Constitution. This section of the constitution has been held not to be a prohibition upon the power of the legislature to require more than a majority in favor of the proposition in question, as three-fifths of the legal votes cast upon that question. State *v.* Nelson, 34 Neb. 162.

further, that there shall be no territory stricken from any organized county unless a majority of the voters living in such territory shall petition for such division, and no territory shall be added to any organized county without the consent of the majority of the voters of the county to which it is proposed to be added.[1]

Voluntary Submission of Question to Popular Vote by Legislature. — While the power to create a new county from a portion of the territory of an old county may be exercised by the legislature alone, uncontrolled by the will of the inhabitants of the counties concerned, the question may be submitted by an act of the legislature to the inhabitants for their acceptance, and such enactment will not be unconstitutional because thus made to depend upon future events or contingencies before taking effect.[2]

c. LIMITATIONS UPON REDUCTION OF AREA. — Provision is made by the constitutions in some of the states for a limit in area below which the territory of the county cannot be reduced. Thus the constitution of *Tennessee* provides that where a new county is formed out of the territory of an old county, such old county shall not be reduced to less than five hundred square miles.[3]

1. Art. 10, § 3, Nebraska Constitution; Wayne County *v.* Cobb, 35 Neb. 231.

2. **Voluntary Legislative Submission of Question of Change of Boundary to Vote.** — Van Dusen *v.* Fridley, 6 Dakota 322; People *v.* Reynolds, 10 Ill. 1. See also Allen *v.* Hostetter, 16 Ind. 15. And see the title STATUTES.

In Van Dusen *v.* Fridley, 6 Dakota 322, where an act for the creation of a new county out of portions of two old ones provided that "a portion of K. county and a portion of S. county hereby proposed to be segregated shall not be cut off unless the question of segregation shall be first submitted to the vote of the people of K. county, and also to the voters of that part of range 69 proposed to be detached from S. county at a special election called for that purpose; * * * in case a majority of the legal voters of said K. county and of said range 69 voting shall vote in favor of said segregation, then this act shall be in full force and effect," it was held that the act required a majority of the vote of each district affected thereby, and not a majority of both.

In California it has been held that the Act of March 11, 1889, which provides for forming the county of Orange out of part of the county of Los Angeles, upon the assent of two-thirds of the qualified electors of the proposed new county voting at an election to be held for that purpose at a time fixed in the act, is constitutional, and is not a delegation of legislative authority. People *v.* McFadden, 81 Cal. 489, 15 Am. St. Rep. 66.

3. **Constitutional Limitations upon Reduction of Area.** — Roane County *v.* Anderson County, 89 Tenn. 259. See also Chicago, etc., R. Co. *v.* Langlade County, 56 Wis. 614.

Detaching Territory from One County and Attaching It to Another. — The constitutional provision set out in the text has been held to apply to acts for changing county lines, and detaching territory from one county and annexing it to another, as well as to acts for the formation of new counties. Marion County *v.* Grundy County, 5 Sneed (Tenn.) 490; Roane County *v.* Anderson County, 89 Tenn. 259.

Unconstitutional Act of Agent of Legislature. — Under the constitution of *Tennessee*, art. 10, § 4, expressly interdicting the diminution of the territory of an old county, by the creation of a new one, to an area less than six hundred and twenty-five square miles, and also the approach of the boundary line of a new county to the court-house of the old one nearer than twelve miles, it has been held that if the boundaries of a new county are so designated by the commissioners appointed under a valid legislative act as to be violative of these prohibitions, the act of the commissioners will be null and void in so far as the boundary designated trenches upon the vested and constitutional rights of the old county. Maury County *v.* Lewis County, 1 Swan (Tenn.) 236.

Effect of Acquiescence. — The mere fact that an old county, whose constitutional right against the diminution of territory has been invaded by the creation of a new county, has for five years failed to resist the encroachment and insist upon its jurisdiction, is not of itself a waiver of the right to be restored to its constitutional limits. Maury County *v.* Lewis County, 1 Swan (Tenn.) 236. *Compare* Roane County *v.* Anderson County, 89 Tenn. 259.

Under the Constitution of Michigan, providing that organized counties shall not be reduced to "less than sixteen townships as surveyed by the United States," unless the act providing therefor be submitted to and ratified by the people of the county, it has been held that the fractional townships as surveyed by the United States are within the meaning of the clause in the constitution, and that an act organizing a new county from portions of territory of other counties will not be unconstitutional, if the remainder of each of those counties contains more than sixteen townships including such fractional county townships. Rice *v.* Ruddiman, 10 Mich. 125.

Wisconsin. — Under section 7, article 13, of the constitution of the state of Wisconsin, providing that no county with an area of nine hundred square miles or less shall be divided or have any part stricken therefrom without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same, it has been held

d. Prohibition as to Interference with Other Political Divisions — **Massachusetts.** — Under a constitutional provision in Massachusetts, to the effect that "the several senatorial districts now existing shall be permanent," it has been held that, in exercising the power of altering the boundaries of counties, it will be necessary for the legislature carefully to provide that, in changing the line of the county, such change, whilst it shall effectually set off the territory from one county and annex it to the other, so far as it concerns the jurisdiction of the court, and for all proper county purposes, shall not alter the relations of the inhabitants of such territory as members of the senatorial district to which they belong, but, on the contrary, to provide that, for the purpose of voting for senators, all the persons residing, or who may come to reside, in the territory thus transferred, shall be taken and deemed to be inhabitants of the town from which such territory was set off, and shall have a right to vote for senators therein in the same manner as if such territory had not been set off.[1]

Arkansas. — But it has been held that the constitution of Arkansas, providing substantially that the division of the state into senatorial districts shall be made by the General Assembly at the first regular session after each enumeration of the inhabitants of the state by the federal and state governments shall have been ascertained, and at no other time, was not violated by a change of county lines so that a portion of one county in a certain senatorial district was attached to a county in another senatorial district, since there was not a change of those districts; the counties, and not the territory or inhabitants, being the constituents of the districts.[2]

that where a county contained more than nine hundred square miles of territory the legislature had power to change its boundaries without first submitting the question to a vote of the people. Chicago, etc., R. Co. *v.* Langlade County, 56 Wis. 614; State *v.* Larrabee, 1 Wis. 200. See State *v.* Merriman, 6 Wis. 14; State *v.* Elwood, 11 Wis. 17.

Under this provision it has been held that the legislature may attach sufficient territory to a county of less than nine hundred square miles to make its area exceed that, and then, by a subsequent act at the same session, divide the county so enlarged. State *v.* Cram, 16 Wis. 343.

The government survey is *prima facie* evidence of such area. Dodge county having twenty-five townships is presumed to contain nine hundred square miles, and therefore incapable of division. The burden of proof to show a greater or less area than that thus presumed is on the party claiming such increase or deficiency. State *v.* Merriman, 6 Wis. 14.

Constitutional Restriction as to Proximity of New County Line to Court-house of Old County. — In *Tennessee* it has been held that where the legislature attached a portion of the territory of Coffee county, including two civil districts, to the county of Grundy, whereby the land of the latter county was made to approach within less than twelve miles of the court-house of the county of Coffee, the act, being in conflict with the constitutional prohibitions, was inoperative and void. Gotcher *v.* Burrows, 9 Humph. (Tenn.) 585.

It is now provided by the constitution of Tennessee, of 1870, art. 10, § 4, that no line of a new county shall approach to the court-house of an old county from which it may have been taken, nearer than eleven miles. Humphreys County *v.* Houston County, 4 Baxt. (Tenn.) 593; Speck *v.* State, 7 Baxt. (Tenn.) 46.

1. Change of Boundaries as Affecting Senatorial District — Massachusetts Constitution. — Opinion of Justices, 6 Cush. (Mass.) 578.

2. Change of Boundaries as Affecting Senatorial District — Arkansas Constitution. — Howard *v.* McDiarmid, 26 Ark. 100; Pulaski County *v.* Saline County, 37 Ark. 339. See also State *v.* Blasdel, 6 Nev. 40.

In New York it has been held that chapter 934 of the Laws of 1895, which provides for the annexation of a part of Westchester county to the city and county of New York, by setting off from the county of Westchester the territory described therein, with its inhabitants and estates, and declaring it annexed to and merged in the city and county of New York, is not rendered unconstitutional by reason of the provisions of the New York Constitution of 1894, conferring upon the legislature power to alter senate districts after a decennial enumeration, and providing that "no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in one county," and that the assembly districts to be apportioned under the constitution shall remain unaltered until another enumeration shall be made, but that nothing in that section should prevent the division, at any time, of counties and towns, by the legislature, and the provisions continuing the judicial districts until after an enumeration — notwithstanding the facts that the city and county of New York constituted the first judicial district, and the county of Westchester was in the second judicial district, and that the county of Westchester was declared by the constitution to constitute a senate district (the twenty-second). But it was further held that such effect should be given to the act in ques-

c. How Constitutionality of Alteration to Be Called in Question — **Collateral Attack.** — It seems to be undisputed that where the constitutionality of an act of the legislature altering county boundaries is questioned, the inquiry cannot be gone into collaterally.[1]

Inquiry by Direct Proceeding. — Upon the question as to whether the constitutionality of an act of the legislature altering county boundaries, which is valid on its face, can be drawn in question by a direct proceeding, the decisions are not agreed. In some jurisdictions it is maintained that such act is conclusive as to all necessary prerequisite facts, and concludes any inquiry as to its constitutionality by all other departments of government, judicial or otherwise;[2] but in other jurisdictions this doctrine is denied.[3]

3. Effects of Alteration — *a.* On County Rights and Liabilities — (1) *Status Quo of Parent County Maintained as a General Rule.* — By general principles of law, as well as by judicial construction of statutes, if a part of the territory and inhabitants of a county are separated from it by annexation to another, or by the erection of a new county, the remaining part of the

tion as will least disturb the general plan, and this will be accomplished by regarding the annexed territory as still a part of the twenty-second district for the election of a senator. People *v.* Westchester County, 147 N. Y. 1. *Compare* Lanning *v.* Carpenter, 20 N. Y. 447.

1. Constitutionality of Alteration Not Subject to Collateral Attack. — Matter of Short, 47 Kan. 250.

Thus it has been held that the unconstitutionality of a law establishing a new county, on the ground that its effect was to reduce the population of the old county below the legal ratio of representation, cannot be inquired into upon a motion quashing an indictment in the court of the new county. State *v.* Rich, 20 Mo. 393.

Also, it has been held that where the act establishing a new county is constitutional upon its face, but the commissioners, in laying out the county, violate the constitution by running one of the lines nearer than eleven miles to the court-house of the old county, and this line is acquiesced in by the old county, the objection cannot be taken in a collateral proceeding by a defendant who has been indicted in the new county. Speck *v.* State, 7 Baxt. (Tenn.) 46.

2. Rule that Constitutionality of Act Creating County Not to Be Questioned by Courts. — In State *v.* Dorsey County, 28 Ark. 378, it was held, on a writ of *quo warranto* brought by the state against a newly organized county, that where the constitutionality of an act of the legislature creating a new county is questioned because the area of the old county was reduced below six hundred square miles, the courts could not go beyond the act itself to determine this fact.

Proceeding Instituted by Private Individual. — Also, in Lusher *v.* Scites, 4 W. Va. 11, it is held that the constitutionality of an act establishing a new county could not be questioned by the court on the ground that its creation had caused the old county to be reduced below the area of four hundred square miles. This decision, however, was rendered in a cause brought by a private individual to restrain the collection of taxes assessed against him by the officers of the new county.

Statute Unconstitutional on Its Face. — In State *v.* Dorsey County, 28 Ark. 382, the court said: "Undoubtedly, if the statute creating a new county contained a declaration that there were less than six hundred square miles within its boundary, or this fact could be made to appear by computation from its defined limits, it would be suicidal. Nothing further would be necessary to effect its nullification."

3. Question of Constitutionality Raised by State. — It has been held that the question of the constitutionality of the organization of a county might be raised by the state in an action or proceeding in the nature of a *quo warranto*. State *v.* Merriman, 6 Wis. 14. See also In the Matter of Short, 47 Kan. 250.

Question Raised by Aggrieved County. — In *Tennessee* it has been held that, while the creation of counties is a legislative and not a judicial function, the court of chancery has the jurisdiction and power to see to it that the constitution and law be not violated in fixing the boundaries of new counties, and in securing to old counties out of which new ones are carved so much of their territory as is declared inviolable, or by protecting such other rights of such old counties as are guaranteed by the organic law. Maury County *v.* Lewis County, 1 Swan (Tenn.) 236; Humphreys County *v.* Houston County, 4 Baxt. (Tenn.) 593. See also Bridgenor *v.* Rodgers, 1 Coldw. (Tenn.) 259.

But in this state it has been held that a citizen and taxpayer of a county from which a portion of its territory is taken to form a new county may not file a bill in chancery to inquire into the validity of the act creating the new county after the new county becomes so organized as to become a political corporation. Bridgenor *v.* Rodgers, 1 Coldw. (Tenn.) 259; Ford *v.* Farmer, 9 Humph. (Tenn.) 152.

Inquiry by Individual through Court of Chancery before Organization Complete. — It has been held in *Tennessee* that where a county is by act of the legislature directed to be established, and commissioners are appointed for that purpose, and it appears that such act is unconstitutional, a court of chancery, at the instance of an individual aggrieved, will restrain by injunction the commissioners from organizing the county. Bradley *v.* Powell County, 2 Humph. (Tenn.) 428.

county retains its property and rights generally,[1] and remains subject to all its obligations and duties,[2] in the absence of a restrictive constitutional or statutory provision on the subject.[3] And this for the reason that the courts must presume that the legislature has made such provision in the alteration of the boundaries as it supposed most conducive to the interest of all concerned, and they cannot, therefore, supplement legislation by assuming to adjust equities which it ignored.[4]

Right of Old County to County Taxes. — Under this principle, upon the erection of a new county out of part of an old one, or the annexing of territory of one county to another, the old county or the county from which the territory has been detached is entitled to, and may enforce payment of, taxes assessed

1. County from Which Territory Is Detached Retains Property. — Laramie County *v.* Albany County, 92 U. S. 307; Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Eagle *v.* Beard, 33 Ark. 497; Washington County *v.* Weld County, 12 Colo. 152; Cooke *v.* School Dist. No. 12, 12 Colo. 453; School Com'rs *v.* School Com'rs, 35 Md. 201; Hampshire County *v.* Franklin County, 16 Mass. 86; Clay County *v.* Chickasaw County, 64 Miss. 534; Morrow County *v.* Hendryx, 14 Oregon 397; Reeves County *v.* Pecos County, 69 Tex. 177.

"**In the Absence of a Restrictive Constitutional or Statutory Provision** on the subject, when a new county is created by segregating a portion of the territory belonging to an existing county, the old county retains all assets previously owned by it, including rights of action, funds and other personal property; also all real estate held in proprietary right, save such, if any, as may be within the territory taken away. It likewise remains bound by its existing contracts, and is subjected to the burden of discharging all existing obligations and liabilities. The new county receives none of the assets, and assumes none of the burdens. The reasons for the foregoing doctrine are that the title to all property and ownership of all assets are vested in the old county as a corporate entity, this entity being in no way disturbed by the division of its territory and separation from it of a portion thereof; while, on the other hand, all existing obligations and liabilities were incurred in its corporate capacity and name. Therefore, while the legislature has power to divest title and apportion property as well as indebtedness, yet if such power be not exercised, there does not follow, as a legal sequence, either a transfer of the assets or liabilities to the new county. Creditors will not be heard to complain, because, in the first place, the legislature has plenary authority to divide counties; secondly, the claims of creditors are exclusively, as above suggested, against the old corporation; and, thirdly, they have no specific lien upon the property, real or personal, assigned to the new county, by the act of separation." Washington County *v.* Weld County, 12 Colo. 152.

School Fund. — Thus the rule of the text was held to obtain where the property in controversy consisted in part of the county school fund. Cooke *v.* School Dist. No. 12, 12 Colo. 453; Clay County *v.* Chickasaw County, 64 Miss. 542. See also School Com'rs *v.* School Com'rs, 35 Md. 201.

Property Falling Within Territory of New County. — In the absence of statute, the new county or portion of territory has no claim to any portion of the public property, except what falls within her boundaries. Laramie County *v.* Albany County, 92 U. S. 315.

As long as the legislative power of apportionment has not been exercised, it seems that each division will hold and have the right to use the public property which falls within its limits. Police Jury *v.* McCormack, 32 La. Ann. 627.

2. Assumption of All Liabilities by Old County. — Laramie County *v.* Albany County, 92 U. S. 307; Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Eagle *v.* Beard, 33 Ark. 497; People *v* Alameda County, 26 Cal. 642; Hampshire County *v.* Franklin County, 16 Mass. 86; Chickasaw County *v.* Sumner County, 58 Miss. 619; Currituck County *v.* Dare County, 79 N. Car. 566; Morrow County *v.* Hendryx, 14 Oregon 397; Reeves County *v.* Pecos County, 69 Tex. 177. See also People *v.* Ulster County, 94 N. Y. 263.

Effect of Division on Township Liability. — But in Plunkett's Creek Tp. *v.* Crawford, 27 Pa. St. 107, it is held that where a township is parted by the line of a new county, both fractions remain liable for a debt due by the old township.

3. The Texas Constitution, art. 9, § 1, subd. 2, provides that when "any part of a county is stricken off and attached to or created into another county, the part stricken off shall be holden for and obliged to pay its liabilities then existing in the county from which it was taken, in such manner as may be prescribed by law." Presidio County *v.* Jeff Davis County, (Tex. Civ. App. 1896) 35 S. W. Rep. 177.

In Colorado a similar constitutional provision exists. Washington County *v.* Weld County, 12 Colo. 152.

Constitution of Tennessee. — Art. 10, § 4, of the constitution of Tennessee provides that the fractions taken from old counties to form new counties, or taken from one county and added to another, shall continue liable for their *pro rata* of all debts contracted by their respective counties prior to the separation, and be entitled to their proportion of any stocks or credits belonging to such old counties. Matthews *v.* Blount County, 3 Lea (Tenn.) 120.

4. Laramie County *v.* Albany County, 92 U. S. 307; Chickasaw County *v.* Sumner County, 58 Miss. 619; Clay County *v.* Chickasaw County, 64 Miss. 534.

before the separation.[1]

Liability for State Taxes. — Also, when a county is divided the old county may be compelled to pay the whole of the state levy of taxes charged upon the county at the time the division took place,[2] unless the legislature otherwise provides.[3]

Taxes After Division. — But apart from statutory provision, where a new county is created from a portion of the territory of an old one, the old county will not, after the division, be liable for more than its proportionate share of the tax which was assessed on the old county one year prior to the division of its territory, and which, under the constitution, furnished the basis for the apportioning of state taxes until the next equalization five years thereafter.[4]

(2) *Apportionment by Statute.* — When a new county is organized, or when a portion of the territory of one county is detached and annexed to another, there may be circumstances rendering it just that the inhabitants residing in the new county or detached territory should not be absolved from the liabilities resting on them in their former relations, nor lose entirely the rights and privileges they formerly enjoyed. In such case it is well settled that the legislature has the power to apportion the common property and the common burdens in such a manner as to them may seem reasonable and equitable, and to compel taxation for that purpose.[5]

1. Right of Old County to Taxes. — Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94; Colusa County *v.* Glenn County, 117 Cal. 434; Devor *v.* M'Clintock, 9 W. & S. (Pa.) 80. *Compare* White Pine County *v.* Ash, 5 Nev. 279. See the titles TAXATION; TAX SALES.

Action for Taxes Wrongfully Paid New County. — Thus in Colusa County *v.* Glenn County, 117 Cal. 434, it was held that when such taxes were wrongfully paid over to the new county it was liable in an action for money had and received, or its implied promise to pay the same to the old county.

Sale for Taxes by Officer of Old County. — Also, in Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94, it was held that when, by a change of county boundaries made after land had been assessed for taxes, it falls into another county, the lien of the taxes on the land still continues, and the tax collector of the old county may enforce the collection of the tax by sale.

Also, in *Mississippi*, it has been held that the act of the legislature of 9th February, 1860, by which a portion of Tallahatchie county was transferred to and made part of Sunflower county, did not deprive the sheriff and tax collector of Tallahatchie county of the right to sell land embraced in this transfer for the nonpayment of the levee taxes of 1859, due by the act of 2d December, 1858, and a sale made of such land by the sheriff of Tallahatchie county, on the 9th April, 1860, was valid, and his deed conferred title on the purchaser. Eskridge *v.* McGruder, 45 Miss. 294.

Officers of Old County Not Empowered to Collect Taxes in New County. — The boundaries of B. county formerly included what are now B. and R. counties, R. county having been stricken off and organized into a new county. In an application for a peremptory writ of mandamus against the county treasurer of B. county to require him to collect the taxes due from the taxpayers of R. county but which were levied by B. county prior to the division, it was held that, as the officers of B. county had no authority nor jurisdiction in R. county, there was no duty devolving on such treasurer in connection with the collection of the taxes referred to. State *v.* Clevenger, 27 Neb. 422, 20 Am. St. Rep. 674.

Under the Indiana Statute providing that "all liens, either by judgment, by mortgage, or otherwise, shall continue in full force in all respects as if no change had been made in the boundaries of said counties, and all taxes that shall be levied and assessed at the time such change shall be made, shall be collected in the same manner as if no change had been made in the boundaries of said counties," it was held that where the boundary between two counties is changed after the assessors of the townships embracing the territory transferred have made their enlistments for the current year, and after the time for making a return of such enlistments has passed, the county from which such territory is detached, and not that to which it is transferred, is entitled to assess, collect, and retain the taxes for that year in such transferred territory. Morgan County *v.* Hendricks County, 32 Ind. 234.

2. Liability of Old County for State Taxes. — Gilliam County *v.* Wasco County, 14 Oregon 525.

3. Ontonagon County *v.* Gogebic County, 74 Mich. 721; Dare County *v.* Currituck County, 95 N. Car. 189.

4. Ontonagon County *v.* Gogebic County, 74 Mich. 721; Auditor-Gen. *v.* Menominee County, 89 Mich. 552.

5. Apportionment of County Rights and Liabilities by Statute — *United States.* — Laramie County *v.* Albany County, 92 U. S. 307.

Alabama. — Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Chambers County *v.* Lee County, 55 Ala. 534.

Arkansas. — Eagle *v.* Beard, 33 Ark. 497; Pulaski County *v.* Saline County, 37 Ark. 339; Perry County *v.* Conway County, 52 Ark. 430.

California. — People *v.* Alameda County, 26 Cal. 641; Beals *v.* Amador County, 28 Cal. 450.

Florida. — Columbia County *v.* King, 13

Power in Legislature Exclusive. — Subject to the control of the constitution, the rule for the division and apportionment of the debts and property between such county and the detached territory belongs exclusively to the legislature,

Fla. 451; Canova *v.* State, 18 Fla. 512; State *v.* Suwannee County, 21 Fla. 1.

Indiana. — State *v.* Votaw, 8 Blackf. (Ind.) 2.

Kansas. — Sedgwick County *v.* Bunker, 16 Kan. 498; State *v.* Kiowa County, 41 Kan. 630.

Kentucky. — Justices *v.* Justices, 2 Bush (Ky.) 93.

Mississippi. — Portwood *v.* Montgomery County, 52 Miss. 523.

Oregon. — Morrow County *v.* Hendryx, 14 Oregon 397; Grant County *v.* Lake County, 17 Oregon 453.

South Dakota. — Lawrence County *v.* Meade County, 6 S. Dak. 528.

Tennessee. — Blount County *v.* Loudon County, 8 Baxt. (Tenn.) 74.

Texas. — Presidio County *v.* Jeff Davis County, (Tex. Civ. App. 1896) 35 S. W. Rep. 177.

Wisconsin. — Hall *v.* Baker, 74 Wis. 118; Forest County *v.* Langlade County, 76 Wis. 605; Land, etc., Co. *v.* Oneida County, 83 Wis. 649; State *v.* Holland, 91 Wis. 646.

Apportionment According to Relative Valuation of Property in Each Division. — In *Florida* it has been held that when the legislature divided New River (Bradford) county it was competent to provide that the new county created out of its territory (Baker) should assume its *pro rata* share of the indebtedness of the former, to be ascertained by the relative valuation of taxable property in each at the time of the division. Canova *v.* State, 18 Fla. 512.

Under the Ohio Statute providing that when any new county shall be laid off and organized, the money which shall remain in the treasury of the county or counties from which the new county was taken, after deducting all just debts and demands which were due and owing at the time of setting off the new county, except such debts as shall have been contracted for public buildings in the old county, shall be divided according to the land and other taxable property within the new county, and the county or counties from which the new county was taken, from which the tax was paid; it has been held that a county from which territory has been taken to form a new county is entitled to deduct its existing indebtedness from the bridge fund, as well as other moneys previously collected and remaining in its treasury at the time of division, and that the balance only, after the deduction is made, is required to be divided between the old and the new counties. Fulton County *v.* Lucas County, 2 Ohio St. 508.

Bonded Indebtedness. — The word "indebtedness" in a statute dividing counties and imposing on the segregated territory its proportionate liability for the existing indebtedness of the old county has been held to include bonded indebtedness. Sierra County *v.* Dona Ana County, 5 N. Mex. 190.

Unnegotiated Bonds Issued Before Alteration. — In 1872 bonds of Hempstead county to the amount of fifty thousand dollars were prepared by the proper authorities and placed in the hands of commissioners to be negotiated by them for the purpose of raising a fund to build a court-house and jail. The county of Howard was created by the Act of April 17, 1873, and part of the territory it embraces was taken from Hempstead. In a proceeding under that act instituted to determine what portion of the indebtedness of Hempstead county at the time Howard was formed, should be paid by the latter, it was held that before the bonds were negotiated they constituted no part of the indebtedness of Hempstead county, and Howard was only liable for its proper proportion of the amount of such bonds as had been negotiated when the act creating it was passed. Hempstead County *v.* Howard County, 51 Ark. 344. See also Sedgwick County *v.* Bunker, 16 Kan. 503.

Bonds for Building Bridge Not in Detached Territory. — Prior to 1873, Marion county issued certain bonds for the purpose of building bridges in the county. In that year one township was detached from Marion and attached to Harvey county. None of the bridges built out of the proceeds of said bonds were within the limits of this detached territory. It was held, under *Kansas* Laws of 1873, c. 142, that this fact did not either legally or equitably relieve the detached territory from contributing to the payment of these bonds. Marion County *v.* Harvey County, 26 Kan. 181.

Bonds Reissued After Alteration of Boundary. — Certain railroad bonds were authorized and issued by the county of Marion prior to the detachment of the township above mentioned. By virtue of an act of the legislature of 1879, and after the detachment, the county of Marion took up these railroad bonds, and issued funding bonds in lieu thereof. Certain changes were made in the time, the amount, and the rate of interest of these bonds — changes all beneficial to the county. It was held that though these funding bonds were technically both authorized and issued after the detachment, yet within the spirit of the law, and legally, the funding bonds were a charge against the detached territory, the same as the railroad bonds had been. Marion County *v.* Harvey County, 26 Kan 181.

Statute Fixing Time of Apportionment. — Under a constitutional provision that "every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken," it was held that a statute fixing the time when the act took effect as the proper period for ascertaining the amount of such assets and liabilities, and not the time of the organization of the county, was not unconstitutional. Los Angeles County *v.* Orange County, 97 Cal. 329.

Also, it has been held competent for the legislature to provide that the liability for a debt arises against the detached territory when the bonds evidencing the indebtedness have been issued, and not after their proceeds have been expended. State *v.* Kiowa County, 41 Kan. 637.

and not to the courts; and when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere.[1]

Where Assignment Is Necessary to Complete Title to Property Apportioned. — Under a statute of *Wisconsin* organizing a new county out of territory segregated from an existing county and enacting that each county should be the exclusive owner of all real property situated within its boundaries, and that the treasurer of the old county should, upon demand by the treasurer of the new county, assign to the latter all tax certificates in his office upon land situated in such new county, it was held that the legal title to such tax certificates did not pass to the new county by virtue of the act itself but a formal assignment was essential; and that the act did not make such specific disposition thereof as would prevent the county boards of the two counties under authority of statute from agreeing that they should remain the property of the old county. Hall *v.* Baker, 74 Wis. 118.

Apportionment of Interest. — Where an act providing for the organization of a new county from a portion of the territory of an old one authorized the commissioners appointed for that purpose to ascertain the indebtedness of the old county at the time of the establishment of the new county, and to determine the proportion of such indebtedness to be paid by the new county, and further authorized the board of supervisors of the new county to assess a special tax to create a fund for the payment of such proportionate share of the indebtedness, it was held that the new county was not required to pay interest on its proportion of the debt, for though, from the language of the statute, the legislature evidently contemplated that the first year's tax might not be sufficient to pay the amount due, it made no provision for the payment of interest. Beals *v.* Amador County, 28 Cal. 450. The court in this case said: "There is no express contract to pay interest, and no rule of law independent of statutory provisions that would require interest to be paid."

But it was held in a subsequent decision in this state that the legislature may, in strict conformity with its constitutional powers and duty, recognize a moral obligation of the new county to pay interest on its share of a debt, and may so provide by subsequent enactment. Beals *v.* Amador County, 35 Cal. 624.

In Grant County *v.* Lake County, 17 Oregon 453, the court said: "The Circuit Court allowed interest upon the amount found due; but I doubt very much whether interest should be allowed on a claim against a county until a warrant therefor has been presented to the county treasurer for payment, and payment refused for want of funds."

Where Indebtedness to Be Apportioned Consists of Interest-bearing Bonds. — In a proceeding under an act of the legislature of *Arkansas* creating a new county, for the purpose of determining what portion of the indebtedness of one of the counties which furnished territory for the formation of a new county, should be paid by the new county, it has been held that when the indebtedness consisted of interest-bearing bonds, it was the duty of the new county to relieve the old county of her proportion of the interest that had accrued upon these bonds to the date of the judgment adjusting the indebtedness. Hempstead County *v.* Howard County, 51 Ark. 350. See also Holliday *v.* Sweet Grass County, (Mont. 1897) 48 Pac. Rep. 553.

1. Power of Legislature Exclusive. — People *v.* Alameda County, 26 Cal. 642; Tulare County *v.* Kings County, 117 Cal. 195; Orange County *v.* Los Angeles County, 114 Cal. 390; Washington County *v.* Weld County, 12 Colo. 152; Cooke *v.* School Dist. No. 12, 12 Colo. 453; Cheyenne County *v.* Bent County, 15 Colo. 320; Sedgwick County *v.* Bunker, 16 Kan. 498; School Com'rs *v.* School Com'rs, 35 Md. 201; Portwood *v.* Montgomery County, 52 Miss. 523.

Thus, when the legislature provided that territory detached from a certain county should be responsible for its *pro rata* share of an indebtedness of fifty thousand dollars, and did not provide for the apportionment of another indebtedness amounting to one hundred and fifty thousand dollars, it was held that the courts could not interfere, whatever the moral obligation resting on the detached territory might be. Sedgwick County *v.* Bunker, 16 Kan. 498.

In People *v.* Alameda County, 26 Cal. 642, the court said: "It is objected that, in appointing commissioners to ascertain and award the amount to be paid by Alameda county to Contra Costa county, the legislature conferred upon them judicial functions, and thereby usurped powers that, under the constitution, belong exclusively to the judicial department of the government. It will be observed that the money claimed was not a legal demand by one county against another, growing out of contracts or transactions between themselves, which could be litigated between them and enforced by suit in a court of justice. The claim as between the counties arose solely out of legislative action in creating the new county of Alameda in part out of the county of Contra Costa, and wholly independent of the action of either county as between themselves. The legislature is charged by the constitution with the power and duty of establishing a system of county and town governments. (Article ix., § 4.) It may divide counties and create new ones, or change the boundaries, as in its wisdom it may deem the public interest to require. And in creating new counties out of territory taken from counties already organized, it is but just that it should apportion the debts already accrued between the new and old counties in the ratio of the territory, population, taxable property, and benefits conferred on the respective counties, or portions of counties, affected by the change. It possesses the taxing power, and the power to determine for what objects of public interest, and to what extent, the taxing power shall be exercised. As incident to these powers, it is authorized to apportion the taxes either upon the whole state, or upon particular districts, according as the object is one of general or local interest or benefit. It may say what amount shall be paid by one district, and what amount by another."

Statute Confined in Application to Alteration of Boundaries Resulting in Formation of New County. — But it has been held that an act allowing a newly created county to demand from the old county from a part of which it was formed a proportionate share of its funds in the treasury, does not apply to the case where county lines are changed and territory is detached from one county and attached to another.[1]

Apportionment of Liabilities Without Corresponding Apportionment of Property. — Where the act creating a new county or altering the boundaries between counties provides for a ratable apportionment of the liabilities of the county from which the territory is detached, and remains silent as to the distribution of the assets belonging to such county, the entire property or assets will continue in the possession and under the control of the old county.[2] Thus, where the act creating a new county provided that such new county should pay its *pro rata* of the debt of the county to which its territory formerly belonged, but contained no provision giving it any interest in the property of the old county, it has been held that the new county cannot recover its *pro rata* of the proceeds of certain stock owned by the old county, although the debt of the old county was in fact incurred in payment of the stock.[3] On the other hand, where an act creating a new county from a portion of an old one provided that an existing debt of the old county should be apportioned between the two counties, it was held to be a fair and legitimate inference from the legislation considered together that a fund intended to be applied upon such indebtedness should also be apportioned, though no such provision was expressly made by statute.[4]

Where Legislature Fails to Apportion in Violation of Constitution.—In Tulare County *v.* Kings County, 117 Cal. 195, it was held that where an act dividing the territory of an old county failed to make provision for an apportionment of the liabilities of the county, the courts were not authorized to make such apportionment, although the constitution provided that "every county which shall be enlarged or created from territory taken from another county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken."

1. Statute Confined in Application to Alteration of Boundaries Resulting in Formation of New County. — Crawford County *v.* Marion County, 16 Ohio 467.

2. Apportionment of Liabilities Without Corresponding Apportionment of Property. — Carter County *v.* Sinton, 120 U. S. 517; Washington County *v.* Weld County, 12 Colo. 152; Montgomery County *v.* Menefee County, 93 Ky. 33; Dare County *v.* Currituck County, 95 N. Car. 189; Vance County *v.* Granville County, 107 N. Car. 291.

Thus, where new counties were created out of a county having a debt, under an act providing that the commissioners of the new and of the old counties "shall have full power and authority to adjust and settle all matters of revenue proper to be done on account of the formation of said counties, and also to apportion the indebtedness of said counties," it was held that the new counties were liable for their share of the existing debt, without making any deduction on account of cash in the treasury of the old county, or of unpaid taxes due to it; and that they were liable *in præsenti* to the old county for their share of the debt, though part of it was not due. Cheyenne County *v.* Bent County, 15 Colo. 320. See also Washington County *v.* Weld County, 12 Colo. 152.

The Constitution of Texas provides that "when any part of a county is stricken off and attached to or created into another county, the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing of the county from which it was taken, in such manner as may be prescribed by law." It was held that the words "all the liabilities" definitely comprehended the whole and precluded the idea that any abatement or equitable adjustment between the two counties was contemplated; and that therefore, where the legislature passed an act providing in effect that where any county has been created, or may thereafter be created, out of any other county or counties, its proportion of the indebtedness of the old county existing at the time of its creation shall be the same as its taxable values at the time bear to the taxable values of the parent county, it acted in the strict pursuance of the constitutional provision, and that it was not authorized to allow the new counties the credit for their proportionate share of the value of the public property belonging to the parent counties. Mills County *v.* Brown County, 87 Tex. 475.

3. Dare County *v.* Currituck County, 95 N. Car. 189.

4. In Wisconsin, by Laws of 1878, c. 155, and Laws of 1879, c. 197, Burnett county was authorized to borrow from the trust funds of the state twenty thousand dollars, to be used in aiding the construction of a railroad, and to be repaid, with interest, in fifteen annual instalments. Until the whole amount should be repaid, the railroad company was required to pay annually into the state treasury, in lieu of all license fees, a sum equal to five per cent. of its gross earnings, which sum was to be

Limited Apportionment of Liability. — If provision is made by statute that the detached portion of territory shall be liable for its *pro rata* share of the debts in the county from which it was taken, it has been held that this provision will not be extended so as to subject the detached portion to a proportionate liability for contingent liabilities arising out of a breach of duty.[1] Similarly, where by statute provision is made that the detached territory shall be liable for certain bonds issued prior to the division of territory by the county from which the territory was detached, but such liability is expressly limited to bonds that have been "legally authorized and issued by a vote of the electors of such county," no tax can be levied on the detached territory to pay such bonds if the condition of the statute has not been complied with.[2]

Liability Imposed on Detached Territory Not Extending to Whole County to Which Annexed. — Under a statute providing that the citizens in the portion of territory detached from one county and attached to another shall pay their *pro rata* proportion of the existing indebtedness of the county from which the territory has been detached, it has been held that no action will lie to recover from the county to which the territory is annexed a *pro rata* of the debt, or to cause it to levy and collect a tax on the property in the detached territory to pay any portion of the debt.[3] In the same way, where a statute creating and directing the organization of a county from parts of three other counties and providing substantially that the citizens in the territory transferred from one of these counties should continue liable for their proportionate part of the public debt incurred by that county, it has been held that the new county as a whole could not be made liable therefor.[4]

Effect of Cession Back of Territory. — Where by the act creating a new county requirement was made that the new county should pay its *pro rata* share of the debts of the several counties out of which it was formed, and bonds to the amount of the indebtedness were executed by the new county, and subsequently by act of the legislature a portion of the territory of the new county was ceded back to the county to which the territory was originally annexed, it was held that the new county was not entitled to a reduction of the bonds corresponding to the diminution of its own area.[5]

Constitutional Limitations. — In apportioning the rights and liabilities of counties upon an alteration of their boundaries, the legislature is, as in all other cases, subject to the restrictions imposed by the organic law.[6]

applied upon the indebtedness of the county. By Laws of 1883, c. 172, Washburn county was formed out of part of the territory of Burnett, and, pursuant to that act, the existing debt was apportioned, and new certificates of indebtedness issued to the state by the respective counties. No provision was made by the act for the application of the sums paid into the treasury by the railroad. It was held that such sums should be applied upon the certificates of the two counties ratably and in proportion to the amount of the indebtedness assumed by each. State *v.* Harshaw, 73 Wis. 211.

1. **Limited Apportionment of Liability.** — Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

2. Chandler *v.* Reynolds, 19 Kan. 249; Hodgeman County *v.* Garfield County, (Kan. 1889) 22 Pac. Rep. 430.

3. **Liability Imposed on Detached Territory Not Extending to Whole County to Which Attached.** — Trinity County *v.* Polk County, 58 Tex. 321. In this case the court said: "It is not necessary to consider or determine in this case whether it would be within the constitutional power of the legislature to impose upon appellee, without its consent, a liability for a portion of the appellant's existing indebtedness; for an examination of the provisions of the act under consideration manifests no such intention upon the part of the legislature. The intent, as there disclosed, is to hold the citizens of that particular territory, and not Polk county, bound for a *pro rata* of appellant's existing indebtedness. This indebtedness was not created for the benefit of Polk county, and is in no sense the indebtedness of that county; no obligation whatever, either legal or moral rests upon it to pay any portion of the same."

4. Blount County *v.* Loudon County, 8 Baxt. (Tenn.) 74; Currituck County *v.* Dare County, 79 N. Car. 565.

5. **Effect of Cession Back of Territory.** — Leflore County *v.* Carroll County, 61 Miss. 220.

6. **Apportionment of Indebtedness According to Standard of Territorial Area.** — Where an act creating a new territory provided that the new county should "pay its *pro rata* of the liabilities of the four several counties from which territory is taken to constitute it, in proportion to the territory taken and the territory remaining to the old county," it was held to be

Impairment of Obligation of Contracts. — Thus, where the act making the division or alteration in the territory will have the effect to impair the obligation of contracts, it will be unconstitutional and void.[1] Accordingly, it has been said that it would be incompetent for the legislature, upon forming a new county from the territory of an old one, to release the old county from its liability to a creditor and transfer it to the new county, but that the creditor may insist upon the discharge of the contract by the old county.[2] Ordinarily, however, the right of the legislature to alter boundaries of counties is not restricted by contracts entered into by one of the counties in question with its creditors or private persons.[3] Thus, it has been held that where an existing county is by statute divided, and the existing indebtedness is either by implication or by express enactment imposed upon the portions of the territory remaining as the old corporation, the act is not void, and accordingly a creditor has no recourse to the segregated territory, unless it appears that the old corporation is by the statute shorn of its ability to meet the payment.[4]

(3) *Whether Apportionment Must Be Contemporaneous with Division of Territory.* — It seems to be the better doctrine that the legislature is not, in all cases and under all circumstances, bound to make the provision for the division or apportionment of the debts and property in the same act by which it divides the county.[5]

Previous General Law Providing for Apportionment. — Thus it may provide for such division or apportionment by a general law passed previously to the act dividing the county.[6]

Apportionment by Subsequent Legislation. — It has been maintained by some of the authorities, however, that an apportionment or division cannot be made by legislation subsequent to the act making the division of territory.[7] But the better and more modern rule would seem to be that in some cases, and under some circumstances, provision may be made by either a general or a special act for such a division or apportionment after the act dividing the county has been passed.[8]

unconstitutional because it apportioned a tax according to a standard of territorial area rather than on the basis of the relative values of the portions of territory involved. Mills County *v.* Brown County, 85 Tex. 391. *Compare* Presidio County *v.* Jeff Davis County, (Tex. Civ. App. 1896) 35 S. W. Rep. 177.

1. Impairment of Obligation of Contracts. — Const. of U. S., art. 1, § 10; Dare County *v.* Currituck County, 95 N. Car. 192; Howard *v.* Horner, 11 Humph. (Tenn.) 532.

2. Howard *v.* Horner, 11 Humph. (Tenn.) 532. *Compare* Land, etc., Co. *v.* Oneida County, 83 Wis. 649.

When State Is Creditor. — When, however, the state is the creditor, a provision that the indebtedness apportioned to a new county should be payable in the same manner as it would have been had the state made a loan directly to that county, will be valid. Land, etc., Co. *v.* Oneida County, 83 Wis. 649.

3. Savings, etc., Assoc. *v.* Alturas County, 65 Fed. Rep. 677; Moore *v.* Ballard, 69 N. Car. 21.

In Washington County *v.* Weld County, 12 Colo. 152, the court said: "Creditors will not be heard to complain, because, in the first place, the legislature has plenary authority to divide counties; secondly, the claims of creditors are exclusively, as above suggested, against the old corporation; and, thirdly, they have no specific lien upon the property, real or personal, assigned to the new county, by the act of separation."

4. Savings, etc., Assoc. *v.* Alturas County, 65 Fed. Rep. 677.

5. Sedgwick County *v.* Bunker, 16 Kan. 498; Perry County *v.* Conway County, 52 Ark. 430.

6. Sedgwick County *v.* Bunker, 16 Kan. 498; State *v.* Kiowa County, 41 Kan. 630; Forest County *v.* Langlade County, 76 Wis. 605

7. Hampshire County *v.* Franklin County, 16 Mass. 76.

Ratification of Apportionment by Agent of County. — But in Hampshire County *v.* Franklin County, 16 Mass. 86, it was held that where, subsequent to an act of the legislature forming a new county from the territory of an old county, another act was passed apportioning the property of the old county, the latter act will be operative and binding upon the old county where it is ratified by the court of sessions, the agent of the old county acting within the scope of its authority.

8. Perry County *v.* Conway County, 52 Ark. 430; Richland County *v.* Lawrence County, 12 Ill. 8; People *v.* Alameda County, 26 Cal. 642; Sedgwick County *v.* Bunker, 16 Kan. 498. In Perry County *v.* Conway County, 52 Ark. 432, the court said: "The better doctrine is that the power of the legislature to impose the debt of the one county upon another depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain whenever it finds the moral

(4) *By Whom Apportionment May Be Made.* — Upon the division of territory between two counties the legislature may itself, in the absence of any constitutional prohibition, ascertain the indebtedness of the county from which the territory is detached, and determine the proportion of such indebtedness to be paid by the detached territory.[1]

Employment of Agency — Board of Commissioners. — At the same time it is competent for the legislature to provide for such ascertainment and adjustment through an appropriate agency,[2] such as a board of commissioners appointed for the purpose.[3]

County Court of Old County. — Also, it has been held competent for the legislature to authorize the county court of a parent county to act for the detached territory in compromising a debt of the parent county for a proportionate share of which the detached territory has been made liable by the legislature. Thus it has been held that the legislature had power to authorize the county court of the parent county to refund certain bonds evidencing the indebtedness of such county, and to issue new bonds instead, and that such action on the part of the county court would bind the detached territory for its *pro rata* payment of the indebtedness, although it was taken without the latter's consent or participation.[4]

Refusal of Authorized Agency to Make Apportionment. — Where it was provided by statute that the commissioners of a parent county and a new county should meet and apportion the indebtedness of the parent county, it has been held that upon the refusal of the commissioners of the new county to comply with the statutory requirement, the parent county has a right of action to have such

obligation to exist." See also Laramie County *v.* Albany County, 92 U. S. 307.

Subsequent Provision as to Interest. — Where a statute for the ascertainment of a debt due from one county to another, and to provide for its payment by a tax which was thereby imposed, made no provision for the payment of interest thereon, under which enactment the debt was fully paid, it has been held to be competent for the legislature by subsequent enactment to provide for the payment of interest on such debt by the imposition of a further tax for that purpose. Beals *v.* Amador County, 35 Cal. 624.

1. Apportionment Made by Legislature. — In the Matter of House Bill No. 231, 9 Colo. 625.

2. Apportionment Through Agency. — In the Matter of House Bill No. 231, 9 Colo. 625; Carter County *v.* Sinton, 120 U. S. 517.

Excess of Authority on Part of Agent. — Where a board of commissioners was created by an act of the legislature for the purpose of determining the amount of indebtedness of Umatilla county, Oregon, which Morrow, a county created out of a portion of the territory of Umatilla, was required to assume and pay after deducting therefrom the value of the public property of Umatilla county, it was held that where the board assumed that Umatilla county was entitled to receive back from Morrow the entire amount of taxes for the year 1884, which were certified to Morrow county under section 5 of the act in question, it acted without authority, and its report was not to be taken as the measure of the liability of Morrow county in this respect. Morrow County *v.* Hendryx, 14 Oregon 397.

3. Apportionment by Commissioners. — Hempstead County *v.* Howard County, 51 Ark. 350; Beals *v.* Amador County, 28 Cal. 450; Cheyenne County *v.* Bent County, 15 Colo. 320; Elmore County *v.* Alturas County, (Idaho 1894) 37 Pac. Rep. 349; Custer County *v.* Yellowstone County, 6 Mont. 39; Vance County *v.* Granville County, 107 N. Car. 291; Craven County *v.* Pamlico County, 73 N. Car. 298; Morrow County *v.* Hendryx, 14 Oregon 397; Lawrence County *v.* Meade County, 6 S. Dak. 528; State *v.* Holland, 91 Wis. 646.

4. Apportionment by County Court of Parent County. — Carter County *v.* Sinton, 120 U. S. 517; Montgomery County *v.* Menefee County, 93 Ky. 33.

Auditing of Indebtedness of Old County by Board of Supervisors Conclusive upon New County. — It has been held that, in the absence of a statutory provision designating the manner in which the debts of an old county should be established and audited, the board of supervisors of the old county provided by the general law for the adjustment of all claims against such county remained the auditing board of the new county as to all pre-existing debts, and that their action in reference thereto was binding and conclusive upon the new county to the same extent that it bound and concluded the taxpayers of the original county. Thus, where bonds issued by the board of supervisors of Chickasaw county (a part of whose territory contributed to the formation of Colfax, now Clay, county) for a debt existing at the time of the creation of the latter county were voluntarily paid for by the officers of Chickasaw county without objection on the part of Clay county, and other such bonds were paid off after being reduced to judgments against the board of supervisors of Chickasaw county, Clay county is bound to contribute to Chickasaw county its portion of the debts thus paid by the latter. Chickasaw County *v.* Clay County, 62 Miss. 325.

indebtedness adjusted by the court, or under its direction.[1] On the other hand, where by statute it was provided that the ratable proportion of the indebtedness of an old county to be assumed by the new county was to be ascertained and audited by the county treasurer of the new county, an action at law could not be maintained by the old county against the new county until the amount of indebtedness had been ascertained and audited by such county treasurer, and it was intimated that if he refused to perform the duty imposed on him by the act a mandamus was to be resorted to.[2]

(5) *Mode of Enforcement of Apportionment* — **Levy of Tax by New County.** — Where a new county is created from a part of the territory of an old county, and the existing indebtedness of the old county is apportioned between the old and the new counties, the legislature may provide for the enforcement of the apportionment by a direction that the board of supervisors, or other authorized officers, of the new county, shall assess a tax for that purpose.[3] So it has been held competent for the legislature to provide for the enforcement of an apportionment by requiring a county formed in part from territory detached from another to proceed and make a levy on the territory detached.[4]

Levy Made by Old County. — Also in *Tennessee*, where the constitution provided that the fractions taken from old counties in the formation of new counties, or taken from one county and added to another, should continue liable for their *pro rata* of all debts contracted by their respective counties prior to the separation, it has been held that an enabling act authorizing old counties from which fractions have been taken to form new counties, for the enforcement of this liability, to appoint tax assessors for such fractions, and to collect taxes therein, was within the power of the legislature.[5]

Action at Law. — In *Texas* it is expressly provided by statute that the old county may enforce the liability of the new county for its proportionate share of the indebtedness of the old county by a suit at law.[6]

Where No Express Statutory Provision Is Made. — Also, it has been held that where the legislature has by enactment created a corporate obligation by apportioning the indebtedness of the county from which territory has been detached and annexed to another, and has provided no particular mode of enforcing it, an action at law is the proper remedy.[7]

(6) *Liability of Annexed Territory for Debts of County to Which Annexed.* — Where territory has been detached from one county and annexed to another, it becomes liable for its proportionate share of the indebtedness of the county of which it last forms a part. Thus, where territory has been

1. Custer County *v.* Yellowstone County, 6 Mont. 39. To the same effect, see Vance County *v.* Granville County, 107 N. Car. 291.

2. Iowa County *v.* Green County, 1 Pin. (Wis.) 518. See also Elmore County *v.* Alturas County, (Idaho 1894) 37 Pac. Rep. 349.

Mistake of Agency Appointed by Legislature — No Remedy at Law. — In Orange County *v.* Los Angeles County, 114 Cal. 390, it was held that if the commissioners appointed by the legislature to make an apportionment fail by mistake to apportion a claim existing in favor of the county against the state, of which they had no knowledge at the time, the remedy of the county is legislative, and no action in the courts can be maintained by the new county to recover its proportion of the claim when paid by the state to the old county.

3. **Enforcement of Apportionment by Levy of Tax by New County.** — Beals *v.* Amador County, 28 Cal. 450.

4. State *v.* Kiowa County, 41 Kan. 630. See also Currituck County *v.* Dare County, 79 N. Car. 565.

Levy Unauthorized by Legislature. — But in Trinity County *v.* Polk County, 58 Tex. 327, it was said that where a portion of territory was detached from one county and annexed to another the county court of the latter county could not legally levy and collect a tax on the portion of territory detached, where no such power was conferred upon it by legislative enactment.

5. **Levy of Tax by Old County — Tennessee.** — Matthews *v.* Blount County, 3 Lea (Tenn.) 120. To the same effect, see Blount County *v.* Loudon County, 8 Baxt. (Tenn.) 74.

6. **Action at Law to Enforce Apportionment — Texas Statute.** — Mills County *v.* Lampasas County, (Tex. 1897) 40 S. W. Rep. 403; Rev. Stat. of Texas, 1895, art. 764.

7. **Action at Law Where No Statutory Provision is Made.** — Grant County *v.* Lake County, 17 Oregon 453.

added to a county after the voting of bonds for the construction of a railway through the county, the taxable property in the additional territory is liable to a *pro rata* taxation for the payment of these obligations.[1]

b. On Vested Rights Between Third Persons — **Rights under Instruments of Record—Registered Conveyance.**— If a conveyance has been registered in the proper county, but by a subsequent change of the county boundaries the land falls within the boundaries of another county, the conveyance will not be affected by such change, and no additional registry in the new county will be necessary.[2]

Recorded Mortgage. — Nor will the lien created by a recorded mortgage become inoperative because the land encumbered, by a subsequent division of territory, falls in a different county from that in which the instrument was recorded.[3]

Judgment Liens. — In the same way the lien of judgments is not lost by the organization of a new county which includes the encumbered lands within its limits.[4]

c. On County Government. — Where a new county is created from a part of the territory of an old county, and provision is made for its organization at a future time, it remains attached to, and under the government and control of, the old county until its organization.[5] But upon the organization

1. Liability of Annexed Territory for Debts of County to Which Annexed. — Chicago, etc., R. Co. *v.* Cuming County, 31 Neb. 374.

2. Effect of Alteration on Conveyance Registered in Old County. — Stebbins *v.* Duncan, 108 U. S. 32; School Directors *v.* Edrington, 40 La. Ann. 633; Koerper *v.* St. Paul, etc., R. Co., 40 Minn. 132; Hill *v.* Wilson, 4 Rich. L. (S. Car.) 521, 55 Am. Dec. 696; McKissick *v.* Colquhoun, 18 Tex. 148; Howard *v.* Colquhoun, 28 Tex. 134; Melton *v.* Turner, 38 Tex. 81; Jones *v.* Powers, 65 Tex. 207. See also Lumpkin *v.* Muncey, 66 Tex. 311.

Change of Boundary After Execution but Prior to Record. — But where the change in the county boundaries is made after the execution of an instrument, but before its record, it must be recorded in that county in which the land lies at the time of its recordation. Astor *v.* Wells, 4 Wheat. (U. S.) 466; Garrison *v.* Haydon, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70; Stewart *v.* McSweeney, 14 Wis. 468. See also Bell *v.* Fry, 5 Dana (Ky.) 344. For further discussion of this question, see the title Recording Acts.

3. Effect of Alteration on Mortgage Recorded in Old County. — Hayden *v.* Nutt, 4 La. Ann. 65; Ellison *v.* Iler, 22 La. Ann. 470; Davidson *v.* Root, 11 Ohio 99, 37 Am. Dec. 411.

4. Effect of Alteration on Judgment Lien on Lands in Detached Territory. — Davidson *v.* Root, 11 Ohio 99, 37 Am. Dec. 411; West's Appeal, 5 Watts (Pa.) 87. In his latter caste it was held that where a county is divided and a new county formed out of one part, and the act erecting the new county makes no provision on the subject of keeping alive the lien of judgments upon lands lying in the new county, the lien of such judgments will either continue without revival, as at common law previous to the Act of 1798, or the lien will be preserved by revivals in the old county without the service of the process in the new county.

On the 12th of February, 1807, an attachment was regularly issued by the court of Williamson county, Tennessee, and was, on the 13th of the same month, levied on a tract of land, the property of the defendant in the suit. Judgment by default was entered on the 15th of October, 1807; the property was on motion condemned, and a writ of *venditioni exponas* issued on the 24th, which came into the hands of the sheriff on the 28th of October, who sold the property under it on the 2d of January, 1808. The county of Williamson was divided on the 16th of November, 1807, and that part of the land for which this ejectment was brought lay in the new county called Maury. It was held that the process of execution for the sale of the land, under which it was sold by the sheriff, was a direction to the sheriff to sell the specific property, which was already in his possession by virtue of the attachment, and was already condemned by the competent tribunal. The subsequent division of the county could not divest his vested interest, or deprive the officer of the power to finish a process which was already begun. Tyrell *v.* Rountree, 7 Pet. (U. S.) 464.

5. New County under Government of Old until Organized. — State *v.* Blasdel, 6 Nev. 40.

Where an act "to create and provide for the organization of the county of Reeves" was passed by the legislature, it was held that until the inhabitants of the territory embraced within the boundary of the new county exercised the privilege which had been granted to them by the legislature by organizing their county government, they remained subject to the dominion of Pecos county, and the acts of the officers of Pecos county done in the performance of their official duties within the territory of Reeves county prior to its organization were legal and valid, and hence taxes paid to the proper officers of Pecos county could not be recovered in an action against Pecos county by Reeves county; and this though the county commissioners and county judge of Pecos county had failed to do their duty in making such organization. Reeves County *v.* Pecos County, 69 Tex. 177.

Registry of Deeds in Old County. — Until a new county is actually organized or attached to

of a new county the authority of the officers of the old county over the territory of the new ceases, and the administration of the affairs of the new county should be conducted only by its own officers.[1]

d. On Jurisdiction of Courts — (1) *Before New Organization Is Accomplished.* — Where a new county is created from a part of the territory of an old county, and provision is made for its organization at a future time, its territory remains subject to the jurisdiction of the courts of the old county until it is actually organized or attached to some other county or district.[2] The principle upon which this doctrine rests is that any citizen of the state is entitled to all the benefits of the civil government and the rights and privileges of the constitution and laws. A requirement that persons are to seek their rights and protect their property through the courts and officers of a newly created county would deprive them of these benefits during the period intervening between the creation of the new county and its organization.[3]

Criminal Jurisdiction of Old County. — Thus, if a new county is created out of a part of the territory of an old county, with its organization to be effected at a future time, the county court of the old county has jurisdiction to find indictments for crimes committed in the territory of the new county between the time of the passage of the law and the organization of the new county.[4]

Civil Jurisdiction of Old County. — Also, it has been held that a civil suit against parties residing in a newly created county where the cause of action arose should be brought in the old county, the former not having been organized at the time, though previously created out of the territory of the latter.[5]

(2) *After Organization of New County.* — But the complete organization of a new county gives it all the jurisdiction over the territory and the persons and the property of individuals within it, both *civiliter* and *criminaliter*, which

some other county, transfers of lands located in it should be registered in the old county. Lumpkin *v.* Muncey, 66 Tex. 311.

Survey by Officer of Old County. — To invalidate a location and survey made by an officer of an old county on the ground that the land lay within the new county erected out of the old at the time of the location and survey, it is not sufficient that the organization of the new county was at the time provided for by law, but it must be proved that the organization had actually been effected. Clark *v.* Goss, 12 Tex. 395, 62 Am. Dec. 531.

1. Newly Organized County Not Subject to Government of Parent County. — State *v.* Clevenger, 27 Neb. 422, 20 Am. St. Rep. 674.

But for a discussion of the right of collectors of taxes of the old county to collect taxes in the newly organized county belonging to the old county, see *supra*, this section, *Effects of Alteration — On County Rights and Liabilities.*

2. Jurisdiction of Courts of Old County Before Organization of New County. — People *v.* McGuire, 32 Cal. 140; O'Shea *v.* Twohig, 9 Tex. 336.

3. Lumpkin *v.* Muncey, 66 Tex. 313.

4. Criminal Jurisdiction of Old County Before Organization of New County. — People *v.* McGuire, 32 Cal. 140.

5. Civil Jurisdiction of Old County Before Organization of New. — O'Shea *v.* Twohig, 9 Tex. 336.

In Runge *v.* Wyatt, 25 Tex. Supp. 291, it is held that where a new county had been created by the legislature and had been organized (with the exception that no district court clerk had been elected), but the county had not been attached to any judicial district, the inhabitants were liable to be sued in the county to which they belonged before the creation of the new county.

In Milk *v.* Kent, 60 Ind. 233, it was held that the division of a county is not complete until a court in the new county is so far organized as to enable suits to be brought in that county, and that until that time the jurisdiction of the circuit court of the old county over actions in relation to real estate situate in the new county was not divested.

But in Georgia a contrary view has been taken. An act of the legislature had changed the territorial limits of the county pending a suit instituted respecting the title to certain lands situate in the territory transferred. Judgment was obtained in the old county and was about to be enforced by the eviction of the parties. It was held to be proper to grant a judgment to restrain the eviction on the ground that the jurisdiction of the court of the old county was ousted by the land falling within the new county after the division. Kelly *v.* Tate, 43 Ga. 535.

Division of County Pendente Lite. — Where a suit was commenced for the foreclosure of a mortgage in the proper county, it was held that such suit would not be defeated by the division of the county afterwards; and a division of the county would not be complete till a court was so far organized in the new county as to enable suits to be commenced in such county. Buckinghouse *v.* Gregg, 19 Ind. 401.

Where a Court of Chancery Has Once Acquired and Exercised Jurisdiction, a change of county boundaries cannot arrest the prosecution of a suit therein. Arnold *v.* Styles, 2 Blackf. (Ind.) 391.

the old county out of which the new county was formed would have possessed had the new county never been erected.[1]

Criminal Jurisdiction. — Thus, if a county is divided and a portion of its territory goes into the formation of a new county, a criminal act done in the ceded territory can be prosecuted only in the new county, though the new county was created and organized subsequently to the perpetration of the offense.[2]

e. On Tenure of Office of Officer of Old County Residing in New County. — Where by the constitution,[3] or by statute,[4] a county officer

Change of Jurisdiction by Statute. — In *Ex p.* Rhodes, 43 Ala. 373, it was held that where the act establishing a new county gave persons residing therein a right to have suits pending in any of the courts of the counties out of which said new county was formed, transferred for trial to the court having jurisdiction thereof in the new county, upon application of such person, the right did not depend upon the discretion of the court, but if such application was not made within a reasonable time the right would be held to be waived.

Presumption of Continuance of Jurisdiction of Old County. — It will be presumed that the jurisdiction of the old county continues until the organization of the new county is proved. Clark *v.* Goss, 12 Tex. 395, 62 Am. Dec. 531. See also State *v.* Ruth, 21 Kan. 583.

Statute Continuing Jurisdiction of Old County. — Where an act of the legislature creating a new county directed that until the said county should be organized for judicial and county purposes it should remain attached to the old county for such purposes, and afterwards an act was passed merely giving authority to the people of the newly created county so to organize by the election of judicial officers, and not itself organizing the county, it was held that the county was not organized for judicial purposes until after officers had been elected for the discharge of all judicial duties, and that consequently up to that time the entry of a judgment in the old county created a lien upon lands within the territorial limits of the newly created county. McCullough's Appeal, 34 Pa. St. 248.

1. Courts in New County Have Jurisdiction After Organization. — Drake *v.* Vaughan, 6 J. J. Marsh. (Ky.) 143.

Probate of Will. — Under a statute in *Kentucky* providing that "if any testator shall have a mansion-house, or known place of residence, his will shall be proved in the court of the county wherein such mansion-house or place of residence is," it has been held that if, after a person dies, the county in which he was last a resident is divided so that the portion of territory in which his mansion-house was situated forms a new county, proof of his will after the formation of the new county should be made therein. Drake *v.* Vaughan, 6 J. J. Marsh. (Ky.) 143. *Compare* Lindsay *v.* M'Cormack, 2 A. K. Marsh. (Ky.) 230.

But under a statute in *California*, providing that "letters testamentary or of administration shall be granted in the county of which the deceased was a resident at or immediately previous to his death, in whatever place his death may have happened," it has been held that if after the death of the intestate that portion of the county in which he resided at the time of his death is erected into a new county, or attached to another county, the probate court of the old county still retains its jurisdiction over the administration. Matter of Harlan, 24 Cal. 182.

2. Criminal Jurisdiction of New County After Organization. — State *v.* Jones, 9 N. J. L. 357; State *v.* Donaldson, 3 Heisk. (Tenn.) 48.

Jurisdiction of District Courts of New County. — If the act creating a new county out of a part of the territory of an old one transfers the new county to a different judicial district from the old one, the district court of the new county has jurisdiction to try all indictments for murder found in the county court of the old county, but committed in the new county after the passage of the act, provided the trial is not had until the new county is organized. People *v.* McGuire, 32 Cal. 140.

3. Justice of the Peace. — Thus it has been held, under the constitution of *Pennsylvania*, that a justice of the peace commissioned within a certain district and county cannot act under his former appointment upon a division of a county, if he shall reside in the new county, though the district remains in it entire. Respublica *v.* M'Clean, 4 Yeates (Pa.) 399.

Sheriff. — But in *Arkansas*, where it was made necessary by the constitution that a sheriff should reside in the county for which he was elected during his continuance in office, it was held that a change of the boundary lines of the county, whereby the sheriff became a nonresident, did not of itself work a forfeiture of his office. State *v.* Hixon, 27 Ark. 398. The court in this case said: "A person who persists in exercising the duties of a sheriff of a county for an unreasonable time while he remains a nonresident of it may perhaps be found guilty of a misdemeanor in office, but not until conviction thereof before a competent tribunal can he be removed from his office."

4. County Commissioners. — Thus in State *v.* Walker, 17 Ohio 135, it was held that on the formation of a new county the county commissioners of any of the counties from which the new county is formed, who reside within its limits, cease to be commissioners of the old county unless they remove within it.

County Judges. — Also, in People *v.* Morrell, 21 Wend. (N. Y.) 563, it was held that where a county is divided and two separate and distinct counties formed out of it by an act of the legislature, to one of which a new name is given, whilst the other, it is declared, shall be and remain a separate and distinct county by the name of the county as it existed previous to the division, the judges of the county courts appointed previously to the division who happen to reside in that portion of the territory distinguished as a county with a new name, under the operation of the act requiring judges

is required to be a resident of the county for which he is appointed, he may be legislated out of office by an act of the legislature which changes the boundaries of the county so that he becomes a resident of the new county.

f. On Other Political Divisions — **Annexation of Territory in Different Judicial or Senatorial Districts.** — Where a portion of one county is annexed to another in a different political division of the state, as for instance, in a different senatorial or judicial district, the annexed territory will, in the absence of statutory provisions to the contrary, become a part of the political division embracing the county to which it is annexed.[1] But it is competent for the legislature to provide that such annexed territory shall remain and constitute a part of the political division to which the county from which it was detached belongs.[2]

Partition of Territory in Same Judicial District. — Also, where a county attached to a judicial district was divided into two, it was held that, in the absence of statutory provision relating thereto, both counties would remain in the same district.[3]

Effect on Townships. — It has been held that the enlarging of the county boundary does not *ipso facto* enlarge the boundary of a township contained in, and bordering upon, the former county boundaries.[4]

V. Annexation of Counties for Special Purposes. — Sometimes counties are annexed to each other by statute for judicial or other special purposes.[5] In the case of such annexation for judicial purposes, in the absence of any provision of law providing how or by whom the court expenses shall be paid no legal ground of action will be furnished by the one county against the other for contribution.[6]

Attachment of Unorganized Territory to County for Special Purposes. — Provision is also made by statute in several of the states for the attachment of unorganized territory to an adjoining organized county, for election,[7] judicial,[8] and revenue purposes.[9] During this temporary attachment, the county authorities will

of county courts to reside within the county for which they are appointed, lose their offices and are no longer competent to act under their commissions; whilst those of the judges who happen to reside in the portion of the territory which retains the original name, continue in office until the expiration of the term for which they were originally appointed. *Compare* Garey *v.* People, 9 Cow. (N. Y.) 640; *Ex p.* M'Collum, 1 Cow. (N. Y.) 550.

1. Annexation of Counties in Different Political Divisions. — Howard *v.* McDiarmid, 26 Ark. 100; Pulaski County *v.* Saline County, 37 Ark. 339; Opinion of Justices, 6 Cush. (Mass.) 578; Lafayette F. Ins. Co. *v.* Remmers, 29 La. Ann. 425.

2. Opinion of Justices, 6 Cush. (Mass.) 578; Lafayette F. Ins. Co. *v.* Remmers, 29 La. Ann. 419; State *v.* Williams, 29 La. Ann. 779.

3. Partition of Territory in Same Judicial District. — People *v.* Maynard, 15 Mich. 463.

4. Effect of Alteration of County Boundaries on Townships. — Morris County *v.* Hinchman, 29 Kan. 90.

5. Annexation of Counties for Special Purposes. — Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414; Crawford County *v.* Iowa County, 2 Chand. (Wis.) 14.

6. Crawford County *v.* Iowa County, 2 Chand. (Wis.) 14.

Where two counties were annexed to each other for judicial purposes, under a statutory provision of the government to which they were respectively subject, and such statute provided that certain courts should be held exclusively in one of the counties, drawing to it thereby the trial of all causes arising in each county; and where by such legislative act no provision was made relating to the expenses to be incurred by the holding of such courts, but these expenses were currently paid by the county in which such courts were provided to be holden — the non-paying county cannot be coerced either in a court of equity or of law to refund the paying county any part of the expenses paid by it, for such purpose, unless by some act of consent to pay it shall create an enforceable binding duty. Crawford County *v.* Iowa County, 2 Chand. (Wis.) 14.

Right of Taxation Not Implied. — In Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, it was held that where a portion of an organized county was attached to another for judicial purposes, the right was not thereby conferred on that county to tax the attached territory, as that is an executive and not a judicial power.

7. Territory Attached to County for Election Purposes. — State *v.* Van Camp, 36 Neb. 91.

8. Territory Attached to County for Judicial Purposes. — *In re* Holcomb, 21 Kan. 628; Pelham *v.* Finney County, 36 Kan. 101; Matter of Schurman, 40 Kan. 539; State *v.* Page, 12 Neb. 386; Fremont, etc., R. Co. *v.* Brown County, 18 Neb. 516; McCullough's Appeal, 34 Pa. St. 248; Nolan County *v.* State, 83 Tex. 182; Alford *v.* Jones, 71 Tex. 519. See also Russel *v.* Reed, 27 Pa. St. 166.

9. Territory Attached to County for Revenue Purposes. — Union Pac. R. Co. *v.* Peniston, 18

have entire control over the unorganized territory for the purposes of the attachment, the same as if such territory were a part of the county.[1] But the ligament that binds such unorganized territory to the organized county will be severed upon its organization and the election and qualification of its officers.[2]

VI. Powers — 1. In General. — Counties, being component parts of the state, can exercise only such powers as are granted by express words in the constitution or the statutes, or are necessarily or fairly implied in or incident to the powers expressed, or are essential to the declared objects and purposes of the corporation.[3]

2. Ordinary Corporate Powers. — They will usually be found invested by statute with the ordinary powers incident to corporations in general.

a. To Sue and Be Sued — (1) *In General.* — At common law counties cannot sue or be sued. Their capacity in this regard depends on the statutory enactment, for the reason that the several counties of a state are political divisions exercising a part of the sovereign power of the state.[4]

Wall. (U. S.) 6; Fremont, etc., R. Co. *v.* Brown County, 18 Neb. 516. See also Morse *v.* Hitchcock County, 19 Neb. 566.

1. Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 6; *Ex p.* Carr, 22 Neb. 535; State *v.* Van Camp, 36 Neb. 91.

Jurisdictional Rights Over Crimes During Attachment. — Thus, in *Ex p.* Crawford, 12 Neb. 379, it was held that an organized county has jurisdiction to punish for crime committed in an unorganized territory directly west of that county and attached thereto. To the same effect is a decision under the *Kansas* statute, State *v.* Ruth, 21 Kan. 583.

Right of Taxation. — When unorganized territory in *Nebraska* is attached to an organized county for revenue purposes, the authorities of such organized county are the proper authorities to levy taxes upon property thus placed under their charge. Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 6.

Taxation of Territory Attached for Judicial Purposes Only. — In Nolan County *v.* State, 83 Tex. 183, it was held that an unorganized county attached for judicial purposes should bear the burdens of taxation to defray the ordinary expenses of county administration, but that the assessed values in such county should not be considered in ascertaining the valuation of the taxable property as the basis of the creation of an indebtedness for permanent county buildings. *Compare* Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414.

By Act of Congress, Nez Perce county was divided and Latah county created. By section 7 of said act it was provided that Latah county should be and remain a part of Nez Perce county for judicial purposes until three days after the next meeting of the judges of the supreme court of the territory of Idaho, which was Dec. 1, 1888, when terms of court were to be fixed for Latah county. By section 5 of said act Latah was to pay to Nez Perce county her just proportion of the net indebtedness of the latter county. It was held that Latah county was liable to pay her just proportion of the judicial expenses of the county of Nez Perce until December 31, 1888. Nez Perce County *v.* Latah County, 2 Idaho 1131.

2. Matter of Hall, 38 Kan. 670; Fremont, etc., R. Co. *v.* Brown County, 18 Neb. 516.

In Fremont, etc., R. Co. *v.* Brown County, 18 Neb. 516, it was held that after the organization of a new county is completed, and its officers have qualified, all taxes due to it are to be paid to its treasurer, and the payment to the treasurer of the county to which it was formerly attached is not a payment to it.

3. Governmental and Corporate Incidents Generally. — Laramie County *v.* Albany County, 92 U. S. 307; Wheeler *v.* Wayne County, 132 Ill. 599; Evans *v.* Cumberland County, 89 N. Car. 157; Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. Rep. 585.

Powers of Strictly Public Character. — In Jefferson County *v.* Ford, 4 Greene (Iowa) 367, the court said: "A county is strictly a political corporation, a grant of power to a designated portion of the people to aid and arrange the machinery of government for the whole state. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character."

4. Counties Incapable of Suing or Being Sued at Common Law — *United States.* — Lyell *v.* St. Clair County, 3 McLean (U. S.) 580.

California. — Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130; Gilman *v.* Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290.

Connecticut. — Ward *v.* Hartford County, 12 Conn. 404; Sheldon *v.* Litchfield County, 1 Root (Conn.) 158; Lyon *v.* Fairfield County, 2 Root (Conn.) 30.

Georgia. — Monroe County *v.* Flynt, 80 Ga. 489; White Star Line Steamboat Co. *v.* Gordon County, 81 Ga. 48.

Illinois. — Schuyler County *v.* Mercer County, 9 Ill. 20.

Mississippi. — Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352; Anderson *v.* State, 23 Miss. 459.

North Carolina. — White *v.* Chowan County, 90 N. Car. 439.

Ohio. — Gallia County *v.* Holcomb, 7 Ohio 232.

Oregon. — Grant County *v.* Lake County, 17 Oregon 453.

Utah. — Taylor *v.* County Ct., 2 Utah 405.

Virginia. — Fry *v.* Albemarle County, 86 Va. 195, 19 Am. St. Rep. 879.

In Alabama it has been held that prior to the Code there was no statute subjecting counties

By Statute — Express Grant of Power. — But, in most of the states, capacity to sue and be sued has been given to counties by statute, in express terms.[1]

Implied Grant of Power. — And it has been maintained that for the purposes for which a county is made a body corporate and politic it is a person, and is

to suit, and the only remedy to enforce a liability against them was by mandamus to the commissioners' court. Tarver *v.* Commissioners' Ct., 17 Ala. 527; Lowndes County *v.* Hunter, 49 Ala. 507.

1. Statutes Granting Capacity to Sue and Be Sued — *United States.* — Lyell *v.* St. Clair County, 3 McLean (U. S.) 580 (decided under *Michigan* statute); Lyell *v.* Lapeer County, 6 McLean (U. S.) 446 (decided under *Michigan* statute); Marion County *v.* McIntyre, 10 Fed. Rep. 543 (decided under *Nebraska* statute); Nash *v.* El Dorado County, 24 Fed. Rep. 252 (decided under *California* statute); Hall *v.* El Dorado County, 24 Fed. Rep. 257 (decided under *California* statute); Vincent *v.* Lincoln County, 30 Fed. Rep. 749 (decided under *Nevada* statute); Pickens County *v.* Bank of Commerce, 97 U. S. 374 (decided under *South Carolina* statute).

Alabama. — Covington County *v.* Kinney, 45 Ala. 176; Montgomery County *v.* Barber, 45 Ala. 237; Schroeder *v.* Colbert County, 66 Ala. 137; James *v.* Conecuh County, 79 Ala. 304.

Arizona. — Yavapai County *v.* O'Neil, (Arizona 1892) 29 Pac. Rep. 430.

California. — Gilman *v.* Contra Costa County, 6 Cal. 676; Price *v.* Sacramento County, 6 Cal. 254; Placer County *v.* Astin, 8 Cal. 305; Gilman *v.* Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290; Crandall *v.* Amador County, 20 Cal. 72; Solano County *v.* Neville, 27 Cal. 465; Colusa County *v.* Glenn County, 117 Cal. 434.

Dakota. — Spencer *v.* Sully County, 4 Dakota 474.

Georgia. — Monroe County *v.* Flynt, 80 Ga. 489; Justices *v.* Griffin, etc., Plank Road Co., 9 Ga. 475; Collins *v.* Hudson, 54 Ga. 25; Cook *v.* Houston County, 54 Ga. 163; Cox *v.* Whitfield County, 65 Ga. 741; Cobb County *v.* Adams, 68 Ga. 51; Hargrove *v.* Lilly, 69 Ga. 326; Arnett *v.* Decatur County, 75 Ga. 782.

Idaho. — U. S. *v.* Shoup, 2 Idaho 459.

Illinois. — Schuyler County *v.* Mercer County, 9 Ill. 20; McDonough County *v.* Markham, 19 Ill. 149; Kane County *v.* Young, 31 Ill. 194; Rock Island County *v.* Steele, 31 Ill. 543; People *v.* Clark County, 50 Ill. 213.

Iowa. — Code of Iowa, § 394 (1897); Campbell *v.* Polk County, 3 Iowa 467; Poweshiek County *v.* Buttles, 70 Iowa 246.

Maine. — Joy *v.* Oxford County, 3 Me. 131.

Michigan. — Johr *v.* St. Clair County, 38 Mich. 532.

Mississippi. — Carroll County *v.* Georgia Pac. R. Co., (Miss. 1892) 11 So. Rep. 471.

Missouri. — State *v.* Sappington, 68 Mo. 454; Lincoln County *v.* Magruder, 3 Mo. App. 314.

North Dakota.—Barrett *v.* Stutsman County, 4 N. Dak. 175.

Oregon. — Grant County *v.* Lake County, 17 Oregon 453, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), title COUNTY; State *v.* Baker County, 24 Oregon 141; Crossen *v.* Wasco County, 10 Oregon 111.

Pennsylvania. — Wilson *v.* Huntingdon County, 7 W. & S. (Pa.) 197; Slegel *v.* Lauer, 148 Pa. St. 236.

South Carolina. — Aiken County *v.* Murray, 35 S. Car. 508; Greenville County *v.* Runion, 9 S. Car. 1.

Compare Walker *v.* Wasco County, (Oregon 1888) 19 Pac. Rep. 81; Pruden *v.* Grant County, 12 Oregon 308.

Judicial Notice of Corporate Character. — In *Alabama* it has been held that the court has judicial knowledge of the corporate character of all the counties in the state. Overton *v.* State, 60 Ala. 73; Camp *v.* Marion County, 91 Ala. 240.

Grant of Power Implied from Language of Statute. — In Waitz *v.* Ormsby County, 1 Nev. 376, it was held that where an "act prescribing the manner of commencing or maintaining actions by or against counties" provided that actions against a county might be commenced in the district court of the judicial district embracing said county, it authorized actions to be brought and maintained against counties, and was not merely an act providing where such actions might be brought. Floral Springs Water Co. *v.* Rives, 14 Nev. 434. See also Gilman *v.* Contra Costa County, 6 Cal. 676, 8 Cal. 52, 68 Am. Dec. 290.

In Connecticut it has been held that where it was provided by statute that counties, in the name of their treasurer, shall have power to commence and prosecute to final judgment any suit at law or bill in equity necessary to enforce, acquire, or establish any right, title, or demand, or to appear by agent or attorney in any suit in favor of or against such society, it will not be implied that suits against such counties are authorized. Ward *v.* Hartford County, 12 Conn. 404.

Statute Creating Claim and Providing No Remedy. — It has been held in *Alabama* that since the code in that state declares every county a body corporate, with power to sue and be sued, if a statute creates a claim against a county and provides no remedy for its enforcement, a suit against the county by summons and complaint is a proper remedy. Autauga County *v.* Davis, 32 Ala. 703; Montgomery County *v.* Barber, 45 Ala. 237.

General Statute Creating New Remedy. — A county cannot be sued except as specially authorized by statute, and general language creating new remedies or prescribing procedure will not operate as authority for such actions against the county. Thus, under the *California* Code, a provision that an action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation, and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other for which the plaintiff is bound as a surety, has been held not to authorize an action against the county. Whittaker *v.* Tuolumne County, 96 Cal. 100.

capable of suing and being sued in regard to matters pertaining to those purposes, the same as an individual, and that the mere vesting of any corporate powers in the county organization will authorize it to sue or be sued without any express provision to that effect.[1]

Jurisdiction of the Federal Courts. — It is well settled that where a state by statute confers upon a county the capacity to sue and be sued, such capacity will be recognized in the federal courts.[2] And it has been maintained that a county, by virtue of its corporate powers, possesses the right and capacity to sue and be sued in the national courts, in the absence of any state statute relative thereto.[3] Accordingly it has been held that the power of a county to contract with citizens of other states implies liability to suit by citizens of other states, and no statutory limitation of liability can defeat a jurisdiction given by the constitution.[4]

(2) *In Particular Actions.* — A discussion of the specific liabilities of counties will be found elsewhere in this article.[5] But instances of specific rights of action on the part of the county can be more conveniently given here.[6]

On Contracts. — General power to sue and special power to make contracts for specified purposes confer authority and capacity, in the absence of statutory restrictions applicable generally or to the particular case, to bring and maintain any appropriate action to recover damages for the breach of a contract; otherwise the county would be powerless to enforce its contracts.[7]

1. Implied Grant of Capacity to Sue and Be Sued. — Levy Ct. *v.* Coroner, 2 Wall. (U. S.) 501; Woods *v.* Madison County, 136 N. Y. 411; Grant County *v.* Lake County, 17 Oregon 453; Salt Lake County *v.* Golding, 2 Utah 319.

In New Mexico it has been held that a county is a *quasi* corporation, and therefore may sue and be sued by virtue of the territorial statute extending the word "person" to bodies "politic and corporate." Donalson *v.* San Miguel County, 1 N. Mex. 263.

In Connecticut it has been held that where the only duty imposed upon a county was the erection and support of proper places for holding courts and the safe keeping of prisoners, the right to bring suit against such county was not to be implied. Ward *v.* Hartford County, 12 Conn. 404.

2. Statutes Authorizing Suits in Federal Courts. — Pickens County *v.* Bank of Commerce, 97 U. S. 374; Lyell *v.* Lapeer County, 6 McLean (U. S.) 446; Lyell *v.* St. Clair County, 3 McLean (U. S.) 580; Jordan *v.* Cass County, 3 Dill. (U. S.) 185; McCoy *v.* Washington County, 3 Wall. Jr. (C. C.) 381; Marion County *v.* McIntyre, 2 McCrary (U. S.) 143; Nash *v.* El Dorado County, 24 Fed. Rep. 252; Hall *v.* El Dorado County, 24 Fed. Rep. 257; Vincent *v.* Lincoln County, 30 Fed. Rep. 749; U. S. *v.* Johnson County, 5 Dill. (U. S.) 208; Roads, etc., Com'rs *v.* Hurd, 49 Ga. 462, 15 Am. Rep. 682; State *v.* Rainey, 74 Mo. 229.

3. Implied Right to Sue and Be Sued in Federal Courts. — Vincent *v.* Lincoln County, 30 Fed. Rep. 749; Cowles *v.* Mercer County, 7 Wall. (U. S.) 118.

4. Thus in Chicot County *v.* Sherwood, 148 U. S. 529, it was held that the *Arkansas* statute of Feb. 27, 1879, repealing all previous acts authorizing counties of the state to sue, and requiring all persons having demands against the county to present them for allowance to the county court, is not adequate to deprive nonresident creditors of a county of their right to sue the county in the national courts, when the amount is sufficient to invoke their jurisdiction. To the same effect see Thompson *v.* Searcy County, 57 Fed. Rep. 1030.

Also it has been held that the statute of *Missouri* of 1879, providing as follows: "All actions whatsoever, against any county, shall be commenced in the circuit court of such county and prosecuted to final judgment and execution therein, unless removed by change of venue to some other county, in which case the action or actions so removed shall be prosecuted to final judgment and execution in the circuit court of such other county;" does not deprive the national courts of jurisdiction in a suit against a county of such state brought by an inhabitant of another state. Cunningham *v.* Ralls County, 1 Fed. Rep. 453. To the same effect see Cowles *v.* Mercer County, 7 Wall. (U. S.) 118.

5. See *infra*, *Duties and Liabilities*.

6. Bill in Equity for Cancellation of Warrant. — A bill in equity may be brought by a county for the cancellation of a county warrant, where it is issued illegally or there is just defense to it. Commissioners' Ct. *v.* Moore, 53 Ala. 25; Pulaski County *v.* Lincoln, 9 Ark. 320; El Dorado County *v.* Elstner, 18 Cal. 144; Modoc County *v.* Spencer, 103 Cal. 498; Paola, etc., R. Co. *v.* Anderson County, 16 Kan. 302; Anderson County *v.* Paola, etc., R. Co., 20 Kan. 534; Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 230.

7. Power of County to Sue on Contract. — James *v.* Conecuh County, 79 Ala. 306; U. S. *v.* Shoup, 2 Idaho 459; Jackson County *v.* Hall, 53 Ill. 440; Carroll County *v.* Georgia Pac. R. Co., (Miss. 1892) 11 So. Rep. 471; Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. Rep. 585; Milliken *v.* Callahan County, 69 Tex. 205.

Action on Bonds of County Officer. — Thus a county may bring action upon the bond given by a county officer. Johr *v.* St. Clair County, 38 Mich. 532; Greenville County *v.* Runion, 9

For the Recovery of Property. — Also, an action may be brought by a county to recover money belonging to the general fund of the county or other personal property.[1] Or it may maintain ejectment for lands which it owns and of which it is entitled to possession.[2]

For Torts. — In the same way a county may maintain an action for injury to its property. Thus it has been held that a county has such an interest in its highways as entitles it to an action in its own name for an injury thereto.[3]

To Enjoin a Nuisance. — Also it has been held that a county may maintain an action to prevent a public nuisance, such as the laying of a railroad along a county road without any lawful authority.[4]

No Concurrent Right of Action in State Apart from Statute. — It has been held that where a right of action exists in a county, a concurrent right of action does not exist in the state, except when given by statute.[5]

(3) *Employment of Counsel.* — It has been held that a county has the right to employ counsel to prosecute or defend an action or to perform other services,[6] and though there is no express statutory provision empowering a county to contract for such services, the power may be implied from the corporate capacity of the county to sue and be sued.[7]

b. To Have Corporate Seal. — Provision is sometimes made by statute for the possession and use of a corporate seal by counties.[8]

c. To Make Contracts — (1) *In General.* — It is very generally provided by the statutes of the different states that counties shall have the power to make all contracts necessary to the execution of their corporate objects and purposes.[9]

S. Car. 1; Aiken County *v.* Murray, 35 S. Car. 508.

Bond of Bridge Contractor. — Also, where a bridge has been erected under contract with the county commissioners, and bond taken from the builder conditioned to keep it in good repair for five years, the county may maintain an action on the bond in the event of the refusal or neglect of the builder to make the necessary repairs. James *v.* Conecuh County, 79 Ala. 304.

Action on Assigned Notes. — Also, a county may maintain an action on a note or a banker's certificate of deposit assigned to it. Marshall County *v.* Hanna, 57 Iowa 372; Shanklin *v.* Madison County, 21 Ohio St. 575.

1. Suit to Recover Personal Property. — Solano County *v.* Neville, 27 Cal. 465. See also Cook *v.* Houston County, 54 Ga. 164.

Action by County as Trustee. — Under the *Iowa* Code, making the county liable for all losses upon loans of the school fund made in the county, it has been held that, to recover such fund, the county may maintain an action in its own name as the trustee of an express fund. Madison County *v.* Tullis, 69 Iowa 720. See also Lincoln County *v.* McLellan, 3 Mo. App. 312.

2. Ejectment to Recover Possession of Lands. — Lincoln County *v.* Magruder, 3 Mo. App. 314.

3. Action for Torts. — Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225; Louisville, etc., R. Co. *v.* Whitley County Ct., 95 Ky. 215.

4. Action to Enjoin Nuisance.—Stearns County *v.* St. Cloud, etc., R. Co., 36 Minn. 425.

5. People *v.* Ingersoll, 58 N. Y 1, 17 Am. Rep. 178. See also People *v.* Wood, 121 N. Y. 522.

Under the Laws of Missouri county funds are the property of the county and not of the state, and the state has no right to sue for their recovery except in actions brought to the use of the county on bonds of officers, which are by law required to be given to the state to the use of the county. State *v.* Rubey, 77 Mo. 610.

Right of Action Against State. — In Lyman County *v.* State, (S. Dak. 1896) 69 N. W. Rep. 601, under a statute declaring it to be competent for "any person" deeming himself aggrieved by the refusal of the state auditor to allow any just claim against the state to commence an action therefor, it has been held that an organized county may bring such an action.

6. Employment of Counsel. — Tatlock *v.* Louisa County, 46 Iowa 138; Jordan *v.* Osceola County, 59 Iowa 388.

7. Jack *v.* Moore, 66 Ala. 187; Brome *v.* Cuming County, 31 Neb. 362.

8. County Corporate Seals. — Code of Iowa, § 394 (1897); Chester County *v.* Brower, 117 Pa. St. 647, 2 Am. St. Rep. 713; Dauphin County *v.* Bridenhart, 16 Pa. St. 458.

In *Missouri* it has been held that where the county appointed a commissioner to contract for the building of a bridge, he might adopt and use any seal as his own, and it would be the seal of the county for that purpose. St. Louis County *v.* Cleland, 4 Mo. 84.

9. Power to Make Contracts. — Montgomery County *v.* Barber, 45 Ala. 237; House *v.* Los Angeles County, 104 Cal. 73; McCabe *v.* Fountain County, 46 Ind. 380; Cass County *v.* Ross, 46 Ind. 404; Halstead *v.* Lake County, 56 Ind. 363; Hight *v.* Monroe County, 68 Ind. 576; Rush County *v.* Rushville, etc., Gravel Road Co., 87 Ind. 502; Louisiana, etc., R. Co. *v.* Police Jury, 48 La. Ann. 331; State *v.* Chosen Freeholders, 53 N. J. L. 531. See also Code of Iowa, § 394 (1897); Pub. Stat. Mass. (1882), p. 200.

Erection of County Jail by Contract. — In *Cali-*

Unauthorized Contracts. — As has been said in the case of powers generally, counties can enter into no contracts not expressly or impliedly authorized by statute or the organic law, and agreements entered into in excess of such authority will be void.[1]

Partly Executed Contract — Action for Recovery of Consideration Paid by County. — But it has been held that while a contract entered into by a county in excess of its authority will not be enforceable against the county, yet the defense of *ultra vires* cannot be set up by the other party to defeat the county in an action to recover the consideration paid by the county in a case where the other party had failed to carry out the contract.[2]

Constitutional Limitations. — Constitutional provisions exist in many of the states imposing restrictions upon the power of counties to contract indebtedness.[3] In most instances this restriction takes the form of a limit in the amount of indebtedness beyond which the county cannot pass.[4] When the constitu-

fornia it has been held that the board of supervisors of a county is authorized by statute to erect a county jail by contract, and this statute is operative without a law authorizing the levy of a special tax therefor. Babcock *v.* Goodrich, 47 Cal. 488.

Repair of Court-house. — In the same way it has been held competent for a county to contract for making repairs and alterations in the court-house. McGowan *v.* Ford, 107 Cal. 177.

Contracts for Insurance of County Buildings. — Under statutes in *Missouri*, substantially providing for the taking of such measures by the county courts as shall be necessary to preserve all buildings and property belonging to a county, it has been held that they have power to enter into contracts for the insurance of county buildings against fire or lightning. Walker *v.* Linn County, 72 Mo. 650.

For a discussion of the liabilities of counties on contracts, see *infra*, this title, *Duties and Liabilities*.

1. Unauthorized Contracts Void. — Thompson *v.* Searcy County, 57 Fed. Rep. 1030; Lebcher *v.* Custer County, 9 Mont. 315; Crawford County *v.* Iowa County, 2 Chand. (Wis.) 14.

Contracting for Benefit of Third Persons. — A county, unless expressly authorized by statute, has no power to take security for third persons nor to make contracts expressly for their benefit. Thus in Breen *v.* Kelly, 45 Minn. 352, it was held that a county has not, without statutory authority, power to take a bond for the benefit of third persons, and such a bond, though voluntarily executed, is void. See also Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. Rep. 585.

Offering Rewards. — Apart from statute expressly or by necessary implication conferring such power, it is not within the power of a county to offer a reward for the arrest of persons charged with the commission of a crime, but the board of supervisors may offer a reward for the recovery of money which has been stolen from the county. Hawk *v.* Marion County, 48 Iowa 472. See the title REWARDS.

Implied Authority to Contract. — In Breen *v.* Kelly, 45 Minn. 352, the court said: "When a municipal corporation has authority to do, or cause to be done, certain work, and make contracts for the doing of the work, it has probably implied authority to take security for and on account of the doing of the work — authority to protect itself in the premises; for it may be presumed the legislature intended it to have that power as incidental to the power expressly granted." See also Hight *v.* Monroe County, 68 Ind. 575.

2. Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. Rep. 585; Leon County *v.* Vann, 86 Tex. 707. See the title ULTRA VIRES.

3. Constitutional Limitations Imposed upon Power to Contract. — See the constitutions of the various states.

Thus the constitution of *North Carolina* provides that "no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Const. of North Carolina, art. 7, § 7; Evans *v.* Cumberland County, 89 N. Car. 154; Brodnax *v.* Groom, 64 N. Car. 244. See also McCless *v.* Meekins, 117 N. Car. 34.

Under this provision it has been held that, as the general head of repairing and building bridges came under the "necessary expenses" of the county, it was not competent for the court to review a decision of the county commissioners as to what particular bridge, as regards either location or description, is or is not necessary. Brodnax *v.* Groom, 64 N. Car. 244; Evans *v.* Cumberland County, 89 N. Car. 154.

4. Limitation upon Amount of Indebtedness to Be Incurred — *United States.* — Wilder *v.* Rio Grande County, 41 Fed. Rep. 512, *construing* the constitution of *Colorado;* Lake County *v.* Rollins, 130 U. S. 662, *construing* the constitution of *Colorado;* Barnard *v.* Knox County, 37 Fed. Rep. 563, *construing* the constitution of *Missouri*.

Arizona. — McRae *v.* Cochise County, (Arizona 1896) 44 Pac. Rep. 299.

Colorado. — People *v.* May, 9 Colo. 80, 9 Colo. 404.

Idaho. — Bannock County *v.* Bunting, (Idaho 1894) 37 Pac. Rep. 277.

Illinois. — People *v.* Hamill, 134 Ill. 666.

Kentucky. — O'Mahoney *v.* Bullock, 97 Ky. 774.

Minnesota. — Johnston *v.* Becker County, 27 Minn. 64; Rogers *v.* Le Sueur County, 57 Minn. 434.

New York. — Adams *v.* East River Sav. Inst., 136 N. Y. 52.

tional limit has been reached, the county has no further capacity to make contracts out of which additional burdens may arise. As to such contracts, it may be said that the county has no existence, and the disability extends to all forms of action, whether by parol, by deed, by confession of judgment, or any other device.[1]

Parties Dealing with the County to Take Notice of Limitation. — Parties dealing with counties must take notice of the limit which the people, in their discretion, have prescribed for county indebtedness, and no plea of ignorance or hardship can be allowed to avail.[2]

Form of Contract. — In *California* it has been held that a contract entered into by a board of supervisors for and on behalf of a county, and signed by the chairman of the board, is the contract of the county.[3] But it may be stated generally that where the mode and manner of contracting are not prescribed by statute, contracts may be made in the same manner as by individuals, or other corporations, and may be in writing or by parol.[4]

Utah. — Fenton *v.* Blair, 11 Utah 78.

Washington. — State *v.* Gloyd, 14 Wash. 5; State *v.* Hopkins, 14 Wash. 59; Hunt *v.* Fawcett, 8 Wash. 396; Murry *v.* Fay, 2 Wash. 352.

West Virginia. — Davis *v.* Wayne County Ct., 38 W. Va. 104.

Wyoming. — Cook County *v.* Rollins Invest. Co., 3 Wyoming 470.

See also *In re* Funding of County Indebtedness, 15 Colo. 421.

Thus, by the constitution of *California*, no county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors. See San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641; Shaw *v.* Statler, 74 Cal. 258; Welch *v.* Strother, 74 Cal. 413; Schwartz *v.* Wilson, 75 Cal. 502; McGowan *v.* Ford, 107 Cal. 177.

But where a county entered into a contract for the building of additions to the county court-house, agreeing to make monthly instalments as the work advanced, it has been held that at the time of entering into the contract no debt or liability is created for the aggregate amount of the instalments to be paid under the contract, but that the whole debt or liability created is that which arises from year to year in separate amounts as the work is performed, and that when such debt for a year does not exceed the income and revenue of the county provided for that year it is not violative of this provision of the constitution. Smilie *v.* Fresno County, 112 Cal. 311.

Paragraph 1, § 7, art. 7, of the constitution of *Georgia* provides: "The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipalities, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law." See Office Specialty Mfg. Co. *v.* Elbert County, 73 Fed. Rep. 324; Spann *v.* Webster County, 64 Ga. 498; Cabaniss *v.* Hill, 74 Ga. 845; Lewis *v.* Lofley, 92 Ga. 804. *Compare* Butts *v.* Little, 68 Ga. 272.

Under this provision it has been held that a contract made on the tenth day of October, 1894, by a county with the plaintiff for furnishing certain compressing files and roller shelves, to be placed in a new court-house, for the amount of two thousand and sixty-seven dollars, to be paid one-half on or before December 30, 1895, and the remaining half on or before December 30, 1896, was held to be invalid and not binding on the county, where no election to authorize the debt had been held. Office Specialty Mfg. Co. *v.* Elbert County, 73 Fed. Rep. 324.

Deducting Cash Assets from County Indebtedness. — Under a provision of the *Washington* constitution to the effect that no county, city, town, school district, or other municipal corporation shall, for any purpose, become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, it has been held that the cash assets of the county shall be deducted from the outstanding indebtedness for the purpose of determining the amount of the indebtedness, within the meaning of the constitutional provision. State *v.* Hopkins, 14 Wash. 59; Mullen *v.* Sackett, 14 Wash. 100.

1. Wilder *v.* Rio Grande County, 41 Fed. Rep. 512, *construing* the Constitution of *Colorado*.

2. **Parties Dealing with County to Take Notice of Limitation.** — Dixon County *v.* Field, 111 U. S. 83; People *v.* May, 9 Colo. 406; Davis *v.* Wayne County Ct., 38 W. Va. 104.

3. Babcock *v.* Goodrich, 47 Cal. 488.

4. **Contracts in Writing or by Parol.** — Montgomery County *v.* Barber, 45 Ala. 237; McCabe *v.* Fountain County, 46 Ind. 380; Gibson County *v.* Motherwell Iron, etc., Co., 123 Ind. 364; Hight *v.* Monroe County, 68 Ind. 576; Baker *v.* Johnson County, 33 Iowa 151; Jordan *v.* Osceola County, 59 Iowa 388; Gillett *v.* Lyon County, 18 Kan. 410; Butler *v.* Neosho County, 15 Kan. 178.

Contract with County Court. — In *Missouri* it

Resolution of County Agent as Contract. — Sometimes the terms of a contract entered into by a county are to be found in the form of a resolution by the authorized county agency,[1] but the resolution will not have the effect of a contract unless there has been an acceptance on the part of the other party.[2]

(2) *To Borrow Money.* — It is very generally held that, in the absence of statute, a county has no power to borrow money, and this though the purpose may be to apply the money to public use.[3] This power must be conferred by

has been held that a contract with the county court cannot be established by parol evidence, since the county court, like any other court of record, can speak only by its record. Maupin *v.* Franklin County, 67 Mo. 327. See also Dennison *v.* St. Louis County, 33 Mo. 168.

Where a Contract for Building a Bridge Read: "This contract made this 22d day of September, 1885, by and between F. M. Keen, party of the first part, and C. H. Zoll, *ex-officio* road and bridge commissioner of the county of Johnson and state of Missouri, party of the second part, witnesseth," etc., it was held that the contract was binding upon the county, although not signed by the commissioner, where it appears that the county court approved the bid for the work and the builder signed the contract. Bryson *v.* Johnson County, 100 Mo. 76.

1. Contract in Form of Resolution by County Board. — Sexton *v.* Cook County, 114 Ill. 174.

Thus where the county board of Cook county passed this resolution: "*Resolved*, That the contractor on the new court-house, P. J. Sexton, be and he is hereby instructed to build as much of the foundation of the dome, under the supervision of the architect, as is necessary to inclose the building, subject to the architect's valuation of the same," it was held that this, when accepted by Sexton, constituted a contract for the building of a portion of the foundation of the dome. Sexton *v.* Cook County, 114 Ill. 174.

Resolution Held Not to Amount to Written Contract. — But where, compensation being due from the general government to Johnson county on account of swamp land, a resolution of the board of supervisors was passed that a swamp land agent should be elected to procure the allowance to the county of the claim, and that he should be allowed a certain compensation for his services, and under this resolution the plaintiff was elected and entered upon a performance of his duties, it was held that the contract was entered into, but that the resolution itself did not constitute the contract so as to render it a contract in writing. Baker *v.* Johnson County, 33 Iowa 151.

2. Resolution Not Contract Without Acceptance. — McCrossen *v.* Lincoln County, 57 Wis. 184.

3. Express Statutory Authority to Borrow Money Necessary. — Wells *v.* Pontotoc County, 102 U. S. 625; Dent *v.* Cook, 45 Ga. 323; Crittenden County Ct. *v.* Shanks, 88 Ky. 475; Beaman *v.* Board of Police, 42 Miss. 247; Parker *v.* Saratoga County, 106 N. Y. 392; Exchange Bank *v.* Lewis County, 28 W. Va. 278; Burnett *v.* Maloney, 97 Tenn. 713, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 382.

In Dickinson County *v.* Warren, 98 Mich. 144, it was held that a board of supervisors has no power under How. Stat., § 483, subd. 7 and 10, to borrow the money necessary to defray the current expenses and charges of the county, but the same must be raised by taxation.

In *Georgia* it has been held that the ordinary of a county has no authority under any general law of that state, even with the recommendation of the grand jury to the county, to borrow money on the credit of the county. Dent *v.* Cook, 45 Ga. 323.

Section 7, par. 1, of the present constitution of Georgia allows a county to incur a debt for a temporary loan or loans to supply casual deficiencies of revenue not to exceed one-fifth of one per centum of the assessed value of taxable property therein. Lewis *v.* Lofley, 92 Ga. 808.

In *Nebraska* it has been held that a county has sufficient authority to raise money otherwise, and an agreement of its treasurer that if money is advanced by a bank for certain county purposes, such bank shall be relieved to a certain extent from liability to the county as a depository is not enforceable. Commercial State Bank *v.* Antelope County, 48 Neb. 496.

In *Indiana*, under a statute providing that "whenever it shall be necessary to construct, complete, or repair a court-house, jail, or other county building, or whenever it may be desirable to fund or average any existing debt incurred for county purposes, and the revenues afforded by reasonable taxation are insufficient to do the same, the county commissioners may borrow for that purpose any sum of money not exceeding one per centum of the assessed valuation of the real and personal property of the county, * * * provided that no second or subsequent loan shall be made or authorized by said commissioners as above provided, so long as any former loan made under the provisions of this act shall remain unpaid," it has been held that a board of county commissioners may, in their discretion, borrow money for the purposes expressed in this section at one or several loans as long as the sum of such loans outstanding at the same time does not exceed one per centum of the assessed value of the real and personal property subject to taxation in the county. Hamilton County *v.* Cottingham, 56 Ind. 559.

Also, it has been held that the clause in the statute set out above prohibiting county commissioners from contracting additional indebtedness while a former loan thereunder exceeding one per centum of the assessed value of the taxable property of the county remains unpaid, does not prohibit loans to meet temporary emergencies. Miller *v.* Dearborn County, 66 Ind. 162.

express legislative authority; it will not be implied from the mere corporate existence of the county.[1]

(3) *To Issue Bonds and Other Securities.* — The power of counties to issue bonds and other securities will be found discussed in another portion of this work.[2]

d. To Acquire and Hold Property — (1) *In General.* — By statute in several of the states, counties have capacity to take and hold title in fee or otherwise to real or personal property.[3] But it seems that express authority

1. Power to Borrow Money Not Implied from Corporate Existence. — Simpson *v.* Lauderdale County, 56 Ala. 64. *Compare* Miller *v.* Dearborn County, 66 Ind. 167; Floyd County *v.* Day, 19 Ind. 450.

2. See the titles Municipal Aid; Municipal Securities.

3. Power of Counties to Acquire and Hold Property. — Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268; Milam County *v.* Bateman, 54 Tex. 163; Parish *v.* Eager, 15 Wis. 532; Allen *v.* Cerro Gordo County, 34 Iowa 54.

Donation by State. — Under *Texas* statutes it has been held that counties have the capacity to acquire title to school lands donated by the state. Milam County *v.* Bateman, 54 Tex. 153.

Title by Prescription. — Where the evidence tended to show that for more than ten years a bridge was claimed and controlled by a county, and continuously used as a public county bridge, and that after that time a damaged pier was erected at the expense of the county, it was held that a prescriptive title to and ownership of the pier was shown, entitling the plaintiff to maintain an action for an injury thereto. Howard County *v.* Chicago, etc., R. Co., 130 Mo. 652.

Title by Devise. — Under statute in some states it has been held that the title to lands may be vested in a county by devise. Hayward *v.* Davidson, 41 Ind. 212; Carder *v.* Fayette County, 16 Ohio St. 354.

Devise to County by Name. — In Carder *v.* Fayette County, 16 Ohio St. 354, it was held that where a devise is made to a county by name, and not to the commissioners of the county, it nevertheless vests in the board of commissioners for the use of the county, the board of county commissioners being the body in whom is vested by law the title of all the property of the county. See also Sumner *v.* Darnell, 128 Ind. 38.

Power of County to Purchase at Mortgage Sale. — Under the *Missouri* Act of Feb. 28, 1855, and the various previous acts relating thereto, the absolute title to the swamp lands in the different counties was vested in them respectively; and where purchased of the county with a mortgage to secure the purchase money, it has been held that the county has the right to buy them in equally as in the case of the purchase by a private mortgagee. Linville *v.* Bohanan, 60 Mo. 554. In this case, the court said: "In selling the land, they possessed the same powers that owners generally possess under like circumstances, one of the most important of which is the right to buy in the premises to secure the debt."

But in Ray County *v.* Bentley, 49 Mo. 236, it was held that where land was mortgaged to a county to secure a loan of school funds, the county, on a foreclosure sale, had no power to bid in the land in satisfaction of the debt.

The court, in Linville *v.* Bohanan, 60 Mo. 558, in distinguishing this case, said: "In that case, the county never had any title. The school lands were vested in the state in trust for the benefit of the inhabitants of the township in which they were respectively situated. The county courts, in such cases, are vested with the management of the fund as trustees, but they act in an administrative capacity, in obedience to the laws of the state, and not by virtue of any power derived from the county. The statute points out the manner in which the funds shall be secured and collected, but no power to purchase by the county is conferred." To the same effect, see Holt County *v.* Harmon, 59 Mo. 165.

Tax Deed to County. — Section 11094 of Sandborn & Berryman's Annot. Stat. of *Wisconsin* provides that when any lands upon which the county holds a tax certificate shall not be redeemed as provided by law, the county clerk shall execute to the county in his name of office a deed therefor, witnessed, sealed, and acknowledged, and in like form as deeds to individuals, and such deeds shall have the same force and effect as deeds executed by such clerk to individuals for lands sold for the nonpayment of taxes, but no such deed shall be issued until the county board shall by resolution order the same. Under this statute it has been held that a tax deed issued to the county is *prima facie* evidence that the clerk was authorized by resolution to execute the same. Bemis *v.* Weege, 67 Wis. 435; Semple *v.* Whorton, 68 Wis. 628. See also Mead *v.* Nelson, 52 Wis. 402. And see the titles Tax Sales; Tax Titles.

Redemption of Tax Title from County. — Where land was sold for taxes by the treasurer, and bought by, and conveyed to, the commissioners of the county, it was held that, the title being absolute in the county, nothing but redemption by their permission could adeem the title of the county. Goodman *v.* Sanger, 85 Pa. St. 37. See the title Taxation.

County Estopped to Assert Tax Title. — It has been held that when county commissioners in Pennsylvania buy in for the county, lands sold for nonpayment of taxes, and thereafter the land, while owned by the county, is illegally assessed for taxes and sold for nonpayment of them by the treasurer of the county, and conveyance is duly made to the purchaser, who remains in possession forty years, the county is estopped from asserting title in itself. Murphy *v.* Packer, 152 U. S. 398. See also Diamond Coal Co. *v.* Fisher, 19 Pa. St. 267.

Grant of Real Estate to "People of the County." — In *New York* it has been held that the peo-

for this purpose need not be given by statute; it may be implied from other statutory powers granted. Thus, it has been held that the power to purchase land may be inferred from the power to erect court-houses and jails.[1]

Capacity to Take Bonds, Notes, etc., by Assignment. — Also, it has been held that, apart from express statutory provision, a county may take by assignment such instruments as bonds,[2] due-bills and notes,[3] or bankers' certificates of deposit.[4]

Power to Acquire Land for Special Purposes. — In some jurisdictions, power is given to counties by statute to acquire and hold title to real estate for a location for a court-house or jail or other county purpose.[5]

ple of the county of Otego had not the capacity to take by a grant, they not being a corporate body known in law, and that an act of the legislature declaring valid certain conveyances to the supervisors of a county applies only to conveyances made to the supervisors by name. Jackson *v.* Cory, 8 Johns. (N. Y.) 385. See also Gillespie *v.* Broas, 23 Barb. (N. Y.) 370.

But in *Missouri* it has been held that an act of the legislature providing that the title to land condemned for a public park shall vest "in the people of the county," is not void from the fact that the people of the county do not constitute any recognized legal or political body, the terms "people of the county" and "the county" being regarded as interchangeable. County Ct. *v.* Griswold, 58 Mo. 175.

Land Conveyed to the Use of County. — Under the *Wisconsin* statutes it has been held that a county can take title to any land conveyed to the county treasurer for its use, whether such lands were purchased for the erection of county buildings or for other public uses of the county or not. Parish *v.* Eager, 15 Wis. 532; 1 Sand. & B. Annot. Stat. of Wis., § 651.

1. Implied Power to Purchase Land. — Under statute in *Missouri*, providing that in any county of the state in which terms of the circuit court or the court of common pleas having the circuit court jurisdiction are by law held at a place other than the county-seat, the county court of such county may cause the erection of a good and sufficient court-house and jail at such place other than the county-seat where such courts are held, and for such purposes shall have and possess all the powers conferred on it for the erection of court-houses and jails at the county-seat, it has been held that the power to purchase land for the erection of such court-houses, if necessary, is implied. Sheidley *v.* Lynch, 95 Mo. 487. To the same effect, see Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484.

2. Assignment of Bond to County. — State *v.* Cunningham, 51 Mo. 479. In this case it was held that a township bond payable to a railroad company or bearer was personal property and passed by delivery, and was such property as could be owned by a county.

3. Assignment of Due-Bill. — Marshall County *v.* Hanna, 57 Iowa 372. In this case it was held that, under some circumstances, a county may take an assignment of notes and due-bills, and the burden of showing the lack of capacity in the county in any case is upon the one denying it.

4. Assignment of Banker's Certificate. — Shanklin *v.* Madison County, 21 Ohio St. 575. In this case, the court said: "It cannot be contended that the county, if capable to act, might not, in any lawful way, adjust and accept satisfaction of a liability justly and legally due to it. Such was the liability of Horace Putnam incurred by his embezzlement. To satisfy that indebtedness, the county might have invoked judicial process, or, in its discretion, have accepted, by amicable arrangement, anything of value in which commercial payment is accustomed to be made. Certificates of deposit on banking houses of reputed solvency, are the lawful and frequent instrumentalities of such payment. The county, therefore, might well have accepted a transfer of such certificate in liquidation of Putnam's liability, without infringing any statutory inhibition or contravening the public policy of the state."

Sufficient Consideration for Assignment to the County. — In *Ohio* it has been held under statute that the liability of a county treasurer incurred by his embezzlement is sufficient consideration for the assignment of a banker's certificate of deposit to a county in reimbursement, and a county auditor's warrant for its payment into the treasury is neither a condition nor a muniment of title, and the want of it will not affect the validity of the transaction. Shanklin *v.* Madison County, 21 Ohio St. 575.

5. Power to Acquire Land for Special Purposes. — Hayward *v.* Davidson, 41 Ind. 212; Raley *v.* Umatilla County, 15 Oregon 172, 3 Am. St. Rep. 142.

In Hayward *v.* Davidson, 41 Ind. 212, the court said: "They [counties] are expressly empowered to acquire and hold the title to real estate for a location for county buildings and for a poor farm, and there may be other instances."

In 2 *Indiana* Stat. 1896, § 5745, power is given to county commissioners "to make orders respecting the property of the county in conformity to law; to sell the public grounds of the county upon which the public buildings are situate, and to purchase in lieu thereof, in the name of the county, other grounds in the county-seat, on which such buildings shall be erected; to purchase other lands for the enlargement of the public square; and to take care of and preserve such property."

Minnesota. — In Williams *v.* Lash, 8 Minn. 496, it was held, under a statute authorizing a county "to purchase and hold for the public use of the county, lands lying within its own limits," that the county could not acquire title to lands except for public use, as, for instance, for a site for a court-house or jail, and that lands bid in by the county at an execution sale upon a judgment in the county's favor were not acquired for the public use within the

Power to Acquire Land Not Restricted by Implication. — But, under an act expressly recognizing the right of counties to take title to and enjoy real estate without any limitation being expressed as to the purposes for which it shall be used, it has been held that no implication will arise restricting the power of counties to acquire title to land for public purposes only.[1]

Whether Acquired for Authorized Use, a Question for the State Alone. — In these cases, it has been held that, the county being authorized for some purposes to acquire and hold title to real estate, it cannot be made a question by any party except the state whether the real estate has been acquired for the authorized uses or not.[2]

(2) *Incidental Powers.* — Where a county is given authority by statute to acquire and hold real estate, it possesses the incidental power the same as an individual to make all contracts necessary to the protection and perfection of the title to the property.[3]

(3) *Disposal of Property.* — By statute in some of the states, express power is given to counties to sell and convey any real estate belonging to them.[4]

intent of the statute, and that, therefore, the conveyance of the same to the county was void. See also Shelley *v.* Lash, 14 Minn. 498.

Under a subsequent amended statute authorizing a county "to purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law," it was held that the words "for the use of the county" had the same meaning as the words "for the public use of the county," and that therefore, upon the principle of *stare decisis*, the doctrine of Williams *v.* Lash, 8 Minn. 496, was applicable to that case also. James *v.* Wilder, 25 Minn. 305.

But, under Gen. Stat. 1866, c. 8, § 75, authorizing a county "to purchase and hold real and personal estate for the use of the county, and lands sold for taxes, as provided by law, and to purchase and hold for the benefit of the county real estate sold by virtue of judicial proceedings in which the county is plaintiff," it has been held that a county may acquire title to land by taking the same in satisfaction of a lawful claim against its debtor. Shepard *v.* Murray County, 33 Minn. 519.

1. Power to Acquire Land Not Restricted by Implication. — Scalf *v.* Collin County, 80 Tex. 514. See also Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

2. Whether Land Was Acquired for Authorized Use, a Question for the State. — Hayward *v.* Davidson, 41 Ind. 212; Raley *v.* Umatilla County, 15 Oregon 172, 3 Am. St. Rep. 142.

3. Powers Incident to Power to Hold Lands. — Allen *v.* Cerro Gordo County, 34 Iowa 54. But it seems that ample authority over the property in this respect was conferred in the above case by express statutory provisions.

Thus, it has been held, where swamp lands were granted by the general government to the state, and by the state to the counties in which the same were situated, that a county thus interested might, through its board of supervisors, in view of the fact that its interests and claims in respect to such lands were involved in doubt, enter into a valid contract with an individual to the effect that, in case he succeeded through his efforts and labor in having the claims of the county established and allowed by the general government, he should be entitled to, and receive as compensation for his services, one-half of the land or the indemnity granted in lieu thereof. Allen *v.* Cerro Gordo County, 34 Iowa 54.

Contract to Convey Swamp Lands to Persons Procuring Patents Therefor. — But it has been held that a contract entered into by the officers of a county whereby the county agreed to convey to certain parties all the swamp lands in which the county might have an interest, and to which such persons would procure patents from the government to the county, and whereby also the county was to pay the expenses incurred in procuring such patents, has been held not to be within the principle of the above decision, and is void for want of authority in the county to make such contract. Palo Alto County *v.* Harrison, 68 Iowa 83. The court in this case said: "In effect, the contract appropriates all of the swamp lands belonging to the county as compensation for such services as should be rendered in procuring the patenting of the portion not yet patented. It is apparent that no interest of the county in the lands could be protected by this contract."

4. Power to Dispose of Real Estate. — State *v.* Baxter, 50 Ark. 447; Wheeler *v.* Wayne County, 132 Ill. 599; Ferguson *v.* Halsell, 47 Tex. 421. See also Vaughn *v.* Forsyth County, 118 N. Car. 636.

By an act of *Missouri*, approved February 28, 1855, it was enacted that the several county courts of "this state are hereby authorized to sell and dispose of the swamp and overflowed lands within their respective counties, either with or without draining and reclaiming the same, as in their discretion they may think most conducive to the interest of the said counties." Linville *v.* Bohanan, 60 Mo. 554; Sturgeon *v.* Hampton, 88 Mo. 204. See also Hooke *v.* Chitwood, 127 Mo. 372.

By *Missouri* Rev. Stat. 1889, vol. 1, § 3422, it is provided that the county court shall have power "to sell and cause to be conveyed any real estate, goods, or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same."

Sale of Swamp Lands Granted by Congress. — Where, by Act of Congress, Sept. 28, 1850, entitled "An Act to enable the state of Arkansas and other states to reclaim swamp lands

Real Estate Held for Special Purpose. — But, in other jurisdictions, this power is restricted by statute to such real estate as is not required to be held for a special purpose.[1]

within its limits," certain swamp lands were granted to the several states in which they lay, with the following proviso: "Provided, however, that the proceeds of said lands, whether from sale or direct appropriation, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said land by means of the levees and drains aforesaid;" it has been held competent in *Iowa* for the legislature to grant such land to the different counties in the state, empowering them to sell the lands and devote the proceeds to general county purposes. Rock *v.* Rinehart, 88 Iowa 37. See also Page County *v.* American Emigrant Co., 41 Iowa 115.

In Keltner *v.* Story County, 28 Iowa 35, it was held that a citizen who has made a purchase of such swamp lands of a county cannot maintain an action against the county upon the ground that it has failed to apply the proceeds arising from the lands to the draining and reclaiming of the same, and that it has appropriated them to other purposes; but that the enforcement of the trust belongs to the United States.

In *Illinois*, it has been held that the proviso in the Act of Congress above mentioned does not limit or qualify the power of the legislature over the lands and their proceeds in any manner, and that where, by the statutes of the state, the whole control of the lands and the appropriation of their proceeds were placed in the hands of the several counties, a purchaser has no remedy to compel the county to appropriate the proceeds of the sale of such lands to their reclamation. Whiteside County *v.* Burchell, 31 Ill. 68; Bureau County *v.* Thompson, 39 Ill. 566.

And in the Supreme Court of the United States, it has been held that a grant made by a state of its swamp lands to the several counties in which they are situated, to be disposed of for general county purposes, was valid, and a county disposing of them in pursuance of such grant cannot rescind its contract on the ground of its being in violation of the Act of Congress. American Emigrant Co. *v.* Adams County, 100 U. S. 62. Mr. Justice Bradley, in this case, said: "It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the state, and whether the state may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the land disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof or other suitable action in a clear case of violation of the conditions. And as the application of the proceeds to the named objects is only prescribed 'as far as necessary,' room is left for the exercise by the state of a large discretion as to the extent of the necessity."

The Consideration — Wisconsin. — It has been held where, by statute in Wisconsin, counties possess the power to sell land for money, that they are not prohibited from selling for money's worth, as where a county transfers by deed to a railroad company certain lands in consideration that the company will construct its road upon a route desired by the county and establish a terminus with sufficient docks and piers suitable for the transfer of passengers and freight from the railroad cars to and from lake-going crafts within the limits of the county. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1.

Consideration for Sale of Swamp Lands — Iowa Statute. — By the Iowa Act, approved January 13, 1859, it was provided that no swamp or overflowed lands should hereafter be sold at less than one dollar and twenty-five cents per acre. But under a subsequent act, approved March 28, 1858, providing that it shall be competent and lawful for the counties owning swamp or overflowed lands to devote the same or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads, etc., provided a proposition to so devote them shall be submitted at some general or special election to the people of the county, and further providing for making the contract and conveyances for carrying out such purposes, it has been held that the sale by a county of its swamp lands at a less price than one dollar and twenty-five cents per acre, where it was stipulated that the proceeds should be devoted to the purposes specified in the Act of March 28, 1858, and the sale was subsequently approved by a vote of the people, is valid. Audubon County *v.* American Emigrant Co., 40 Iowa 460; American Emigrant Co. *v.* Adams County, 100 U. S. 61.

1. Power Restricted to Real Estate Not Devoted to County Purpose. — Martin *v.* Townsend, 32 Fla. 318; Bemis *v.* Weege, 67 Wis. 435; Semple *v.* Whorton, 68 Wis. 628. See also State *v.* Baxter, 50 Ark. 447; Wheeler *v.* Wayne County, 132 Ill. 599; Vaughn *v.* Forsyth County, 118 N. Car. 636.

Section 653 of 1 Sandborn & Berryman's Annot. Stat. of *Wisconsin* provides that the county board may, by resolution or ordinance, direct the county clerk to sell and convey any real estate of the county not donated and required to be held for a special purpose, and all deeds made in pursuance thereof on behalf of the county, by the county clerk, under his hand and the county seal and acknowledged by him, shall convey all the right, title, interest and estate which the county may then have in and to the land so conveyed. Under this statute, it has been held that the real estate of the county can be conveyed only in pursuance of authority given by the county board, and a deed executed by the county clerk is not presumptive evidence that the requisite authority had been conferred. Bemis *v.* Weege, 67 Wis. 435; Semple *v.* Whorton, 68 Wis. 626. See also Ward *v.* Necedah Lumber Co., 70 Wis. 445; Rice *v.* Ashland Real Estate, etc., Co., 72 Wis. 103; Haseltine *v.* Donahue, 42 Wis. 576.

Conformity to Mode of Disposition Prescribed by Statute Necessary. — The lands belonging to a county can be sold and conveyed only in the manner pointed out by statute.[1]

Power to Mortgage Not Implied from Power to Sell, and Vice Versa. — A statute expressly granting to a county the power to sell and convey real estate does not confer authority to mortgage the same.[2] Nor does the power to mortgage confer the power to sell.[3]

3. Governmental Functions — *a.* IN GENERAL. — Besides the above-mentioned ordinary corporate powers, counties are usually invested with certain subordinate legislative and administrative powers, to facilitate the due administration of their own internal affairs and to promote the general welfare of the municipality.[4]

Reason of Grant of Power. — These powers of local government are intrusted to the local authorities on the supposition that they possess more available means and opportunities to ascertain the needs and wishes of the people in respect to local matters, and are better qualified to determine what local regulations are important and contributive to their convenience and well being.[5]

b. PROVISION FOR INTERNAL IMPROVEMENT. — Thus one of the more usual of the legislative and administrative powers conferred on counties is the power to provide for internal improvements within their boundaries, such as the establishment and maintenance of roads,[6] the erection and repair of bridges,[7] poorhouses,[8] court-houses,[9] jails,[10] and other public buildings.

c. AID OF ENTERPRISES OF QUASI-PUBLIC NATURE — **Railway Construction.** — It is now well settled that railways are of such a public character that, in the absence of constitutional restrictions, counties may be authorized by legislation to aid in their construction, either by donations thereto or by subscrip-

In *Louisiana* it has been said that parishes are incapable of acquiring or holding immovable property, except for public purposes, under legislative authority, expressed or distinctly implied, and such property, once acquired and devoted to public use, cannot be alienated without legislative authority. Police Jury *v.* McCormack, 32 La. Ann. 624.

Under statute in *Illinois*, it has been held competent for the properly constituted authorities of the county to sell and convey real estate owned by the county, although such real estate may have been purchased for the purpose of erecting thereon a court house and other county buildings. Warren County *v.* Patterson, 56 Ill. 111.

1. Conformity to Mode of Disposition Prescribed by Statute Necessary. — Under a *Texas* statute providing that a county court may, by an order to be entered on the minutes of the said court, appoint a commissioner to sell and dispose of any real estate of the county at public auction, etc., it has been held that although this statute is permissive in its terms, yet it is the only mode expressly pointed out in the general laws of the state by which the county court can divest the county of its title to real estate, and therefore a sale of real estate made otherwise than at public auction will confer no title. Ferguson *v.* Halsell, 47 Tex. 421. See also Moss *v.* Kauffman, 131 Mo. 429; Hooke *v.* Chitwood, 127 Mo. 372; Sturgeon *v.* Hampton, 88 Mo. 203.

In *Nebraska* it has been held under statute that a sale of the public property of a county, consisting of real estate, made without the consent of a majority of the electors voting at an election authorized by law, is a nullity, and passes no title to the purchaser. Douglas County *v.* Keller, 43 Neb. 635.

2. Power to Mortgage Not Implied from Power to Sell. — Vaughn *v.* Forsyth County, 118 N. Car. 636.

3. Power to Sell Not Implied from Power to Mortgage. — Moss *v.* Kauffman, 131 Mo. 424.

4. Governmental Functions of Counties. — Laramie County *v.* Albany County, 92 U. S. 307; Thomson *v.* Lee County, 3 Wall. (U. S.) 327; People *v.* Baker, 29 Barb. (N. Y.) 81; Grant *v.* Lindsay, 11 Heisk. (Tenn.) 651; Nashville, etc., R. Co. *v.* Wilson County, 89 Tenn. 597; State *v.* Forest County, 74 Wis. 610.

5. Stanfill *v.* Court of County Revenue, 80 Ala. 290. See also Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730; Cooley, Con. Lim. 140.

6. Establishment and Maintenance of Roads. — See the titles COUNTY COMMISSIONERS, *post;* HIGHWAYS.

7. Erection and Repair of Bridges. — See the titles BRIDGES, vol. 4, p. 918; COUNTY COMMISSIONERS, *post.*

8. Erection and Repair of Poorhouses. — Henry *v.* Cohen, 66 Ala. 382; People *v.* Baker, 29 Barb. (N. Y.) 81. See the titles COUNTY COMMISSIONERS, *post;* POOR AND POOR LAWS.

9. Erection of Court-houses. — McGowan *v.* Ford, 107 Cal. 177; Vaughn *v.* Forsyth County, 117 N. Car. 429; Carey *v.* Justices, 5 Sneed (Tenn.) 516. See also Com. *v.* Bowman, 3 Pa. St. 202. See further, on this question, the title COUNTY COMMISSIONERS, *post.*

10. Erection of Jails. — Pauly Jail Bldg., etc., Co. *v.* Hemphill County, 62 Fed. Rep. 698; Hall *v.* Los Angeles County, 74 Cal. 502; Sharp *v.* Wike, (Pa. 1887) 9 Atl. Rep. 454. See

tion to their stock. There is no such inherent power in counties, and it can be given only by express legislative provision.[1]

also the titles COUNTY COMMISSIONERS, *post;* PRISONS.

1. **Aid in Railway Construction** — *United States.* — Rogers *v.* Burlington, 3 Wall. (U. S.) 654; Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 689; U. S. *v.* Macon County, 99 U. S. 582; Chicot County *v.* Lewis, 103 U. S. 164; Otoe County *v.* Baldwin, 111 U. S. 1; Bates County *v.* Winters, 112 U. S. 325; Burns *v.* Multnomah R. Co., 15 Fed. Rep. 177, 8 Sawy. (U. S.) 543; Foster *v.* Callaway County, 3 Dill. (U. S.) 200; Ketchum *v.* Pacific R. Co., 4 Dill. (U. S.) 78; Rathbone *v.* Kiowa County, 73 Fed. Rep. 395.

California. — Robinson *v.* Bidwell, 22 Cal. 379; Coleman *v.* Marin County, 50 Cal. 493; Nevada Bank *v.* Steinmitz, 64 Cal. 301.

Colorado. — People *v.* Pueblo County, 2 Colo. 360.

Florida. — Cotten *v.* Leon County, 6 Fla. 610.

Indiana. — Harney *v.* Indianapolis, etc., R. Co., 32 Ind. 244; Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185; John *v.* Cincinnati, etc., R. Co., 35 Ind. 539; Crooke *v.* Daviess County, 36 Ind. 320; Crawford County *v.* Louisville, etc., Air Line R. Co., 39 Ind. 192; State *v.* Wheadon, 39 Ind. 520; Detroit, etc., R. Co. *v.* Bearss, 39 Ind. 598; Petty *v.* Myers, 49 Ind. 1; Delaware County *v.* McClintock, 51 Ind. 325.

Kansas. — Leavenworth County *v.* Miller, 7 Kan. 479; Leavenworth, etc., R. Co. *v.* Douglas County, 18 Kan. 169.

Mississippi. — Hawkins *v.* Carroll County, 50 Miss. 735.

Missouri. — Dunklin County *v.* Chouteau, 120 Mo. 577; St. Joseph, etc., R. Co. *v.* Buchanan County Ct., 39 Mo. 485; Smith *v.* Clark County, 54 Mo. 58; Leavenworth, etc., R. Co. *v.* County Ct., 42 Mo. 171; Ranney *v.* Baeder, 50 Mo. 600; State *v.* Saline County Ct., 51 Mo. 350; State *v.* Sullivan County Ct., 51 Mo. 522.

New Mexico. — Coler *v.* Santa Fe County, 6 N. Mex. 88.

North Carolina. — Caldwell *v.* Justices, 4 Jones Eq. (57 N. Car.) 323; Hill *v.* Forsythe County, 67 N. Car. 367; Wood *v.* Oxford, 97 N. Car. 227.

Tennessee. — Louisville, etc., R. Co. *v.* County Ct., 1 Sneed (Tenn.) 637; Buchanan *v.* Springer, (Tenn. 1895) 35 S. W. Rep. 774.

Railway Outside of County. — The legislature of a state, unless restrained by constitutional provisions, may properly authorize a county to aid by donation, the issuing of bonds, or otherwise, the construction of a railroad outside of the county, and even outside of the state, where the purpose of the road is to give the county a desirable connection with some other region. Council Bluffs, etc., R. Co. *v.* Otoe County, 16 Wall. (U. S.) 667.

Power to Donate Not Implied from Power to Subscribe. — Where a statute authorizes a subscription to the stock of a railroad company in aid of a railroad, a power to make a donation to such company in lieu thereof is not to be implied. Choisser *v.* People, 140 Ill. 21; Sampson *v.* People, 140 Ill. 466. See also Chicago, etc., R. Co. *v.* Pinckney, 74 Ill. 277; Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562.

Nevada Constitution. — Section 10, art. 8, of the constitution of Nevada, providing that no county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation, or association whatever, or loan its credit in aid of any such company, corporation, or association, except railroad corporations, companies, or associations, has been held not to prevent the legislature from authorizing a county to aid a railroad, either by loaning its credit, by donation, or otherwise. Gibson *v.* Mason, 5 Nev. 284.

By the Constitution of Ohio it is provided that the General Assembly shall never authorize any county, town, or township, by a vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association. See Knox County *v.* Nichols, 14 Ohio St. 260; Thompson *v.* Kelly, 2 Ohio St. 647.

It Is Settled by the Supreme Court of Wisconsin that counties may subscribe stock of a railroad when power has been expressly conferred. Clark *v.* Janesville, 10 Wis. 136; Bushnell *v.* Beloit, 10 Wis. 195; Phillips *v.* Albany, 28 Wis. 340; Lawson *v.* Milwaukee, etc., R. Co., 30 Wis. 597; Portage County *v.* Wisconsin Cent. R. Co., 121 Mass. 460, *construing* the laws of Wisconsin.

But it has been held that the legislature has no authority to authorize counties to give aid to railways by donation, either of land or money. Whiting *v.* Sheboygan, etc., R. Co., 25 Wis. 167; Ellis *v.* Northern Pac. R. Co., 77 Wis. 118.

But the Supreme Court of the United States has held that the courts of the United States are not bound to follow these decisions when applied to a corporation created by an Act of Congress for national purposes, and for interstate commerce. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1. In this case, however, the transaction between the county and the railway company was a sale of land by the county in consideration of money paid down, and to be paid in the form of taxes, in addition to the great advantages to inure to the public.

In Illinois, at one time, counties were authorized by statute to subscribe to railroad stock. Prettyman *v.* Tazewell County, 19 Ill. 406, 71 Am. Dec. 230; Johnson *v.* Stark County, 24 Ill. 75; Perkins *v.* Lewis, 24 Ill. 208; Butler *v.* Dunham, 27 Ill. 475; Schuyler County *v.* People, 25 Ill. 181.

The Illinois Constitution of 1870 provides that "no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

Other Enterprises of Partly Private Nature. — The same rules have been laid down in regard to certain other enterprises of a partially private nature, such as turnpikes,[1] canals,[2] and public gristmills.[3]

Issue of Aid Bonds. — In most instances it is provided in the legislation on this question that bonds are to be issued by the counties in payment of their subscription.[4]

Medium of Payment Other than Bonds. — But, where authorized by statute, the county may pay its subscription in money, land, or other property, instead of by the issue of bonds.[5]

Rights of County as Stockholder. — It has been held under statute that where railroad stock is subscribed by a county it becomes vested in the county,[6] and the county has precisely the same rights in regard thereto as any other stockholder.[7]

A Full Discussion of the question of aid by counties to *quasi*-public enterprises will be found in another portion of this work.[8]

d. TAXATION. — The power of counties to exercise the right of taxation will be found discussed in another part of this work.[9]

4. By Whom Powers Are to Be Exercised — *a.* IN GENERAL. — Counties being mere artificial persons, their powers are to be exercised through the agencies provided by law, as, for instance, the board of county commissioners[10]

Choisser *v.* People, 140 Ill. 21; Sampson *v.* People, 140 Ill. 466.

In Iowa the decisions upon the question in the text were at one time in much confusion. King *v.* Wilson, 1 Dill. (U. S.) 555, and authorities *cited*. See also Johnson *v.* Kessler, 76 Iowa 411.

By section 594, Code of Iowa 1897, it is provided that no county shall, in its corporate capacity, or by its officers, directly or indirectly, subscribe for stock or become interested as a partner, shareholder, or otherwise in any banking institution, plank road, turnpike, railway, or work of internal improvement.

Submission to Vote of People — Tennessee. — By the constitution of Tennessee it is provided that the credit of any county, city, or town shall not be given or loaned to, or in aid of, any person, company, association, or corporation, except upon an election to be held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at such an election. Buchanan *v.* Soringer, (Tenn. 1895) 35 S. W. Rep. 774; Nelson *v.* Haywood County, 87 Tenn. 781; Colburn *v.* Chattanooga Western R. Co., 94 Tenn. 43.

Similar Statutory Provisions Exist in Other States. — Schuyler County *v.* Thomas, 98 U. S. 169; Scotland County *v.* Thomas, 94 U. S. 682; Macon County *v.* Shores, 97 U. S. 272; Henry County *v.* Nicolay, 95 U. S. 619; Ray County *v.* Vansycle, 96 U. S. 675; Callaway County *v.* Foster, 93 U. S. 567; Coleman *v.* Marin County, 50 Cal. 493; Hawkins *v.* Carroll County, 50 Miss. 735; Webb *v.* Lafayette County, 67 Mo. 353; State *v.* Brassfield, 67 Mo. 331; State *v.* Holladay, 72 Mo. 499; State *v.* Rainey, 74 Mo. 229; Hays *v.* Dowis, 75 Mo. 250; State *v.* Walker, 85 Mo. 41; State *v.* Macon County Ct., 41 Mo. 453; Reineman *v.* Covington, etc., R. Co., 7 Neb. 310.

1. See the title TURNPIKES.

2. State *v.* Thorne, 9 Neb. 458. See also Blair *v.* Cuming County, 111 U. S. 363. See the title CANALS, vol. 5, p. 111.

3. Blair *v.* Cuming County, 111 U. S. 363; Traver *v.* Merrick County, 14 Neb. 327, 45 Am. Rep. 111. See also State *v.* Thorne, 9 Neb. 458. *Compare* Osborne *v.* Adams County, 106 U. S. 181.

4. See the title MUNICIPAL SECURITIES.

5. Hall *v.* Baker, 74 Wis. 118; Moss *v.* Kauffman, 131 Mo. 424. See also Buchanan *v.* Springer, (Tenn. 1895) 35 S. W. Rep. 774; Single *v.* Marathon County, 38 Wis. 364.

Payment in Tax Certificates. — Thus it has been held, under statute in *Wisconsin*, that payment of the subscription might be made in tax certificates. Hall *v.* Baker, 74 Wis. 118.

Conveyance of Swamp Lands — Missouri. — Under the Missouri statute providing that "any county subscribing for railroad stock which shall have internal improvement funds, or overflowed or swamp lands, granted to it by the state, may apply such funds or mortgage or sell such overflowed or swamp lands to pay such subscription, or any part thereof, and provide for the remainder, if any, by the tax aforesaid; and any county, city, or town subscribing as aforesaid may (if so required by the railroad company, to raise funds to pay the instalments in anticipation of the collection and payment of its railroad tax), issue the bonds of such city, county, or town," etc., it has been held that the county is not authorized to convey its swamp lands in payment of its subscription to railroad stocks. Moss *v.* Kauffman, 131 Mo. 424.

But where a conveyance of swamp land is expressly provided for by statute, such payment has been held to be valid. Dunklin County *v.* Chouteau, 120 Mo. 577.

6. **Rights of County as Stockholder.** — Ridings *v.* Hall, 48 Mo. 100.

7. Hornblower *v.* Duden, 35 Cal. 664.

8. See the title MUNICIPAL AID.

9. **Power of Counties to Tax.** — See the title TAXATION.

10. **Powers Exercised by County Board.**—Montgomery County *v.* Barber, 45 Ala. 237; House *v.* Los Angeles County, 104 Cal. 73. Frandzen

the county court or other like instrumentalities.[1]

Limitations of Authority. — Such agencies are invested with such powers only as are expressly conferred upon them by statute and the organic law and such as may be fairly or necessarily implied from those expressly granted.[2]

Unauthorized Act of Agent Not Binding. — Like any other agents, they must act within their power, and if they exceed the limited authority conferred by statute in a material matter, the county will not be bound.[3]

Persons Dealing with Agent to Take Notice of Limit of Authority. — Persons dealing with the agents of a county are charged with the knowledge of the limits of their authority.[4]

b. DELEGATION OF AUTHORITY BY COUNTY AGENTS. — Where the board or county court has authority under statutes to employ agents, the acts of such agents, in pursuance of the authority vested in them, will be valid and binding on the county,[5] but where such delegation of authority is prohibited by

v. San Diego County, 101 Cal. 317; People *v.* Pueblo County, 2 Colo. 360; Benton County *v.* Patrick, 54 Miss. 240. See the titles COUNTY COMMISSIONERS, *post;* PUBLIC OFFICERS.

Authority to Contract — Indiana. — In Indiana it has been held that the general, though not unlimited, authority to contract for a county is vested in the board of commissioners under the statute, but other agents are named in certain cases. Moon *v.* Howard County, 97 Ind. 176.

Thus in the case of contracts for the publishing in a newspaper a statement showing all allowances made by the county commissioners, the county auditor is employed. Washington County *v.* Kemp, 14 Ind. App. 604.

In Illinois a county cannot make a valid contract, even within the scope of its power, except through its county board. Wheeler *v.* Wayne County, 132 Ill. 599; Sexton *v.* Cook County, 114 Ill. 179; Randolph County *v.* Jones, 1 Ill. 237.

Purchase of Property — Wisconsin. — In McCrossen *v.* Lincoln County, 57 Wis. 184, it was held that the property of a county can be purchased only through the board of supervisors, except in cases where some other body or officer is authorized to make the sale.

1. Powers Exercised by County Court. — In some jurisdictions the corporate powers of a county are exercised by the county court instead of by a board of county commissioners. Walker *v.* Linn County, 72 Mo. 650; Fenton *v.* Blair, 11 Utah 78; Davis *v.* Wayne County Ct., 38 W. Va. 104.

2. Limitations of Authority Vested in Agency. — Burnett *v.* Abbott, 51 Ind. 254; Hight *v.* Monroe County, 68 Ind. 576; Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226; Benton County *v.* Patrick, 54 Miss. 240; Walker *v.* Linn County, 72 Mo. 650; Nashville, etc., R. Co. *v.* Wilson County, 89 Tenn. 597.

Thus, under statute in *Indiana*, the county board has no power to employ a person to aid the attorneys of the state in prosecuting and procuring to be prosecuted a person charged with a crime. Hight *v.* Monroe County, 68 Ind. 576.

Nor, under the same statute, can the board contract to pay a reward for an arrest. Grant County *v.* Bradford, 72 Ind. 455.

Right of Appeal on Part of Private Citizen from Action of Agency — Tennessee. — It has been held that the Tennessee Act of 1844, c. 99, which gives an appeal to any citizen from any decree or decision of the county court, or allowance out of the county treasury, by which such citizen may think himself aggrieved, does not contemplate such police orders and regulations as may affect all the citizens alike. Thus, a mere order of the county court for the building of a court-house has been held not to be such decree or decision of said court as a citizen has a right to appeal from. Carey *v.* Justices, 5 Sneed (Tenn.) 515.

3. Unauthorized Act of Agent Not Binding. — Morrill *v.* Douglass, 14 Kan. 293; Noble *v.* Cain, 22 Kan. 493; Jefferson County *v.* Arrighi, 54 Miss. 670; Wolcott *v.* Lawrence County, 26 Mo. 272; Lebcher *v.* Custer County, 9 Mont. 315; Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. Rep. 585.

Under statute in *Montana*, requiring that a county is to care for "poor persons who shall be unable to earn a livelihood in consequence of bodily infirmities," where such poor persons have no relatives, and authorizing the county commissioners to award contracts for the care of "the sick, poor, and infirm," it has been held that a contract by such commissioners for the care of the sick, and a contract for the care of the poor of the county, are void, the statute only applying to contracts for the care of persons who are both poor and sick or infirm. Lebcher *v.* Custer County, 9 Mont. 315.

4. Persons Dealing with Agency to Take Notice of Limit of Authority. — Wolcott *v.* Lawrence County, 26 Mo. 272; Lebcher *v.* Custer County, 9 Mont. 315; Davis *v.* Wayne County Ct., 38 W. Va. 104.

5. Delegation of Authority by County Agents. — Plummer *v.* Kennedy, 72 Mich. 295.

In *Wisconsin*, under a statute declaring that the powers of a county as a body corporate can be exercised only by the county board, "or in pursuance of a resolution or ordinance by them adopted," it has been held that the county board may delegate to a committee of its members the power to purchase a poor farm for the county where the purchase is made pursuant to a resolution adopted by the board. French *v.* Dunn County, 58 Wis. 402. The court in this case said, however: "There are doubtless powers vested in the county board which could not be delegated to any committee. Powers which are legislative in

statute, acts performed thereunder will be void.[1]

VII. Duties and Liabilities — 1. Generally. — Counties, being mere auxiliaries of the state government, partake of the state's immunity from liability. The state is not liable except by its own consent, and so the county is exempt from liability except such as is imposed or authorized expressly or impliedly by statute.[2]

their character, which are confined to the judgment and discretion of the board itself, such as the levying of taxes, must be exercised under the immediate authority of the board."

Contract by One Member of Board. — A county let a contract for building a jail and appointed a building committee, whose chairman was also chairman of the board of supervisors. He agreed with the plaintiffs, who furnished a part of the materials for the building, that the county would pay for the same, and they were furnished in reliance upon this undertaking. It was held that the undertaking was not binding upon the county, in the absence of special authority from the board of supervisors to make it, and that such authority would not be inferred from the fact that the party making it was a member of the building committee and board of supervisors. Rice *v.* Plymouth County, 43 Iowa 136. But authority to make the contract may be conferred upon one member of the board by the board, and when this is done, such a contract will be binding upon the county. Tatlock *v.* Louisa County, 46 Iowa 138.

Ratification of Unauthorized Act. — Where a county judge purchased the bonds of another county, to be paid for out of the permanent school fund of his county, without an order of the commissioners' court, passed in accordance with law, it was held that the contract had no binding force upon the county, but it might be ratified by the county court. Boydstun *v.* Rockwall County, (Tex. Civ. App. 1893) 23 S. W. Rep. 541.

But where a county board was prohibited by statute from entering into a contract through a committee appointed, it was held that it had no power to validate such contract by subsequent ratification. Jefferson County *v.* Arrighi, 54 Miss. 668.

What Does Not Constitute Ratification. — A ratification of a contract made by the county treasurer and county attorney cannot be inferred from the fact that the treasurer made a report thereof to the board, where the board did not have knowledge of all the material facts or examine into the matter. Wilhelm *v.* Cedar County, 50 Iowa 254.

Approval of Part of Claim. — In a suit of attorneys against a county for services rendered the county on an alleged employment made by the district attorney, the claim being based upon an alleged ratification by the county commissioners of the contract of employment, it was held that if the plaintiffs presented their claim to the commissioners for a specific amount, and they approved it for a portion only of such amount, such approval of part did not in itself alone constitute a ratification of any agreement or contract made by the district attorney. Clarke *v.* Lyon County, 7 Nev. 75.

1. Jefferson County *v.* Arrighi, 54 Miss. 668.

2. **Liabilities of Counties Generally** — *United States.* — Eastman *v.* Clackamas County, 32 Fed. Rep. 24; Madden *v.* Lancaster County, 65 Fed. Rep. 191.

Alabama. — Covington County *v.* Kinney, 45 Ala. 176; Barbour County *v.* Horn, 48 Ala. 566; Askew *v.* Hale County, 54 Ala. 639; Simpson *v.* Lauderdale County, 56 Ala. 64; James *v.* Conecuh County, 79 Ala. 304.

Arkansas. — Granger *v.* Pulaski County, 26 Ark. 37.

California. — Price *v.* Sacramento County, 6 Cal. 254; Neville *v.* Solano County, 29 Cal. 252.

Indiana. — Moon *v.* Howard County, 97 Ind. 176.

Iowa. — Tatlock *v.* Louisa County, 46 Iowa 138; Harvey *v.* Tama County, 46 Iowa 522.

Kansas. — Shawnee County *v.* Carter, 2 Kan. 115; Mitchell *v.* Leavenworth County, 18 Kan. 188; Heller *v.* Shawnee County, 23 Kan. 128.

Maine. — Emerson *v.* Washington County, 9 Me. 88.

Minnesota. — Raymond *v.* Stearns County, 18 Minn. 60.

Mississippi. — Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

Missouri. — Wolcott *v.* Lawrence County, 26 Mo. 272.

Montana. — Territory *v.* Cascade County, 8 Mont. 414; Lebcher *v.* Custer County, 9 Mont. 315.

North Carolina. — White *v.* Chowan County, 90 N. Car. 437; Burbank *v.* Beaufort County, 92 N. Car. 260.

Ohio. — Hamilton County *v.* Mighels, 7 Ohio St. 115; Gallia County *v.* Holcomb, 7 Ohio, pt. i. 232.

Oregon. — Kelly *v.* Multnomah County, 18 Oregon 356; Pruden *v.* Grant County, 12 Oregon 308; Walker *v.* Wasco County, (Oregon 1888) 19 Pac. Rep. 81; Grant County *v.* Lake County, 17 Oregon 453; State *v.* Baker County, 24 Oregon 141.

Pennsylvania. — Com. *v.* Huntingdon County, 3 Rawle (Pa.) 487.

South Dakota. — Bailey *v.* Lawrence County, 5 S. Dak. 393.

Tennessee. — Wood *v.* Tipton County, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561; White's Creek Turnpike Co. *v.* Davidson County, 14 Lea (Tenn.) 76.

Texas. — Watkins *v.* Walker County, 18 Tex. 585, 70 Am. Dec. 298; Hamilton County *v.* Garrett, 62 Tex. 602; Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. Rep. 585.

Virginia. — Fry *v.* Albemarle County, 86 Va. 195, 19 Am. St. Rep. 879.

By the Georgia Code it is expressly declared that a county is not liable to suit or any cause of action unless made so by statute. Code of Ga. 1895, vol. 1, § 341; Monroe County *v.* Flynt, 80 Ga. 489; White Star Line Steamboat Co. *v.* Gordon County, 81 Ga. 47.

2. On Contracts — *a.* IN GENERAL. — Counties are held to the same liability on their legal engagements as individuals.[1]

Unauthorized Contracts. — But a county will not be bound by the agreement of its officers in respect to matters wholly beyond its corporate powers or beyond the authority vested in the officers making the contract.[2]

Liability for Services. — Thus a county will be liable on a contract for services rendered for its benefit where such contract is entered into by express or clearly implied power given by statute,[3] but not where the contract is not

1. Counties Liable like Individuals on Contracts. — Johnson *v.* Stark County, 24 Ill. 75; Clinton County *v.* Hill, 122 Ind. 215; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234; Tompkins *v.* New York, 14 N. Y. App. Div. 536; Smith *v.* Jefferson County, (Tex. Civ. App. 1897) 41 S. W. Rep. 148.

A Lease for a year by the county commissioners under their own seals, and not the county seal, has been held to be binding on the county as an express contract. Dauphin County *v.* Bridenhart, 16 Pa. St. 458.

2. County Not Liable on Unauthorized Contract — *United States.*— Pacific Bridge Co. *v.* Clackamas County, 45 Fed. Rep. 217; Office Specialty Mfg. Co. *v.* Elbert County, 73 Fed. Rep. 324.

Arkansas. — Wiegel *v.* Pulaski County, 61 Ark. 74; Fones Hardware Co. *v.* Erb, 54 Ark. 645.

California. — Murphy *v.* Napa County, 20 Cal. 497; Keller *v.* Hyde, 20 Cal. 594.

Idaho. — Meller *v.* Logan County, (Idaho 1894) 35 Pac. Rep. 712.

Indiana. — Potts *v.* Henderson, 2 Ind. 327; Browning *v.* Owen County, 44 Ind. 11; Cass County *v.* Ross, 46 Ind. 404; Campbell *v.* Brackenridge, 8 Blackf. (Ind.) 471; Woodruff *v.* Noble County, 10 Ind. App. 179; Morrison *v.* Decatur County, 16 Ind. App. 317.

Louisiana. — Reynolds, etc., Constr. Co. *v.* Police Jury, 44 La. Ann. 863; Byrne *v.* East Carroll Parish, 45 La. Ann. 392.

Michigan. — Davis *v.* Ontonagon County, 64 Mich. 404.

Minnesota. — Henderson *v.* Sibley County, 28 Minn. 515.

Mississippi. — Jefferson County *v.* Arrighi, 54 Miss. 668.

Missouri. — Wolcott *v.* Lawrence County, 26 Mo. 272; Steines *v.* Franklin County, 48 Mo. 168, 8 Am. Rep. 87; Saline County *v.* Wilson, 61 Mo. 237; Heidelberg *v.* St. Francois County, 100 Mo. 69.

Montana. — Lebcher *v.* Custer County, 9 Mont. 315.

Nebraska. — Commercial State Bank *v.* Antelope County, 48 Neb. 496.

New York. — Brainard *v.* Kings County, 84 Hun (N. Y.) 290.

Pennsylvania. — Lancaster County *v.* Fulton, 128 Pa. St. 48.

Texas. — Nolan County *v.* Simpson, 74 Tex. 218; Edwards County *v.* Jennings, 89 Tex. 618.

Virginia. — Allegheny County *v.* Parrish, 93 Va. 615.

Claims Not Expressly Enumerated in Statute. — In Jack *v.* Moore, 66 Ala. 187, the court said: "It is true that no claims are chargeable on the county treasury, nor can be paid therefrom, except such as the law imposes on the county, or empowers it to contract. No officer of the county can charge it with the payment of other claims, however meritorious the consideration, or whatever may be the benefit the county may derive and enjoy from them. But it must not be understood that the statutes enumerate every claim chargeable on the county, and that no other claims than such as are enumerated can be charged upon it. The county is a body corporate, compelled or subject to suit as a corporation, in several instances expressed in the statutes; and yet there is no express provision empowering it to employ and compensate counsel for the prosecution or defense of suits. The employment is a necessity, for an appearance by person is a mere impossibility. Compensation of counsel is a claim upon the county, which it lies within the jurisdiction of the Commissioners' Court to allow, and order paid from the county treasury."

3. Liability for Services under Authorized Contract — *United States.* — Pacific Bridge Co. *v.* Clackamas County, 45 Fed. Rep. 217; Pauly Jail Bldg., etc., Co. *v.* Hemphill County, 62 Fed. Rep. 698.

California. — Hall *v.* Los Angeles County, 74 Cal. 502; McGowan *v.* Ford, 107 Cal. 177.

Illinois. — Clark County *v.* Lawrence, 63 Ill. 32.

Indiana. — Bush *v.* Hamilton County, 121 Ind. 420; Robling *v.* Pike County, 141 Ind. 522; Washington County *v.* Kemp, 14 Ind. App. 604; Bartholomew County *v.* Jameson, 86 Ind. 154.

Iowa. — Curtis *v.* Cass County, 49 Iowa 421; Call *v.* Hamilton County, 62 Iowa 448; Holland *v.* Union County, 68 Iowa 56.

Tennessee. — Smith *v.* Hubbard, 85 Tenn. 306.

West Virginia. — Kinsley *v.* County Ct., 31 W. Va. 464.

Wisconsin. — Hoffman *v.* Chippewa County, 77 Wis. 214.

Contract for Publication of Statement of Allowances Made by County Board. — Where a county auditor, under statutory authority, contracts for the publication in a newspaper of a statement showing all allowances made by county commissioners at each term of that court, the county is bound thereby, and the board of commissioners is bound to make the statutory compensation for the work performed. Washington County *v.* Kemp, 14 Ind. App. 604. See also Bush *v.* Hamilton County, 121 Ind. 420.

Bounty to Soldier. — The county board, by resolution, offered a bounty to each soldier who might enlist in the late civil war, and be credited to any of the towns of the county, and the plaintiff under such resolution agreed to enlist. Subsequently an act of the legislature was passed authorizing the payment of

founded on such express or implied power.[1]

Attorney's Services. — Accordingly, a county will be liable for the services of counsel in the prosecution or defending of actions or for other services where

bounties by counties, after which the plaintiff was accepted by the United States and mustered into the service and credited to the county. After this the county board readopted its former resolution, but it did not appear whether this was before or after the issuance and delivery of the order of the county for the payment of the bounty. It was held that, as the actual enlistment was after the act of the legislature, the county was liable. Clark County *v.* Lawrence, 63 Ill. 32.

Plan for County Jail. — Under the Civil Code of *California*, section 25, subd. 9, giving the board of supervisors power to erect a county jail, and providing that it shall not be erected until plans shall have been made therefor and adopted by the board, it has been held, in an action by an architect against a county for the value of services rendered in making plans for a jail building, which had been adopted by the board on condition that they should receive a bid from some reliable person, and after receiving bids they refused to open or act upon them, and rejected the plaintiff's plans, alleging that he procured their adoption by the board by fraud, that the plans had been adopted within the meaning of the act, and that the plaintiff could recover. Hall *v.* Los Angeles County, 74 Cal. 502.

Chemist Employed by Coroner. — That a coroner was, by the corrupt appliances of others, induced to employ a chemist to discover whether poison caused the death of one on whose body he holds an inquest, is no defense to a suit by the chemist to recover compensation for his services where they were rendered upon the request of the coroner duly authorized by statute. Bartholomew County *v.* Jameson, 86 Ind. 154.

Statement Constituting Contract. — A statement by supervisors to a claimant, in declining to pay his claim, that they would compensate him for future services, was held to be sufficient to support a contract with the county. Curtis *v.* Cass County, 49 Iowa 421.

But a statement by the chairman of a county board to the claimant in open session, without objection, that they could not pay the bill that day, but that as soon as the work was accepted it would be paid, does not constitute a contract binding as an obligation against the county. Rice *v.* Plymouth County, 43 Iowa 136.

Noncompliance of Other Party with Contract. — Where a contractor made material departures from the specifications in the contract, it was held that, though he completed the building within the time specified, he was not entitled to recover the price agreed to be paid. McCoy *v.* Justices, 8 Jones L. (53 N. Car.) 272.

Bridge to Be Built According to Certain Specifications and to the "Satisfaction of the County Court." — Where a contractor entered into a contract with a county to make a road and bridge according to certain specifications, and afterwards stipulated that the road and bridge should be "to the satisfaction of the county court," it was held that the contract was to make the road and build the bridge according to the specifications, which would be to the satisfaction of the court. Kinsley *v.* County Ct., 31 W. Va. 464.

Contract for Building Not Avoided by Defective Plan for Which County Is Responsible. — In an action for the contract price for building a county bridge, where the bridge proved worthless on account of the defective plan on which it was built, it was held that there was sufficient evidence (see opinion) to justify the jury in rendering a verdict for the plaintiff on the ground that the county was responsible for the plan. Holland *v.* Union County, 68 Iowa 56.

Compliance with Contract Presumed from Acquiescence. — In an action against bridge commissioners to recover the contract price of a bridge ordered by them, the defense cannot be made that the bridge, being a public one, constructed by a county, was not completed according to contract, when it appears that it has been used by the public for five years, and that jurors appointed by the county court to examine it approved it. Smith *v.* Hubbard, 85 Tenn. 306.

Acceptance by Agent of County Prima Facie Evidence of Compliance with Contract. — In a contract for the building of a jail it was specified that the county should appoint a commissioner qualified to judge of the work, to inspect and report upon the work during its construction, and to notify the county should material be furnished which, in his opinion, was not in accordance with the plans and specifications. It was held that the allowance of the work by the commissioner, in the absence of any complaint made at the time, and in the manner provided by the contract, is *prima facie* evidence of compliance with the contract, and should be conclusive, except upon clear and distinct proof of fraud; and that the fact that the commissioner was not qualified for his duty was no defense. Pauly Jail Bldg., etc., Co. *v.* Hemphill County, 62 Fed. Rep. 698.

Contract for Compensation Lower than That Fixed by Statute. — It has been held that when the compensation of a party performing services for a county is fixed by statute, it cannot be reduced by the officer or person by whom he is employed. Thus where, by statute, it is expressly declared that when the number of descriptions in a tax list is less than three thousand dollars, the printer publishing it shall receive thirty cents for each lot or tract of land in the advertised list, the compensation could not be diminished by any arrangement or contract which the county clerk might make in respect thereto. Hoffman *v.* Chippewa County, 77 Wis. 214.

1. **Liability for Services under Contract Not Authorized** — *Arizona*. — Heney *v.* Pima County, (Arizona 1887) 14 Pac. Rep. 299.

Florida. —Payne *v.* Washington County, 25 Fla. 798.

Georgia. — Ward *v.* Appling County, 80 Ga. 672.

Indiana. — Montgomery County *v.* Fullen, 111 Ind. 410; Spidell *v.* Johnson, 128 Ind. 235;

the contract therefor was entered into by a right,[1] and through the officials,[2] expressly or impliedly authorized by statute. But where the right or duty to employ an attorney is not imposed by statute,[3] as where the services rendered were a part of the duties required by law to be discharged by the county

Little *v.* Hamilton County, 7 Ind. App. 118; Deweese *v.* Hutton, 144 Ind. 114.

Iowa. — McBride *v.* Hardin County, 58 Iowa 219; King *v.* Mahaska County, 75 Iowa 329.

New York. — People *v.* Hamilton County, 73 N. Y. 604.

Pennsylvania. — Raush *v.* Ward, 44 Pa. St. 389.

Thus it has been held that a sheriff cannot provide food and lodging at the expense of the county for militia called out by him to suppress insurrections and riots; and persons furnishing food and lodging to militia called out for that purpose, at the instance of the sheriff, must have recourse to him personally, and not to the county. Raush *v.* Ward, 44 Pa. St. 389.

Contract for Building Court-house. — A contract by county authorities for the building of a court-house provided that changes thereafter made in the plan of the work, increasing or lessening the cost, should be followed by like changes in the amount to be paid for the building, which was the full sum authorized by a vote of the people under a law requiring such question to be submitted to them. Subsequently, changes were made, all of which added to the cost. It was held that the changes in the contract, so far as they imposed a liability upon the county for more than the sum so voted, were void. King *v.* Mahaska County, 75 Iowa 329.

Repair of Bridge. — Under Rev. Stat. of *Indiana* 1894, § 3275 (Rev. Stat. 1881, § 2885), requiring county commissioners, when they think public convenience requires a bridge to be repaired, to cause a survey and estimate to be made, and to direct the work to be done; and Rev. Stat. 1894, § 3276 (Rev. Stat. 1881, § 2886), authorizing them, if the estimate exceeds the ability of the road district in which the bridge is located, to make an appropriation therefor out of the county treasury, it has been held that a contract by county commissioners for repairs to a bridge, obligating the county to pay for the same, was void, where it was made without any survey or estimate having been made. Deweese *v.* Hutton, 144 Ind. 114.

The Expense of Advertising the Delinquent Tax List by the tax collector of the county has been held not to properly fall upon the county, because the tax collector is not authorized by any statute or by virtue of his being a county officer to bind the county for such expense. Payne *v.* Washington County, 25 Fla. 798.

Also, where the expense of publishing notices for the redemption of lands sold for taxes was contracted by a county officer without authority, such expense was held not to be a proper county charge. People *v.* Hamilton County, 73 N. Y. 604.

Services of Notary Public. — When a statute makes it the duty of the collector of taxes to execute deeds of lands struck off to the territory at tax sales conveying the same to the territory without charge, services of a notary public certifying the acknowledgment of his signature are not a proper charge against the county. Heney *v.* Pima County, (Arizona 1887) 14 Pac. Rep. 299.

Contract by Agent of Third Person Not Binding on County. — In *Indiana* it has been held that the board of commissioners in the construction of free gravel roads act, not as the agents of the county, but by the terms of the statute represent the interest of the property owners whose lands are liable to be assessed to pay for such improvement, and a county will not be liable for a contract made by such commissioners for extra work. Little *v.* Hamilton County, 7 Ind. App. 118. See also Montgomery County *v.* Fullen, 111 Ind. 410; Spidell *v.* Johnson, 128 Ind. 235.

1. County Liable for Compensation of Counsel, Where Right to Employ Exists. — In Jordan *v.* Osceola County, 59 Iowa 388, it was held that a county has the undoubted right to employ counsel to prosecute or defend an action, or to perform other services, and may bind itself by contract for such services.

Right Implied from Corporate Capacity. — Such right has been held to be implied from the corporate capacity of a county to sue and be sued. Jack *v.* Moore, 66 Ala. 184. See also Garfield County *v.* Leonard, 3 Colo. App. 576. And see *supra*, this title, *Powers*.

For a discussion of the liability of counties for the fees of county attorneys see *infra*, this section, *Expenses Connected with Public Offices*.

2. Liability for Services of Counsel Employed by Proper Authorities. — Hornblower *v.* Duden, 35 Cal. 664; Hurd *v.* Hamill, 10 Colo. 174; McCabe *v.* Fountain County, 46 Ind. 380; White *v.* Polk County, 17 Iowa 413; Tatlock *v.* Louisa County, 46 Iowa 138; Thacher *v.* Jefferson County, 13 Kan. 182; Washington County Ct. *v.* Thompson, 13 Bush (Ky.) 239; Talbott *v.* Iberville Parish, 24 La. Ann. 135; People *v.* Queens County, 39 Hun (N. Y.) 442; City Nat. Bank *v.* Presidio County, (Tex. Civ. App. 1894) 26 S. W. Rep. 775.

Thus in Washington County Ct. *v.* Thompson, 13 Bush (Ky.) 239, it was held that a county judge has power to bind the county by employing counsel to resist the application of a railroad company for a mandamus to compel him to subscribe for its stock and to issue bonds of the county to pay the subscription, and it was the duty of the county levy court to make provision for the payment of a reasonable compensation to such counsel for the services rendered under such employment.

3. Where Duty to Employ Attorney Is Not Imposed by Statute. — Barr *v.* State, (Ind. 1897) 47 N. E. Rep. 829.

Criminal Actions. — It has been held under statute in *California* that boards of supervisors have no power to employ counsel on behalf of the county to prosecute or assist in the prosecution of criminal cases prosecuted in the name and on behalf of the people of the state, and the county will not be bound by such contract. Modoc County *v.* Spencer, 103 Cal. 498.

attorney,[1] or where the contract for such services was made by an unauthorized person,[2] the county will not be bound.

Services of Attorney Appointed to Defend Poor Persons — Compensation Provided For by Statute. — In a number of states, statutes have been passed providing for compensation by the county to attorneys appointed by the court to defend poor persons. In the absence of such statute, the courts are divided as to the county's liability. This question has been discussed in previous portions of this work.[3]

Physician's Services. — A discussion of the liability of counties on contracts for medical services rendered criminals [4] and paupers [5] will be found in other portions of this work.

b. IMPLIED CONTRACTS. — Though there may be no express contract, a county may be held liable on an implied contract where it knowingly receives and appropriates to its own use the property or services of another. In such case, it will be liable on a *quantum meruit* for the reasonable value of such property and services.[6] A promise by implication will also arise where

1. In *Nebraska*, it has been held that, by statute, the county attorney is a law officer of the county, and the county board cannot lawfully employ an attorney to perform the duties required by law to be discharged by the county attorney and pay for such services out of the treasury of the county. Brome *v.* Cuming County, 31 Neb. 362.

When the notice required by section 3459 of the Code of *Iowa* to be given to the district attorney to attend the hearing of a habeas corpus case has not been given, it has been held that the court or judge cannot, by the appointment of another member of the bar to appear for the defendant, confer upon him the right to demand of the county payment for his services. Miller *v.* Buena Vista County, 68 Iowa 711.

2. Contract by Unauthorized Official. — In Simmes *v.* Chicot County, 50 Ark. 566, it was held that the county court alone could bind the county for attorney's fees, and that, where a contract for the services of counsel was entered into by a county tax collector, the county would not be liable.

In Tatlock *v.* Louisa County, 46 Iowa 138, it was held in an action by an attorney against the county for legal services rendered in aid of the district attorney, that while it may be the duty of the district attorney to appear for and defend actions brought against a county, this by no means gives him authority to employ additional counsel, nor will his acceptance of the services of attorneys who may appear in the cause bind the county to payment therefor.

A Justice of the Peace has no authority to appoint, on behalf of the state, an attorney to conduct a criminal prosecution commenced before him; and an attorney cannot recover of a county for services rendered under such an appointment. Davis *v.* Linn County, 24 Iowa 508.

3. See the titles ATTORNEY AND CLIENT, vol. 3, p. 418; and CONSTITUTIONAL LAW, vol. 6, p. 1000. See also Posey *v.* Mobile County, 50 Ala. 6; Fountain County *v.* Wood, 35 Ind. 70; Johnson *v.* Whiteside County, 110 Ill. 22; Montgomery County *v.* Courtney, 105 Ind. 311; Case *v.* Shawnee County, 4 Kan. 512; Kelley *v.* Andrew County, 43 Mo. 338; State *v.* Montgomery County, 26 Ohio St. 599; Handy *v.* Hamilton County, 1 Disney (Ohio) 263.

4. See the title PRISONS.

5. See the title POOR AND POOR LAWS.

6. **Liability of County on Implied Contract.** — Montgomery County *v.* Barber, 45 Ala. 237; Butler *v.* Neosho County, 15 Kan. 178; Mitchell *v.* Leavenworth County, 18 Kan. 188; Brady *v.* New York, 10 N. Y. 260; Madison County *v.* Gibbs, 9 Lea (Tenn.) 383.

Thus, where the county treasurer occupied for his office a room belonging to a third person, with the knowledge and consent of the board of commissioners of the county, and after information had been given by the owner of the room to at least two members of the board that he should expect and demand compensation for the room, it was held that the county was liable for the value of the use of the room on the implied contract. Butler *v.* Neosho County, 15 Kan. 178.

Also, under the provisions of a statute which authorized the county court to appoint commissioners to contract for and have completed repairs of bridges, levees, etc., it was held that a person who performed work and furnished materials in such repairs with the knowledge and consent of the commissioners, and whose work was accepted and used by the county, might recover from the county what the work and material were reasonably worth, in the absence of an express contract. Madison County *v.* Gibbs, 9 Lea (Tenn.) 383.

Knowledge of County Through Proper Officers Necessary. — A contract for services will not be implied against a county unless the board of supervisors, acting in an official capacity, had notice of the fact that the plaintiffs were acting for the county, expecting compensation from it, and the board permitted the plaintiffs to proceed. Fouke *v.* Jackson County, 84 Iowa 616.

No Implication in Contradiction of Express Contract. — But where there is an express contract, the law will not imply a contract by the county contradictory to such express contract. Thus, where the court of sessions, as the duly authorized agent of a county, contracted for the making of a road to be paid by a tax collected from the owner or owners of the township through which the road passed, it was held that the county itself could not be made liable on an implied contract to pay for the road. Emerson *v.* Washington County, 9 Me. 95.

materials are furnished or services rendered to the county at its request, although no stipulation be made as to the value of such materials or services.[1]

Statutory Prohibition. — But such liability will not attach where an express contract only is contemplated by statute.[2] Nor can liability on an implied contract be created by an act of ratification where the circumstances are such that the county would be forbidden by statute to bind itself by an express contract.[3]

Liability for Property Obtained under Contract Ultra Vires. — But the obligation to do justice rests upon all persons, natural and artificial; and if a county obtains the property of another under a contract unauthorized by statute, the law, independent of any statute, will compel restitution unless some valid reason to the contrary can be shown, as, that the contract was illegal in the sense of being prohibited as an offense.[4] Thus it has been held that money made use of by a county for beneficial purposes, though obtained under a contract *ultra vires* on the part of the county, may be recovered on a count for money had and received.[5]

See also Jewett *v.* Somerset County, 1 Me. 125.

Where an express contract was made with a county to construct a certain road across a tract of land, which contract stipulated that the land should pay the cost of construction, it was held that the county was not liable for the difference between the price which the land brought and the cost of making the road. Young *v.* Iberville Parish, 22 La. Ann. 87.

1. Services Done or Materials Furnished by Request but Without Agreement as to Compensation. — Montgomery County *v.* Barber, 45 Ala. 237; Gibson County *v.* Motherwell Iron, etc., Co., 123 Ind. 364; Moynahan *v.* Birkett, 81 Hun (N. Y.) 395; Pacific Bridge Co. *v.* Clackamus County, 45 Fed. Rep. 217.

Compensation for Extra Work. — Where a board of commissioners gave into the hands of an architect the full supervision of the construction of a court-house, and the architect ordered a change in the work which incurred an increase in the expense, and the work was done by the contractor in accordance with the directions of the architect, and was accepted by the commissioners after its completion, the county will be liable for the extra work, although there was no agreement as to the price of the extra work. Gibson County *v.* Motherwell Iron, etc., Co., 123 Ind. 364. See also Carroll County *v.* O'Connor, 137 Ind. 622; Bass Foundry, etc., Works *v.* Parke County, 141 Ind. 68; Hamilton County *v.* Newlin, 132 Ind. 27.

Failure of Consideration Stipulated. — Where a county, in consideration for the erection of a bridge, paid the contractor a certain sum of money and also conveyed certain lands, and the title to the lands failed, it was held that the contractor was entitled to recover the actual value of the bridge. Clark *v.* Saline County, 9 Neb. 516.

2. No Implied Liability Where Express Contract Is Prescribed by Statute. — Wolcott *v.* Lawrence County, 26 Mo. 272; Lehigh County *v.* Kleckner, 5 W. & S. (Pa.) 181.

Thus in Wolcott *v.* Lawrence County, 26 Mo. 272, it was held that no recovery could be had against a county on a *quantum meruit* for erecting a court-house for the county, and that a recovery, if had at all, must be had upon a special contract entered into in conformity with the provisions of the act providing for erecting county buildings.

3. No Implied Contract Where Express Contract Forbidden. — Richardson *v.* Grant County, 27 Fed. Rep. 495; Reichard *v.* Warren County, 31 Iowa 381; Hovey *v.* Wyandotte County, 56 Kan. 577; State *v.* Getchell, 3 N. Dak. 243. *Compare* Clark *v.* Dayton, 6 Neb. 102.

Thus in Reichard *v.* Warren County, 31 Iowa 381, it was held that the board of supervisors had no power to bind the county for the erection of a public building, the probable cost of which would exceed five thousand dollars, unless thereto authorized by a majority vote of the legal voters of the county, and when so authorized to exceed this sum they had no power to bind the county in excess of the amount authorized by the vote; and that this rule applied to implied contracts as well as to express contracts.

4. Liability of County for Property Obtained under Contract Ultra Vires. — Marsh *v.* Fulton County, 10 Wall. (U. S.) 676; Chapman *v.* Douglas County, 107 U. S. 348. See the title ULTRA VIRES.

Where lands were conveyed to a county, and the agreement failed by reason of the legal disability of the county to perform its part according to its conditions, it was held that the vendor was entitled to call for a re-conveyance of the lands. Chapman *v.* Douglas County, 107 U. S. 348. The court in this case said: "The illegality in the contract related, not to its substance, but only to a specific mode of performance, and does not bring it within that class mentioned by Mr. Justice Bradley in Thomas *v.* Richmond, 12 Wall. (U. S.) 349. The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense. The power in that form was simply withheld."

5. Money Obtained under Contract Ultra Vires. — Henderson *v.* Sibley County, 28 Minn. 515. See the title ULTRA VIRES.

Liability for Money Borrowed for County Without Statutory Authority. — In *Georgia*, where a constitutional provision authorized the general assembly to confer the right and authority on counties to borrow money, but no act of the

c. VOLUNTARY SERVICES. — Where a person, without the direction or assent of the proper authorities of the county, voluntarily performs services for the county, he has no legal demand against the county for compensation therefor.[1]

d. LIABILITY TO ASSIGNEE OF CONTRACT. — It has been held that a partial assignment by a contractor of a contract with a county for the performance of work, though notified to the county, if not assented to by it, will not render the county liable to the assignee, or prevent it from making a settlement in good faith with the original contractor; and this on the ground that it is against public policy to permit public corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by subcontracts between their contractors and third persons to which they have never consented.[2] But it has been intimated that where the assignment is of an entire contract for the performance of work which, from its nature, implies no personal confidence in the contractor, it will be valid without the consent of the county.[3]

e. EFFECT OF TEMPORARY ABANDONMENT OF ORGANIZATION ON LIABILITY. — It has been held that the debts of a county contracted during a valid organization remain the obligations of the county, although, for a time, the organization is abandoned, and there are no officers to be reached by the process of the courts.[4]

3. In Tort — *a.* GENERAL RULE. — It is the general rule that a county is not liable for torts in the absence of statute expressly or by necessary implication declaring the liability.[5]

assembly was passed putting said constitutional provision in force, it was held that where the money of a lender had been actually applied to objects to which county revenue might rightly be devoted, the lender could enforce the repayment of the loan out of the county treasury with interest. Peed *v.* McCrary, 94 Ga. 487.

Also, in Waitz *v.* Ormsby County, 1 Nev. 370, it was held that money loaned to commissioners for the benefit of the county, although the transaction was unauthorized by statute, may be recovered if it is shown that it was appropriated to the execution of an act which it was made the duty of the commissioners to perform, and the county received the benefit of it, but nothing can be recovered which is not shown to have been expended for the use and benefit of the county and for a purpose authorized by law.

But where no power was conferred upon a county treasurer to make, and no authority upon the board of supervisors to order him to make, any other than an absolute and fully executed sale of tax certificates, and for cash in hand, and he entered into an executory contract of sale, it was held that he did not act as a public officer, or in his official character as county treasurer acting within the scope of his authority, but as an individual and private person, and that, where he received two hundred dollars advanced upon this illegal contract, the county should not be made liable to refund it upon the failure of the consideration or for want of it. Smith *v.* Barron County, 44 Wis. 686. But Ryan, C. J., in a dissenting opinion, said it appeared that the money paid by the appellant went into the county treasury.

1. County Not Liable for Voluntary Services. — Fite *v.* Black, 92 Ga. 363; Huntington County *v.* Boyle, 9 Ind. 296; Duval *v.* Laclede County, 21 Mo. 396; Handlin *v.* Morgan County, 57 Mo. 114; Ostendorff *v.* Charleston County, 14 S. Car. 403; Epperson *v.* Shelby County, 7 Lea (Tenn.) 275.

Building Bridge. — Persons who build or repair a bridge over a creek on a public road without an order from the county court, but simply do the work upon advice of a justice of the county, can have no remedy against the county for building or repairing the same. Epperson *v.* Shelby County, 7 Lea (Tenn.) 275.

2. Liability of County to Assignee of Contract for Work. — Delaware County *v.* Diebold Safe, etc., Co., 133 U. S. 473. See also Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234.

3. Delaware County *v.* Diebold Safe, etc., Co., 133 U. S. 473.

4. Comanche County *v.* Lewis, 133 U. S. 198.

5. Liability of Counties for Torts in General. — Askew *v.* Hale County, 54 Ala. 639; El Paso County *v.* Bish, 18 Colo. 474; Davis *v.* Ada County (Idaho 1896) 47 Pac. Rep. 93; Field *v.* Albemarle County, (Va. 1895) 20 S. E. Rep. 954; Fry *v.* Albemarle County, 86 Va. 195, 19 Am. St. Rep. 879.

Liability for Loss of Horse Bailed to Officer. — It has been held that where an officer who had a warrant for the arrest of a man charged with robbery took the plaintiff's horse for the pursuit, and the horse was over-driven and injured, the county was not liable for the value of the horse. Randles *v.* Waukesha County, (Wis. 1897) 71 N. W. Rep. 1034. To the same effect see Dougherty County *v.* Kemp, 55 Ga. 252.

Detention of Steamers by Bridges. — In White Star Line Steamboat Co. *v.* Gordon County, 81 Ga. 47, it was held that in *Georgia* there is no statutory provision subjecting counties to actions for detaining steamers or craft of any

b. NEGLIGENCE IN PERFORMANCE OF CORPORATE DUTIES — (1) *In General.* — The great weight of authority is in favor of the conclusion that even when a duty is imposed by statute, the county is not liable for failure to perform it in the absence of express provision creating such liability;[1] and there

kind upon the water, and whether done by means of bridges or by other obstructions, there is no redress for it against the county. The court in this case said: "Indeed, the county cannot do it, because there is no agency recognized by the law to represent the county in detaining steamers and committing torts of this character." But in Houston *v.* Police Jury, 3 La. Ann. 566, it was held that damages may be recovered against a police jury for an injury done to a boat in consequence of any illegal obstruction to the navigation of a river resulting from neglect in the management of a drawbridge by persons for whose acts the jury were responsible.

Unlawfully Beating Convict by Guard. — In Hammond *v.* Richmond County, 72 Ga. 188, it was held that a county is not responsible in damages for the tort of one of the guards in unlawfully beating a convict in the chain gang, nor for the negligence of the rest of the guards in not protecting the convict from the unlawful beating.

Vacating Roads. — It has been held that where the county commissioners of a county vacate a county road, the county will not be liable in damages to any persons who may sustain loss in consequence thereof. Coffey County *v.* Venard, 10 Kan. 95.

Where a Barn Was Negligently Burned by laborers employed by the county to work the county road, it was held that the county was not responsible for the loss. Field *v.* Albemarle County, (Va. 1895) 20 S. E. Rep. 954.

Also in Symonds *v.* Clay County, 71 Ill. 355, an action on the case was brought to recover the damage done the plaintiff's land by means of fire which had spread from the poor farm belonging to the county, through the negligence of the servants of the county in charge of the farm, and it was held that the county was not liable at common law or by statute.

Damage Caused by Overflow of Ditch Dug by County. — Also in Green *v.* Harrison County, 61 Iowa 311, it was held that a county is not liable for damages caused by the overflow of a ditch constructed under its direction, and which had become obstructed by sediment. See also Nutt *v.* Mills County, 61 Iowa 754; Dashner *v.* Mills County, (Iowa 1893) 55 N. W. Rep. 468.

1. Negligence in Performance of Corporate Duties – *United States.* — Smith *v.* Carlton County, 46 Fed. Rep. 340.

Alabama. — Covington County *v.* Kinney, 45 Ala. 176; Sims *v.* Butler County, 49 Ala. 110; Askew *v.* Hale County, 54 Ala. 639.

Arkansas. — Granger *v.* Pulaski County, 26 Ark. 37.

California. — Huffman *v.* San Joaquin County, 21 Cal. 427.

Colorado. — El Paso County *v.* Bish, 18 Colo. 474.

Connecticut. — McLoud *v.* Selby, 10 Conn. 390; Ward *v.* Hartford County, 12 Conn. 404.

Illinois. — Hedges *v.* Madison County, 6 Ill. 567; Hollenbeck *v.* Winnebago County, 95 Ill. 148, 35 Am. Rep. 151.

Michigan. — Larkin *v.* Saginaw County, 11 Mich. 88, 82 Am. Dec. 63.

Mississippi. — Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

Missouri. — Reardon *v.* St. Louis County, 36 Mo. 555.

Montana. — Territory *v.* Cascade County, 3 Mont. 396.

Ohio. — Hamilton County *v.* Mighels, 7 Ohio St. 109.

Tennessee. — White's Creek Turnpike Co. *v.* Davidson County, 14 Lea (Tenn.) 75.

Texas. — Walton *v.* Travis County, 5 Tex. Civ. App. 525.

In Madden *v.* Lancaster County, 65 Fed. Rep. 188, the court said: "All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state; and inasmuch as the sovereign power is not amenable to individuals for neglect in the discharge of public duty, and cannot be sued for such neglect without express permission from the state itself, so these *quasi* corporations, its agents, are not liable for such negligence, and no action for damages arising therefrom can be maintained against any of them, in the absence of an express statute imposing the liability and permitting the action."

Wrongful Attachment. — In Reed *v.* Howell County, 125 Mo. 58, 46 Am. St. Rep. 466, it was held that a county was not liable in damages for a wrongful attachment of property.

Unskilful Treatment by Physician. — In Sherbourne *v.* Yuba County, 21 Cal. 113, 81 Am. Dec. 151, it was held that a county was not liable for the damage which a person sustained by reason of the unskilful treatment he received from the resident physician, and the insufficient and unwholesome food and other necessaries supplied him while in the county hospital as an indigent sick person. To the same effect see Summers *v.* Daviess County, 103 Ind. 262.

In *New York*, prior to the act declaring counties to be municipal corporations, the nonliability of counties for acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, was established in several cases. Ensign *v.* Livingston County, 25 Hun (N. Y.) 20; Alamango *v.* Albany County, 25 Hun (N. Y.) 551; Hughes *v.* Monroe County, 147 N. Y. 49.

Thus where an employee at an insane asylum maintained by the county for its insane, was injured while operating a steam mangle in the laundry, it was held that he could not maintain an action against the county to recover damages on the ground of negligence. Hughes *v.* Monroe County, 147 N. Y. 49. And it has been held that this rule is not altered by the statute declaring counties to be municipal corporations. Albrecht *v.* Queens County, 84 Hun (N. Y.) 399; Godfrey *v.*

is no distinction in the application of this rule between the neglect to perform an act which ought to have been performed, and the performance of the duty in a negligent manner.[1]

(2) *Negligence in Construction and Maintenance of County Buildings* — **Court-Houses.** — Thus, in the absence of statute, a county will not be liable in damages to a person injured by reason of the negligent construction or maintenance of its court-house.[2]

County Jail. — The same rule applies to negligence in the construction and maintenance of county jails.[3]

Liability to Adjoining Property Owners. — Thus a county will not, apart from statute, be liable for an injury caused by the flooding of adjacent premises in the erection of a county jail,[4] nor for damages by reason of the fact that the jail is kept in so filthy a condition as to become an actual nuisance to persons living near it.[5]

Liability to Inmates. — Nor will it be liable to the inmates of the jail for negligently permitting it to become and remain in such a bad condition that they become sick and diseased.[6]

Queens County, 89 Hun (N. Y.) 18; Ahern *v.* Kings County, 89 Hun (N. Y.) 148.

Liability of Counties for Escape of Prisoners. — In *Connecticut* it is provided by statute that if any person committed on any civil process to any jail shall escape through any defect of such jail, the costs and charges occasioned thereby, and the damages sustained by the party in whose behalf said prisoner was committed to jail by reason of such escape, shall be paid by the county in which such jail is, and the superior court in that county, upon proper application, shall ascertain said costs and damages and order payment accordingly; but no person shall be thereby deprived of any remedy to which he may be otherwise legally entitled, and if satisfaction may be had from the person escaping, or his abettors, the county shall not be liable for said damages. Gen. Stat. of Conn. 1888, § 3391; Hawley *v.* Litchfield County, 1 Root (Conn.) 155; Dutton *v.* Litchfield County, 1 Root (Conn.) 450; Staphorse *v.* New-Haven County, 1 Root (Conn.) 126; Dennie *v.* Middlesex County, 1 Root (Conn.) 278; Clark *v.* Litchfield, Kirby (Conn.) 318; Paul *v.* Tolland County, 2 Root (Conn.) 196; Hubbard *v.* Shaler, 2 Day (Conn.) 195. See also the title PRISONS.

Liability for Damages by Mobs. — In some states liability for damages caused by mobs is imposed upon counties under certain circumstances. Dale County *v.* Gunter, 46 Ala. 118; Luke *v.* Calhoun County, 52 Ala. 115; Clear Lake Water Works Co. *v.* Lake County, 45 Cal. 90; Clark Thread Co. *v.* Chosen Freeholders, 54 N. J. L. 265; 2 Birdseye's Rev. Stat. New York (2d ed.), p. 2107; Ely *v.* Niagara County, 36 N. Y. 297; Loomis *v.* Oneida County, 6 Lans. (N. Y.) 269; Schiellein *v.* Kings County, 43 Barb. (N. Y.) 490; Paladino *v.* Westchester County, 47 Hun (N. Y.) 337; Hill *v.* Rensselaer County, 53 Hun (N. Y.) 194; Wolfe *v.* Richmond County, 11 Abb. Pr. (N. Y. Supreme Ct.) 270; Donoghue *v.* Philadelphia County, 2 Pa. St. 230; Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep 670. See further the statutes of the various states.

1. Hollenbeck *v.* Winnebago County, 95 Ill. 148, 35 Am. Rep. 151; Downing *v.* Mason County, 87 Ky. 208, 12 Am. St. Rep. 473.

2. **Negligence in Construction or Maintenance of Court-houses.** — Dosdall *v.* Olmsted County, 30 Minn. 96, 44 Am. Rep. 185; Vigo County *v.* Daily, 132 Ind. 73; Kincaid *v.* Hardin County, 53 Iowa 430, 36 Am. Rep. 236.

In Hamilton County *v.* Mighels, 7 Ohio St. 109, it was held that a county was not liable for an injury suffered by the plaintiff, when an attendant upon court as a witness, who was precipitated into the cellar of the court-house in consequence of the negligent omission of the agents or officers of the county to guard or light a dangerous opening leading into the cellar. To the same effect see Kincaid *v.* Hardin County, 53 Iowa 430, 36 Am. Rep. 236.

Death by Falling of Court-house in Course of Erection. — In Hollenbeck *v.* Winnebago County, 95 Ill. 148, 35 Am. Rep. 151, it was held that where a person was killed by the falling of a portion of the court-house while it was being erected, the deceased at the time being engaged as a workman on the building, the county was not liable civilly for such death, in the absence of a statute expressly imposing such liability.

3. **Reimbursement of Sheriff for Damages for Escape of Prisoner from Jail.** — It has been held that a county is not liable to respond to the sheriff for damages recovered from him for the escape of a debtor on account of the insufficiency of the jail. Haygood *v.* Justices, 19 Ga. 97, 20 Ga. 845. Here the court said: "The justices of the inferior court are required by law to cause to be erected and kept in good repair a sufficient jail, at the charge of the county. This is a public duty imposed on them by law; but there is no statute for enforcing the performance of it, nor does the law subject them to indictment or civil suit for its nonperformance."

4. Downing *v.* Mason County, 87 Ky. 208, 12 Am. St. Rep. 473.

5. Wehn *v.* Gage County, 5 Neb. 494, 25 Am. Rep. 497.

6. **Liability to Inmates for Damage from Filthy Condition of Jail.** — White *v.* Sullivan County, 129 Ind. 396; Morris *v.* Switzerland County,

(3) *Injuries Caused by Defective Highways or Bridges* — **Prevailing Doctrine.** — The overwhelming weight of authority is to the effect that the duty of counties to construct and keep in repair highways and bridges, whether imposed by the common law [1] or by statute,[2] does not carry with it an implied liability to answer in damages for injuries sustained from defective or unsafe highways or bridges, and that such liability can only arise from express statutory enactment or by implication necessarily arising therefrom.

131 Ind. 285; Greene County *v.* Boswell, 4 Ind. App. 133; Lindley *v.* Polk County, 84 Iowa 308; Pfefferle *v.* Lyon County, 39 Kan. 432; Hite *v.* Whitley County Ct., 91 Ky. 168; Manuel *v.* Cumberland County, 98 N. Car. 9.

1. At Common Law counties were not liable for injuries caused by negligence in failing to keep bridges in repair. Russell *v.* Devon County, 2 T. R. 667; Cones *v.* Benton County, 137 Ind. 404; Jasper County *v.* Allman, 142 Ind. 573; Woods *v.* Colfax County, 10 Neb. 552; Templeton *v.* Linn County, 22 Oregon 313.

In an action on the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to a wagon of the plaintiff in consequence of a bridge being out of repair which ought to have been repaired by the county, it was held that, no fund existing out of which satisfaction could be made, the action would not lie. Russell *v.* Devon County, 2 T. R. 667.

2. County Not Liable for Injuries from Defective Highways in Absence of Express Statute — *Alabama.* — Lee County *v.* Yarbrough, 85 Ala. 590; Askew *v.* Hale County, 54 Ala. 639.

Arkansas. — Granger *v.* Pulaski County, 26 Ark. 39.

California. — Huffman *v.* San Joaquin County, 21 Cal. 427; Crowell *v.* Sonoma County, 25 Cal. 313; Barnett *v.* Contra Costa County, 67 Cal. 77.

Colorado. — El Paso County *v.* Bish, 18 Colo. 474, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 364.

Connecticut. — Ward *v.* Hartford County, 12 Conn. 404.

Idaho. — Davis *v.* Ada County, (Idaho 1896) 47 Pac. Rep. 93.

Illinois. — White *v.* Bond County, 58 Ill. 297, 11 Am. Rep. 65.

Indiana. — Carroll County *v.* Bailey, 122 Ind. 46; Vermilion County *v.* Chipps, 131 Ind. 56; Smith *v.* Allen County, 131 Ind. 116; Cones *v.* Benton County, 137 Ind. 404; Abbett *v.* Johnson County, 114 Ind. 63; Jasper County *v.* Allman, 142 Ind. 573, (*overruling* House *v.* Montgomery County, 60 Ind. 580, and *citing* 4 AM. AND ENG. ENCYC. OF LAW, (1st ed.) pp. 364, 367); Johnson County *v.* Hemphill, 14 Ind. App. 219; Montgomery County *v.* Coffenberry, 14 Ind. App. 701; Johnson County *v.* Reinier, (Ind. App. 1897) 47 N. E. Rep. 642.

Kansas. — Marion County *v.* Riggs, 24 Kan. 255.

Michigan. — Larkin *v.* Saginaw County, 11 Mich. 88, 82 Am. Dec. 63.

Minnesota. — Smith *v.* Carlton County, 46 Fed. Rep. 340.

Mississippi. — Sutton *v.* Police Board, 41 Miss. 236; Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

Missouri. — Reardon *v.* St. Louis County, 36 Mo. 555; Clark *v.* Adair County, 79 Mo. 536; Jefferson County *v.* St. Louis County, 113 Mo. 619.

Nebraska. — Woods *v.* Colfax County, 10 Neb. 552.

New Jersey. — Chosen Freeholders *v.* Strader, 18 N. J. L. 108; Cooley *v.* Chosen Freeholders, 27 N. J. L. 415; Livermore *v.* Chosen Freeholders, 29 N. J. L. 245.

New York. — Albrecht *v.* Queens County, 84 Hun (N. Y.) 399; Ahern *v.* Kings County, 89 Hun (N. Y.) 148.

North Carolina. — White *v.* Chowan County, 90 N. Car. 437.

Oregon. — Templeton *v.* Linn County, 22 Oregon 313.

South Dakota. — Bailey *v.* Lawrence County, 5 S. Dak. 393.

Tennessee. — Wood *v.* Tipton County, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561.

Texas. — Heigel *v.* Wichita County, 84 Tex. 392, 31 Am. St. Rep. 63.

West Virginia. — Watkins *v.* County Ct., 30 W. Va. 657.

Compare McCalla *v.* Multnomah County, 3 Oregon 424; Eastman *v.* Clackamas County, 32 Fed. Rep. 24 (declaring the law in Oregon); Ford *v.* Umatilla County, 15 Oregon 313; Heilner *v.* Union County, 7 Oregon 84, 33 Am. Rep. 703.

In Clark *v.* Adair County, 79 Mo. 536, it is held that a county is not liable in damages to one injured either in person or property by the fall of a county bridge.

Injury to Adjoining Property by Defective Bridge. — A county is not liable for damages for injuries sustained by individuals, caused by a road overseer placing the abutment of a bridge in the bed of a stream in such manner as to cause the waters of the stream to flow out of their usual channel and wash away land or the improvements thereon. Crowell *v.* Sonoma County, 25 Cal. 313.

Injury from Negligent Explosion in Construction of Bridge. — In an action by an employee of an independent contractor engaged in building a bridge in a county, for damages occasioned by the negligent firing of a charge of dynamite while blasting and building an approach to the bridge, the county was held not to be liable, in the absence of statute in *Minnesota* to that effect. Smith *v.* Carlton County, 46 Fed. Rep. 340.

Injury from Defective Road. — An action will not lie against a county for damages sustained by the laying off by the county court of a public road afterwards held by the courts to be a shunpike, and a nuisance to the plaintiff's rights, and ordered to be closed. White's Creek Turnpike Co. *v.* Davidson County, 14 Lea (Tenn.) 73.

Filling Up Millrace Crossing Road. — Where the county court caused a millrace across a

In a Few Jurisdictions it is maintained that where the legislature devolves on a county the duty to keep in repair the highways and bridges within its jurisdiction, and provides it with the means of enforcing the performance of this duty, there necessarily results from the breach or nonperformance of this duty a liability against the county, for which the common law will furnish a remedy, whether one is expressly provided by statute or not.[1]

road to be filled up for the purpose of preventing injury to the road, it was held that the county was not liable to the owners of the mill for the injury thereby sustained. Swineford *v.* Franklin County, 73 Mo. 279.

Falling of Dead Tree Standing Near Road. — If a dead tree standing within five feet of a public road falls upon a person traveling along such road, it has been held that the county court cannot be sued by such person because of the injuries sustained by the falling of such tree. Watkins *v.* County Ct., 30 W. Va. 657.

Defective Sidewalk. — A county is not liable to a civil action for damages occasioned by a defective sidewalk under its control, unless so declared by statute. Clark *v.* Lincoln County, 1 Wash. 518, 25 Am. & Eng. Corp. Cas. 211.

It has been held that a county is not liable for an injury occasioned by the negligence of its commissioners in failing to keep in repair a sidewalk on the court-house premises. Dosdall *v.* Olmsted County, 30 Minn. 96, 44 Am. Rep. 185.

County and Municipal Liability Distinguished. — "It is urged that no valid reason exists for exempting counties from liability for injuries resulting from defective highways and bridges, while holding cities and towns liable for such injuries. We think a sufficient answer to this argument is to be found in the distinction existing between municipal corporations, created by the request, and, under our constitution, by the act, of the citizens resident within the territorial limits thereof, for their local advantage and convenience, and counties, which are created by the legislature for the purpose of exercising a part of the political power of the state. Moreover, such municipal subdivisions are usually confined within small, compact territorial limits, and are provided with officers authorized to receive notices, and empowered to act promptly in all contingencies, while counties, with us, frequently include large areas, and embrace within their limits extended regions of sparsely-settled territory, making it difficult, if not impossible, for them, with their inadequate means, and limited complement of officers, to guard against defects in highways and bridges." El Paso County *v.* Bish, 18 Colo. 474.

1. **Jurisdictions Holding County Liable for Damage from Defective Highways Apart from Express Statute.** — Anne Arundel County *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557; Baltimore County *v.* Baker, 44 Md. 1; Calvert County *v.* Gibson, 36 Md 229; Eyler *v.* Allegany County, 49 Md. 257, 33 Am. Rep. 249; Rigony *v.* Schuylkill County, 103 Pa. St. 382; Humphreys *v.* Armstrong County, 3 Brews. (Pa.) 49.

In Calvert County *v.* Gibson, 36 Md. 229, the court held that where, in consequence of the condition of the public roads of a county, a wagon and carriage were injured, the owner thereof was entitled to recover from the county commissioners damages for such injury, provided he used due care and caution while traveling over the road.

Contribution Between Counties Maintaining Same Bridge.—In Armstrong County *v.* Clarion County, 66 Pa. St. 218, it was held that where a traveler passing over a bridge which was maintainable by two counties was injured by its breaking down, and recovered damages in an action for negligence against one of the counties, such county might recover contribution from the other.

When Statutory Provision Is Directory Merely. — Where the county commissioners failed to exercise their authority to erect footwalks adjoining a county bridge, under *Pennsylvania* Act of February 18, 1870, it was held, in an action brought against the county for injuries occasioned by such neglect, that the power granted was discretionary only, and that the county was not liable for the nonexercise of the same. Lehigh County *v.* Hoffort, 19 W. N. C. (Pa.) 363.

In *Iowa* it is held that counties are liable for injuries resulting from defects in bridges upon public highways erected and maintained by them, and that this liability arises by implication from the statute imposing the duty of building, maintaining, and repairing bridges. Brown *v.* Jefferson County, 16 Iowa 339; Krause *v.* Davis County, 44 Iowa 141; Huff *v.* Poweshiek County, 60 Iowa 529; Wilson *v.* Jefferson County, 13 Iowa 181; Cooper *v.* Mills County, 69 Iowa 350; Huston *v.* Iowa County, *cited* in Krause *v.* Davis County, 44 Iowa 142; Ferguson *v.* Davis County, 57 Iowa 601; Brown *v.* Jefferson County, 16 Iowa 339; Albee *v.* Floyd County, 46 Iowa 177. See also Roby *v.* Appanoose County, 63 Iowa 113.

But it has been held that to establish the liability of the county for an injury, it must be shown that, prior to the time of its occurrence, the county had assumed control of the bridge or made appropriations for building or keeping it in repair. Titler *v.* Iowa County, 48 Iowa 90.

Accordingly it has been held that for an injury caused by a defective culvert or small bridge, which it was the duty, not of the county, but of the officers of the road district to complete and keep in repair as a part of the highway, the county will not be liable. Soper *v.* Henry County, 26 Iowa 264; Taylor *v.* Davis County, 40 Iowa 295.

And in this state the doctrine of the text seems to be confined to injuries sustained by reason of defective bridges. Thus in Packard *v.* Voltz, 94 Iowa 277, it was held that a county could not be held liable for damages caused by negligence in the construction of a drain across a highway.

Injury for Necessary and Reasonable Improvement. — It has been held that if, by reasonable or necessary improvement to a highway, a

By Express Statute. — In several states, moreover, there exist statutes making provision, with certain limitations and conditions in some cases, for the enforcement against counties of the liability for damages arising from defective bridges and highways.[1]

party suffers consequential damages, it is *damnum absque injuria*, and no right of action accrues to him. Walter *v.* Wicomico County, 35 Md. 385; Tyson *v.* Baltimore County, 28 Md. 510.

1. **By Statute in Nebraska** it is provided that "if special damage happens to any person, his team, carriage, or other property, by means of insufficiency or want of repairs of a highway or bridge which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county; and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs: provided, however, that such action is commenced within thirty days of the time of said injury or damage occurring." Comp. Stat. Nebraska 1893, c. 18, § 1934. Under this statute it has been held that a county will be liable for damages sustained by a defective bridge, unless the person injured was guilty of contributory negligence. Hollingsworth *v.* Saunders County, 36 Neb. 144; Madden *v.* Lancaster County, 65 Fed. Rep. 188, declaring the law in Nebraska.

And in Raasch *v.* Dodge County, 43 Neb. 508, it was held that a county was liable, notwithstanding the fact that no notice of the defective condition of the bridge had, previous to the occurrence of the injury received, been given to any officer of the county concerned.

Under a Statute in South Carolina, providing that "any person who shall receive bodily injury or damage in his person or property through a defect in the repair of a highway, causeway, or bridge, may recover in an action against the county the amount of damage fixed by the finding of a jury," etc., it has been held that a ferry is not a highway within the meaning of the statute. Chick *v.* Newberry, etc., Counties, 27 S. Car. 419.

Under the same statute it has been held that a county was not responsible for injuries to a mule and buggy caused by the mule taking fright at a placard placed on a public bridge without the knowledge of the county commissioners, and removed by them as soon as it was brought to their attention. Acker *v.* Anderson County, 20 S. Car. 495.

Under a Statute in Massachusetts, imposing the duty of keeping a bridge in repair jointly upon a county and town, and making both liable for damages occasioned by want of repair, it was held that the county was liable for the whole damages in an action against it, if it did not avail itself of the defense by way of abatement that the town was not joined as a defendant. Lyman *v.* Hampshire County, 140 Mass. 311.

In New Jersey the Act of March 15, 1860, making any township or board of chosen freeholders which is by law chargeable with the erection or reparation of bridges, liable to an action for injuries to persons or property, sustained by reason of a wrongful neglect to erect, rebuild, or repair any bridge, has been held to give a remedy by action for all injuries to persons or property for the safety of which the rebuilding or repairing the particular bridge is by law cast upon the municipal body. Ripley *v.* Chosen Freeholders, 40 N. J. L. 45; Jernee *v.* Chosen Freeholders, 52 N. J. L. 557; Chosen Freeholders *v.* Hough, 55 N. J. L. 628; Murphy *v.* Chosen Freeholders, 57 N. J. L. 245. See also Livermore *v.* Chosen Freeholders, 29 N. J. L. 245.

In Alabama it is provided that when a bridge or causeway has been erected by contract with the county commissioners, with a guaranty by bond or otherwise that it shall continue safe for the passage of travelers and other persons for a stipulated time, any person injured in person or property before the expiration of such period, by a defect in such bridge or causeway, may sue in his own name on the bond or other guaranty and recover damages for the injury, and if no guaranty has been taken, or the period has expired, may sue and recover damages of the county. 1 Civil Code of Alabama (1886), § 1456; Barbour County *v.* Brunson, 36 Ala. 362; Barbour County *v.* Horn, 48 Ala. 566; Covington County *v.* Kinney, 45 Ala. 176; Sims *v.* Butler County, 49 Ala. 110; Schroeder *v.* Colbert County, 66 Ala. 137; Greene County *v.* Eubanks, 80 Ala. 204; Askew *v.* Hale County, 54 Ala. 639; Lee County *v.* Yarbrough, 85 Ala. 590.

Under this statute it has been held that a bridge erected by the citizens, on a public road, and not under a contract with the Commissioners' Court, is not such a bridge as will render a county liable for injuries sustained from defective repairs. Covington County *v.* Kinney, 45 Ala. 176; Sims *v.* Butler County, 49 Ala. 110.

Under this statute also it has been held that the liability of the county, having attached by the nonrequirement of a guaranty or by the expiration of the stipulated period, cannot be divested by imposing upon the overseer of the public road the duty to keep a bridge in proper repair. Greene County *v.* Eubanks, 80 Ala. 204.

Also it has been held that where the bond or guaranty of the contractor only requires that the bridge "shall continue safe for the passage of travelers and other persons," without extending to injuries to stock running at large, the county is not liable for such injuries, although stock running at large are not trespassers. Lee County *v.* Yarbrough, 85 Ala. 590.

By the Georgia Code it is provided that "any proprietor of any bridge, ferry, turnpike, or causeway, whether by charter or prescription, or without, or whether by right of owning the lands on the stream, are bound to prompt and faithful attention to all their duties as such; and if any damage shall occur by reason of nonattendance, neglect, carelessness, or bad

c. NEGLECT OF SPECIAL DUTY IMPOSED WITH CONSENT OF COUNTY. — The prevailing rule that a private action cannot be maintained against a county for neglect of corporate duty, unless the action be given by statute, has been held to be of limited application. Thus the rule has been held to apply to the neglect or omission of a county to perform those duties which are imposed on all counties without their corporate assent, and not to the neglect of those obligations which a county incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is conferred on it at its request. In the latter case the county is subject to the same liabilities as private corporations for the neglect of those special duties.[1]

d. TORT RATIFIED AND BENEFITS RETAINED BY COUNTY. — Where the county adopts and ratifies the wrongful act complained of, and retains and enjoys the benefits flowing therefrom, the rule of exemption of counties at common law from liability for torts generally will not apply.[2]

Wrongful Appropriation of Funds. — Thus if the property of another has been either wilfully or negligently appropriated by the county officers or agents to the use of the county, the law, independently of any statute, will compel restitution or compensation.[3]

conduct, he is bound for all damages, even if over and beyond the amount of any bond that may be given." Code of Georgia (1895), vol. 1, § 622. And by the succeeding section it is further provided that " the provisions of the preceding section apply to all contractors for the establishment of such, when damages accrue from want of good faith in performing their several contracts, and if no bond or sufficient guarantee has been taken by the ordinary, the county is also liable for the damages." See Scales *v.* Chattahoochee County, 41 Ga. 225; Collins *v.* Hudson, 54 Ga. 25; Mackey *v.* Murray, etc., Counties, 59 Ga. 832; Gwinnett County *v.* Dunn, 74 Ga. 358; Davis *v.* Horne, 64 Ga. 69; Moreland *v.* Troup County, 70 Ga. 714; Hammond *v.* Richmond County, 72 Ga. 188; Arline *v.* Laurens County, 77 Ga. 249; Monroe County *v.* Flynt, 80 Ga. 489; Arnold *v.* Henry County, 81 Ga. 730; Bibb, etc., Counties *v.* Dorsey, 90 Ga. 72; Grays *v.* Bibb County, 94 Ga. 698; Mapping *v.* Washington County, 92 Ga. 130; Cook *v.* DeKalb County, 95 Ga. 218; Smith *v.* Wilkes, etc., Counties, 79 Ga. 125; Smith *v.* Floyd County, 85 Ga. 420.

In California the rule holding a county not liable for any damages whatever caused by defective bridges or highways prevailed at one time. Huffman *v.* San Joaquin County, 21 Cal. 427; Crowell *v.* Sonoma County, 25 Cal. 313; Barnett *v.* Contra Costa County, 67 Cal. 77.

But under the Constitution of 1879, art. 1, § 14, providing that " private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner," it has been held that a county is liable for damages to property occasioned by the construction of a bridge in such a manner that the current of the stream was turned upon such property. Tyler *v.* Tehama County, 109 Cal. 618.

1. Neglect by County of Special Duty Imposed with Its Consent. — Rowland *v.* Kalamazoo County, 49 Mich. 553; Hannon *v.* St. Louis County, 62 Mo. 313. See also Webster *v.* Hillsdale County, 99 Mich. 261; Swineford *v.* Franklin County, 73 Mo. 279; Reed *v.* Howell County, 125 Mo. 58, 46 Am. St. Rep. 466, Bigelow *v.* Randolph, 14 Gray (Mass.) 541, Coburn *v.* San Mateo County, 75 Fed. Rep. 520; Kincaid *v.* Hardin County, 53 Iowa 430, 36 Am. Rep. 236. *Compare* Hughes *v.* Monroe County, 147 N. Y. 49.

Thus where the county of St. Louis made a contract for laying water-pipes to the county insane asylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum it caved in and killed one of the workmen, it was held that the duty in which the county was engaged was not one imposed by general law upon all counties, but a self-imposed one, and the county was liable for damages. Hannon *v.* St. Louis County, 62 Mo. 313.

2. Torts Resulting in Benefit to County. — May *v.* Logan County, 30 Fed. Rep. 259. See also Marsh *v.* Fulton County, 10 Wall. (U. S.) 676.

In Schussler *v.* Hennepin County, (Minn. 1897) 70 N. W. Rep. 6, it was held, in an action to recover damages alleged to have been sustained by the plaintiff by reason of the construction and maintenance of a dam whereby a stream of water was obstructed and held back, that, as a general rule, a county is not responsible for the unauthorized and unlawful act of its officers, though done *colore officii;* but when, after such act is done, the county adopts and ratifies it, and retains and enjoys its benefit, it is liable in damages. See also Coburn *v.* San Mateo County, 75 Fed. Rep. 520.

3. Wrongful Appropriation of Funds. — Marsh *v.* Fulton County, 10 Wall. (U. S.) 676.

Thus where a sheriff collects taxes belonging to the city and collectible by its officers, and pays the same into the county treasury, the city may sue the county to recover the same. Salem *v.* Marion County, 25 Oregon 449.

Where a warrant issued to the collector of a town required him to pay over to the county treasurer moneys belonging to a town, which had been collected as taxes, which command the collector obeyed instead of paying the amount collected to the railroad commissioners of the town as prescribed by statute, it was

Infringement of Patents. — On this principle, it has been held that a county may be held liable for the infringement of a patent, independently of any statute.[1]

Where Funds Misappropriated Are Not Used for County Benefit. — But it seems that a county is not, in the absence of statute, liable for the misappropriation by a county officer of funds deposited with him, though in accordance with statute, by a third person, unless the funds have been in some way used or applied for the benefit of the county.[2]

Illegal Collection or Misappropriation of Taxes. — A discussion of the liability of counties to taxpayers for illegal collection of taxes, or to the state or other political division of the state for a wrongful application or appropriation of taxes collected, will be found in another portion of this work.[3]

4. Liability for Interest — Claims Arising from Statute. — Where a claim against a county arises from a statute, and such statute makes no provision for interest, no interest will be liable on such claim.[4]

Claims Arising Ex Contractu. — Nor are counties liable to pay interest on their contracts apart from statutory provisions.[5]

Interest by Way of Damages. — But it has been held that in actions originating in tort, as where a county illegally enforces and detains money belonging to another party, interest is recoverable by way of damages.[6]

5. Some Specific Duties and Liabilities — *a.* EXPENSES CONNECTED WITH PUBLIC OFFICES. — Discussions of the duties and liabilities of a county for the remuneration of its officers for their services, and for reimbursement for their expenditures, and for other expenses connected with the different county offices, will be found in other portions of this work.[7]

held that an action as for money had and received was properly brought by the supervisors of the town against the board of supervisors of the county to recover the amount so paid. Bridges *v.* Sullivan County, 92 N. Y. 570.

1. Infringement of Patents. — May *v.* Fond du Lac County, 27 Fed. Rep. 691; May *v.* Mercer County, 30 Fed. Rep. 246; May *v.* Logan County, 30 Fed. Rep. 260; May *v.* Ralls County, 31 Fed. Rep. 473; May *v.* Saginaw County, 32 Fed. Rep. 629. *Compare* Jacobs *v.* Hamilton County, 1 Bond (U. S.) 500.

But where the county authorities were ignorant of the fact that a contractor used a lock in building a county jail without authority from the patentee, it was held that the county was not liable in an action for damages for the infringement. May *v.* Juneau County, 30 Fed. Rep. 241.

2. Funds Misappropriated Not Used for County Benefit. — Estep *v.* Keokuk County, 18 Iowa 199; School Dist. Number Two *v.* Saline County, 9 Neb. 403; Eaton *v.* Cass County, 11 Neb. 229; Gray *v.* Tompkins County, 93 N. Y. 603; Burbank *v.* Beaufort County, 92 N. Car. 260; Wyoming County *v.* Bardwell, 84 Pa. St. 104; Dewey *v.* Niagara County, 62 N. Y. 294.

Misappropriation of Funds of Infant. — It has been held that a county is not liable for the misappropriation by its county treasurer of funds belonging to an infant, deposited with said treasurer, in pursuance of the New York Act of 1848 (Chap. 277, Laws of 1848); at least, in the absence of evidence that the funds were in some way used or applied for the benefit of the county. Gray *v.* Tompkins County, 93 N. Y. 603.

Misapplication of School Funds. — Where, by statute, it was the duty of the treasurer of a county to place to the credit of the school districts in the county certain license moneys received, and he disbursed the funds belonging to one school district among other districts, the county was held not to be liable for the misapplication. School Dist. Number Two *v.* Saline County, 9 Neb. 403.

3. See the title TAXATION.

4. Interest on Claims Arising by Statutes. — Clay County *v.* Chickasaw County, 64 Miss. 534. See also *supra*, this title, *Effects of Alteration — On County Rights and Liabilities.*

5. Interest on Claims Arising by Contract. — Warren County *v.* Klein, 51 Miss. 808; Hardin County *v.* McFarlan, 82 Ill. 138; Pike County *v.* Hosford, 11 Ill. 170.

Agreement in County Warrant to Pay Interest. — Nor, it has been held, does the fact that a warrant contains a clause for the payment of interest estop the county from setting up the defense of *ultra vires* in an action for interest. Hall *v.* Jackson County, 95 Ill. 352. But see Read *v.* Buffalo, 74 N. Y. 463.

For a further discussion of this question, see the title MUNICIPAL SECURITIES.

Assumption of Debt of Third Party Calling for Interest. — In Washington County Ct. *v.* McKee, (Ky. 1890) 13 S. W. Rep. 909, it was held that where a county court, under the authority of the legislature, assumed the indebtedness of certain taxpayers for services rendered by an attorney in a suit assailing the validity of railroad subscriptions, the county was liable for interest on the debt, although it had failed to make any such agreement.

6. Interest by Way of Damages. — La Salle County *v.* Simmons, 10 Ill. 513.

7. See the title PUBLIC OFFICERS, and specific titles dealing with particular offices.

b. EXPENSES CONNECTED WITH THE ADMINISTRATION OF JUSTICE. — It may be stated as a general rule that it is the duty of a county to pay the expenses of the local administration of justice within the county, and it has been said that this duty may arise as well from the general system of county organization as from express statutes defining the duties of counties on this particular subject.[1] It would not be convenient or appropriate to treat in detail here the various expenses arising under this head. Reference should in general be made to other portions of this work [2] and to the statutes of the various states.

Costs. — A brief reference, however, will be made to the liability of counties for costs in criminal and civil proceedings.

Costs in Criminal Prosecutions. — Costs are not given in criminal cases by the common law, and county commissioners have no authority to pay them except in specific circumstances prescribed by statute.[3]

1. Expenses Connected with the Administration of Justice. — DeKalb County *v.* Beveridge, 16 Ill. 312; Venango County *v.* Durban, 3 Grant's Cas. (Pa.) 66; Penobscot County *v.* Bangor, 70 Me. 497.

In DeKalb County *v.* Beveridge, 16 Ill. 312, it was held that although the statute had not specified lights and fuel in express terms among the items to be provided by the county for the clerk's office, such items were nevertheless a county charge, since the clerk's office was not sufficiently furnished for the convenient and comfortable transaction of the public business without them. The court said: "In provisions of this kind some things must necessarily be implied."

2. See such titles as CLERKS OF COURTS, vol. 6, p. 132; JUDGE; JURY AND JURY TRIAL; PUBLIC OFFICERS; SHERIFFS, CONSTABLES, AND MARSHALS.

3. Costs in Criminal Cases Not Chargeable to County at Common Law — *Colorado.* — Fremont County *v.* Wilson, 3 Colo. App. 492; Larimer County *v.* Lee, 3 Colo. App. 177.

Indiana. — Rawley *v.* Vigo County, 2 Blackf. (Ind.) 355.

Kansas. — State *v.* Campbell, 19 Kan. 481; Shawnee County *v.* Barlinger, 20 Kan. 590.

Minnesota.—Hendershott *v.* Fillmore County, 45 Minn. 281.

Missouri. — Henry County *v.* St. Clair County, 81 Mo. 72.

North Carolina. — Guilford *v.* Beaufort County, 120 N. Car. 23; Clerk's Office *v.* Carteret County, (N. Car. 1897) 27 S. E. Rep. 1003.

Oregon. — Morin *v.* Multnomah County, 18 Oregon 163; Daly *v.* Multnomah County, 14 Oregon 20.

Pennsylvania. — Franklin County *v.* Conrad, 36 Pa. St. 317; Crawford County *v.* Barr, 92 Pa. St. 359; Gilkyson *v.* Bucks County, 84 Pa. St. 22; Williams *v.* Northumberland County, 110 Pa. St. 48.

Under *Arkansas* statutes providing that in all criminal or penal cases, if the defendant shall be acquitted, except when the prosecutor shall be adjudged to pay the costs, or, if convicted, will not have property to pay the costs, the same shall be paid by the county, it has been held that counties are liable for costs in all cases of acquittals on indictments. Bradley County *v.* Bond, 37 Ark. 226.

Under statute in *North Carolina* it has been held that a county cannot be taxed with any part of the fees of the clerk or other officers in criminal actions if a grand jury returns "Not a true bill." Guilford *v.* Beaufort County, 120 N. Car. 23.

Costs in Trials for Vagrancy — Pennsylvania. — In Gilkyson *v.* Bucks County, 84 Pa. St. 22, it was held that where vagrants are committed to the county jail by a justice of the peace, the county is not liable for the costs if the vagrants are discharged by the sheriff at the expiration of the time for which they were sentenced without the payment of costs, the county being liable under statute only when the discharge was according to law; that is, by the authority of the county commissioners.

Witness Fees. — In Daly *v.* Multnomah County, 14 Oregon 20, it was held that the services of witnesses called to testify in criminal cases where the witnesses resided "within two miles of the place of trial, or the place where they are required to appear," were not "particular services," but were of the class of general services which every man was bound to render for the general as well as his own individual good; and therefore that the law of 1885, which refused compensation in such cases, was not in violation of the constitution. See also Morin *v.* Multnomah County, 18 Oregon 163.

In *Pennsylvania* it has been held that the fees and mileage of witnesses called and examined on behalf of a defendant in a trial for felony cannot be recovered from the county by such witnesses. Williams *v.* Northumberland County, 110 Pa. St. 48.

Extra Compensation of Expert Witnesses. — In Larimer County *v.* Lee, 3 Colo. App. 177, it was held that the district court has no inherent or other power to allow compensation in excess of the statutory fee to experts to be called as witnesses in a criminal case, and such an order is not binding upon the county chargeable with the costs.

Food and Lodging for Jury. — In *Georgia* it has been held that a county is not, apart from statute, liable for food and lodging furnished to a jury, although the court may have ordered the same to be charged against the county. Justices *v.* State, 24 Ga. 82.

In *Texas* it has been held that notwithstanding the statutes providing that the county court should provide court-houses, jails, and all necessary public buildings, and allow all county accounts, including all reasonable expenses in-

Costs Accruing from a Change of Venue. — Statutes exist in many states providing that the costs accruing from a change of venue in a criminal case shall be paid by the county in which the indictment was found.[1] And it seems to be settled that the county in which a crime was committed can be held liable to the county to which the cause was removed for trial only by virtue of some statute.[2]

Costs in Civil Proceedings. — Provision is made by statute also, in some instances, making the costs accruing in certain civil proceedings chargeable against the county.[3]

Where County Is Party. —And in a civil suit to which the county is a party, it may be held liable under statute to be taxed with costs as other unsuccessful parties to civil suits.[4]

c. SUPPORT AND CARE OF THE POOR, INSANE, AND PRISONERS. — Full treatments of the liability of counties for the support and care of the poor,[5]

curred by the sheriff in the performance of his duty, an order to furnish the jury with food does not import that it is to be done at the expense of the county, but that, as they are not permitted to separate, the sheriff must take care that their provisions are duly received by them. Morris *v.* Runnells, 12 Tex. 175.

In *Missouri* it has been held that, prior to the act of 1883 (Sessions Acts, p. 80), the expense of boarding and lodging juries kept together by order of the court in cases of felony was not a proper item of costs, and could not be taxed against the county as such by the court. Person *v.* Ozark County, 82 Mo. 491. See also Bright *v.* Pike County, 69 Mo. 519.

When Requisite Statutory Steps Are Not Taken. — In Foulke *v.* Arapahoe County, (Colo. App. 1897) 48 Pac. Rep. 153, it was held that a county was not liable for the costs incurred by a defendant in a habeas corpus proceeding where the requisite statutory steps were not taken to make his expenses a charge against the county.

Costs in Criminal Cases on Appeal. — In *Iowa* it has been held that the expense of printing, for the use of the attorney-general, abstracts of the record in criminal cases under Acts of the Twenty-first General Assembly, c. 73, § 2, and of amendments to such abstracts when filed by the accused, is not taxable as part of the costs in the cause to be paid by the county wherein the accused was indicted, but should be paid by the state upon allowance by the executive council. State *v.* Billings, 81 Iowa 566.

1. Costs Accruing from a Change of Venue. — Carroll County *v.* Pollard, (Ind. App. 1897) 46 N. E. Rep. 1012; Billings First Nat. Bank *v.* Custer County, 7 Mont. 464; Stoll *v.* Johnson County, (Wyoming 1896) 44 Pac. Rep. 58.

Thus, under statute in *Maryland*, it has been held that money paid by the county where a case was tried, for meals furnished to the jurors impaneled to try such case and to the bailiff who had such jurors in charge, was properly recoverable by the county where the case was tried, from the county where the case originated. Alleghany County *v.* Howard County, 57 Md. 393.

2. Henry County *v.* St. Clair County, 81 Mo. 72.

In *Nebraska* it has been held that upon a change of venue under section 456 of the Criminal Code, the expenses of the county in which the cause is tried, including jurors, bailiffs, use of court-room, etc., are not costs within the meaning of said section, to "be paid by the county in which the indictment was found." Stanton County *v.* Madison County, 10 Neb. 304.

In *Alabama* it has been held under statute that fees of persons summoned as special jurors for the trial of an indictment which has been transferred on a change of venue, when properly certified, are payable by the county in which the indictment was found, and not by the county to whose courts the trial was transferred; but if the latter county pays them, it is a voluntary payment which will not constitute it a creditor of the county in which the indictment was found. Greene County *v.* Hale County, 61 Ala. 72.

3. Thus under 2 Gen. Stat. of *Kansas* 1897, § 44, providing that when any person shall be found to be insane or an habitual drunkard, according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county, it was held that where one trial was had before the probate court and a jury with regard to the sanity of a person, and the jury found that he was not insane, and thereupon he was by the court allowed to go at large, and on the next day a second trial was duly had which resulted in a verdict that the said person was insane, it was proper to charge the costs of both trials to the county, where it appeared that the estate of the insane person was entirely insufficient to pay the costs and expenses of the proceedings. Saline County *v.* Bondi, 23 Kan. 117.

Costs Impliedly Chargeable. — In Penobscot County *v.* Bangor, 70 Me. 497, it was held that the county of Penobscot, and not the city of Bangor, should bear the expenses of a jury and attending officers when a jury was summoned by county commissioners to determine the damages sustained by landowners from flowage caused by the dam across the Penobscot River and erected by the city for its waterworks. The court in this case said: "We think the county should bear the expenses in question. It is fairly a county bill. The theory of our laws is that the county furnishes a tribunal for the trial of jury causes."

4. Costs in Civil Proceedings to Which County Is a Party. — Dover *v.* State, 45 Ala. 244; State *v.* Blossom, 22 Nev. 71.

5. Support and Care of Poor. — See the title POOR AND POOR LAWS.

the insane,[1] and criminals,[2] will be found under appropriate titles elsewhere in this work.

d. EXPENSES INCURRED IN PRESERVATION OF PUBLIC HEALTH. — In some of the states provision is made by statute that the expenses necessarily incurred by the boards of health of a town, city, or county for the preservation of the public health, such as the removal and care of persons infected with the smallpox or other sickness dangerous to the public health, are especially chargeable to the whole county to which such persons belong, instead of to the particular community thereof, such as a town wherein the disease was first discovered.[3]

e. ERECTION AND MAINTENANCE OF HIGHWAYS AND BRIDGES. — For full discussions of the duties and obligations of counties to erect and maintain highways and bridges, reference should be made to other portions of this work.[4]

f. ELECTION EXPENSES. — A county will be liable for the expense of holding elections when made chargeable therefor by statute.[5] A full discussion of this question will be found elsewhere in this work.[6]

g. TAXATION. — A complete discussion of the liability of counties for taxation of its property by the state or a municipality in which the property is situated, and the liability to the state for taxation for state purposes within their limits generally, will be found in another part of this work.[7]

6. Enforcement of Liabilities — *a.* PRESENTATION OF CLAIMS FOR AUDITING AND ALLOWANCE. — Provision is made by statute in the states generally for the auditing and allowance of claims against counties;[8] and in many states it has been held under statute that suit cannot be maintained against the county upon a claim proper to be audited until such claim or demand has been presented to the proper authorities, and is by law disallowed in whole or in part.[9]

1. Support and Care of the Insane. — See the title INSANE ASYLUMS.

2. Support and Care of Prisoners. — See the title PRISONS.

3. Expenses Incurred in Preservation of Public Health. — People *v.* Macomb County, 3 Mich. 475; Saguache County *v.* Decker, 10 Colo. 149. See also Schmidt *v.* Stearns County, 34 Minn. 112; Boyce *v.* Cayuga County, 20 Barb. (N. Y.) 294. See generally the title BOARDS OF HEALTH, vol. 4, p. 596.

4. Erection and Maintenance of Highways and Bridges. — See the titles BRIDGES, vol. 4, p. 918; HIGHWAYS.

5. Election Expenses. — Early County *v.* Powell, 94 Ga. 680; Kearney County *v.* Stein, 26 Neb. 132; Bartholomew *v.* Lehigh County, 148 Pa. St. 82; Eyster *v.* Rineman, 11 Pa. St. 147.

In *Iowa* it has been held that a county is not liable for the necessary expense incurred by township trustees in providing and furnishing a place in which to hold the general state elections, when the payment thereof is not required or authorized by statute. Twiner *v.* Woodbury County, 57 Iowa 440.

6. See the title ELECTIONS.

7. Liability to Taxation. — See the title TAXATION.

8. Presentation of Claims Against County for Allowance. — See the statutes of the various states.

9. Presentment a Prerequisite to Bringing Suit. — Barbour County *v.* Horn, 41 Ala. 114; Price *v.* Sacramento County, 6 Cal. 255; McCann *v.* Sierra County, 7 Cal. 121; Sullivan County *v.* Arnett, 116 Ind. 434; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234; Armstrong *v.* Tama County, 34 Iowa 309; Lawrence County *v.* Brookhaven, 51 Miss. 68. *Compare* Waitz *v.* Ormsby County, 1 Nev. 370. See Political Code of California, (1897) § 4075.

In *Alabama* provision is made that suit must not be brought against a county until the claim has been presented to the court of county commissioners and disallowed, or has been reduced by the court and the reduction refused by the plaintiff. Autauga County *v.* Davis, 32 Ala. 703; Marshall County *v.* Jackson County, 36 Ala. 613; Barbour County *v.* Horn, 41 Ala. 114; Dale County *v.* Gunter, 46 Ala. 118; Randolph County *v.* Hutchins, 46 Ala. 397; Limestone County *v.* Rather, 48 Ala. 434; Covington County *v.* Dunklin, 52 Ala. 28; Shinbone *v.* Randolph County, 56 Ala. 183; Schroeder *v.* Colbert County, 66 Ala. 137; Jackson *v.* Dinkins, 46 Ala. 69.

Where, in accordance with a statutory provision in Alabama, claims were presented to the court of county commissioners to be by them allowed or disallowed, it was held that if the claims were audited and allowed, the only remedy against the county was by mandamus to compel the levy of a tax for the payment thereof, and that an ordinary action at law to enforce the performance of this duty was improper. Marshall County *v.* Jackson County, 36 Ala. 613; Covington County *v.* Dunklin, 52 Ala. 28, *overruling* Randolph County *v.* Hutchins, 46 Ala. 397.

Under the *Texas* statute requiring that no suit can be maintained against a county "unless the claim upon which such suit is founded shall have first been presented to the county

By Whom Allowance Is to Be Made. — It has been very generally provided by the statutes of the different states that the allowance and auditing shall be made

commissioners' court for allowance, and such court shall have neglected or refused to audit and allow the same," it has been held that the presentation to the county court thus required is a condition precedent, and indispensable to the right to sue the county. Hohman *v.* Comal County, 34 Tex. 36; Rev. Stat. of Texas, (1895) art. 790. Also it has been held that this statutory prerequisite applies to garnishment proceedings, since garnishment is a suit within the statute. Herring-Hall-Marvin Co. *v.* Bexar County, (Tex. Civ. App. 1897) 40 S. W. Rep. 145. But this rule has been held not to apply to claims of an old county against a part that has been stricken off for its portion of the existing indebtedness. Mills County *v.* Lampasas County, 90 Tex. 603.

In *Kansas*, under an act providing that the county commissioners of the several counties shall have exclusive control of all expenditures in all cases whatsoever, and a subsequent act providing that the county commissioners are required to publish a statement of all sums of money allowed, and for what purpose, and to whom issued, etc., it has been held that it is to be implied that all claims are to be presented to the board for audit and allowance. State *v.* Bonebrake, 4 Kan. 211.

It is provided by statute in *Wisconsin* that no action shall be brought or maintained against a county upon any action, demand, or cause of action when the only relief demandable is a judgment for money, except upon a county order, unless the county board shall consent and agree to the institution of an action by the claimant against the county, or unless such claim shall have been duly presented to the county board and they shall have failed to act upon the same within the time fixed by law. Sanborn & Berryman's Annotated Stat., § 676; Jackson County *v.* La Crosse County, 13 Wis. 490; Smith *v.* Barron County, 44 Wis. 686.

Claims for Damages for Torts. — It has been held in some states that claims for damages for torts as well as claims arising out of contracts must be presented before suit. Barbour County *v.* Horn, 41 Ala. 114; McCann *v.* Sierra County, 7 Cal. 121; Hohman *v.* Comal County, 34 Tex. 36.

Thus it has been held that damages for injuries sustained by the falling of a bridge cannot be recovered where presentment of the claim therefor has not been made in accordance with statutory requirement. Roberts *v.* Cleburne County, (Ala. 1897) 22 So. Rep. 545; Homan *v.* Franklin County, 98 Iowa 692.

In Maddox *v.* Randolph County, 65 Ga. 216, it was held that where damage is claimed from a county because of injuries sustained by the falling of a bridge on which the plaintiff was riding, the declaration must show that the claim sued for had been presented to the ordinary for auditing within twelve months from the time of the injuries.

But in Dement *v.* De Kalb County, 97 Ga. 733, it was held that where an action for damages to realty was brought against a county within twelve months from the time the claim for such damages arose, the plaintiff's action was not barred because he failed, before bringing the action, to present such claim to the proper county authorities. The bringing of the suit within the time limited was considered a sufficient presentation of the claim within the meaning of the code.

Property Taken for Public Use — "Claims" Construed. — Under statute in *Nebraska*, providing in effect that all claims against the county must be filed by the county clerk, and presented to, and passed upon by, the board of county commissioners, it has been held that the word "claims" refers only to claims originating in contract, express or implied, between the claimant and the county, and that a claim against the county for damages caused to the claimant's property by the county's taking it for public use, or damaging it by the construction of a public improvement, is not such a claim as need be first filed with the county clerk and passed upon by the county authorities, but an action on such a claim may be brought in the first instance in any court having jurisdiction of the subject-matter. Douglas County *v.* Taylor, 50 Neb. 535.

Action for Infringment of Patents. — It has been held that the provision of the Code of *Iowa* requiring the presentation of unliquidated demands to the board of supervisors before suit can be brought thereon against the counties of the state, is applicable to actions for infringement of patent rights. May *v.* Cass County, 30 Fed. Rep. 762; May *v.* Buchanan County, 29 Fed. Rep. 469.

Claims Arising under an Act Providing a Remedy for Their Recovery are not required to be presented to the board of supervisors for allowance in the absence of such requirement in the statute creating them. Thus in *Alabama* it has been held that the penalty given against a county by the act entitled "An act to suppress murder, lynching, assaults, and assaults and batteries," is not a claim required to be presented to the court of county commissioners before suit is brought, but must be recovered by an action in the circuit court of the proper county by summons and complaint against the county. Dale County *v.* Gunter, 46 Ala. 118.

Also in *California* it has been held that a claim for damages for injuries to property caused by a mob or riot is not to be presented in the first instance to the board of supervisors for allowance as in the case of other claims. State Bank *v.* Shaber, 55 Cal. 322; Clear Lake Water Works Co. *v.* Lake County, 45 Cal. 90.

Formal Vote of Supervisors Not Necessary to Render Allowance Valid. — Where a claim against the county was examined by the board of supervisors, and marked "allowed" by one of them, with the knowledge and consent of all, in accordance with the usual course of business of the board, it was held that the allowance was legal and bound the county, although no formal vote was taken or appeared of record. Griggs *v.* Kimball, 42 Iowa 512.

But under statute in *Georgia* it has been held that mere conversation with individual

by the board of county commissioners;[1] but in *Georgia* the duty of auditing and settling claims has been imposed upon the courts of ordinary.[2]

Time of Presentment. — In some jurisdictions it is provided by statute that no suit can be brought against the county unless the claim or demand has been presented within twelve months after it accrues or becomes payable.[3]

Conclusiveness of Allowance Against County. — It may be laid down as a general proposition, that the allowance by a board of commissioners of a claim against a county is not final and conclusive, but is *prima facie* evidence only of the validity or correctness of the claim.[4]

members of the board of supervisors, looking to a compromise of the matter, is not sufficient to constitute an allowance. Powell *v.* Muscogee County, 71 Ga. 587.

Demand on County Treasurer. — Under statute in *North Carolina* it has been held that where claims have been audited and allowed by the board of commissioners of a county it is necessary that the demand should be made on the county treasurer for payment before action can be maintained against the county. Jones *v.* Bladen County, 73 N. Car. 182; Love *v.* Chatham County, 64 N. Car. 706.

1. Allowance Made by County Commissioners — *Alabama.* — Barbour County *v.* Horn, 41 Ala. 114.

California. — McCann *v.* Sierra County, 7 Cal. 121.

Idaho. — Jolly *v.* Woodworth, (Idaho 1895) 42 Pac. Rep. 512.

Indiana. — Fountain County *v.* Wood, 35 Ind. 70; Carroll County *v.* Pollard, (Ind. App. 1897) 46 N. E. Rep. 1012.

Iowa. — Armstrong *v.* Tama County, 34 Iowa 309.

Kansas. — State *v.* Bonebrake, 4 Kan. 211; Gillett *v.* Lyon County, 18 Kan. 410.

Minnesota. — Raymond *v.* Stearns County, 18 Minn. 60.

Mississippi. — Taylor *v.* Marion County, 51 Miss. 731; Lawrence County *v.* Brookhaven, 51 Miss. 68.

New Hampshire. — Brown *v.* Grafton County, (N. H. 1897) 36 Atl. Rep. 874.

North Carolina. — Jones *v.* Bladen County, 73 N. Car. 182; Love *v.* Chatham County, 64 N. Car. 706.

Texas. — Hohman *v.* Comal County, 34 Tex. 36.

Wisconsin. — Jackson County *v.* La Crosse County, 13 Wis. 490; Smith *v.* Barron County, 44 Wis. 686.

See also State *v.* Corning, 44 Kan. 444; Roberts *v.* Pottawatomie County, 10 Kan. 29.

Under Statute in Indiana providing that "in all changes of venue from the county, the county from which the change was taken shall be liable for the expenses and charges of removing, delivering, and keeping the prisoner, and the *per diem* allowance and expenses of the jury trying the cause, and of the whole panel of jurors in attendance during the trial," and that "all costs and charges specified in the last preceding section, or coming justly and equitably within its provisions, shall be audited and allowed by the court trying such cause," it has been held that such court might audit and allow counsel fees rendered in a criminal case on a change of venue, but that such allowance was not conclusive of either the county in which the cause originated or the claimant, and did not oust the county board of such county of its jurisdiction in the allowance of claims against the county. Carroll County *v.* Pollard, (Ind. App. 1897) 46 N. E. Rep. 1012.

New York — Courts Not Empowered to Audit. — In the Matter of Tinsley, 90 N. Y. 231, it was held that no court can audit a claim against a county, or order any such claim to be paid by the county treasurer, except by authority of some statute, and that claims should be presented to the board of supervisors to be audited and allowed by it. See the title COUNTY COMMISSIONERS, *post*.

In Arkansas the duty of auditing and allowing accounts is imposed on what are called the county courts, whose duties are the same as those of boards of commissioners in other states. English *v.* Chicot County, 26 Ark. 454; Chicot County *v.* Tilghman, 26 Ark. 461.

2. Under the Georgia Code the court of ordinary is empowered to examine, settle, and allow all claims against a county. Ga. Code of 1895, § 4238, par. 6; Cobb County *v.* Adams, 68 Ga. 51; Maddox *v.* Randolph County, 65 Ga. 216.

And in Powell *v.* Muscogee County, 71 Ga. 587, it was held that where there are commissioners of roads and revenue presentment should be made to them.

3. Time Within Which Presentment Must Be Made. — Barbour County *v.* Horn, 41 Ala. 114.

The Code of Georgia, 1895, § 362, provides that all claims against counties must be presented within twelve months after they accrue or become payable, or the same are barred, unless held by minors or other persons laboring under disabilities, who are allowed twelve months after the removal of such disability. Powell *v.* Muscogee County, 71 Ga. 587; Maddox *v.* Randolph County, 65 Ga. 216; Cobb County *v.* Adams, 68 Ga. 51.

In Kansas it has been held that a claim against a county for compensation for land appropriated for public highways must be presented within two years after the claim accrues. Herdman *v.* Woodson County, (Kan. App. 1897) 50 Pac. Rep. 946.

4. Allowance of Claim Prima Facie Evidence Only Against County. — Commissioners Ct. *v.* Moore, 53 Ala. 25; Leavenworth County *v.* Keller, 6 Kan. 510; Ryan *v.* Dakota County, 32 Minn. 138; Abernathy *v.* Phifer, 84 N. Car. 711.

But in California it has been held that the allowance by county supervisors of the claim for services of attorneys employed by the supervisors to transact business for the county is conclusive on the auditor of the rendition

Right of Appeal. — Thus provision is made by statute in some of the states for an appeal by the county to the courts.[1]

Rescission by Board. — But it seems to be the prevailing rule that an allowance by a county board is an adjudication of the claim which is conclusive against the county unless reversed by the courts on appeal, and that there cannot be a re-examination by the board itself.[2] But in *North Carolina* it has been held that such an allowance may at any time be examined, modified, or annulled by the board for reasons that may appear to it sufficient.[3]

Claims Not Legally Chargeable — Action to Recover Back Money Paid. — A county board has no power to audit and allow accounts on their face not legally chargeable to the county, and if it does so it acts in excess of its jurisdiction, and its action will create no legal liability on the part of the county.[4] In accordance

and value of the services. Lamberson *v.* Jefferds, (Cal. 1897) 50 Pac. Rep. 403.

Allowance Conclusive as to Due Observance of Formalities in Presentment. — Where a claim allowed by a board did not show when the indebtedness accrued, and, consequently, that it was not presented within the time required by law, it was held that there being no contest made against the claim itself, the allowance and settlement by the board was an adjudication of the claim which was conclusive. Colusa County *v.* De Jarnett, 55 Cal. 373. The court in this case said: "When the board of supervisors of the county allowed it, they acted as a *quasi*-judicial body, and their allowance and settlement was an adjudication of the claim, which is conclusive."

In Richmond County *v.* Ellis, 59 N. Y. 620, the court said: "Doubtless, if a board of supervisors at one time acts finally upon a matter of which they have jurisdiction, and as to which they have lawful right to act, a succeeding board may not undo what they have done to the immediate detriment of third parties." See also People *v.* Lawrence, 6 Hill (N. Y.) 244.

Part Payment by Board of Illegal Claim Inoperative as Acknowledgment of Liability. — Where the board of supervisors allowed a portion of a claim against a county, they being under no legal obligation to do so, it was held that this could not be construed into an acknowledgment on the part of the county for the entire claim. Peoria County *v.* Roche, 65 Ill. 77.

1. Right of Appeal by County. — Warren County *v.* Gregory, 42 Ind. 32; Ryan *v.* Dakota County, 32 Minn. 138.

In *Kansas* it has been held that, apart from special statutory provision, an appeal on the part of the county lies from the decision of the county board to the courts. Leavenworth County *v.* Keller, 6 Kan. 510.

But in *Arkansas*, when the county court is empowered to audit and allow claims against the county, it has been held that an appeal would not lie at the instance of several citizens of the county. Chicot County *v.* Tilghman, 26 Ark. 461. The court in this case said: "The idea of a county appealing from the allowance of a claim made by its county court is simply ridiculous."

In *Michigan*, section 10 of article 10 of the constitution provides that "the board of supervisors * * * shall have the exclusive power to prescribe and fix the compensation for all services rendered for, and to adjust all claims against, their respective counties, and the sum so fixed or defined shall be subject to no appeal." Endriss *v.* Chippewa County, 43 Mich. 317.

2. Rescission of Allowance by Board. — Warren County *v.* Gregory, 42 Ind. 32; Arthur *v.* Adam, 49 Miss. 404. See also Lyons *v.* Miller, 17 Ind. 250.

In *Alabama* it has been held that the commissioners' court, in auditing and allowing claims against a county under statute, performs an executive, not a judicial, act, and that the allowance of a claim is only *prima facie* evidence of its correctness, but the board having allowed a claim, it has no authority at a subsequent term to vacate and annul the order allowing it. Commissioners Ct. *v.* Moore, 53 Ala. 25.

3. Abernathy *v.* Phifer, 84 N. Car. 711.

Under Express Statute in Nebraska, it has been held that the county board has authority to once reconsider its action in an allowance of a claim against a county upon notice to the parties interested. State *v.* Baushausen, 49 Neb. 558.

4. Action to Recover Money Not Legally Chargeable. — Commissioners Ct. *v.* Moore, 53 Ala. 25; Cumberland County *v.* Edwards, 76 Ill. 544; People *v.* Lawrence, 6 Hill (N. Y.) 244; Richmond County *v.* Ellis, 59 N. Y. 620; Chemung Canal Bank *v.* Chemung County, 5 Den. (N. Y.) 517. See also Foster *v.* Clinton County, 51 Iowa 541. *Compare* People *v.* Stocking, 50 Barb. (N. Y.) 573.

In *Arkansas* it has been held that the power of the county court to audit and settle claims for or against a county must be confined to such claims as a county has authority to contract. English *v.* Chicot County, 26 Ark. 454.

Under General Laws of California, 1897, p. 89, the power of the board of supervisors to allow accounts against a county is confined to those "legally chargeable." People *v.* El Dorado County, 11 Cal. 170.

In Linden *v.* Case, 46 Cal. 174, the court said: "No claim against a county can be allowed unless it be legally chargeable to the county, and if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liabilities."

Relief in Equity Not Available. — It has been held that where, by statutory provision, a county has an appeal to the district court from any decision of the board of county commissioners, such legal remedy must be pursued

with this rule, it has been held that if an illegal charge has been paid in consequence of an improper allowance, an action lies at the suit of the county to recover back the money paid.[1]

Conclusiveness of Disallowance upon Claimant — Right of Appeal. — In many of the states provision is made by statute that when a claim against a county shall be disallowed or reduced, an appeal may be had from the decision of the county board to the courts.[2]

and equitable relief cannot be invoked. Wood *v.* Bangs, 1 Dakota 172. See also Linden *v.* Case, 46 Cal. 172.

But in Hospers *v.* Wyatt, 63 Iowa 264, it was held that the allowance of a claim against a county by a board of supervisors is not the rendition of a judgment, and where such allowance is illegal the taxpayer may enjoin the payment of the allowance, and is not required to proceed by appeal or certiorari. It did not appear, however, in this case that a right of appeal was given by statute.

Board Adjusting Their Own Claims Already Fixed by Statute. — In Kennedy *v.* Gies, 25 Mich. 83, mandamus was refused to compel a county treasurer to pay a demand which the county auditors of Wayne had allowed for their own services for which the statute itself had established a lower compensation, and this though the constitution provided that the board of supervisors, or, in the county of Wayne, the board of county auditors, shall have the exclusive power to prescribe and fix the compensation for all services rendered for, and to adjust all claims against, their respective counties, and the sum so fixed or defined shall be subject to no appeal.

1. Recovery Back of Money Paid. — Cumberland County *v.* Edwards, 76 Ill. 544; Saline County *v.* Wilson, 61 Mo. 238; Richmond County *v.* Ellis, 59 N. Y. 620; Commissioner *v.* Easton, 6 Ohio Dec. 333; Union County *v.* Hyde, 26 Oregon 24. *Compare* Randall *v.* Lyon County, 20 Nev. 35; Macon County *v.* Jackson County, 75 N. Car. 240.

Thus it has been held that a county is not estopped by the board of supervisors passing upon and approving a collector's account containing charges for illegal fees, and that an action might be maintained by the county to recover fees or commissions retained in excess of what the law allowed. Cumberland County *v.* Edwards, 76 Ill. 544.

Charges in Violation of Constitution. — In Ada County *v.* Gess, (Idaho 1895) 43 Pac. Rep. 71, it was held that money paid an officer of the county by the county commissioners in violation of the provision of the Constitution may be recovered back in a suit at law. In this case the court said: "We are told that money paid through a mistake of law is a voluntary payment, and cannot be recovered back. * * * We cannot consent to carry the doctrine beyond settlements between private individuals. Therefore we must hold that payments made by the county commissioners to public officers, which are positively and absolutely forbidden by the statutes of the state and by the constitution thereof, may be recovered back. Both are public officers, and it is the duty of both to see to it that the county is not damaged through their malfeasance, negligence, or mistake."

No Recovery in the Absence of Illegality, Fraud, or Mistake. — It has been held that where work has been done on account of the county under an agreement with the commissioners, and has been accepted and paid for, no action lies at the suit of the commissioners, in the absence of illegality, fraud, or mistake, to recover back the moneys thus paid. Hamilton County *v.* Noyes, 35 Ohio St. 201; Ridenour *v.* State, 14 Ohio Cir. Ct. Rep. 393. See also Randall *v.* Lyon County, 20 Nev. 35; Garfield County *v.* Leonard, 3 Colo. App. 576.

2. Right of Appeal from Decision of Board — *Idaho.* — Jolly *v.* Woodworth, (Idaho 1895) 42 Pac. Rep. 512.

Indiana. — Blackford County *v.* Shrader, 36 Ind. 87; Warren County *v.* Gregory, 42 Ind. 32; Jackson County *v.* Applewhite, 62 Ind. 464; Hancock County *v.* Binford, 70 Ind. 208; State *v.* Washington County, 101 Ind. 69; Sullivan County *v.* Arnett, 116 Ind. 438; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234; Maxwell *v.* Fulton County, 119 Ind. 20.

Iowa. — Umbarger *v.* Bean, 15 Iowa 256; Garber *v.* Clayton County, 19 Iowa 29; Stone *v.* Marion County, 78 Iowa 15; Moser *v.* Boone County, 91 Iowa 359.

Kansas. — Leavenworth County *v.* Brewer, 9 Kan. 307.

Minnesota. — Murphy *v.* Steele County, 14 Minn. 67; Gutches *v.* Todd County, 44 Minn. 383.

Mississippi. — Taylor *v.* Marion County, 51 Miss. 731.

Montana. — Davis *v.* Lewis County, 4 Mont. 292; Billings First Nat. Bank *v.* Custer County, 7 Mont. 464.

Ohio. — Belmont County *v.* Ziegelhofer, 38 Ohio St. 523.

See also Armstrong *v.* Tama County, 34 Iowa 313.

In New York it has been held that the law gives no appeal from the determination of the board of supervisors. Martin *v.* Greene County, 29 N. Y. 645.

Michigan. — It has been held that the purpose of the provision of the constitution of Michigan to the effect that the board of supervisors, or, in the county of Wayne, the board of county auditors, shall have the exclusive power to prescribe and fix the compensation for all services rendered for, and to adjust all claims against, their respective counties, and the sum so fixed or defined shall be subject to no appeal, was to take away and entirely abrogate a right of appeal from decisions made by boards of supervisors, in fixing compensation and adjusting claims which, before the revision of the constitution, existed by law. People *v.* Macomb County, 3 Mich. 475; Kennedy *v.* Gies, 25 Mich. 83; Endriss *v.* Chippewa County, 43 Mich. 317; People *v.* Wayne County, 10 Mich. 307.

Independent Right of Action. — And, according to the prevailing rule, the claimant is not limited to the right of appeal given by statute, but may maintain an independent action to recover the amount of the claim.[1]

Remedy upon Refusal of Board to Audit. — In some jurisdictions, it has been held that where a claim against a county for money is properly presented to the board of county commissioners, and they fail or refuse to take any action

Accepting Part Allowance Not Waiver of Right of Appeal. — In Bell *v.* Waupaca County, 62 Wis. 214, it was held that section 686 of the Revised Statutes of *Wisconsin*, providing that any person whose claim has been allowed in part by the county board may receive the county's orders issued for the part allowed without prejudice to his right to appeal as to the part disallowed, applies as well where a certain percentage of the whole claim is allowed as where some items are allowed and others disallowed.

1. Independent Right of Action upon Disallowance by Board — *Idaho.* — Jolly *v.* Woodworth, (Idaho 1895) 42 Pac. Rep. 512.

Indiana. — Fountain County *v.* Wood, 35 Ind. 70; Blackford County *v.* Shrader, 36 Ind. 87; Warren County *v.* Gregory, 42 Ind. 38; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234; Sullivan County *v.* Arnett, 116 Ind. 438.

Iowa. — Curtis *v.* Cass County, 49 Iowa 421.

Kansas. — Leavenworth County *v.* Brewer, 9 Kan. 307; Gillett *v.* Lyon County, 18 Kan. 410.

Minnesota. — Murphy *v.* Steele County, 14 Minn. 67; Gutches *v.* Todd County, 44 Minn. 383.

Mississippi. — Lawrence County *v.* Brookhaven, 51 Miss. 68; Taylor *v.* Marion County, 51 Miss. 731.

Ohio. — Belmont County *v.* Ziegelhofer, 38 Ohio St. 523.

See Armstrong *v.* Tama County, 34 Iowa 309; Wapello County *v.* Sinnaman, 1 Greene (Iowa) 413; Boswell *v.* Albany County, 1 Wyoming 235. See also Raymond *v.* Stearns County, 18 Minn. 60; Waitz *v.* Ormsby County, 1 Nev. 370.

In California it has been held that the board of supervisors of a county in disallowing a claim exercises judicial functions, and hence, when it has disallowed a claim, a writ of mandate will not be issued to reverse or review its judgment. Tilden *v.* Sacramento County, 41 Cal. 68.

But it is provided in this state by statute that a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board. Political Code of California, § 4075.

In Utah it was at one time held that, there being no statute in that territory allowing a county to be sued, mandamus to the county court might be resorted to in order to compel the audit and allowance of claims which had been previously disallowed. Taylor *v.* County Ct., 2 Utah 405.

But now, by statute in that state, it is provided that a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within one year after the first rejection thereof by the board, but not afterwards. Rev. Stat. of Utah, (1898) § 533.

In Georgia it has been held that the superior court has jurisdiction not only by way of appeal, but in an ordinary suit at law, after the refusal by the ordinary to approve the claim. Cobb County *v.* Adams, 68 Ga. 51.

In Nebraska it has been held under statute that a board of commissioners acts in a judicial or *quasi*-judicial capacity in the examination and allowance of claims against the county, and is invested with exclusive original jurisdiction in the matter, and that no action is maintainable in a court of law except by way of appeal from the decision of the board. Brown *v.* Otoe County, 6 Neb. 111; Dixon County *v.* Barnes, 13 Neb. 294; Richardson County *v.* Hull, 24 Neb. 536.

In South Carolina the same rule has been laid down. Jennings *v.* Abbeville County, 24 S. Car. 543.

New York. — In Martin *v.* Greene County, 29 N. Y. 645, it is held that the action of the board of supervisors upon a claim against a county, examined and passed upon by them, is conclusive as to the amount due, and no action will subsequently lie against the county to recover a larger sum.

In Michigan it has been held that claims for services to a county under a reward offered therefor by the board of supervisors, are within the exclusive jurisdiction of the board, and its disposition of them is not subject to review on the facts; nor will an action lie against the county therefor after the board has considered and rejected them. Stamp *v.* Cass County, 47 Mich. 330.

But in Endriss *v.* Chippewa County, 43 Mich. 317, it was held that a claim against a county for moneys illegally collected by its officers will sustain an action at common law against the county, and such an action is not prohibited by the clause in the constitution giving the board of supervisors "exclusive power to adjust all claims against their respective counties," and prohibiting a right of appeal from their decision.

In Ohio it has been held that where a claim against a county is created by statute, and is to be paid by the county upon the allowance of the county commissioners, if a claim is disallowed, or allowed in part, the remedy of the claimant, if not satisfied with the determination by the commissioners, is to appeal to the court of common pleas, and in such case he cannot sue at common law. Shepard *v.* Darke County, 8 Ohio St. 354; State *v.* Hamilton County, 26 Ohio St. 364.

In Arkansas it has been said that counties cannot be sued in the ordinary way of bringing suits, but only by way of appeal from the action of the county court in rejecting the claim in whole or in part. Nevada County *v.* Hicks, 50 Ark. 416.

thereon, the claimant may then commence an original action against the county for the amount of the claim.[1] In other jurisdictions, it has been held that if the commissioners refuse to take cognizance of or act upon a claim when properly brought before them, they may be compelled to do so by mandamus.[2]

Allowance of Claims Already Audited — Judgment Operative as Auditing. — It has been held that the ascertainment by the judgment of a court having jurisdiction of the case that a certain claim is due from a county is an audit of it,[3] and when so audited it becomes the duty of the commissioners of the county to allow it as such;[4] unless, it has been said, some sufficient defense exists thereto, such as fraud in obtaining it, the statute of limitations, or a set-off.[5]

Auditing by Other Boards. — Also it has been held that where the statute gave to a special board of officers the authority to incur a liability on behalf of the county and to adjust the amount of the same, the board of supervisors were not at liberty to refuse to recognize and allow or pay it.[6]

b. ACTION AT LAW. — The right to maintain an action at law for the enforcement of liabilities against counties has been discussed in a preceding portion of this article.[7]

Venue. — The question of venue in such suits will be here briefly referred to, however.

Under a Statute in Illinois providing that all actions, local or transitory, against any county may be commenced and prosecuted to final judgment in the Circuit Court or in any court of general jurisdiction in the county against

1. Action at Law upon Refusal of Board to Audit. — White *v.* Polk County, 17 Iowa 413; Gillett *v.* Lyon County, 18 Kan. 410; Barrett *v.* Stutsman County, 4 N. Dak. 175.

2. Remedy by Mandamus upon Refusal of Board to Audit. — Mixer *v.* Manistee County, 26 Mich. 422; State *v.* Hamilton County, 26 Ohio St. 369. *Compare* State *v.* Floyd County Judge, 5 Iowa 380.

In Mixer *v.* Manistee County, 26 Mich. 422, it was held that the board of supervisors of a county are bound to consider all claims against the county lawfully presented, and to give the claimant an opportunity of presenting his case and proofs, and to allow for all services legally and properly rendered the amount fixed by law, or, if no amount is fixed, then such sum as they are reasonably worth, and mandamus will lie for the enforcement of these duties.

In *California* it has been held that if a board of supervisors of a county refuse to act on a claim against the county presented to them, for the reason that they have not the power to approve of it, mandamus is a proper action to determine whether they possess such power. People *v.* San Francisco, 28 Cal. 430. See also Alden *v.* Alameda County, 43 Cal. 270.

By the General Laws of *California* 1897, § 43, it is provided that if the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, such refusal or neglect may, at the option of the claimant, be deemed equivalent to final action and rejection on the ninetieth day, and a claimant, dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterwards.

In *New York* it has been held that, as a rule, an action cannot be maintained against a county to enforce a claim against it, but such claim must be presented to the board of supervisors of such county for audit, and in case of a refusal on the part of such board to audit it, the remedy is by mandamus. Albrecht *v.* Queens County, 84 Hun (N. Y.) 399; Brady *v.* New York, 10 N. Y. 260.

3. Judgment Operative as Auditing. — Rock Island County *v.* U. S., 4 Wall. (U. S.) 435; Ralls County Ct. *v.* U. S., 105 U. S. 734; Lincoln County Ct. *v.* U. S., 105 U. S. 739, note; Hill *v.* Scotland County Ct., 32 Fed. Rep. 716; State *v.* Blossom, 22 Nev. 71; State *v.* Gloyd, 14 Wash. 5.

But in Wilder *v.* Rio Grande County, 41 Fed. Rep. 512, the court said: "When no issue has been made as to the capacity of the county to contract the indebtedness, it seems to be doubtful whether a judgment against a county on a void obligation can be enforced in any form. When in the pleadings the capacity of the county to contract the indebtedness is put in issue, the judgment is conclusive."

4. Allowance of Judgment Debts. — Alden *v.* Alameda County, 43 Cal. 270; State *v.* Blossom, 22 Nev. 71.

Thus in a proceeding by mandamus to compel the supervisors of a county "to allow and pay" a judgment recovered against the county, a defense that the payment of the judgment will incur an indebtedness and liability exceeding the income for the year cannot be interposed. Johnson *v.* Sacramento County, 65 Cal. 481. See also State *v.* Gloyd, 14 Wash. 5.

5. State *v.* Blossom, 22 Nev. 71.

6. Allowance of Claims Audited by Special Board. — People *v.* Macomb County, 3 Mich. 476. See also People *v.* Wayne County, 13 Mich. 233.

7. Enforcement of County Liability by Action at Law. — See *supra*, this title, *Powers*.

which action is brought, it has been held that action against a county must be brought in the courts of the county sued.[1]

In Pennsylvania it has been held that, apart from special statutory provision, a county can only be sued in the courts of the county itself.[2]

But in Massachusetts it is provided by statute that actions, whether local or transitory, against the inhabitants of a county shall be brought either in the county where the plaintiff lives, or in the defendant county, or in a county adjoining thereto, at the plaintiff's election.[3]

c. EXECUTION. — In the absence of statute no execution can issue against the property of a county,[4] and the mode of satisfaction provided by statute must be pursued.[5] Thus in many jurisdictions it is held that a judgment against a county has the effect only of converting a disputed into an audited claim,[6] which the officers of the county may be compelled by mandamus to pay out of the proper funds, or, in the absence of funds, by the levy of a county tax.[7]

1. **Venue in Actions Against Counties.** — Schuyler County *v.* Mercer County, 9 Ill. 20; Randolph County *v.* Ralls, 18 Ill. 29; King *v.* McDrew, 31 Ill. 418.

Venue in Actions by Counties. — In this state also it is provided by statute that any action, local or transitory in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant in such case resides. Starr & Curt. Annot. Stat. Illinois (1896), vol. 1, p. 1092; Schuyler County *v.* Mercer County, 9 Ill. 20.

Change of Venue. — But it was held, in Jackson County *v.* Hall, 53 Ill. 440, that in a suit in which a county is a party a change of venue may be awarded as in other civil actions.

2. Lehigh County *v.* Kleckner, 5 W. & S. (Pa.) 181.

3. Pub. Stat. of Mass. 1882, c. 161, § 5. See also Hawkes *v.* Kennebeck County, 7 Mass. 461.

In this state also it is provided by statute that actions by inhabitants of a county shall be brought in the county in which the defendant lives, or in any county adjoining the plaintiff county, and when the defendant lives in the plaintiff county, they shall be brought in an adjoining county. Pub. Stat. of Mass. 1882, c. 161, § 6. See also Lincoln County *v.* Prince, 2 Mass. 544.

4. **No Execution Against Counties in Absence of Statute.** — Covington County *v.* Dunklin, 52 Ala. 28; Gilman *v.* Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290; Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742; Randolph County *v.* Ralls, 18 Ill. 29; King *v.* McDrew, 31 Ill. 418; Cumberland County *v.* Edwards, 76 Ill. 544; Police Jury *v.* McCormack, 32 La. Ann. 624; State *v.* Blossom, 22 Nev. 71; Gooch *v.* Gregory, 65 N. Car. 142; Hughes *v.* Craven County, 107 N. Car. 598. See Savage *v.* Crawford County, 10 Wis. 49. *Compare* Lyell *v.* St. Clair County, 3 McLean (U. S.) 580.

The Public Square of a County cannot be sold on execution to pay an assessment on street improvement. Lowe *v.* Howard County, 94 Ind. 553.

The Mere Authorization of a Suit by statute against a county does not imply necessarily a means of enforcement of a judgment therein obtained. Sharp *v.* Contra Costa County, 34 Cal. 284.

The Texas Statute expressly provides that "no execution shall be issued on any judgment against any county." Pasch. Dig., art. 1050; Trinity County *v.* Polk County, 58 Tex. 328.

Mechanics' Liens. — In the absence of statute, laws creating liens in favor of mechanics do not operate on the public property of counties. Parke County *v.* O'Conner, 86 Ind. 531; Secrist *v.* Delaware County, 100 Ind. 59.

Under the West Virginia Code, § 43, c. 39, providing that the lands, buildings, furniture, and books belonging to a county and used for county purposes shall not be subject to execution or other process, it has been held that the public buildings of a county are wholly exempt from the operation of the mechanics' lien law. Hall's Safe, etc., Co. *v.* Scites, 38 W. Va. 691.

5. **Statutory Mode of Enforcement of Judgment to Be Followed.** — Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742; Randolph County *v.* Ralls, 18 Ill. 29; Wilson *v.* Huntingdon County, 7 W. & S. (Pa.) 197.

Thus where the circuit court rendered judgment against a county and directed in the judgment order that the county court allow to the plaintiff the amount of the judgment and issue to him an order therefor, it was held that the direction as to the mode of satisfaction of the judgment was in accordance with the statutory requirement in the case of judgments against counties. Randolph County *v.* Ralls, 18 Ill. 29.

6. **Judgment Equivalent to Auditing of Claim.** — Sharp *v.* Contra Costa County, 34 Cal. 284; Youngs *v.* Hall, 9 Nev. 224.

7. Covington County *v.* Dunklin, 52 Ala. 28; Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742; State *v.* Blossom, 22 Nev. 71; Gooch *v.* Gregory, 65 N. Car. 142; Hughes *v.* Craven County, 107 N. Car. 598.

In Emeric *v.* Gilman, 10 Cal. 410, 70 Am. Dec. 742, the court said: "The statute has authorized a suit against the county by which his demand may pass into judgment, but it has given no remedy by execution. When the judgment is rendered, it becomes the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or, if there are no funds, and they possess the requisite power, to levy a tax for that purpose; and if they fail or refuse to apply the funds, or to exercise the power, he can resort to a mandamus. But if they have no funds, and the power to levy the

Reason of the Rule. — The rule not permitting executions against counties in the absence of statutes rests on the principle that the public good requires that property needed for the proper administration of local governmental affairs shall not be taken from the local authorities, lest the due administration of such affairs be so much disturbed as to cause the public to suffer.[1]

Property Not Used for Governmental Purposes. — But in *Indiana* it has been held that apart from special statutory provision an execution may issue against the county upon a judgment rendered against it, and may be levied upon any property owned by such county not needed for governmental purposes.[2]

Liability of Private Property to Execution Against County. — It would seem to be the prevailing rule, apart from statutory provision, that the private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county;[3] but it has been said that by the common law of *Massachusetts* and of other New England states, derived from immemorial usages, the estate of any inhabitant of a county, town, territorial parish, or school district is liable to be taken on execution on a judgment against the corporation.[4]

d. MANDAMUS, ATTACHMENT, AND GARNISHMENT. — A complete discussion of the liability of counties to such proceedings as mandamus, attachment, and garnishment will be found in other portions of this work.[5]

VIII. LEGISLATIVE CONTROL — 1. In General. — A county being one of the

tax has not been delegated to them, the legislature must be invoked for additional authority."

1. Lowe *v.* Howard County, 94 Ind. 553.

2. Execution Against Property Not Used for Governmental Purposes. — State *v.* Buckles, 8 Ind. App. 282.

In *North Carolina*, under the Act of 1868, c. 20, it has been held that a county can only acquire and hold property for necessary public purposes and for the benefit of all its citizens, and that principles of public policy prevent such property from being sold under execution to satisfy the debt of an individual. Gooch *v.* Gregory, 65 N. Car. 142; Hughes *v.* Craven County, 107 N. Car. 598.

But in Hughes *v.* Craven County, 107 N. Car. 598, the court intimated that where it appears that a mandamus has been answered by the county commissioners and proven unavailable because the constitutional limit of taxation has been exhausted to meet the current expenses, and it further appears that the county holds real estate or other property not used or needful for its public functions, and for any reason such property could not have been subjected except by an equitable *fi. fa.*, such property can be subjected for the discharge of the debt of a judgment creditor against the county in some other way, if not by sale and execution.

3. Private Property Not Liable to Be Seized on Execution Against County. — Russell *v.* Devon County, 2 T. R. 667; Lyell *v.* St. Clair County, 3 McLean (U. S.) 580; Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742.

In Emeric *v.* Gilman, 10 Cal. 408, 70 Am. Dec. 742, the court said: "We are unable to find any adjudged case in the other states going to the extent of the courts in New England, and as we have seen, the rule is there regarded as peculiar, or founded on immemorial usage. There appear to us insurmountable difficulties in the way of any just application of the rule. The inhabitants of a county are constantly changing; those who contributed to the debt may be nonresidents upon the recovery of the judgment or the levy of the execution; those who opposed the creation of the liability may be subjected to its payment, whilst those by whose fault the burden has been imposed may be entirely relieved of responsibility. Again, it is a settled principle that whenever one of several is held liable for their joint debt, he may have recourse, upon its payment, to the others for contribution. To enforce this right against the inhabitants of a county, even where its population is small, would lead to such a multiplicity of suits as to render the right utterly valueless. Or if, as might be the case, the party should institute his action against the county for the amount which he had thus paid on its account, and recover judgment, he might in turn levy upon the property of another inhabitant, and even of the original creditor himself, if he should also be an inhabitant of the county. And it might be insisted that the creditor, if an inhabitant of the county, was only entitled to a proportional part of his judgment from the other inhabitants, or why might not the entire judgment be satisfied out of his own property? If all the private property of the inhabitants of a county may be indiscriminately seized by the officer, we do not perceive any ground for excepting that of the creditor himself. And if a contribution was sustained, the person who was compelled to pay more than his share would be obliged to resort to a similar remedy, and thus there would be such a continuing series of difficulties and inconveniences attending the assertion of the rule for which the appellants contend, as to render it a source of far greater evil than good."

4. Private Property Liable to Seizure on Execution Against County in Massachusetts. — Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332.

5. See the titles ATTACHMENT, vol. 3, p. 181; GARNISHMENT; MANDAMUS.

public territorial divisions of the state, created and organized for public political purposes connected with the administration of the state government, and especially charged with the administration of the local affairs of the community, the legislature may, unless restrained by the constitution or some one or other of those fundamental maxims of right and justice with respect to which all governments and societies are supposed to be organized, exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the county organization.[1] Furthermore, subject to constitutional limitations, it may enlarge or diminish the powers of the county, extend or limit its boundaries, divide it into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether in the legislative discretion.[2]

Power of Legislature Exclusive. — But where grants, whether of rights or power, are conferred upon a county by the legislature, they are held absolutely and to be enjoyed and exercised independently, subject only to the general laws of the state and the terms and conditions annexed to the grant, until withdrawn or modified by the legislature.[3]

Power of Congress Over Counties Within Territories. — In respect to counties that lie within the territories of the United States, Congress exercises complete control, under the restrictions and limitations imposed by the Constitution of the United States.[4]

2. Over Finances — *a.* COUNTY PROPERTY AND REVENUES. — The revenues of a county are not the property of the county in the sense in which the revenue of a private person or corporation is regarded.[5] A county is a mere

1. Legislative Control Over Counties Generally. — Talbot County *v.* Queen Anne's County, 50 Md. 245. In this case it was held that the legislature can, by a mandatory act, require the county commissioners of a county to levy taxes upon the public of the county generally, and incur debts and obligations for the construction and maintenance of a way or bridge located within the limits of another county, where the purpose of the taxation required is not only public, but the object to be accomplished is, at the same time, local in its character, and of special and peculiar interest to the people sought to be taxed.

2. Laramie County *v.* Albany County, 92 U. S. 307; Coles *v.* Madison County, 1 Ill. 154; Richland County *v.* Lawrence County, 12 Ill. 7; Division of Howard County, 15 Kan. 194; State *v.* Hamilton, 40 Kan. 323; Guilder *v.* Dayton, 22 Minn. 366; State *v.* McFadden, 23 Minn. 40; McCormac *v.* Robeson County, 90 N. Car. 445; Board of Education *v.* Bladen County, 113 N. Car. 379; Mills *v.* Williams, 11 Ired. L. (33 N. Car.) 558; Bass *v.* Fontleroy, 11 Tex. 705; Milam County *v.* Bateman, 54 Tex. 165; State *v.* Forest County, 74 Wis. 610.

Distinction Between Private and Public Corporations. — In Coles *v.* Madison County, 1 Ill. 154, the court said: "On an inquiry into the different kinds of corporations, their uses and objects, it will appear that a plain line of distinction exists between such as are of a private and such as are of a public nature, and form a part of the general police of the state. Those that are of a private nature, and not general to the whole community, the legislature cannot interfere with. The grant of incorporation is a contract. But all public incorporations which are established as a part of the police of the state are subject to legislative control, and may be changed, modified, enlarged, restrained, or repealed, to suit the ever varying exigencies of the state. Counties are corporations of this character, and are, consequently, subject to legislative control."

Control Over Political and Property Rights Distinguished. — "Counties, in their relation toward the state, may be viewed in a twofold aspect: one, which pertains to their political rights and privileges; the other, to their rights of property. Over the former the legislature, as the representative of state sovereignty, can exercise absolute power, unless restricted by the organic law. If it could not exercise such power over the delegated political rights and privileges of counties, which are subdivisions of state governmental authority, we might have a system of petty discordant governments within a government, without unity of design or action. Hence the political rights and privileges delegated to counties are not within the constitutional prohibitions against retroactive laws and those which impair vested rights." Milam County *v.* Bateman, 54 Tex. 165.

3. Powers Granted Not to Be Withdrawn Except by Legislature. — People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

Thus it has been held that a county cannot be deprived of its corporate right of action apart from the statute in the discretion of the law officer of the state. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

4. Power of Congress Over Counties Within Territories. — National Bank *v.* Yankton County, 101 U. S. 129; McRae *v.* Cochise County, (Arizona 1896) 44 Pac. Rep. 299.

5. People *v.* Power, 25 Ill. 187.

agency of the state government, and so its property and revenues are subject, to a large extent, to legislative control, limited as it may be by the organic law.[1]

Mode of Distribution. — Thus, as a general proposition, the legislature may direct the appropriation of county funds in such a manner and to such an amount as it shall deem best for any purpose, provided it be a public one and a special benefit to the county.[2]

Diversion of Fund for Purpose Other than That Originally Designated — Property Derived from the State. — The tenure by a county of property derived from the state for a specific public purpose, or obtained for such purpose through means which the state alone can authorize — that is, taxation — is so far subject to the control of the legislature that the property may be applied to other public uses of the county than those originally designated.[3] This follows from the nature of

1. Legislative Control Over County Property. — State *v.* County Ct., 34 Mo. 572; Barton County *v.* Walser, 47 Mo. 203.

Constitutional Limitation upon Amount of Indebtedness to be Incurred. — In *Oregon* it has been held that the constitutional inhibition that no county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, has no application to debts and liabilities not created by the county itself, but imposed upon them by law. Grant County *v.* Lake County, 17 Oregon 453. The court in this case said: "A county is mainly a mere agency of the state government, a function through which the state administers its governmental affairs, and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount to, cannot in reason be said to have been created in violation of the provision of the constitution referred to, as they are really created by the general laws of the state in the administration of its governmental affairs. Said provision of the constitution, as I view it, only applies to debts and liabilities which a county, in its corporate character and as an artificial person, voluntarily creates."

But under a similar constitutional provision in *Colorado* a different view seems to have been adopted by the Supreme Court of the United States. Lake County *v.* Rollins, 130 U. S. 662. In this case the court said: "Neither can we assent to the position of the court below, that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it as against the disability of a constitutional prohibition."

2. General Rule as to Distribution of County Funds by Legislature. — State *v.* Shawnee County, 28 Kan. 431; State *v.* County Ct., 34 Mo. 572; Talbot County *v.* Queen Anne's County, 50 Md. 246.

Funds Devoted to Establishment of Road. — The legislature has the power to establish a state road, and cast the cost and expense thereof upon the county in which the road lies, and this without submitting the question in any form for approval by the county commissioners, or any other county officers, or the people of the county; and to this end may itself appoint the commissioners to locate the road, prescribe their fees, give to them the power to adjust the land damages, and require the county officers to issue warrants therefor without any revision or control of their proceedings. State *v.* Shawnee County, 28 Kan. 431.

Building Bridge. — It is competent for the legislature, as an exercise of purely legislative power, to determine in an act that a particular bridge shall be constructed in a prescribed manner, and within a fixed expense, by counties within whose territorial limits it will lie when completed, and to determine in what proportion these several counties shall contribute to defray the costs of its construction. Guilder *v.* Dayton, 22 Minn. 366; Dennis *v.* Maynard, 15 Ill. 477.

Subscription to Railway Stock. —The legislature may compel a county to become a subscriber to a railway already built, for the purpose of paying its debts, and to become a stockholder therein and issue its bonds for the stock, and to raise money by taxation and appropriate it to the payment of the bonds. Napa Valley R. Co. *v.* Napa County, 30 Cal. 435.

Specification of Funds to Be Used in Payment of Indebtedness. — In *California* it has been held that an act by which the county treasurer is expressly inhibited from paying warrants issued on indebtedness accruing prior to the first of May, 1854, except with funds then in hand or subsequently received and belonging to the revenue of the county previous to 1854, was valid, and that a fund which was collected in 1856, and belonged to the revenue of that year, could not be used in the payment of such warrants. McDonald *v.* Maddux, 11 Cal. 187.

3. Diversion of Property Derived from State, to Purpose Other than That Originally Designated. —Tippecanoe County *v.* Lucas, 93 U. S. 114; State *v.* County Ct., 34 Mo. 546; Clark *v.* Sheldon, 106 N. Y. 104; Bridges *v.* Sullivan County, 92 N. Y. 570.

In Clark *v.* Sheldon, 106 N. Y. 104, it was held that the legislature had the power to direct that the taxes levied and collected for the ordinary county purposes should be set aside for a sinking fund for the payment and redemp-

a county, and the dependent character of its existence.[1] Thus it has been held that where a donation was made to a county for purposes of internal improvement, the legislature had power to convert a portion of such funds into a school fund for the county, where such action was taken before the fund had been appropriated for the original purpose.[2]

Property Derived from Other Sources. — But property derived by a county from other sources is often held by the terms of its grant for special uses, from which it cannot be diverted by the legislature. In such cases, it has been said the property is protected by all the guards against legislative interference possessed by individual and private corporations for their property.[3]

Apportionment of County Funds Between County and City Within Its Limits. — In *Tennessee* it has been held that an act of the legislature directing that the portion of the revenue of a county, collected within the limits of a city within that county, be paid into the treasury of the city for its sole use and benefit, is unconstitutional and void.[4] But a similar statutory provision in *Illinois* has been held to be constitutional.[5]

tion of certain municipal bonds, and that it was the duty of the county to apply the funds for such specific purpose; and that it is no answer for the treasurer to say that if he should set aside the taxes for a sinking fund, there would be a deficiency in other funds, and that he may not have money enough to pay the obligations of the county to the state and to the county officials and county creditors.

Use of Poor Fund for Pensioners. — Under section 2, art. 5, of the constitution of *North Carolina*, providing that the proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent. thereof be appropriated to the latter purpose, it has been held that the legislature has power to delegate authority to the county officials to provide for indigent persons who were disabled during the war, and to disburse a part of the fund devoted by the constitution to the support of the poor by appropriating it to such pensioners. Board of Education *v.* Bladen County, 113 N. Car. 379.

Legislative Disposition of Property Not to Be Interfered with by Courts. — In State *v.* Rubey, 77 Mo. 617, the court said: "The state has an undoubted right to dispose of the revenues collected under its authority, for county and township purposes as it may see proper, when such disposition does not impair the obligation of some contract. But having once provided by law how such revenues shall be disposed of, no other or different disposition can be made of the same, except by the exercise of the legislative power of the state." See also People *v.* Ingersoll, 58 N. Y. 21, 17 Am. Rep. 178.

1. Tippecanoe County *v.* Lucas, 93 U. S. 114.

2. **Fund for Internal Improvement Used as School Fund.** — Cage *v.* Hogg, 1 Humph. (Tenn.) 48.

3. Tippecanoe County *v.* Lucas, 93 U. S. 108.

4. **Apportionment of County Funds Between County and City Within Its Limits — Tennessee.** — The act of the assembly in this case was held to be void under a constitutional provision as follows: "The General Assembly shall have power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law." The court in this case said: "And here is a power expressly delegated to the County Court to levy and cause to be collected a tax for county purposes, and in the exercise of that power the fund which is the subject-matter of this controversy was levied and collected, and the legal title to it was vested in the county trustee for county purposes. Now has the legislature the power to divert the fund from the purposes for which it was levied and collected, and transfer it to another separate and distinct corporation to be by it appropriated and used at its discretion? We think not. This would be an unauthorized interference with vested rights." Nashville *v.* Towns, 5 Sneed (Tenn.) 186.

5. **Apportionment of County Funds Between County and City Within Its Limits — Illinois.** — People *v.* Power, 25 Ill. 187; Sangamon County *v.* Springfield, 63 Ill. 66. The act in question provided: "The county court of Sangamon county shall cause an accurate account to be kept of all expenditures made for county purposes, and shall charge all expenditures made for county purposes (excepting for the making and repairing of roads and highways, and the building and repairing of bridges), in said county, without said city, ratably to said county and to the city of Springfield, in proportion to the taxes collected for the county purposes within said city, and in the county without said city, and paid into the county treasury by each respectively. And the surplus of all taxes which may be collected for county purposes, after making the charges to the city and county in the manner herein required, shall be divided between the said city and the said county, in proportion to the amount of taxes collected for county purposes within said city, and in the county without said city, and paid into the county treasury by each respectively." In this case the court said: "This act of the legislature nowhere proposes to take from the county of Sangamon, and give to the city of Springfield, any property belonging to the county, or revenues collected for the use of the county. But if it did, it would not be objectionable. But, on the contrary, it proposes alone to appropriate the revenue which may be collected by the

Transfer of Vested Property to Third Persons. — According to some of the authorities the legislature has not the power to take away from a county its vested property and transfer it to third persons.[1] And it has been held that even though the state itself should have donated the property, the right to have it protected as a vested right is not impaired. Thus it has been held that if land is donated by the state to a county for school purposes, the state may exercise such supervisory control as may be necessary to enforce a performance of the trust, but it cannot by the legislature divert its use to other and different parties and purposes from those contemplated when it was originally granted.[2] But in *Illinois* it has been held that the property held by a county is acquired and held only by authority conferred by the legislature, and is under the absolute control of the legislature. Thus it has been held in that state that where certain persons, to procure the location of a county seat at a certain place, made a donation to the county both to purchase the land and erect the court-house, the legislature had the power to direct that in case of a removal of the county seat the county should convey the court-house and the land upon which it was erected to the parties making the donation, in proportion to the donation made.[3]

Where County Has Not Acquired Vested Interest. — In some instances the legislative control has been held to be absolute because no vested interest had been acquired by the county.[4]

Where Funds Are Merely Appropriated for State Purposes to Be Expended by County. — Thus where certain funds were not granted to a county, but simply appropriated to be drawn and expended by the county in the improvement of roads, construction of bridges, and other public works, it has been held that before such expenditure the legislature had entire control over the fund, either to resume it altogether or to change the purposes for which it was originally designed to be expended.[5]

Release of Forfeiture or Penalty Imposed by Legislature for Benefit of County. — Also it has been held that where by statute a corporation is made liable to forfeit, upon certain contingencies, a sum of money to the state for the use of the county,

county by taxes levied on property both in the city and county, in certain proportions ratably to the city and county."

In Missouri also, it has been held that the moneys acquired by a county from taxation may, by the direction of the General Assembly, be appropriated to pay a portion of the police expenses of a city situated within its limits, and this though the money in question was collected for specific purposes. The court in this case said: "The General Assembly, having the legislative power of the state, determines to what local uses the county funds shall be applied. Its determination and direction may operate unwisely, harshly, and unjustly, but that is no argument against its power to direct. It authorizes and causes the funds to be collected, and requires their expenditure for purposes which it determines to be of local interest and benefit, and its determination is final. The judiciary cannot review this determination of the legislative power; cannot inquire whether the legislature, in directing an expenditure of county funds, judged correctly or not as to its being for the accomplishment of an object of interest or advantage to the inhabitants of the county. In the present case the legislature has thought proper to direct that the county of St. Louis shall pay one-fourth of the expenses of a police in the city of St. Louis, which is wholly within, and forms a part of the county of St. Louis. This court cannot say that this is not a legitimate use of county funds, or that it is a taking or application of private property to public use without just compensation; and it certainly is not an application of property to private use, for the police commissioners are an agency of the state government, and required to perform within a specified locality some of the most important duties of the government." State *v.* St. Louis County Court, 34 Mo. 570.

1. **View that County Property Cannot Be Transferred to Third Persons.** — Cooley's Const. Limitations (4th ed.), * 240. See also Hargrove *v.* Lilly, 69 Ga. 329; Nashville *v.* Towns, 5 Sneed (Tenn.) 186; State *v.* County Ct., 34 Mo. 572.

In Tippecanoe County *v.* Lucas, 93 U. S. 115, Mr. Justice Field, in giving the opinion of the court, said: "And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants."

2. **Property Donated by Legislature for Specific Purpose Not to Be Diverted to Third Person.** — Milam County *v.* Bateman, 54 Tex. 153.

3. Harris *v.* Whiteside County, 105 Ill. 445.

4. **Legislative Control of Property in Which County Has Acquired No Vested Interest.** — People *v.* Crennan, 141 N. Y. 239.

5. Richland County *v.* Lawrence County, 12 Ill. 1.

it is within the power of the legislature to relieve such corporation from the forfeiture and to direct a discontinuance of a suit brought to recover the same, on the ground that the county had not acquired any separate interest in the money forfeited distinct from that of the state.[1] Similarly it has been held that the legislature may release a penalty given by statute after a verdict therefor, but before a judgment in an action brought for the benefit of a county.[2] And it has been held that the legislature is competent also to relieve from a forfeiture imposed by statute, where the money accrues to a county, even after a judgment has been recovered for the same.[3]

Direction to Make Restitution to Taxpayers. — It has been held that the legislature has power to direct a restitution to taxpayers of a county, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in the possession of the county.[4]

b. COUNTY INDEBTEDNESS — **Inability of Legislature to Create Indebtedness to Third Person.** — The legislature cannot, in general, by a mere legislative act, create an indebtedness from one county to another or to a third person.[5]

Power to Direct Payment of Just Claim. — But the legislature may direct the county authorities to allow just claims out of the public treasury, or may fix the amount and direct the means to be raised by taxation for the payment.[6]

Equitable Claims Invalid in Law. — And where the claim against a county is invalid in law, but is equitable and just in itself, the legislature may give it legal effect.[7]

1. **Release of Penalty Imposed by Legislature for Benefit of County.** — Maryland *v.* Baltimore, etc., R. Co., 3 How. (U. S.) 534.

2. Coles *v.* Madison County, 1 Ill. 154.

3. Conner *v.* Bent, 1 Mo. 235. See also People *v.* Crennan, 141 N. Y. 239.

4. **Direction to Make Restitution to Taxpayers.** — Lucas *v.* Tippecanoe County, 44 Ind. 524, *affirmed* in 93 U. S. 108. See the title TAXATION.

5. **Inability of Legislature to Create Indebtedness on Part of County.** — Jackson County *v.* La Crosse County, 13 Wis. 490.

6. **Power of Legislature to Direct Payment of Just Claim.** — Dennis *v.* Maynard, 15 Ill. 477.

Restoration of Diverted Trust Funds. — Where a specific fund, given to a county by the legislature to be held in trust for certain purposes, was diverted from that purpose and mixed with the general funds of the county, it was held not to be error in the court to award a mandamus to compel such fund to be paid over to the persons entitled to it, and to direct an order to be drawn upon the general funds of the county in the treasury. Pike County *v.* People, 11 Ill. 202.

7. **Direction to Pay Equitable Claims.** — Ritchie *v.* Franklin County, 22 Wall. (U. S.) 67; People *v.* Burr, 13 Cal. 343; Chapman *v.* Morris, 28 Cal. 393; Beals *v.* Amador County, 35 Cal. 624; Creighton *v.* San Francisco, 42 Cal. 446; Coles *v.* Washington County, 35 Minn. 124; Guilford *v.* Chenango County, 13 N. Y. 143; Lycoming County *v.* Union County, 15 Pa. St. 166, 53 Am. Dec. 575. See also Craft *v.* Lofinck, 34 Kan. 365.

Thus it has been held to be competent for the legislature to provide a fund for the extinguishment of certain claims by the issuance of bonds in the name of a county and city, although the claims were without legal obligation, since they exceeded the limit fixed by the charter of the city, beyond which it was not permitted to create an indebtedness. People *v.* Burr, 13 Cal. 343.

Reimbursement for Trial by County from Which Cause was Removed. — In Lycoming County *v.* Union County, 15 Pa. St. 166, 53 Am. Dec. 575, it was held that an act providing for the reimbursement to a county, by other counties from which certain causes had been removed for trial by virtue of a prior act, of a proper proportion of the expenses which had been incurred by the former county on account of said trials, was constitutional.

Claim for Building Bridge. — A bridge upon a public highway across a stream dividing two towns, having been swept away, was rebuilt under a contract made in good faith with the commissioners of highways of the two towns, and was used by the public. It was the duty, not of the towns, but of the county, to construct the bridge, but in an action against the county it was held not liable because it had not ordered the construction and the work was not done under its direction. Thereupon an act was passed (c. 156, Laws of 1872), entitled "An Act for the relief of C. and others," by which the board of supervisors of the county were "authorized to adjust and audit the claims" of C. and others, to allow so much as the work was worth, not exceeding the contract price, and to cause the amount to be levied and collected upon the two towns, or upon the county, in their discretion. It was held that the act was mandatory, and not simply permissive to confer authority upon the board of supervisors to act or not in their discretion. People *v.* Livingston County, 68 N. Y. 114.

Claim of Counsel Assigned by Court to Defend Prisoner. — An act of the legislature authorized the board of supervisors of a county at its next annual session to audit and pay, as a county charge to the relator, the counsel assigned by the court to defend a prisoner

Impairment of Obligation of Contracts. — But the provision in the Federal Constitution, and in the state constitutions generally, prohibiting a state legislature from passing laws impairing the obligation of contracts, applies to contracts between a county and third persons.[1] Thus it has been held that the repealing of an act which authorized the issuing by a county of bonds in aid of railroads in certain cases, does not affect the validity of bonds issued under a contract which was made and partly performed prior to the passage of the repealing act.[2]

Change of Mode of Payment. — Also, it has been held that a creditor cannot be compelled to accept another and an essentially different mode of payment from that provided by his contract as determined by the laws existing at the time he became a creditor of the county, as where the legislature attempts to require the creditors of the county to surrender their evidences of indebtedness and accept new ones different in terms from the old.[3]

Revocation of Mere Gratuitous Concession. — But where a claim against a county is not recoverable by action, or is not a public charge in virtue of any pre-

upon the charge of murder, the disbursements actually incurred by said counsel in conducting the defense of the prisoner. It was held that it was the duty of the defendant to audit and pay the relator's claim as if the words of the act had been imperative, and this though previous to the passage of the act there existed no legal liability on the part of the defendants which could be enforced by action or otherwise to pay the claim. People *v.* Erie County, Sheld. (N. Y.) 517.

Restoration of Money Paid by Mistake. — By an act of the legislature, approved Oct. 14, 1856, the town of Bristol was detached from Jackson county and attached to the county of La Crosse. By another act of the next session, approved March 3, 1857, it was restored to Jackson county. But, in the meantime, the treasurer of that town had paid to the treasurer of La Crosse county the amount of state and county taxes collected in that town for the year 1856. In 1858 a further act was passed requiring the treasurer of La Crosse county to pay over to the treasurer of Jackson county the amount so received. It was held that the act of 1858 requiring the treasurer of La Crosse county to pay over to the treasurer of Jackson county the amount in question was constitutional. Jackson County *v.* La Crosse County, 13 Wis. 490.

1. Impairment of Obligation of Contracts — *United States.* — U. S. *v.* Miller County, 4 Dill. (U. S.) 233; Moultrie County *v.* Rockingham Ten-Cent Savings Bank, 92 U. S. 631; Ralls County Ct. *v.* U. S., 105 U. S. 733; Nelson *v.* Police Jury, 111 U. S. 716.

Alabama. — Slaughter *v.* Mobile County, 73 Ala. 134.

California. — Nevada Bank *v.* Steinmitz, 64 Cal. 301.

Florida. — Columbia County *v.* King, 13 Fla. 451.

Mississippi. — Beck *v.* Allen, 58 Miss. 143.

New York. — People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

North Carolina. — McCless *v.* Meekins, 117 N. Car. 34.

Pennsylvania. — Com. *v.* Allegheny County, 37 Pa. St. 277.

See also Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678; People *v.* Williams, 8 Cal. 98; English *v.* Sacramento, 19 Cal. 172. And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

2. Nevada Bank *v.* Steinmitz, 64 Cal. 301. See also Slaughter *v.* Mobile County, 73 Ala. 138.

In the same way it has been held that subscriptions to railroad stock made in pursuance of a power granted by statute before the power was revoked remained binding after the abrogation of the power by the state constitution. Moultrie County *v.* Rockingham Ten-Cent Savings Bank, 92 U. S. 631.

3. Change of Mode of Payment under Original Contract. — McCracken *v.* Moody, 33 Ark. 81; Rose *v.* Estudillo, 39 Cal. 270.

But as to the power of the legislature to refuse in such case to provide funds by taxation unless new evidences of debt are accepted, see the title TAXATION.

Transfer of Claim from General to Special Fund. — Where a claim at the time of its accruing was an allowed claim, payable out of the general funds of the county by the then existing laws, it could not be made a charge against a special fund alone by a subsequent act of the legislature. Scruggs *v.* Underwood, 54 Ala. 186.

Diversion of Fund Designated for the Payment of Certain Claims. — Also, where a fund in the county treasury has been provided and designated by law for the payment of certain claims, creditors holding them have a vested interest in the fund of which the legislature cannot deprive them. Rose *v.* Estudillo, 39 Cal. 270; Youngs *v.* Hall, 9 Nev. 212.

When Diversion of Fund Does Not Interfere with Prior Vested Right. — But the payment of all ordinary claims against a county is subject to any specific appropriation and setting apart of the county revenues for any designated purpose, unless such appropriation interferes with some prior vested right to the revenue. Humboldt County *v.* Churchill County, 6 Nev. 30, in which case the court said: "The legislature undoubtedly has the power to direct that certain claims against the county shall have a preference over all others which are not so situated as to give the holder a vested right to money in, or to come into, the treasury, at the time of the legislative action."

vious or existing laws, but is only founded in equity and justice, and is made a county charge by the legislature, the action of the legislature in such case does not vest a right in the claimant until the money is raised and actually paid over, when no condition is imposed upon the claimant, and nothing is done or required to be done by him as a consideration for the concession; and hence a repeal of the act operating merely as a revocation of a gratuitous concession is not within the constitutional inhibition against the passage of laws impairing the obligation of contracts.[1]

3. Over Remedies. — As the remedy by suit against a county is given by the state, it may be withdrawn or denied at any time the legislature may think proper.[2] But while the legislature may change the nature and the extent of the remedy by which a contract and the right of parties against a county may be enforced, it has been held that it cannot fully extinguish all existing remedy so as to leave no redress, for thereby the obligation of contracts would be impaired.[3]

4. Validation of Void Acts. — The legislature has power to validate or ratify the acts of a county and its officers that are not in violation of constitutional provisions,[4] not only in the matter of irregularity in authorized proceedings, but even where the county has acted without any legislative authority whatever.[5]

COUNTING-HOUSE. — A counting-house, according to the common understanding of mankind, is a part of a house devoted to purposes of commerce; a room or set of rooms appropriated by merchants, traders, and manufacturers to the business of keeping their books, accounts, letters, and papers. It therefore need not be an entire house.[6]

COUNTRY. — The term "country" in its primary meaning signifies place, and, in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections or regions of the earth; but its metaphorical meaning is no less definite and well understood; and in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and

1. Revocation of Mere Gratuitous Concession. — People *v.* Montgomery County, 67 N. Y. 109.

2. Withdrawal of Remedy Against County. — Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130.

3. Impairment of Obligation of Contracts. — National Bank *v.* Sebastian County, 5 Dill. (U. S.) 414; Griffith *v.* Sebastian County, 49 Ark. 24. See also Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

Thus in Griffith *v.* Sebastian County, 49 Ark. 24, it was held that the *Arkansas* Act of Feb. 27, 1879, expressly repealing all laws declaring counties to be corporations, and prohibiting suits against them elsewhere than in the county court, did not apply to actions in equity which had already accrued, since otherwise the parties would be deprived of all remedy, as the county court had no equity jurisdiction. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

4. Validation by Legislature of Void County Acts. — Shawnee County *v.* Carter, 2 Kan. 115; Burns *v.* Multnomah R. Co., 15 Fed. Rep. 177; Marshall *v.* Silliman, 61 Ill. 218; People *v.* Holden, 82 Ill. 93; Barnes *v.* Lacon, 84 Ill. 461.

5. *United States.* — Thomson *v.* Lee County, 3 Wall. (U. S.) 327; Grenada County *v.* Brogden, 112 U. S. 261; Otoe County *v.* Baldwin, 111 U. S. 1; Quaker City Nat. Bank *v.* Nolan County, 59 Fed. Rep. 660; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1.

Kentucky. — Shelby County Ct. *v.* Cumberland, etc., R. Co., 8 Bush (Ky.) 209.

Missouri. — Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294; Barton County *v.* Walser, 47 Mo. 189; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87; State *v.* Saline County Ct., 48 Mo. 390, 8 Am. Rep. 108.

New York. — People *v.* Mitchell, 35 N. Y. 551.

North Dakota. — Erskine *v.* Nelson County, 4 N. Dak. 66.

Texas. — Nolan County *v.* State, 83 Tex. 182; Ball *v.* Presidio County, (Tex. Civ. App. 1894) 27 S. W. Rep. 702, 88 Tex. 60.

Virginia. — Cumberland County *v.* Randolph, 89 Va. 614.

Wisconsin. — Single *v.* Marathon County, 38 Wis. 364.

The validation by statute of proceedings of a county cures all defects therein, although such statute was enacted after the commencement of the suit based on such alleged defects. Hall *v.* Baker, 74 Wis. 118.

6. Counting-House. — Piercy *v.* Maclean, L. R. 5 C. P. 252, 256, 258. For decisions as to cases coming within that definition under the statute 7 and 8 Geo. IV., c. 29, § 15, see Reg. *v.* Potter, 2 Den. C. C. 235, Temp. & M. 501, 15 Jur. 498, 4 Eng. L. & Eq. 575, 20 L. J. M. C. 170; under the Municipal Corp. Act, 5 and 6 Wm. IV., c. 76, § 9, *Re* Creek, 3 B. & S. 459, 113 E. C. L. 459; and under 2 Wm. IV., c. 45, § 27, Piercy *v.* Maclean, L. R. 5 C. P. 252.

international codes, not to refer to sacred writ, the term "country" is employed to denote the population, the nation, the state, the government, having possession and dominion over the country.[1] The word "country," in the revenue laws of the *United States*, has always been construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control.[2]

A state, however, may with propriety be called a country; and in certain

1. U. S. *v.* The Ship Recorder, 1 Blatchf. (U. S.) 225. In that case the court said, further: "Thus Vattel says, 'The term ***country*** seems to be well understood by everybody. However, as it is taken in different senses, it may not be unuseful to give it here an exact definition. It commonly signifies the state of which one is a member. In a more confined sense this term signifies the state, or even more particularly the town or place, of our birth.' (Bk. 1, c. 9, § 122.) 'When a nation takes possession of a distant ***country***, and settles a colony there, that ***country***, though separated from the principal establishment, or mother ***country***, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws or treaties make no distinction between them, everything said of the territory of a nation ought also to extend to its colonies.' (Bk. 1, c. 18, § 210.) 'The whole of a ***country*** possessed by a nation, and subject to its laws, forms its territories, and it is the common ***country*** of all the individuals of the nation.' (Bk. 1, c. 19, § 211.)"

Country from Whence He Came — Chinese Exclusion Acts. (See also the title CHINESE EXCLUSION ACTS, vol. 5, p. 1104.) — A *United States* statute provided that under certain circumstance a Chinese laborer should be removed "to the ***country*** from whence he came." It was held that the words "the ***country*** from whence he came" did not refer exclusively to the Chinese Empire. The court said: "The United States attorney argues that as a matter of law every Chinese laborer found to be unlawfully in the United States must be deported to China; in other words, that the act must be construed by substituting the words 'Empire of China' for the words 'the ***country*** from whence he came.' I hold, however, that such construction is unwarranted. Manifestly the law was framed in contemplation of the probability that Chinese laborers would attempt to enter the United States from the Sandwich Islands, from Canada, Mexico, Australia, and even from Europe, just as they have in fact been doing; and it was intended to exclude all such, and provide for their deportation, even though by reason of their expatriation any of them should have become entitled to the protection of any other government, and their return to China should be impossible. To give the narrow construction of the law contended for is but to invite all the thousands of Chinese residents of British Columbia to come this way, and travel at the expense of the United States, whenever for pleasure or convenience they wish to revisit their native land." *In re* Leo Hem Bow, 47 Fed. Rep. 303. See also U. S. *v.* Chong Sam, 47 Fed. Rep. 878. In U. S. *v.* Ah Toy, 47 Fed. Rep. 305, the petitioner, although he had been residing in Canada, was not entitled under the laws of that ***country*** to return. It was held he must be deported to China. The court said: "As this defendant is not entitled, under the laws of Canada, to return to that ***country***, his case is distinguishable from the case of *In re* Leo Hem Bow, 47 Fed. Rep. 302, in which I have given an opinion to the effect that, within the meaning of the Exclusion Act, British Columbia is the ***country*** to which he should be removed."

Country Store. — An application for insurance on a stock of goods represented that it was to be upon "all of goods usually kept in a ***country*** store," and that there was no cotton or woolen waste or rags kept in or near the property to be insured. The by-laws, to which the insurance was expressly made subject, provided that no building in which cotton or woollen waste or oily rags were allowed to remain at night should be insured; and that all cotton, woolen, hempen, or oily waste, or rags, should be destroyed or removed every evening. It was held that the keeping of clean white cotton rags, if usually forming part of the stock of "a ***country*** store," did not avoid the policy. Elliott *v.* Hamilton Mut. Ins. Co., 13 Gray (Mass.) 139. See also the title FIRE INSURANCE.

Indian Country. (See also the title INDIANS.) — In U. S. *v.* Knowlton, 3 Dakota 74, the court said: "To define what is Indian ***country*** within the meaning of the Act of Congress punishing crimes therein committed, is not entirely free from difficulty. The definition given in the Act of Congress, if not absolutely repealed, has become obsolete and without meaning, as applied to the present condition of the ***country*** west of the Mississippi river. Without entering into a more elaborate definition, it is sufficient for the purposes of this case to say that the term 'Indian ***country***' includes such portions of the public domain as are expressly reserved for the use and occupation of the several bands and tribes of Indians, and which are not included within the jurisdiction of any state or territorial government."

2. **Revenue Laws.** (See also the title REVENUE LAWS.) — Stairs *v.* Peaslee, 18 How. (U. S.) 526. In that case the court said: "Congress certainly could not have intended to refer to mere localities or geographical divisions, without regard to the state or nation to which they belonged; for, if the word ***country*** were used in that sense, the law furnishes no certain and fixed limits to guide the appraisers in determining what are its principal markets; and it would often be difficult to decide whether the market selected by appraisers, to regulate the value, was actually within the limits of the ***country*** from which the exportation was made."

cases, when the legislature uses the expression "the country," it is natural to suppose that they mean the country for which they are legislating.[1]

The word is used also to signify a jury, as in the expressions, "trial by the country," "conclusion to the country," "puts himself upon the country," etc.[2]

COUNTY AFFAIRS. — See AFFAIRS, vol. 1, p. 908; and the title COUNTIES, *ante*.

COUNTY AFORESAID. — See AFORESAID, vol. 1, p. 919.

COUNTY BLOCK. — See note 3.

COUNTY CLERK. — See the titles CLERKS OF COURTS, vol. 6, p. 132; PUBLIC OFFICERS.

1. **Limitation of Action.** (See also the title LIMITATION OF ACTIONS.) — Mansell *v.* Israel, 3 Bibb (Ky.) 514. "But the second ground assumed, we apprehend, clearly brings the plaintiff within the exception which prevents the statute from running against a person without the ***country***. We cannot suppose, as was contended in the argument, that the expression 'the ***country***' should be construed to mean the United States, and not this state."

Extradition for Crime. — A convention for extradition between the United States and Switzerland provided that the party charged with crime should be given up only when the fact of the commission of the crime should be so established as to justify an apprehension and commitment for trial, if the crime had been committed in the ***country*** where such person should be found. It was held that the word ***country*** meant the special political jurisdiction that had cognizance of the crime. *In re* Farez, 7 Blatchf. (U. S.) 345. See also the title EXTRADITION.

Mr. Dicey says: "The word ***country*** has among its numerous significations the two following meanings, which require to be carefully distinguished from one another: (1) A ***country***, in what may be called the political sense of the word, means 'the whole of the district or territory subject to one sovereign power;' such as France, Italy, the United States, or the British Empire. (2) A ***country***, in what may be called the legal sense of the word, means 'a district or territory, which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one system of law;' such, for example, as England, Scotland, or Ireland, or as each of the states which collectively make up the United States." Dicey on Domicil, p. 31.

2. See the title JURY AND JURY TRIAL.

3. **County Block.** — These words written upon a block in the plat of a town were held not sufficient to indicate the dedication of the block to the ***county***. Hennepin County *v.* Dayton, 17 Minn. 260. See generally the title DEDICATION.

COUNTY COMMISSIONERS.

By Chris H. Murray.

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For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject see the following titles in this work:* AGENCY, vol. 1, p. 930; BRIDGES, vol. 4, p. 918; CONSTITUTIONAL LAW, vol. 6, p. 882; CONTEMPT, *ante*; COUNTIES, *ante*; COUNTY SEAT, *post*; DE FACTO OFFICERS; DEPUTY; DRAINS AND SEWERS; ELECTIONS; FERRIES; HIGHWAYS; INJUNCTIONS; MANDAMUS; MUNICIPAL CORPORATIONS; MUNICIPAL SECURITIES; OFFICIAL BONDS; PROHIBITION; PUBLIC OFFICERS; QUO WARRANTO; STATUTES; TAXATION; TOWNS AND TOWNSHIPS.

I. Definition. — **Boards of County Commissioners** are corporations or *quasi* corporations,[1] existing by virtue of the statutes or constitutions of the several

1. **Quasi Corporations or Corporations.** — Supervisors are a *quasi* political corporation. People *v.* Hester, 6 Cal. 679; Hawkins *v.* Carroll County, 50 Miss. 735.

In Platter *v.* Elkhart County, 103 Ind. 369, Elliott, J., said: "There are numerous decisions in our own reports declaring that the board of commissioners constitutes a corpora-

states, charged with various duties and powers, judicial, legislative, and executive, pertaining to the police, fiscal, and civil regulations and affairs of the counties.[1]

Boards of Commissioners Are the General Public Agents by which the powers of the counties are exercised,[2] but, being creatures of statute, they can exercise only such powers as are expressly conferred upon them,[3] or are necessary to the

tion, and that its rights, duties, and liabilities are substantially the same as those of a municipal corporation." See also Neal *v.* Franklin County, 43 Ill. App. 267.

Police juries are political corporations whose powers are specially defined by the legislature, and they can legally exercise no other powers than those delegated to them. Sterling *v.* West Feliciana Parish, 26 La. Ann. 59.

Boards of county commissioners are *quasi* corporations, and their official duties and powers partake more of the characteristics of corporate acts and powers than those of mere trustees. Martin *v.* Townsend, 32 Fla. 327, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 374.

The supervisors of a county are a corporation for special purposes and with special powers only, and, beyond the special powers conferred upon them, they have not capacities incident to a corporation. Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422. See also Peter *v.* Prettyman, 62 Md. 566.

County commissioners are but a corporation performing certain public functions, and are not possessed of any sovereign character exempting them from suit. Paine *v.* Portage County, Wright (Ohio) 417.

Perpetual Existence. — A board of county commissioners has perpetual existence, and the body remains the same, notwithstanding a change in the individuals who compose it. Pulaski County *v.* Shields, 130 Ind. 6; Ridley *v.* Dougherty, 85 Iowa 418; Chapman *v.* York County, 79 Me. 267; Pegram *v.* Cleveland County, 65 N. Car. 114; Perry *v.* State, 9 Wis. 19. See also Chenango County *v.* Birdsall, 4 Wend. (N. Y.) 453; Scioto *v.* Gherky, Wright (Ohio) 493.

A board of commissioners, in acting upon a petition for the laying out of a road, constitutes a court, and the court is not dissolved by a change in its personality caused by one of the commissioners going out of office and his successor coming in. Chapman *v.* York County, 79 Me. 267.

Board Bound by Predecessor's Acts. — Boards composed of new members are bound by the acts of their predecessors within the scope of their authority, but not by such acts as are not within such authority. Jefferson County *v.* Grafton, (Miss. 1897) 21 So. Rep. 247, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 375.

1. People *v.* El Dorado County, 8 Cal. 58; State *v.* Ormsby County, 7 Nev. 392.

As to the special duties of commissioners, see *infra*, this title, *passim*.

General Character of Duties — Judicial, Legislative, and Executive. — In *California* it has been held that county supervisors are not within the provision of the state constitution requiring the separation of the judicial, legislative, and executive departments of the government, and forbidding any person belonging to one department to exercise functions appertaining to another. Cal. Const., art. 3, § 1; Wulzen *v.* San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17; Kimball *v.* Alameda County, 46 Cal. 19; People *v.* Provines, 34 Cal. 532; People *v.* El Dorado County, 8 Cal. 58.

In the last case cited the court said: "The duties of the officer [supervisor] are various and manifold; sometimes judicial, and at others legislative and executive. From the necessity of the case it would be impossible to reconcile them to any particular head, and therefore, in matters relating to the police and fiscal regulations of counties, they are allowed to perform such duties as may be enjoined upon them by law, without any nice examination into the exact character of the powers conferred."

Are Public Officers. — County commissioners in *Pennsylvania* are officers within that clause of the constitution which requires all officers to take the oath of office. Keyser *v.* M'Kissan, 2 Rawle (Pa.) 139.

Whether Courts of Record. — Boards of commissioners or supervisors do not constitute courts of record. La Croix *v.* Fairfield County, 50 Conn. 321, 47 Am. Rep. 648; Woodman *v.* Somerset County, 37 Me. 29; Stenberg *v.* State, 48 Neb. 299. See also Cunningham *v.* Squires, 2 W. Va. 422, 98 Am. Dec. 770. But *compare* Commissioners Ct. *v.* Moore, 53 Ala. 25; Beaman *v.* Board of Police, 42 Miss. 237; Yalabusha County *v.* Carbry, 3 Smed. & M. (Miss.) 529, *queried* in Board of Police *v.* Grant, 9 Smed. & M. (Miss.) 90.

2. "It may be laid down as a general rule that the board of county commissioners is clothed with authority to do whatever the corporate or political entity, the county, might, if capable of rational action, except in respect to matters the cognizance of which is exclusively vested in some other officer or person. Only what the county might not do, it may not, except as aforesaid. It is, in an enlarged sense, the representative and guardian of the county, having the management and control of its financial interests." West, J., in Shanklin *v.* Madison County, 21 Ohio St. 583.

3. Powers Dependent on Statute. — Sterling *v.* West Feliciana Parish, 26 La. Ann. 59.

The board of commissioners of a county is a *quasi* corporation, a local organization which, for the purpose of civil administration, is invested with a few of the functions characteristic of corporate existence. A grant of powers to such a corporation must be strictly construed. When acting under a special power, it must act strictly on the condition under which it is given. Treadwell *v.* Hancock County, 11 Ohio St. 183. See also Gorman *v.* Boise County, 1 Idaho 553; Mitchell *v.* St. Louis County, 24 Minn. 459; Hawkins *v.* Carroll County, 50 Miss. 735; Jefferson County *v.* Grafton, (Miss. 1897) 21 So. Rep. 247, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 375,

performance of their public trusts and duties.[1]

Other Equivalent Terms. — The term "county commissioners" is the one employed in most of the states. In other states bodies with similar powers exist, which are designated as boards of "supervisors," "chosen freeholders," and "police juries."[2] This title deals with all these bodies, under whatever name they may be known.

II. Election and Term of Office. — The existence and tenure of office of county commissioners and similar officers are absolutely dependent upon the provisions of the statutes under which they exist, and which must be consulted as to any given jurisdiction. Generally speaking, it may be said that the members are elected by the qualified voters of the county at the general election, and are chosen either from and by the county at large, or from and by districts and townships. In some states they are elected for a term of years, and until their successors are chosen; in some, vacancies are filled by election of the board; in others, they are to be appointed by the judges of the court; and in others again, such vacancy would be filled by appointment of the governor.[3]

379; People *v.* Van Gaskin, 5 Mont. 352; State *v.* Lincoln County, 18 Neb. 283; Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422.

1. The Commissioners Are the Public Agents of the County with respect to all the money concerns, and must necessarily possess an authority, without any express grant from the legislature, commensurate with their public trusts and duties. Vankirk *v.* Clark, 16 S. & R. (Pa.) 286; Mansel *v.* Nicely, 175 Pa. St. 367.

2. See the local statutes.

In the *District of Columbia* the Levy Court is vested with those powers which in the several states are performed by "county commissioners," "overseers of the poor," "county supervisors," and similar bodies with other designations. Levy Ct. *v.* Coroner, 2 Wall. (U. S.) 507.

3. For holdings under the provisions of particular statutes see Trinity County *v.* McCammon, 25 Cal. 117; People *v.* Reid, 11 Colo. 138; Jones *v.* State, 112 Ind. 193; Barrett *v.* State, 112 Ind. 322; State *v.* Bemenderfer, 96 Ind. 374; State *v.* Barlow, 103 Ind. 563; Parcel *v.* State, 110 Ind. 122; State *v.* Clendenning, 117 Ind. 111; Bell *v.* State, 129 Ind. 1; Hayes *v.* Rogers, 24 Kan. 143; Fuller *v.* Miller, 32 Kan. 130; Rogers *v.* Slonaker, 32 Kan. 191; Strong, Petitioner, 20 Pick. (Mass.) 487; Snell *v.* Westcott, 34 Neb. 84; State *v.* Woodbury, 17 Nev. 337; Farrier *v.* Dugan, 48 N. J. L. 613; Miller *v.* Chosen Freeholders, 58 N. J. L. 501; People *v.* Van Horne, 18 Wend. (N. Y.) 515; *In re* Bradley, (Supreme Ct.) 21 N. Y. Supp. 167; Kilburn *v.* Latham, 81 N. Car. 312; York County *v.* Small, 1 W. & S. (Pa.) 315; State *v.* Twichell, 9 Wash. 531.

Dying after Qualifying before Term Begun. — When a duly elected county commissioner has qualified and then dies before his term begins, his predecessor cannot hold over. State *v.* Bemenderfer, 96 Ind. 374.

Arranging County into Commissioner Districts. — County commissioners in *Kansas* have the power to rearrange the county into commissioner districts in such a manner that no portion of a former district may be found in the corresponding new one, and no appeal lies to the District Court at the instance of an elector. Hayes *v.* Rogers, 24 Kan. 143.

Temporary or special county commissioners appointed by the governor have power to divide the county into commissioners' districts, and the commissioners elected to succeed the temporary commissioners after such division are to be elected by the districts, and not by the vote of the entire county. Keating *v.* Marble, 39 Kan. 370.

California — County Judge Appointing to Vacancy. — In Myers *v.* Alameda County, 60 Cal. 287, it was held that, as the law then stood, the county government bill having been declared unconstitutional, the judges of the Superior Court were without power to appoint a county supervisor; but in Myers *v.* Hamilton, 60 Cal. 289, the court decided that when the judges have assumed to exercise such power their action will not be reviewed by certiorari, because the assumed power is not a judicial power.

Indiana — Term of Office. — In Indiana the term of office of a county commissioner is three years, but this applies to the office, and not to the individual, and the term ends with the expiration of three years, regardless of the time when the officer commenced service in the term to which he was elected. Jones *v.* State, 112 Ind. 193; State *v.* Barlow, 103 Ind. 563.

The Chairman of a Retiring Board has no authority to act after the new board has been elected and its members have qualified, although the new board has not yet organized. State *v.* Bryce, 11 S. Car. 342.

Legislative Change in Term. — A statute limiting the term of county commissioners, in contravention of the provisions of the state constitution, is void. Leavenworth County *v.* State, 5 Kan. 688.

But where the term of office is not provided for by the constitution, the legislature may enlarge, abridge, or otherwise change the term, either temporarily or permanently, or may abolish it entirely. State *v.* Bell, 116 Ind. 1.

When Board Acts as Board of Canvassers. — Where an existing board of county commissioners of a specified county is by statute constituted a board of canvassers to determine the result of a special election, a new board of commissioners, elected at such election, has not the power to canvass the vote and issue cer-

Board Cannot Go Behind Certificate of Election. — The board cannot go behind the statutory certificate of the election of a specified member.[1]

Commissioners De Facto. — And when the board is provided for by law, and the members enter upon their office, they are officers *de facto* in spite of irregularities in their election.[2]

A Member of the Board Appointed to Fill a Vacancy Therein has the same right as one originally elected to take part in the proceedings of the board.[3]

tificates of election to other persons claiming under such election. Rider *v.* Brown, 1 Okla. 244.

In *Iowa* the county supervisors may be compelled by mandamus to perform their duties as a canvassing board. Jayne *v.* Drorbaugh, 63 Iowa 712.

Defective Certificate of Return. — Where a certificate of the number of votes given for county commissioner at a town meeting duly held for that purpose was signed "Attest, J. T.," but did not show that it was a copy of the town record, or that "J. T." was town clerk, it was held that this was not such a return as the board of examiners were authorized to receive, or would be required by mandamus to consider in determining who was elected county commissioner. Luce *v.* Mayhew, 13 Gray (Mass.) 83.

Qualifications of Commissioners — Residence. — As to the interpretation of statutory requirements as to the residence of commissioners see Brungardt *v.* Leiker, 42 Kan. 206; Smith *v.* State, 24 Ind. 101; State *v.* Skirving, 19 Neb. 497; State *v.* Milwaukee County, 21 Wis. 443.

Holding Another Office at the Same Time. — In *Kansas* a person holding a city office cannot hold at the same time the office of county commissioner. State *v.* Plymell, 46 Kan. 294.

In *Texas*, under the constitution, a county commissioner may at the same time hold the office of justice of the peace, notary public, or postmaster. Gaal *v.* Townsend, 77 Tex. 464.

In *Illinois* a town officer may also be a member of the county board. Bruner *v.* Madison County, 111 Ill. 11.

Creation of New County — Effect of. — Under the statutes of *Nebraska*, where a new county is created by the division of a larger one the board of county commissioners elected at an election ordered by the governor in the new county continue in office until the next general election for such officers, and until their successors are elected and qualified. State *v.* Field, 26 Neb. 393.

Disqualification for Interest. — A county commissioner who is interested in the proceedings of laying out and building a highway is disqualified to act therein. Taylor *v.* Worcester County, 105 Mass. 225; Ipswich *v.* Essex County, 10 Pick. (Mass.) 519; New Boston's Petition, 49 N. H. 328. See also Wilbraham *v.* Hampden County, 11 Pick. (Mass.) 322.

The ownership of lands contiguous to a proposed highway which may affect or enhance their value is not such an interest as legally precludes the owner from acting as a member of the board of county commissioners upon petition signed by himself and others for establishing the road. Webster *v.* Washington County, 26 Minn. 220.

Where the county commissioner is a taxable inhabitant of a town through which a contemplated road is to pass, this circumstance does not constitute such an interest as will disqualify him to act as a county commissioner in the proceedings relative to laying out and making the road. Wilbraham *v.* Hampden County, 11 Pick. (Mass.) 322; Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; Danvers *v.* Essex County, 2 Met. (Mass.) 185; Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394.

But by the express terms of *Massachusetts* General Statutes, c. 17, § 12, if any part of a road upon which the county commissioners are to act lies within the city or town in which either of them resides, he is disqualified to act thereon (unless a board cannot be organized without him), and one of the special commissioners of the county is to act in his place. Boston, etc., R. Co. *v.* Hampden County, 116 Mass. 73.

Incapacity on Account of Age. — A county commissioner is not disqualified from acting on a petition for a highway although he is more than seventy years of age, as he is not a "judge" within the meaning of the constitutional provision of the state of *Connecticut* providing that no judge shall hold office after seventy. Betts *v.* New Hartford, 25 Conn. 180.

Oath of Office. — The county commissioners of a county are bound to take an oath of office. Worthy *v.* Barrett, 63 N. Car. 199; Keyser *v.* M'Kissan, 2 Rawle (Pa.) 139.

1. Robinson *v.* Cheboygan County, 49 Mich. 321, holding further that mandamus will lie to compel them to admit the person so declared elected.

2. **De Facto Officers.** — Waller *v.* Perkins, 52 Ga. 233.

County officials *de facto* can perform all acts lawfully appertaining to their office. State *v.* Jacobs, 17 Ohio 143. See also Leach *v.* People, 122 Ill. 420, where it was held that acts of commissioners lawfully elected under an act which was afterwards declared unconstitutional were valid as the acts of *de facto* officers.

Failure to Qualify — Former Officers Holding Over. — Where a newly elected county commissioner fails to qualify at the time prescribed by law, the old board, as *de facto* officers, have the power to declare a vacancy and fill the same by appointment. Jones *v.* Jones, 80 N. Car. 127.

3. Peck *v.* Berrien County, 102 Mich. 346.

Election to Fill Vacancy Gives Right to Unexpired Term. — Where a county commissioner is elected to fill a vacancy, he holds during the unexpired term of his predecessor only. Parcel *v.* State, 110 Ind. 122; Parmater *v.* State, 102 Ind. 90; Peck *v.* Berrien County, 102 Mich. 346.

Filling Vacancy. — Where a vacancy occurred in the office of the county commissioners, two commissioners remaining, and one of them

III. Meetings of the Board — Proceedings and Records — 1. General, Special, and Adjourned Meetings. — A board of county commissioners can act only when convened as a board in legal session, either regular, adjourned, or special, as may be provided by statute.[1]

A Special Session of the Board has no power to transact business unless it has been called in the manner provided by law, and notice of the meeting is in all cases essential.[2]

and the county clerk, in the absence of the other, and without notice to him, met and in form appointed a person to fill the vacancy, such appointment was held to be void. In such a case the vacancy must be filled by the remaining commissioners and the county clerk. Rogers *v.* Slonaker, 32 Kan. 192. *Compare* Hawke *v.* Wentworth, (Arizona 1895) 39 Pac. Rep. 809.

Under the Code of *North Carolina*, which requires the board of county commissioners to meet on the first Monday in December to accept the bonds of county officers elected at the preceding election, the board has power, after all the business before it has been disposed of, to adjourn on that day; and if any officer shall fail to perfect his bond according to law before such adjournment, it has the further power to declare such office vacant and to fill it, when authority to fill such yacancies is vested by law in the board. Cole *v.* Patterson, 97 N. Car. 360.

1. Meeting of Board Necessary for Official Action — *Alabama.* — Wightman *v.* Karsner, 20 Ala. 446.

California. — People *v.* Harrington, 63 Cal. 257.

Colorado. — People *v.* Lathrop, 3 Colo. 428.

Florida. — Martin *v.* Townsend, 32 Fla. 318.

Illinois. — Ottawa *v.* La Salle County, 11 Ill. 654; Cumberland County *v.* Webster, 53 Ill. 141; Bouton *v.* McDonough County, 84 Ill. 384; Wheeler *v.* Wayne County, 31 Ill. App. 299.

Indiana. — Potts *v.* Henderson, 2 Ind. 327; Fayette County *v.* Chitwood, 8 Ind. 504; Loesnitz *v.* Seelinger, 127 Ind. 422; Archer *v.* Allen County, 3 Blackf. (Ind.) 501.

Iowa. — Jordan *v.* Osceola County, 59 Iowa 388; Rice *v.* Plymouth County, 43 Iowa 136.

Kansas. — Paola, etc., R. Co. *v.* Anderson County, 16 Kan. 302.

Massachusetts. — Reed *v.* Scituate, 5 Allen (Mass.) 120; Joslyn *v.* Franklin County, 15 Gray (Mass.) 567; Plymouth *v.* Plymouth County, 16 Gray (Mass.) 341.

Mississippi. — Crump *v.* Colfax County, 52 Miss. 107.

Nebraska. — Morris *v.* Merrell, 44 Neb. 423; Inavale Tp. *v.* Bailey, 35 Neb. 453; Merrick County *v.* Batty, 10 Neb. 176.

New York. — People *v.* Schenectady County, 35 Barb. (N. Y.) 408; Matter of Pilsbury, 56 How. Pr. (N. Y. Supreme Ct.) 290; Van Antwerp *v.* Kelly, 50 Hun (N. Y.) 513.

Oklahoma. — Cleveland County *v.* Seawell, 3 Okla. 281.

Pennsylvania. — Pike County *v.* Rowland, 94 Pa. St. 238.

Tennessee. — Ezell *v.* Justices, 3 Head (Tenn.) 583.

Texas. — District School Trustees *v.* Wimberly, 2 Tex. Civ. App. 404.

Wisconsin. — Oconto County *v.* Hall, 47 Wis. 208.

In Paola, etc., R. Co. *v.* Anderson County, 16 Kan. 302, Brewer, J., said: "Two commissioners casually meeting have no power to act for the county. There must be a session of the 'board.' This single entity, the 'board,' alone can by its action bind the county. And it exists only when legally convened. Its regular sessions are fixed by law, and of them all the members must take notice. Its special sessions exist only upon call of the chairman, and that, as we have seen, implies notice." To the same effect see Anderson County *v.* Paola, etc., R. Co., 20 Kan. 534; Hamilton County *v.* Webb, 47 Kan. 104.

A contract between a board of county commissioners and a builder for the erection of a public building, under which the builder agrees to change the plans until the board shall be satisfied, means that the request to make changes shall come from the board acting, and not from a member acting individually and in his private capacity. Franklin County *v.* Bunting, 111 Ind. 143, where Elliott, J., said: "The question is, can the acts of individual members bind a party where official action is required? If it were held that individual members of the board might bind a party by individual, and not official, action, then it might often happen that the act of a minority would bind the majority."

Where extra work was performed upon a county jail, it was held that the contract for such extra work could not be shown by proving the separate individual assent of the members of the county board of commissioners. Eigemann *v.* Posey County, 82 Ind. 413.

Record Sufficient to Show Official Action. — Where an offer of the reward for the arrest of a criminal and for the return of stolen property was signed "By order of the board of supervisors, H. D. L. chairman," it was held that the document showed the offer to be the act of the board of supervisors in its official capacity, and not the act of the individual members of the board. Huthsing *v.* Bousquet, 7 Fed. Rep. 833.

2. Special Meetings — Notice. — Trammell *v.* Pennington, 45 Ala. 673; El Dorado County *v.* Reed, 11 Cal. 130; Packard *v.* Jefferson County, 2 Colo. 338; Rosenthal *v.* Madison, etc., Plankroad Co., 10 Ind. 358; Scott *v.* Paulen, 15 Kan. 162; Paola, etc., R. Co. *v.* Anderson County, 16 Kan. 302; Morris *v.* Merrell, 44 Neb. 423; McNeill *v.* Green, 75 N. Car. 329; Hamilton *v.* Tucker County Ct., 38 W. Va. 71. See also State *v.* Pike County, 104 Ind. 123; Gosman *v.* State, 106 Ind. 203; Kearney County *v.* Kent, 5 Neb. 227; State *v.* Saline County, 18 Neb. 423; State *v.* Manhattan Silver Min. Co., 4 Nev. 318; Cassin *v.* Zavalla County, 70 Tex. 419.

Character of Business at Special Meeting. — The powers of the board convened in special meeting are limited by statutes which require certain proceedings to

Where a board of commissioners proposes to do any deliberative act that will be binding on the absent members, it must do so at a regular stated meeting or a regular adjourned meeting, and if the meeting be special, notice is necessary, and it must be personally served, if practicable, upon every member entitled to be present. Pike County *v.* Rowland, 94 Pa. St. 238.

Levying a special tax to aid in the construction of a gravel road is illegal and void when the levy is made at a special session not legally convened. Fahlor *v.* Wells County, 101 Ind. 167.

A special or called meeting of the county commissioners in which all the members participate, held before the day to which they had adjourned at their preceding meeting, is valid. Douglass *v.* Baker County, 23 Fla. 419.

Voluntary Meeting Without Notice — All Present. — In Jones *v.* Cullen, 142 Ind. 335, it was held that where all the members of the board of commissioners were present, on their own volition and without notice, at the place provided by law for their meeting, and at a time when they could have convened in special session upon call, in accordance with the provisions of the statute, an act done by the commissioners acting as a board was valid, at least so far as to be beyond collateral attack on the ground that the meeting was irregular.

In *Colorado*, under a statute which provided that the board of commissioners should meet quarterly, at specified times, "and at such other times as, in the opinion of the board, the public interests may require," it was held that the necessity for such further meetings and the times of holding them was left to the exclusive determination of the board acting officially, and that there was no authority in any member to call a special meeting; therefore, that the quarterly meetings and adjourned meetings were the only ones provided for. But it was declared that "if the board should voluntarily come together, or should be gotten together in any manner, the fact of the transaction of business at the meeting so held would probably be a sufficient expression of their opinion of the necessity of the meeting." People *v.* Carver, 5 Colo. App. 156.

Proof of Notice — Presumption. — The caption of the minutes of a meeting of a board of supervisors, and not the orders made at the meeting, should show the organization of the board according to law, and where the orders only of such board, not made at a regular meeting, are introduced in evidence in a case, and there is no proof of notice given for a special meeting, it is presumed that the caption of the minutes, if produced, would show that such notice was given. Corburn *v.* Crittenden, 62 Miss. 125.

The record need not show that notice was given, though it is advisable that such entry be made. Williams *v.* Cammack, 27 Miss. 209. See also Packard *v.* Jefferson County, 2 Colo. 338.

What Is Notice. — In Paola, etc., R. Co. *v.* Anderson County, 16 Kan. 302, the court, in construing a statute which provided that special sessions of the board of commissioners might be held "on the call of the chairman, at the request of two members of the board, as often as the interests of the county may demand," said: "It does not specify whether the call shall be verbal or in writing, how long prior to the meeting it shall be made, nor require a record to be preserved of it. And the same is true as to the request. But still it requires a 'call;' and a call of a meeting, in the legal sense of the term, is a summons to the parties entitled to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller, or an expression of that purpose unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated is sometimes prescribed by statute, or by by-law. It is sometimes provided that it shall be by publication in the newspaper, sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal notice. But in some way or other notice must be given; and if there be no regulation as to the manner of notice it must be personal, at least where personal notice is practicable."

Iowa Statute. — For a construction of the Iowa statute as to notice of meetings of supervisors, see Mitchell County *v.* Horton, 75 Iowa 271.

Oral Notice Held Sufficient. — In *Indiana* it has been held that oral notice of the meeting of the board given by the county auditor is sufficient. White *v.* Fleming, 114 Ind. 560; Loesnitz *v.* Seelinger, 127 Ind. 422.

Board Need Not Meet to Give Notice. — A board of supervisors need not meet for the mere purpose of ordering notice to be given of a hearing of charges against officers appointed by them, and a service on August the 7th of a copy of charges and notice of meeting to investigate them to be held on August the 18th was held sufficient, although made on the authority of two supervisors, without a meeting of the board. Gager *v.* Chippewa County, 47 Mich. 167.

Estoppel to Deny Notice. — It has been held that members of a board of commissioners who protested against the sufficiency of the notice upon which the meeting was convened were estopped from denying its sufficiency by their conduct in taking part in the whole of the proceedings of such meeting. Mitchell County *v.* Horton, 75 Iowa 271; White *v.* Fleming, 114 Ind. 560.

The Chairman of the Board has, in his individual capacity, no greater authority to bind the board than any other member. Bouton *v.* McDonough County, 84 Ill. 384; Gardner *v.* Dakota County, 21 Minn. 33. See also Rice *v.* Plymouth County, 43 Iowa 136.

Organization Before Annual Meeting — Permanent and Temporary Chairman. — Under a statute which provided that the board of commissioners should, at each annual meeting, choose a chairman to preside at the meetings throughout the year, and, in case of his absence from

take place at regular meetings of the board.[1] In general, the rule is, that the board, when called together in special session, can transact only such business as is specified in the call.[2] But this rule is not recognized to its full extent in some states.[3]

Who May Call Special Meeting — Determining Necessity. — Under a statute which vests in a particular county officer the duty to call a meeting of the board of county commissioners whenever the public interests require it, the determination of the necessity for the call, and the fixing of the notice of the meeting, rest in the discretion of such officer.[4]

Statutory Prescriptions as to the Manner of Holding Stated Meetings of the board, and especially those relating to calling special meetings and the nature of business which may be transacted thereat, must be strictly observed.[5]

any meeting, the members present should choose a temporary chairman, and which also provided for special meetings of the board at such times and places as the members might find convenient, it was held that before the organization of the board at its annual meeting, and before the election of the permanent chairman, the board might convene and transact business after the selection of a temporary chairman. Ottawa *v.* La Salle County, 11 Ill. 654.

1. In Vincennes *v.* Windman, 72 Ind. 218, it was held, construing a provision of the *Indiana* Revised Statutes, that a board of county commissioners could not, at special session, make a valid order for the annexation of contiguous territory to an incorporated city. See also *infra*, this section, the paragraph *Adjournments*.

2. El Dorado County *v.* Reed, 11 Cal. 130; People *v.* Carver, 5 Colo. App. 156. See also Rosenthal *v.* Madison, etc., Plankroad Co., 10 Ind. 358.

3. Business at Special Session — Notice of Purpose. — In *Indiana* it has been held that it is only where the business is such as can only be transacted after giving notice, and in which adversary proceedings may be had, and for the transaction of which, at a special session, no express statutory authority exists, that the board cannot lawfully act at a special meeting. Prezinger *v.* Harness, 114 Ind. 491.

Under the *Indiana* statute authorizing the county auditor to call a special meeting of the commissioners whenever the interests of the county demand it, it was held that the call need not state the objects of the special session, and that, if they were stated, the board was not confined in its action to the consideration of the specified objects. Oliver *v.* Keightley, 24 Ind. 514; Vincennes *v.* Windman, 72 Ind. 218; White *v.* Fleming, 114 Ind. 560.

In *Nebraska* the notice calling a meeting of the county commissioners must state the object of the meeting; but at a meeting day called, the commissioners may make orders respecting the property of the county, although they are not strictly within the terms of the notice. Kearney County *v.* Kent, 5 Neb. 227.

In *West Virginia* when the commissioners of a county meet as a canvassing board five days after an election for the sole purpose of declaring the result of such election, counting the votes, etc., no notice as to the object of the meeting is required to be posted such as is necessary when special sessions are to be held for other purposes. Minear *v.* Tucker County Ct., 39 W. Va. 627.

Illustrations — *Establishing Free Turnpike Roads.* — The board of county commissioners has power to act in the matter of establishing free turnpike roads, at a special session. Stipp *v.* Claman, 123 Ind. 532; Fleener *v.* Claman, 126 Ind. 166; Loesnitz *v.* Seelinger, 127 Ind. 422.

An Order of Sale of county property may be made at a special session. Platter *v.* Elkhart County, 103 Ind. 360.

The Approval of an Assessment Roll by a board of supervisors at a time when there could be no regular meeting of such board, is presumed to have been at a legally called special meeting, in the absence of an affirmative showing to the contrary. Tierney *v.* Brown, 65 Miss. 563, 7 Am. St. Rep. 676.

Contract to Establish Title to Lands. — In *Iowa* it has been held that a contract with an individual which has reference to the establishment of the county's title to certain lands could properly be made at a special meeting of the board. Allen *v.* Cerro Gordo County, 34 Iowa 54.

4. Oliver *v.* Keightley, 24 Ind. 514; Madison County *v.* Brown, 28 Ind. 161; Jussen *v.* Lake County, 95 Ind. 567.

In Wilson *v.* Hamilton County, 68 Ind. 507, the court said: "It seems to us that the general assembly of this state, in and by these statutory provisions, have committed to the county officers named in said act, and first to the county auditor, the discretionary right, power, and duty to determine finally and conclusively, in each particular case, these three questions: (1) whether the public interests require a special session of the board of commissioners; (2) whether the facts of the particular case will authorize and justify the giving of at least six days' notice of such special session; and, (3) if not, and in the opinion of such county auditor first, or other officer named in their order, an emergency shall exist requiring a shorter notice, what notice shall be given, and when such special session shall begin. When the county auditor, or other county officer acting as authorized by the provisions of the statute, shall have considered, passed upon, and determined any or all of these three questions, we think that the decision of such auditor or other officer, in regard thereto, is and ought to be final, and that such decision cannot thereafter be questioned, annulled, set aside, or held void and of no effect."

5. Statutory Requirements as to Holding and Calling. — Where a statute prescribes the manner in which a special meeting of the board shall be called, a special meeting held without

Presumption in Favor of Legality of Meeting. — Where the law authorizes special meetings to be held, a special meeting will be presumed to have been rightfully held, in the absence of any showing to the contrary.[1]

Adjournments. — A board of commissioners has power to adjourn from day to day, or from time to time, without losing jurisdiction, until its business is complete.[2]

observing these requirements is not legal. Goedgen *v.* Manitowoc County, 2 Biss. (U. S.) 328.

Meetings of supervisors must be held and called as provided by law, otherwise the actions of a meeting not so called are illegal. Goedgen *v.* Manitowoc County, 2 Biss. (U. S.) 328.

Statute Designating Days for Meeting.— County commissioners are not precluded, by statute designating particular days for their meetings, from transacting business on other days. McNeill *v.* Green, 75 N. Car. 329.

Quorum — Majority.—The provision of the Revised Statutes relative to majority of supervisors constituting a quorum of the board, cannot be set aside by any rule of the board. People *v.* Brinkerhoff, 68 N. Y. 259.

The majority of a quorum of a board of supervisors, a quorum being present, can perform any act which the majority of the board could perform, all being present. People *v.* Harrington, 63 Cal. 257.

In *Texas*, three out of the four county commissioners constituting the court, the county judge being one, constitute a quorum; but an order made by three commissioners in the absence of the judge was void. West *v.* Burke, 60 Tex. 51; Free *v.* Scarborough, 70 Tex. 672.

Proof of Service of Notice. — A meeting of a board of county commissioners is not unlawfully convened because the sheriff's return showing service is not signed or dated. State *v.* Pike County, 104 Ind. 123.

Place of Meeting. — Under the *Nebraska* Act, Feb. 27, 1873, it was held that the commissioners must transact county business at the county-seat, and were absolutely without authority to enter into contracts at any other place. Merrick County *v.* Batty, 10 Neb. 176.

In *Mississippi* such meetings must be held at the county court-house. Harris *v.* State, 72 Miss. 960, where it was held that a meeting of the board of supervisors in a building ten feet away from the court-house was not at the court-house within the meaning of the statute.

In *Pennsylvania* it has been held that a contract, though not made at the office of the county commissioners, is binding if within the scope of their authority. Jefferson County *v.* Slagle, 66 Pa. St. 202.

Boards of Adjoining Counties Acting Together — Majority of Each. — In *Ohio*, under section 22 of the act relating to ditches, which provides that where a proposed ditch is in more than one county, a majority of the board of county commissioners of each county may, in joint session, locate and establish the same, each board of county commissioners constitutes an integral part of the joint body, and it is essential to the validity of the proceedings in joint session, that a majority of each board should concur therein. Chesborough *v.* Putnam County, 37 Ohio St. 508.

Composition of Board — Uniformity of County Government. — A *Wisconsin* statute which provides that, in every county embracing more than one town, the county board is to consist of the chairmen of the several towns, while in every county consisting of only one town the supervisors thereof shall constitute the county board, is not in violation of that clause of the constitution (art. 4, § 23) which declares that the legislature shall establish but one system of town and county government which shall be as nearly uniform as practicable. Cathcart *v.* Comstock, 56 Wis. 590.

1. Allen *v.* Cerro Gordo County, 34 Iowa 54; Brigins *v.* Chandler, 60 Miss. 862; Corburn *v.* Crittenden, 62 Miss. 125. See also White *v.* Fleming, 114 Ind. 560; Prezinger *v.* Harness, 114 Ind. 491; Wayne County *v.* Wayne Circuit Judges, 106 Mich. 166.

Record Need Not Show Aye and No Vote. — By the statutes of *Michigan* (How. Mich. Stat. 476), it is made the duty of the clerk to record the vote of each supervisor only when required by any member present; and when, therefore, the record does not disclose the majority, but does set forth the adoption of the resolution, it will be presumed that it received the necessary vote under the law. Giddings *v.* Wells, 99 Mich. 221.

Under the statute of Michigan, providing "that the county treasurer shall pay money on the order of the board of supervisors, countersigned by the chairman and signed by the clerk," an order in that form will be presumed to be correct, and the official acts of the board. Lyell *v.* Lapeer County, 6 McLean (U. S.) 446.

2. **Adjournments.** — People *v.* Linden, 107 Cal. 94; *Ex p.* Mirande, 73 Cal. 365; *Ex p.* Benjamin, 65 Cal. 310; *Ex p.* Benninger, 64 Cal. 291. See also Lewis *v.* Gainesville, 7 Ala. 85; Banning *v.* McManus, 51 Minn. 289.

Adjournments by Less than Quorum. — When a board of county commissioners meets as a board of equalization on the day appointed by law, and, after organization, adjourns until the next day, subsequent adjournments from day to day by less than a quorum of such board will preserve the duration of such session. O'Neil *v.* Tyler, 3 N. Dak. 47.

Adjournment of Special Meeting. — A special meeting of the board of county commissioners, of which the commissioners have been duly notified, may be adjourned to a subsequent day by the members present, being a majority of the entire board. Stockton *v.* Powell, 29 Fla. 1; Madison County *v.* Brown, 28 Ind. 161.

Adjourned Meeting After Expiration of Time for Regular Meeting. — In *Arkansas* it appears that the statutes provide only for "regular" and "special" meetings of the boards of commissioners, the latter to be convened upon call, and also provide that the regular meetings "shall continue six days if business shall so long require, and no longer." Under these

2. Record of Proceedings. — When sitting as a court, a board of county commissioners or supervisors is a court of limited jurisdiction only, and its jurisdiction must appear in the record of its proceedings.[1]

Jurisdiction Once Established, Regularity of Action Presumed. — But when once the jurisdiction of the board has been established over the subject-matter and over the parties to a proceeding, the same presumptions are indulged in favor of the regularity of its action as prevail in favor of the action of courts of general powers, and its judgments are alike unassailable by collateral attack.[2]

provisions, it was held that an action of a board taken at an adjourned meeting three days after the termination of the regular meeting of the board, was invalid and void. Grimmett *v.* Askew, 48 Ark. 151.

Under the statutes of *Mississippi* a similar ruling has been made. Tierney *v.* Brown, 67 Miss. 109.

But, under a *Minnesota* statute, providing that no regular session of the board should continue longer than six days, it was held that it was not necessary that the session should be continuous from day to day, and that the statute did not deprive the board of the power to adjourn the session to a date more than six days from its commencement. Banning *v.* McManus, 51 Minn. 289.

Petition for County Road at Adjourned Session. — A petition for a county road may be presented for hearing at an "adjourned session" of the board of county commissioners, provided thirty days previous notice has been given in the manner prescribed by statute, and the time when such petition will be heard. Burkleo *v.* Washington County, 38 Minn. 441.

No Power to Revoke Order of Adjournment. — Where a statute provided that county commissioners should hold their meetings on the first Monday of January, April, July, and October, and adjourn from time to time until the business before them should be disposed of, it was held that after the board had adjourned to a certain day, it had no power to revoke the order and meet at an earlier day. State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

Adjourned Session of "The Annual Meeting." — Under the statutes of *Wisconsin* which give to county boards of supervisors power "at the annual meeting in November" to determine the amount of the annual salary that should be received by the county treasurer who was to be elected in the county "during the ensuing year" it was held that the board might determine such amount at an adjourned session of such annual session, though so late as March of the year following, and that the salary of the treasurer elected at the following election would be limited by such determination. Hull *v.* Winnebago County, 54 Wis. 291.

Maine "Regular Session." — A session of the county commissioners held by adjournment from a regular session is a regular session within the meaning of the statute. Harkness *v.* Waldo County, 26 Me. 353; Waterville *v.* Kennebec County, 59 Me. 80; Bethel *v.* Oxford County, 60 Me. 536.

Under the Maine statute, all reports which the commissioners are required to make at the "regular session" must be made at the "term of record" held on the first Tuesday of January and June, and all continuances required by law are to be at the next "term of record." State *v.* Cumberland County, 78 Me. 100.

Business Required to Lie Over from One Regular Session to Another. — Under a statute which provides that the hearing in certain proceedings shall take place at one regular session of the county commissioners, and that the case shall then be continued to the next regular session when the proceedings will be finally disposed of, the commissioners cannot lawfully, without any assignable cause, neglect or omit to hold the next regular term and continue all proceedings over the regular term to the one subsequent thereto. Monticello *v.* Aroostook County, 59 Me. 391, where the court said: "If they could act at a term other than the next regular term, they might do it at any term held, however long thereafter." See also Chapman *v.* York County, 79 Me. 267.

1. Finch *v.* Tehama County, 29 Cal. 453; Plummer *v.* Waterville, 32 Me. 566. See also Macon County *v.* Shores, 97 U. S. 272; Riley *v.* Pettis County, 96 Mo. 318; and the title JURISDICTION.

In Johnson *v.* Eureka County, 12 Nev. 28, the court said: "This court has frequently decided that the board of county commissioners is of special and limited jurisdiction, that nothing in regard to its proceedings is to be presumed in its favor, and that its records must affirmatively show the necessary jurisdictional facts. State *v.* Washoe County, 5 Nev. 319; State *v.* Ormsby County, 6 Nev. 97."

2. Jurisdiction Established — Regularity Presumed. — Stoddard *v.* Johnson, 75 Ind. 20; Bowen *v.* Hester, 143 Ind. 511; Million *v.* Carroll County, 89 Ind. 5; Ricketts *v.* Spraker, 77 Ind. 371; Carroll County *v.* Justice, 133 Ind. 89; McEneney *v.* Sullivan, 125 Ind. 407; Chicago, etc., R. Co. *v.* Sutton, 130 Ind. 405; White *v.* Fleming, 114 Ind. 560

In Stoddard *v.* Johnson, 75 Ind. 20, it was claimed that the board did not acquire jurisdiction, and that the record of the board must show affirmatively that it acquired jurisdiction and conducted the proceedings in strict conformity with the requirements of the law; and State *v.* Conner, 5 Blackf. (Ind.) 325, and Rhode *v.* Davis, 2 Ind. 53, and other cases were cited in support of this contention. But the court said: "In most of these cases, the questions were raised on appeal, and involved no collateral attack. In so far as many of these cases hold that the jurisdiction of an inferior court must be shown in its own record, they accord with our present ruling. * * * Some of them perhaps contain dicta against the indulgence of presumptions in favor of the proceedings of inferior courts after jurisdiction has been acquired, and to the effect that their proceedings are void unless

Distinction Between Judicial and Simple Corporate Acts. — A distinction has been taken, however, between the acts of the board as a judicial tribunal and its acts as a corporation simply, and it has been held that in the latter case the board need not enter its action of record in order to make it binding upon the county, nor need it be proved by record made under the direction of the board.[1]

Proof of Acts by Record — Effect of Failure to Record. — In many of the states statutes exist requiring that the board shall keep a record of its proceedings, and where such a requirement exists, the record is the proper evidence of its official doings,[2] and the existence of an ordinance upon the record is *prima facie* proof that it has been legally passed.[3] But statutes requiring such record have been held to be directory merely, and not to have the effect of

in strict compliance with the law. If so, they are not in harmony with [the prevailing authority in this state], and in such respects are overruled."

A judgment of the court of county commissioners in a matter shown to be within their jurisdiction is in force until reversed, although there are omissions and informalities in the recitals of their records as to the preliminary proceedings. Plummer *v.* Waterville, 32 Me. 566.

In State *v.* Crawford County, 39 Wis. 596, while holding sufficient certain records of a board of supervisors, the court, by Ryan, C. J., said: "There is an inherent infirmity in the use of language; and therefore it is judicial duty to give it construction, *ut res magis valeat quam pereat.* The records of official action are subject to this common infirmity; and therefore in passing judicially upon them, when authority appears or is implied by law, *omnia præsumuntur rite acta, donec probetur in contrarium.* We must construe these proceedings according to their intent, and assume that they were rightfully had, in the absence of all suggestion in the record to the contrary."

1. Judicial and Corporate Action Distinguished. — McCabe *v.* Fountain County, 46 Ind. 380, where the court, after stating the principle of the text, proceeded: "Doubtless, the action must be at a time when the board may be, and is, legally in session, and it must be the concurrent, and not separate and successive, act of the members." And it was held that an attorney who had rendered services to a county under a parol employment by the board of commissioners at a legal session, to defend a suit against the county, might recover compensation for his services.

Proof of Parol Contracts. — Where a board of county commissioners having entered into a contract failed to have the same entered upon the records of the board, the other party to the contract, in an action against the county for the breach thereof, may prove the same by parol. Franklin County *v.* Layman, 145 Ill. 138; Vermilion County *v.* Knight, 2 Ill. 97. See also, to the same effect, Jordan *v.* Osceola County, 59 Iowa 388; Baker *v.* Johnson County, 33 Iowa 151; McCabe *v.* Fountain County, 46 Ind. 380.

Record of Contract Held Essential. — The evidence to establish a contract which could only obtain legal sanction from the action of a county commissioners' court must be contained in the written proceedings of the court found in its minutes. Polly *v.* Hopkins, 74 Tex. 145. See also Maupin *v.* Franklin County, 67 Mo. 327; Johnson County *v.* Wood, 84 Mo. 489.

So, in Crump *v.* Colfax County, 52 Miss. 107, it was held that the board of supervisors could not bind the county by an express contract unless its consent thereto was manifested by its official acts entered in term time on its minutes. See also Bridges *v.* Clay County, 58 Miss. 817.

2. Records as Evidence. — State *v.* Central Pac. R. Co., 17 Nev. 259, *citing* Lowell *v.* Wheelock, 11 Cush. (Mass.) 391; Harris *v.* Whitcomb, 4 Gray (Mass.) 433; Morrison *v.* Lawrence, 98 Mass. 219; Louisville *v.* McKegney, 7 Bush (Ky.) 651. See also Warren County *v.* State, 15 Ind. 250.

A book kept in the office of the clerk of the county commissioners, under their direction, respecting the affairs of the county, though not a public record, is yet *prima facie* evidence against the county of the facts therein stated. La Salle County *v.* Simmons, 10 Ill. 513.

And so is any book kept by the County Court. Whitaker *v.* Dillard, 81 Tex. 359.

Certified Copy of Record — Proper Form. — In *Massachusetts* it has been held that the clerk, and not the chairman, of the county commissioners, is the proper officer to make records of their doings and to attest copies thereof, and a copy of the records attested by the chairman is not competent evidence of an action taken by the commissioners. Rich *v.* Lancaster R. Co., 114 Mass. 514.

3. Presumption of Legality from Record. — A presumption of the legality of an ordinance of a board of supervisors arises from its existence upon the records of ordinances, which is *prima facie* proof that it was duly passed, signed, and attested, and the burden of showing its invalidity is upon the party who denies its legality. San Diego County *v.* Seifert, 97 Cal. 594.

Record Prima Facie Evidence. — The record of the proceedings of the board of supervisors, under their seal, is *prima facie* evidence of such proceedings. People *v.* Bircham, 12 Cal. 50; Mosteller *v.* Mosteller, 40 Kan. 658.

In Jefferson County *v.* Lewis, 20 Fla. 080, it was held that as against a *bona fide* holder of certain bonds, a recital in the record of the proceedings of the county commissioners estopped the county from denying that the board subscribed for stock as stated in the record.

rendering invalid an ordinance properly passed and not recorded.[1] Where it is, by statute, made the duty of the clerk to record the ordinances of the board, a failure on his part to perform this duty does not render invalid an action by the board.[2]

Signing the Record. — Where no statute requires the proceedings of the board to be signed by the members of the board, the unsigned orders of the board are not void,[3] and a statute which requires the chairman and clerk to sign the records does not render unsigned records invalid, but simply imposes upon the party desiring to prove the official action of the board the burden of establishing the handwriting of the entries, their contemporaneous character, and the official custody upon which the book was produced.[4]

1. Unrecorded Acts Held Valid. — In Brown *v.* Ruse, 69 Tex. 589, it was held that an order of the Commissioners' Court allowing a claim against the county might be proved and given effect, although it had never been entered upon the minutes of the court. See also Halstead *v.* Lake County, 56 Ind. 363.

In Ewing *v.* Duncan, 81 Tex. 230, it was held that the fact that no order appeared upon the minutes of a Commissioners' Court providing for an election did not authorize the holding that the election was void, the court saying: "The statute provides that a record shall be made of the proceedings of the Commissioners' Court. Rev. Stat., arts. 1527, 1528. In reference to the orders of the County Court in reference to estates of deceased persons, etc., it also provides that all orders shall be recorded, and that any supposed order not entered of record shall be a nullity. Rev. Stat., art. 1802. There is no such provision with reference to the orders of the Commissioners' Court. * * * We conclude that the fact that no order appears upon the minutes of the Commissioners' Court of Crosby county directing and fixing the time of the election does not authorize us to hold the election void."

In Georgetown, etc., Road Co. *v.* Hutchinson, 4 Colo. 50, it was held that the failure of a board of commissioners to make and keep a record of its actions, prescribing rates of toll to be charged and collected by an incorporated company, could not prejudice the right of the company to charge and collect its tolls, but that it might be shown by parol that the rates of toll had been in fact fixed by the board in compliance with the provisions of the statute.

A board of supervisors passed an ordinance in pursuance of their statutory duty fixing the time for the regular meetings of the board, but this ordinance was not properly recorded in the ordinance book. It was held, however, that meetings having been held under this ordinance for a long period as and for regular meetings, the question of their regularity could not be brought in question so as to render abortive all the public business that had been transacted at such meetings. Central Irrigation Dist. *v.* De Lappe, 79 Cal. 351.

Recording Not a Condition Precedent to Taking Effect. — Section 26 of the California County Government Act, which requires *inter alia* that "all ordinances shall be entered at length in the ordinance book," does not amount to a requirement that the ordinance shall be recorded before it shall take effect. People *v.* Cole, 70 Cal. 59, where the court said: "By the statute, publication or posting is made necessary before it takes effect, but not recording."

Failure to Copy Seal with Ordinance. — When an ordinance has been properly passed, the omission of the clerk of the board to add the board's seal to the record of it in the ordinance book does not render it invalid. Santa Clara County *v.* Southern Pac. R. Co., 66 Cal. 642.

Failure to Affix Seal to Copy of Proclamation for Publication. — In San Luis Obispo County *v.* White, 91 Cal. 432, it was held that where the board of supervisors had the authority to issue a proclamation and ordered that it should issue and be authenticated in a certain manner, the failure of the clerk of the board to affix the seal of the board to the copy which was ordered published did not affect the validity of the proclamation.

2. San Luis Obispo County *v.* White, 91 Cal. 432, where the court said: "As appears by the case last referred to [Central Irrigation Dist. *v.* De Lappe, 79 Cal. 358], the failure of the clerk to record an ordinance will not defeat it. Neither do we think the failure to enter the order in this case precluded proof of it by oral evidence. The power of the board to act exists independently of any action of the clerk, and the validity of an exercise of it does not depend upon the diligence of the clerk. Were it otherwise, the clerk would have it in his power to, either by carelessness or design, defeat any of the actions of the board."

3. Signing Record. — Goddard *v.* Stockman, 74 Ind. 400, where the court said: "But conceding the propriety and necessity of the signatures of commissioners, we are clear that unsigned orders of the board are not void, and, when properly signed within any reasonable time, become valid from the time when made."

The omission of the signatures of the chairman and clerk to the record of the proceedings of the board of supervisors may be supplied by them during their then term of office. Boyce *v.* Auditor-Gen., 90 Mich. 314.

And the effect is to make the minutes valid as if originally and regularly made at the related term. Beck *v.* Allen, 58 Miss. 143.

4. People *v.* Eureka Lake, etc., Co., 48 Cal. 143; San Diego County *v.* Seifert, 97 Cal. 594. To the same effect, see Arthur *v.* Adam, 49 Miss. 404.

Signing and Attestation of Original Ordinance Essential. — The signing and attesting of an ordinance by the chairman and clerk of the board of supervisors, as required by the California County Government Act, are necessary

Amendment of Records. — A board of county commissioners has the same power as any court to amend its records according to the truth, and upon such evidence as the board, in its discretion, may deem sufficient.[1]

3. Control of Proceedings — Rules. — A board of commissioners has power to make reasonable rules and regulations for the government of its proceedings, and, in the absence of proof to the contrary, it would be presumed that business before the board was conducted in conformity with such rules.[2]

IV. COMPENSATION. — The compensation of county supervisors or commissioners is usually fixed by state statute, and can only be allowed in accordance with the provisions of the act.[3]

to render it valid. San Diego County *v.* Seifert, 97 Cal. 594.

Statute Held to Necessitate Signing. — Under a statute of *Kansas*, which gave the county commissioners authority to make certain orders as to the confinement of stock "under their hands, and cause the same to be entered upon the record of their proceedings," it was held that such order subscribed "By order of the Board of Commissioners, A. G. M. chairman," was not subscribed under their hands in accordance with the statute. To satisfy the law, the order should have been attested by the signatures of a majority at least of the commissioners. Tinkham *v.* Greer, 11 Kan. 299.

1. Power to Amend Records. — Commissioners' Ct. *v.* Hearne, 59 Ala. 371; Dresden *v.* Lincoln County, 62 Me. 365; Lapan *v.* Cumberland County, 65 Me. 160; Levant *v.* Penobscot County, 67 Me. 429; Gloucester *v.* Essex County, 116 Mass. 579; State *v.* Central Pac. R. Co., 17 Nev. 259.

But a clerk of the board cannot be compelled to correct the record. Wigginton *v.* Markley, 52 Cal. 411.

County commissioners have no right to amend their record on a petition for land damages by inserting therein as parties names not embraced in the petition. Littlefield *v.* Boston, etc., R. Co., 65 Me. 248.

2. Power to Control Proceedings. — Higgins *v.* Curtis, 39 Kan. 283; Masters *v.* McHolland, 12 Kan. 17; Hundley *v.* Finney County, 2 Kan. App. 41.

Thus, a reconsideration by the board of its action taken on a former day of the same session on any matter before the board, will be presumed to have been done in conformity with its rules and regulations. Higgins *v.* Curtis, 39 Kan. 283.

Action Presumed Regular. — The presumption is in favor of the regularity of the proceedings of a board of commissioners. Clay County *v.* Markle, 46 Ind. 96; Ryder *v.* Horsting, 130 Ind. 104.

Rules of Evidence. — When the statute fails to prescribe any particular mode of procedure for the board when exercising jurisdiction conferred upon it, the board is not confined to legal rules of evidence in determining facts upon which it is required to act. People *v.* Mays, 17 Ill. App. 361.

The Clerk of a Board of Supervisors has no authority to direct or control any of its proceedings. Matter of Gardner, 68 N. Y. 467.

Limit of Power over Proceedings. — A board of county supervisors cannot be restrained in its methods in the disposition of a claim, if the claimant has not been deprived thereby of an opportunity to be heard. Vincent *v.* Mecosta County, 52 Mich. 340; Gager *v.* Chippewa County, 47 Mich. 167.

A board of county commissioners acting in respect to a ministerial matter affecting the interests of the county cannot, by a system of rules of its own making, preclude the reconsideration and correction of its erroneous action, whether resulting from haste and want of consideration or from intentional wrong. McCord *v.* Pike, 121 Ill. 288, 2 Am. St. Rep. 85.

The rules of the board, in order to be sufficient to exempt the county from expenses incurred contrary thereto, must be reasonable. Fayette County *v.* Morton, 53 Ill. App. 552.

The board of county supervisors has no authority by resolution or ordinance to make anything a condition precedent to the duty of auditing accounts in regard to matters which are by statute expressly made a county charge. But it appears that a different rule obtains in regard to matters which are not so expressly made a county charge by statute. People *v.* New York County, 21 How. Pr. (N. Y. Supreme Ct.) 322, *affirmed* in 22 How. Pr. (N. Y.) 71.

3. Dependent on Statute. — A member of a board of county commissioners or supervisors, where compensation is not specifically provided, is not entitled to any remuneration for services rendered the county except *per diem* and mileage as fixed by the statute. Andrews *v.* Pratt, 44 Cal. 309; Howes *v.* Abbott, 78 Cal. 270; Cook County *v.* Wren, 43 Ill. App. 388; Richmond County *v.* Ellis, 59 N. Y. 620.

Under some statutes fixing the commissioners' compensation at a *per diem* allowance, it seems that the compensation can only be recovered for attendance at regular meetings of the board, and is not recoverable for attendance at special meetings. See McNeill *v.* Green, 75 N. Car. 329.

In *Idaho* the board is entitled to a *per diem* only when acting as a board actually in session and transacting county business. Fisher *v.* Bannock County, (Idaho 1895) 39 Pac. Rep. 552; Rankin *v.* Jauman, (Idaho 1895) 39 Pac. Rep. 1111.

Under the *Michigan* statute, a county supervisor may receive pay as a member of a committee while the board is in session, but cannot receive such compensation when the board is not in session. Ewing *v.* Ainger, 97 Mich. 381, 96 Mich. 587.

Statutory Limit of Compensation in Kansas — Extra Compensation for Certain Services. — The limitation of one hundred dollars, contained in the Kansas statute relative to the compensation

Auditing Accounts — Presumption of Regularity of Acts. — Where the compensation of county commissioners or supervisors is fixed at a certain *per diem* allowance for each day actually and necessarily employed in the discharge of their duties, the commissioners or supervisors are *prima facie* entitled to the allowance for each day employed by them in their duties, the presumption being in favor of their good faith and the correctness and regularity of their official acts. But the evidence of an abuse of their office for the purpose of unfairly increasing their emoluments may be left to the jury.[1]

V. Powers — 1. General Statement. — It has been said that these county boards have power to do whatever the political entity, the county, might do if capable of rational action, except in respect to matters the cognizance of which is exclusively vested in some other officer or person, and that in an enlarged sense they are the guardians of the county, having the management and control of its financial interests.[2]

Dependent upon Statutory Provisions. — The judicial interpretation as to the powers vested in the county boards will, therefore, be found to be a construction of the powers of the county in so far as they may be vested in the commissioners or supervisors, and they will, of course, vary in different states, according to the distribution of county functions by acts of the legislature among them and the other county officers, so that any attempt at generalization is dangerous.

Ultra Vires Acts. — Where a resolution is passed, the effect of which does not in any way either enable the board of supervisors to discharge any duty imposed upon it by law, or aid it in looking after the affairs of the county and

of county commissioners, does not include the pay for services while attending meetings to equalize assessments to levy taxes or to canvass election returns. Additional compensation may be recovered in such cases. Burroughs *v.* Norton County, 29 Kan. 196; State *v.* Corning, 44 Kan. 442.

Usage or Custom Cannot Enlarge the Compensation to which commissioners are entitled as against the plain provisions of the statute. Albright *v.* Bedford County, 106 Pa. St. 582.

Mileage. — For decisions as to how far commissioners or supervisors are entitled to an allowance for mileage under particular statutes, see Howes *v.* Abbott, 78 Cal. 270; Rankin *v.* Jauman, (Idaho 1895) 39 Pac. Rep. 1111; Mansel *v.* Nicely, 175 Pa. St. 367; State *v.* Norris, 111 N. Car. 652; State *v.* Bemen, 15 Wash. 24.

1. Emoluments of Office — Per Diem. — Mansel *v.* Nicely, 175 Pa. St. 367, where a county commissioner was held entitled to the *per diem* allowance fixed by statute (1 Bright. Purd. Pa. Dig., p. 449, § 5), for each of the three hundred and six days during which he attended at his office, the court saying: "The presence at their office of one or all of the commissioners may be important when daily sessions are not necessary. It is their duty to keep their office open and be in attendance whenever it is necessary, and the necessity is not to be determined alone by the hours of actual labor or the amount of work done. The convenience of the public who have business with the office is to be considered, and the commissioners should be in attendance whenever their presence is required by the reasonable demands of public business. The duties of the commissioners cannot be delegated to their clerk. He is a clerk merely, with duties fixed by act of assembly. It is difficult to determine exactly where the line should be drawn to secure the proper service of the interest and convenience of the public on the one hand and to guard against an abuse of the office on the other. Each case must depend upon its own facts, and the necessity for attendance must be left largely to the discretion of the commissioners themselves. They are public officers, presumably acting in good faith, and the presumption is in favor of the correctness and regularity of all their official acts. Their conduct and their discretion as to attendance are subject to review on an appeal such as this, and where there is any evidence of an abuse for the purpose of unfairly increasing the emoluments of their office, the question is for the jury. But to carry the question to the jury there must be some basis for a finding more substantial than a mere conjecture whether public officers could have done their work in a less number of days."

2. Shanklin *v.* Madison County, 21 Ohio St. 575.

The Board of Commissioners of a County Is a Creature of the Statute, and is vested with, and possessed of, just such powers, rights, privileges and franchises, corporate, judicial, legislative and ministerial, as the statute has conferred upon it, and such as are clearly and necessarily implied to enable it to carry out and accomplish the objects and purposes of its creation Grant County *v.* Bradford, 72 Ind. 455. See, to the same effect, Modoc County *v.* Spencer, 103 Cal. 498; Cook County *v.* Gilbert, 146 Ill. 268, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 389; O'Brian *v.* Baltimore County, 51 Md. 15; Sterling *v.* West Feliciana Parish, 26 La Ann. 59; Jefferson County *v.* Grafton, (Miss. 1897) 21 So. Rep. 247, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), pp. 375, 379.

in protecting its interests, the resolution is void.[1]

Commissioners Not Liable as Individuals for Ultra Vires Acts. — Where a board of supervisors or commissioners makes a contract *ultra vires*, the other contracting party cannot hold the members of the board responsible on the ground that they are agents acting without authority.[2]

Ratification of Unauthorized Acts. — Where a board of commissioners has authority to do certain acts in the first instance, it has authority to certify and confirm the unauthorized acts of a committee of its members in regard to such matters.[3]

2. Delegation of Powers. — It is an elementary rule that when authority is conferred on public officials to do acts which involve the exercise of judgment and discretion, the execution of that authority cannot be delegated to others,[4] and this principle is applicable to boards of county supervisors or commissioners.[5]

Limitations to Rule Against Delegation. — But the usual limitation to the rule against the delegation of power[6] obtains, and the board may delegate purely

1. Faulkner *v.* Morey, 22 Hun (N. Y.) 379; Atty.-Gen. *v.* Bay County, 34 Mich. 46; Henderson *v.* Sibley County, 28 Minn. 515. See also Jefferson County *v.* Grafton, (Miss. 1897) 21 So. Rep. 247, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 375, 379.

In *Michigan* the supervisors of a county have no authority by resolution to vote the sheriff a salary in lieu of all statutory fees for services rendered the county and include such salary in the yearly tax levy. Hewitt *v.* White, 78 Mich. 117.

Performing Statutory Functions of Other Officials. — Where, by statute, certain duties are conferred upon specially designated officials, the county supervisors or commissioners have no authority, express or implied, in the premises, and any contract entered into by them in respect thereto is *ultra vires* and void. House *v.* Los Angeles County, 104 Cal. 73; El Dorado County *v.* Meiss, 100 Cal. 268; Smith *v.* Los Angeles County, 99 Cal. 628; People *v.* Johnson, 95 Cal. 472.

Enjoining Execution of Unauthorized Contract. — A court of equity has no power to enjoin the board of county commissioners from passing a resolution that an illegal contract be made by the county, where no irremediable injury is likely to ensue therefrom, but it may enjoin the execution of such a contract when made. Stevens *v.* St. Mary's Training School, 144 Ill. 336. See also State *v.* Marion County, 21 Kan. 419, 437.

2. Huthsing *v.* Bousquet, 7 Fed. Rep. 833; Thomas *v.* Wilton, 40 Ohio St. 516. See also the title PUBLIC OFFICERS.

3. Hark *v.* Gladwell, 49 Wis. 172.

What Amounts to a Ratification. — In Hark *v.* Gladwell, 49 Wis. 172, it was held that a resolution that the report of the "road committee be accepted and the committee discharged," was obviously intended to adopt the report of the committee and to confirm its acts, and was equivalent to giving the committee full authority to perform such acts; the court, by Cole, J., saying: "It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law; therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body."

The Acts of an Unauthorized Agent may be ratified. Leon County *v.* Vann, 86 Tex. 707.

4. See the title AGENCY, vol. 1, p. 974.

5. People *v.* St. Clair County, 15 Mich. 85; Mansel *v.* Nicely, 175 Pa. St. 367. See also Miller *v.* Embree, 88 Ind. 133.

Power to Commence, Control, and Compromise Actions Cannot Be Delegated. — In *California* it has been held that a board of supervisors has no authority to delegate to others the power to determine whether to commence a suit in the name of the county and to select and employ attorneys to commence and prosecute such suit, nor to advocate its control by the prosecution of such a suit, nor to make its compromise or settlement dependent upon the written consent of strangers, such powers being in the nature of public trusts conferred upon the board for the public benefit. Scollay *v.* Butte County, 67 Cal. 249. See also Looscan *v.* Harris County, 58 Tex. 511.

Locating and Erecting Public Institution. — In People *v.* St. Lawrence County, 25 Hun (N. Y.) 131, it was held that the attempt of a board of supervisors to delegate to a committee of its members the right to locate and purchase a site for a "children's home," and to incur indebtedness upon behalf of the county therefor, also in the erection of a building on the site chosen, was without sanction of law and void; the court saying: "Nothing is better settled, both on principle and authority, than this, that rights, privileges, and duties conferred or imposed upon public officers and public bodies in the aggregate cannot be delegated. Especially is this so as to subjects and matters where judgment and discretion are to be invoked and exercised."

The Manner of Giving Notice of an Election under an order of a board of supervisors, providing for the submission to the voters of the question of the incorporation of a proposed municipal corporation, and the length of time that the notice is to be published or posted, are matters committed to the discretion of the board, and cannot be delegated to the discretion of a clerk. People *v.* Linden, 107 Cal. 94.

6. See the title AGENCY, vol. 1, p. 978.

ministerial and executive duties, the discharge of which does not call for the exercise of reason or discretion.[1]

3. Power to Contract — *a.* GENERAL DOCTRINE. — A board of county commissioners is confined in making contracts to the power expressly granted to it by statute, and to the implied powers incidental and necessary to the execution of such expressed powers and the performance of the duties enjoined upon it.[2]

1. Ministerial Duties May Be Delegated. — House *v.* Los Angeles County, 104 Cal. 73; People *v.* Rensselaer County, 52 Hun (N. Y.) 446, *affirmed* 119 N. Y. 636. See also Sexton *v.* Cook County, 114 Ill. 174; Rice *v.* Plymouth County, 43 Iowa 136; Plummer *v.* Kennedy, 72 Mich. 295.

In People *v.* Rensselaer County, 52 Hun (N. Y.) 446, the Supreme Court of New York, by Landon, J., said: "I incline to the opinion that, in so far as such a body exercises governmental functions, such as the imposition of a tax or the adoption or ordering of any act in the nature of a governmental or administrative regulation, the whole body must act; but in so far as it is a mere business corporation, it may delegate the execution of its mechanical and physical work to agents, like any other corporation. I should think the building of a board fence around a farm lot such a piece of business." And in the same opinion it is said: "It is not easy to draw the exact line between those duties which are, by the statute, committed to the judgment and discretion of the entire board, and whose performance therefore cannot be delegated to a committee or agent, and those purely ministerial and executive duties which the board may delegate to a committee or even to an employee or servant. Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385, and Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 105, show that acts which embrace the plan of a local improvement to result in a tax paid by the owners of property along the line of the improvement cannot be delegated. Edwards *v.* Watertown, 24 Hun (N. Y.) 428, is to the effect that a common council may authorize a committee to buy the necessary furniture for its chamber."

Collecting and Collating Facts by Committee. — It is competent for the board of county supervisors, when convened to determine whether or not an election has been demanded by the required board of voters, to appoint a committee to collect and collate the required statutory facts. Giddings *v.* Wells, 99 Mich. 221, where the court said: "It is urged that this reference was the delegation of a duty which was by the statute enjoined upon the board. There would be some force in the contention if no action had been taken upon the report by the board, or if the board had delegated the matter of the determination to the committee, and empowered such committee to do some act predicated upon the finding so made. The statute does not take away the power of the board to collect and collate facts through committees appointed by it."

Florida — Delegating Power to Arrange for Utilizing Labor of Prisoners. — A resolution of the board of county commissioners authorizing two of its members to take such action as, in their judgment, is necessary to utilize the labor of county prisoners on public works, is not an illegal delegation of the board's powers under a statute authorizing a board so to employ prisoners. Holland *v.* State, 23 Fla. 123. In its opinion the court said: "It is apparent that the commissioners had determined to enforce the statute, and had not left or delegated the decision of this point to any other authority. The details of carrying out this determination were properly assigned to a committee whose action is, of course, not beyond the supervision or control of the board."

Agent to Negotiate Bonds. — A board of commissioners may employ an agent to negotiate bonds for the county. Cushman *v.* Carver County, 19 Minn. 295. See also Nolan County *v.* Simpson, 74 Tex. 218.

To Borrow Money. — And in contracting indebtedness for the county, the board may act by agent. Miller *v.* Dearborn County, 66 Ind. 162.

Authority Necessary — Member of Board. — An agent can bind the board only in the measure in which authority is conferred on him by the board; nor has a member of the board any greater authority than any other agent in this respect. He can act only as authorized. Rice *v.* Plymouth County, 43 Iowa 136. See also Sexton *v.* Cook County, 114 Ill. 174.

2. Contracts — *California.* — Keller *v.* Hyde, 20 Cal. 594; Smith *v.* Los Angeles County, 99 Cal. 628.

Illinois. — Franklin County *v.* Layman, 145 Ill. 139; Sexton *v.* Cook County, 114 Ill. 174.

Indiana. — Burnett *v.* Abbott, 51 Ind. 254; Hight *v.* Monroe County, 68 Ind. 575; Hoffman *v.* Lake County, 96 Ind. 84; Henry County *v.* Gillies, 138 Ind. 667; Tippecanoe County *v.* Barnes, 123 Ind. 403; Lee *v.* Huntington County, 124 Ind. 214.

Kansas. — Morrill *v.* Douglass, 14 Kan. 293, and note.

Minnesota. — Mitchell *v.* St. Louis County, 24 Minn. 459.

Missouri. — Sturgeon *v.* Hampton, 88 Mo. 203; Alderson *v.* St. Charles County, 6 Mo. App. 420.

Nebraska. — State *v.* Saline County, 19 Neb. 253; State *v.* Lancaster County, 20 Neb. 419.

New York. — Hall *v.* Lauderdale, 46 N. Y. 70.

South Carolina. — Ostendorff *v.* Charleston County, 14 S. Car. 403.

Wisconsin. — Hyde *v.* Kenosha County, 43 Wis. 129.

May Rescind Before Acceptance. — A resolution of a board of county commissioners in the nature of an offer to compromise a claim against the county may be retracted or rescinded by the board at any time before it is acted upon and accepted. It only becomes binding as a contract upon acceptance. People *v.* Klokke, 92 Ill. 134. See also Welch *v.*

Contracts to Lowest Responsible Bidder. — Many statutes dealing with the powers of commissioners in awarding certain classes of contracts, require that the contracts are to be awarded to the lowest responsible bidder who furnishes satisfactory security. The provisions of these statutes must be strictly followed.[1]

Cannot Contract with Themselves. — It has been held upon principles of public policy that a board of commissioners can make no contracts with themselves, nor can they make an allowance to a member of the board for services voluntarily rendered or things voluntarily furnished by him to the county.[2]

Bowen, 103 Ind. 252; People *v.* Mills, 32 Hun (N. Y.) 459; People *v.* Baker, 29 Barb. (N. Y.) 81; People *v.* Schenectady County, 35 Barb. (N. Y.) 408; Makemson *v.* Kauffman, 35 Ohio St. 444.

Beneficial Labor Performed for County. — While it is true that the powers of a board of commissioners are entirely statutory, still the law is not to be construed in such a manner as to deprive the county board of the power to pay a reasonable compensation for beneficial labor performed for the county at its request. But, on the other hand, county commissioners have no authority by a speculative contract with a person acting as an agent of the county to divert the funds belonging to the county from their lawful purposes. Thus, where an attorney offered his services to secure the refunding at a lower rate of interest of county bonds payable "on or before" certain dates, "for one-sixth part of the sum saved," and the commissioners, being ignorant that the bonds were payable "before" the dates named, accepted his proposition, and the attorney thereupon expended his own money and time in securing the refunding of such bonds, it was held that he was entitled to the repayment of the money expended by him and to a fair compensation for the labor actually performed, but that he was not entitled to enforce his contract against the county in other particulars. State *v.* Lancaster County, 20 Neb. 419. See also Platte County *v.* Gerrard, 12 Neb. 244.

And in Crump *v.* Colfax County, 52 Miss. 107, it was held that while the board of supervisors could bind the county by express contract only when entered of record, yet if the county under a verbal action or contract uses the property of another, it will be bound, as by an implied contract, upon the principle of *quantum valebat*.

Contracts for Indexing Records. — A board of county commissioners has power to contract for indexing the public records of the county, although not expressly authorized to do so by statute. Hoffman *v.* Lake County, 96 Ind. 84; Tippecanoe County *v.* Mitchell, 131 Ind. 370.

Where the board of county commissioners purchases the right to use a patent system of indexing public records in the register's office, this is a proper county charge which may be audited as such. The board may also purchase or take any assignment of such patent to secure the county forever from having to pay over again for the use of the invention. People *v.* Earle, 47 How. Pr. (N. Y. C. Pl.) 368.

Purchasing Stationery. — The power to purchase stationery for the use of the county is expressly conferred upon the board of commissioners by the statutes of Indiana, and in making the purchase the board must strictly comply with the requirements of the statute. Henry County *v.* Gillies, 138 Ind. 667.

Contracts Necessary for Protection of Property. — The power to make all contracts necessary to the protection and perfection of the title to property is incidental to the power to acquire and hold it. Thus a board of supervisors, vested with the title to county lands, was authorized to make a contract with any individual, looking to the establishment of the county's title to certain lands, and to agree to give him as compensation for his services a certain proportion of the lands recovered, or an indemnity in lieu thereof. Allen *v.* Cerro Gordo County, 34 Iowa 54.

Presumption of Validity of Contract — Burden of Proof. — The presumption is in favor of the validity and legal execution of a contract entered into by a board of commissioners or supervisors, and one who seeks to impeach such a contract has the burden of showing the facts rendering it invalid. Hamilton County *v.* Noyes, 35 Ohio St. 201.

1. Connolly *v.* Chosen Freeholders, 57 N. J. L. 286; State *v.* Yeatman, 22 Ohio St. 546. See also *infra*, this section, *As to Erection and Management of County Buildings*.

2. **Commissioners Contracting with Themselves.** — In Com. *v.* Philadelphia County, 2 S. & R. (Pa.) 193, it was held that a sale of chairs by a member of the board of county commissioners to the county for county purposes was void under an act which made it a misdemeanor in office if any county commissioner should receive or hold any contract, or be either directly or indirectly interested in the management of any public work or improvement by the authority of the board of commissioners. In answer to a contention that the prohibition of this act was confined to public works, the court said: "The meaning of the law, where the words are ambiguous, may be best known by considering the mischief which it was intended to prevent. Now it is certain that there is danger in permitting a body of men intrusted with the public money to purchase from themselves the articles required for the public service. * * * The limiting it to the management of superintendents of works would go but a small way in preventing mischief, for then the various contracts for furnishing building materials would be open. Nor is there any reason for the prohibiting of contracts with regard to public works, which applies not with equal force to the purchase of furniture. The commissioners are to be prevented from contracting with themselves; secure that, and the object of the law is attained." See also Beebe *v.* Sullivan County, 64 Hun (N. Y.) 377; and the title AGENCY, vol. 1, p. 1075.

In Waymire *v.* Powell, 105 Ind. 328, it was

Reward for Arrest of Criminal or Return of Property. — In the absence of statutory authority, a board of county commissioners or supervisors has no power to offer a reward for the arrest of persons charged with crime.[1] But the board being charged with the management and control of the county funds, it has authority to offer a reward for the recovery of property stolen from the county.[2]

b. To Create Debts and Borrow Money. — Except as provided by law, county commissioners or supervisors have no power to create a debt or liability on the part of the county,[3] but such power may be inferred so far as is necessary for the carrying out of express powers conferred upon the board,[4] or may be specially conferred by the legislature,[5] sometimes subject to the provision that the plan must be submitted to the voters of the county for approval.[6]

declared that a board of commissioners can make no contract of any kind with one of their own members, and there can be no such thing as an allowance to a county commissioner for services voluntarily rendered or things voluntarily furnished by a member of the board. "Upon every claim that is presented for allowance," said the court, "the county is entitled to the unbiased judgment of its board of commissioners. The law does not yet recognize it as a fact that members of boards of commissioners or of any other tribunal can sit as judges in their own cases." To the same effect is Waymire *v.* Jasper County, 105 Ind. 600. See also the title Judge.

1. Huthsing *v.* Bousquet, 7 Fed. Rep. 833; Hawk *v.* Marion County, 48 Iowa 472. See also Hanger *v.* Des Moines, 52 Iowa 193, 35 Am. Rep. 266; Crawford County *v.* Spenney, 21 Ill. 288; Gale *v.* South Berwick, 51 Me. 174; Stamp *v.* Cass County, 47 Mich. 330.

The law confers no power and enjoins no duty upon the board of commissioners of a county to aid in the arrest, prosecution, or conviction of a person charged with the commission of crime, either by an offer of reward, or by the employment of detective or professional skill. Grant County *v.* Bradford, 72 Ind. 455.

Municipal bodies, such as county boards, are sometimes given such powers, either expressly or by necessary implication. Butler *v.* McLean County, 32 Ill. App. 397; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; York *v.* Forscht, 23 Pa. St. 391. See also Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374.

2. Hawk *v.* Marion County, 48 Iowa 472.

3. **Borrowing Money.** — Wells *v.* Supervisors, 102 U. S. 625; Foster *v.* Coleman, 10 Cal. 278. See also Burnett *v.* Maloney, 97 Tenn. 713, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.) 382.

In Parker *v.* Saratoga County, 106 N. Y. 410, Andrews, J., said: "The contention that boards of supervisors have no inherent power to borrow money or to issue negotiable paper accords with the general understanding and with the tenor of the adjudged cases and the course of legislation, which presupposes the necessity of express legislative sanction in order to justify the exercise of this authority." *Compare* Lewis *v.* Sherman County, 5 Fed. Rep. 269.

A county court in *Missouri* cannot contract a debt for any purpose in excess of its revenues for the current year. Book *v.* Earl, 87 Mo. 246.

Cannot Draw Bills of Exchange to Pay Claimant. — A board of supervisors cannot draw bills of exchange for the payment of a claim, but can merely certify the evidence of the auditing of the board. Chemung Canal Bank *v.* Chemung County, 5 Den. (N. Y.) 517.

And as a committee of the board cannot do what the board could not do, a committee has no power to draw a draft upon the county treasurer to liquidate any indebtedness of the county. Rensselaer County *v.* Weed, 35 Barb. (N. Y.) 136.

Louisiana Police Juries Cannot Issue Negotiable Instruments. — The police juries of Louisiana have no authority to issue and put in circulation negotiable instruments of any kind. Sterling *v.* West Feliciana Parish, 26 La. Ann. 59; Flagg *v.* St. Charles Parish, 27 La. Ann. 319; Meng *v.* St. Charles Parish, 28 La. Ann. 192; Bertrand *v.* Vermilion Parish, 28 La. Ann. 588; Davis *v.* Caldwell Parish, 28 La. Ann. 860.

And where a method of raising money for the necessary expenses of the parish is provided by statute, namely, the levying of a tax, the police jury has no authority to issue negotiable instruments even for such necessary expenses. Sterling *v.* West Feliciana Parish, 26 La. Ann. 59.

Recognizing Existing Indebtedness. — An ordinance recognizing an existing demand against the parish is not within the rules restricting the powers of a police jury to create a debt or to bind the parish by negotiable instruments. Davis *v.* Caldwell Parish, 28 La. Ann. 860.

4. Thus, in *Georgia* it has been held that the power to make provision for the safe-keeping and employment of convicts excludes the right to use those means and incur those expenses which may be reasonably necessary for the execution of such power not exceeding the constitutional limit, and therefore the county commissioners may incur a debt (when too late to levy a tax) for the purchase of necessary tools or implements not exceeding the limit set by the constitution. Pennington *v.* Gammon, 67 Ga. 456.

Commissioner Lending Credit to County. — It is not fraud for a member of the board of commissioners to lend his personal credit to the county. Long *v.* Richmond County, 76 N. Car. 273.

5. See Hamilton County *v.* Cottingham, 56 Ind. 559; Hubbard *v.* Sadler, 104 N. Y. 223.

6. County commissioners have power, after

c. EMPLOYMENT OF COUNSEL. — A board of county commissioners may, in the exercise of their judgment or discretion, employ counsel other than their legally authorized representative in all matters in which the county, in its *quasi*-corporate capacity, has a direct interest.[1] But counsel so employed cannot act

a vote of the people in favor thereof, to borrow money to meet the current expenses of the county. Money thus raised for a specific purpose by a county treasurer cannot be diverted to any other purpose. Doty *v.* Ellsbree, 11 Kan. 209. See also Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6.

1. **Employing Counsel** — *Alabama.* — Jack *v.* Moore, 66 Ala. 184.

California. — Lassen County *v.* Shinn, 88 Cal. 510; Hornblower *v.* Duden, 35 Cal. 664; People *v.* Walters, 98 Cal. 138; Power *v.* May, 114 Cal. 207; Herrington *v.* Santa Clara County, 44 Cal. 496.

Idaho. — Meller *v.* Logan County, (Idaho 1894) 35 Pac. Rep. 712.

Illinois. — Gillett *v.* Logan County, 67 Ill. 256; Ottawa Gas Light, etc., Co. *v.* People, 138 Ill. 336; Franklin County *v.* Layman, 34 Ill. App. 606.

Indiana. — Stingley *v.* Nichols, 131 Ind. 214; Holman *v.* Robbins, 5 Ind. App. 436.

Iowa. — Whicher *v.* Cedar County, 1 Greene (Iowa) 217; Hopkins *v.* Clayton County, 32 Iowa 15; Taylor County *v.* Standley, 79 Iowa 666.

Missouri. — Thrasher *v.* Greene County, 87 Mo. 419.

Nevada. — Ellis *v.* Washoe County, 7 Nev. 291; Clarke *v.* Lyon County, 8 Nev. 181.

New York. — Gillespie *v.* Broas, 23 Barb. (N. Y.) 370; People *v.* Kingston, 101 N. Y. 82.

Ohio. — State *v.* Franklin County, 21 Ohio St. 648.

Oregon. — Taylor *v.* Umatilla County, 6 Oregon 394.

Pennsylvania. — Chester County *v.* Barber, 97 Pa. St. 455.

Texas. — City Nat. Bank *v.* Presidio County, (Tex. Civ. App. 1894) 26 S. W. Rep. 775.

Wisconsin. — Eagle River *v.* Oneida County, 86 Wis. 266.

See, *contra*, Clough *v.* Hart, 8 Kan. 487; Waters *v.* Trovillo, 47 Kan. 197; Cuming County *v.* Tate, 10 Neb. 193; Platte County *v.* Gerrard, 12 Neb. 244.

In *Kansas*, in the case of Thacher *v.* Jefferson County, 13 Kan. 182, it was held that a board of county commissioners had authority to employ an attorney other than the county attorney to defend a proceeding for a mandamus to compel the board to submit to the voters of the county the question whether stock should be subscribed in aid of a railroad.

Where a county attorney commences an action in the name of the state or in his own relation in the district court against the board of commissioners, and upon an adverse decision in the district court takes the case to an appellate court, the county board may make a legal and valid contract with an attorney to defend the case in the appellate court. Doster *v.* Howe, 28 Kan. 358.

In *Missouri* under the statute, a county court has no authority to employ a special attorney to attend to county business, when the circuit attorney resides within the county. Dixon *v.* Livingston County, 70 Mo. 239.

Services Performed Beyond the Limits of the County. — A county attorney who goes beyond the limits of his county to transact business for the county, at the instance and with the consent of the county board, may recover reasonable compensation for such services, in addition to his salary, although there is no express contract between the attorney and the board that he shall receive compensation therefor; the law implies a contract. Huffman *v.* Greenwood County, 23 Kan. 281; Leavenworth County *v.* Brewer, 9 Kan. 307. To the same effect see Videto *v.* Jackson County, 31 Mich. 116; Jones *v.* Morgan, 67 Cal. 308.

Employing Unnecessary Counsel. — In *Texas* a county commissioners' court has no authority to contract for the services of an attorney as its special adviser, and to defend all suits against the county for a fixed period at a given salary, payable out of the general fund, where it appears that such services were neither required nor performed. Grooms *v.* Atascosa County, (Tex. Civ. App. 1895) 32 S. W. Rep. 188.

In Merriam *v.* Barnum, 116 Cal. 619, it was held that a board of supervisors had no power to retain an attorney as special counsel "to attend this board on all matters pertaining to the reconstruction of the court-house, insurance matters, etc.," since the district attorney was by law the legal adviser of the board, and it was declared that the power of the board to employ counsel was limited to the employment of additional and special counsel in suits either already commenced or which, in the nature of things, would probably be commenced.

Employment on Implied Contract. — In order to bind a county on an implied contract to pay for services rendered by attorneys, in a suit against the county, it must appear that the board of supervisors, acting officially, knew that the attorneys were performing services in the suit, expecting compensation therefor, and that the board permitted them to proceed without objection. Fouke *v.* Jackson County, 84 Iowa 616.

Employing Attorney to Assist in Prosecution. — In *Wisconsin* the county board of supervisors has no authority to employ, at the expense of the county, an attorney to aid the district attorney in a criminal prosecution. Montgomery *v.* Jackson County, 22 Wis. 69.

So in *Indiana*. Hight *v.* Monroe County, 18 Ind. 575; Ripley County *v.* Ward, 69 Ind. 441.

And in *California*. Modoc County *v.* Spencer, 103 Cal. 498.

When Contract Cannot Be Rescinded. — Where county commissioners have made a written contract employing an attorney for the board for a certain period, at a stipulated price, to be paid quarterly, the board cannot afterwards rescind the contract without the consent of the attorney if he be without fault, and he may claim each quarter's pay as it becomes due. Tippecanoe County *v.* Everett, 51 Ind. 543.

for a period beyond the time when the board will, by operation of law, have to be reorganized.[1]

d. EMPLOYMENT OF PHYSICIAN. — County commissioners may employ a physician to attend the prisoners confined in the county jail and to care for poor persons who are a county charge.[2]

4. Powers in Respect to Certain Specific Matters — *a.* AS TO OTHER COUNTY OFFICERS — **Compensation.** — The statutes of the several states usually provide for the compensation to be paid to the various county officers, and when such compensation is so fixed the board of county commissioners has no power to increase or otherwise change it during the incumbent's term of office.[3]

Appointment and Removal. — Both in making an appointment to fill a vacancy in a county office and in removing an incumbent therefrom a board of county commissioners acts by authority of the statute alone, and must proceed in conformity thereto.[4]

1. Jay County *v.* Taylor, 123 Ind. 148. And the board of county commissioners cannot render the county liable for services rendered by an attorney, as such, by a contract with such attorney, or an employment of him, when such board is not in session according to law, or when the members of the board are acting successively and separately. Cass County *v.* Ross, 46 Ind. 404.

2. Physician. — Fayette County *v.* Chitwood, 8 Ind. 504; Decatur County *v.* Wheeldon, 15 Ind. 147; Rider *v.* Ashland County, 87 Wis. 160.

And the contract may be made with one physician only, if the board in the exercise of a reasonable discretion shall deem it sufficient. Bartholomew County *v.* Boynton, 30 Ind. 359.

But unless such services are authorized by the board, the county is not bound to pay therefor. Roberts *v.* Pottawatomie County, 10 Kan. 29. *Compare* Schmidt *v.* Stearns County, 34 Minn. 112.

However, a contract with a physician, when accepted by the board, cannot be rescinded, although extending for a period beyond the terms of the commissioners making it. Webb *v.* Spokane County, 9 Wash. 103.

In *Maryland*, under the act entitled "An Act for the protection of the people of the state from small-pox," it is made the duty of the county commissioners to pay its physician for every child vaccinated, whose guardians or parents are too poor to pay for the service, the fee prescribed by the act for the same. Allegany County *v.* McClintock, 60 Md. 559.

The employment of a physician by the board of county commissioners is an administrative duty and not the performance of a judicial act. Orange County *v.* Ritter, 90 Ind. 362.

And a county is not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful and incompetent physician. Summers *v.* Daviess County, 103 Ind. 262.

Medical Services. — Where the obligation of a board of county supervisors to pay for medical services is made to depend on the ability of the patient to pay for them himself, such pecuniary ability is a question of fact to be passed upon by the board. Farnsworth *v.* Kalkaska County, 56 Mich. 640.

3. Powers as to Compensation of Other County Officers. — Dougherty *v.* Austin, 94 Cal. 601; Orange County *v.* Harris, 97 Cal. 600; People *v.* El Dorado County, 11 Cal. 170; Jennings *v.* Fayette County, 97 Ill. 419; Briscoe *v.* Clark County, 95 Ill. 309; Hall *v.* Beveridge, 81 Ill. 128; Lee *v.* Huntington County, 124 Ind. 214; Keightley *v.* Putnam County, 42 Ind. 576; Fawcett *v.* Woodbury County, 55 Iowa 154; People *v.* Edmunds, 19 Barb. (N. Y.) 468; Spring *v.* Wait, 22 Hun (N. Y.) 441; Doherty *v.* Ransom County, 5 N. Dak. 1. See generally the title PUBLIC OFFICERS.

A board of county supervisors may be authorized by statute to fix the number and compensation of employees in a county officer's office. People *v.* Kings County, 38 Hun (N. Y.) 373; Vose *v.* Essex County, 145 Mass. 500; Nelson *v.* Troy, 11 Wash. 435; Ragcos *v.* Cuming County, 36 Neb. 375.

The Term "County Board" Used in the Illinois Constitution in the provision which requires such board to fix the compensation of all county officers is not confined to any particular body of persons, but belongs to that body which is intrusted with the transaction of the county business, and embraces as well county courts as boards of supervisors and courts of county commissioners. Hughes *v.* People, 82 Ill. 78; Broadwell *v.* People, 76 Ill. 554.

The county board of Cook county is alone invested with the power to fix the compensation of its own members. Wulff *v.* Aldrich, 124 Ill. 591.

In Illinois a board of supervisors has no power to appropriate any portion of the county funds to the use or benefit of the circuit judge as a compensation to him in that capacity. Perry *v.* Kinnear, 42 Ill. 160; Beauchamp *v.* Kankakee County, 45 Ill. 274.

4. Hedley *v.* Franklin County, 4 Blackf. (Ind.) 116; State *v.* Walker, 30 Neb. 501; Rose *v.* Knox County, 50 Me. 243.

In Com. *v.* Philadelphia County, 5 Rawle (Pa.) 75, it was held that the county commissioners had power to inquire into the irregularity of a ward election, and in the case of a failure to elect might appoint an assessor, if any vacancy in such office occurred.

Appointment by Drawing Cuts Illegal. — Where a board of county commissioners appointed a county treasurer, by drawing cuts to decide which of two of them should give up his nomination to the other, the appointment was held to be illegal. Com. *v.* County Com'rs, 5 Binn. (Pa.) 534.

Appointment by Commissioner Whose Term of Office Has Expired, Invalid. — In People *v.* Reid,

Vacancy Cannot Be Created. — However, a vacancy cannot be created; but when such vacancy has occurred, the board may declare its existence and make an appointment to supply it, as prescribed by the statute.[1]

b. As to County Lands — **Sale and Conveyance.** — A board of county commissioners may sell and convey the lands of the county, not required for public use, and in such manner as may be deemed best, only when fully authorized

11 Colo. 141, it was held that an appointment to fill a vacancy in the office of county treasurer, made by the vote of a county commissioner, whose term of office expired at midnight the night before, was invalid.

The President Pro Tempore of a board of county supervisors is a "county authority" within the meaning of the constitution, which authorizes the legislature to confer the power to appoint county officers upon "county authorities." Matter of Carboy, 27 Hun (N. Y.) 82.

Failure to Qualify. — Where a person appointed by the board of county commissioners to the office of collector failed to qualify, it was held that the board had authority under the statute to reappoint him. Pumphrey *v.* State, 17 Md. 57.

Appointee Refusing or Neglecting to Give Bonds. — See Flatan *v.* State, 56 Tex. 93.

No Authority Over Independent County Officer. — A board of county commissioners has no authority over an independent county officer. People *v.* Nash, 3 Hun (N. Y.) 538; Meller *v.* Logan County, (Idaho 1894) 35 Pac. Rep. 712.

In Halbert *v.* State, 22 Ind. 125, where the county treasurer sought to avoid liability for money stolen from his safe, on the ground that he had complied with an order of the commissioners directing him to keep it in the safe, it was held that his compliance with the order did not exonerate him.

In *Nebraska*, in counties under township organization, the board of supervisors has authority to hear and determine complaints against county officers. State *v.* Saline County, 18 Neb. 422.

Illustrations of Removal. — In *Wisconsin*, a board of county supervisors, by a two-thirds vote, may remove the clerk of the board "when in their opinion he is incompetent to execute properly the duties of his office, or when on charges and evidence it shall appear to said board that he has been guilty of official misconduct or habitual or wilful neglect of duty, if in the opinion of said board such misconduct or habitual or wilful neglect shall be a sufficient cause for removal." It was held that this statute gave the board the widest judicial discretion, which would not be revised except in the clearest case of abuse. State *v.* Prince, 45 Wis. 610.

Under the statute, when the board of county supervisors has removed the inspector of the house of correction, signing in writing upon the minutes any of the grounds of removal there mentioned, its decision is final. State *v.* McGarry, 21 Wis. 496.

In *Iowa*, under the constitution, a board of county supervisors has no power to remove from office, at its pleasure, one whom it has appointed to fill a vacancy occurring in the office of sheriff of the county. State *v.* Chatburn, 63 Iowa 659, 50 Am. Rep. 760.

In *Michigan*, a board of supervisors may under the statute remove an officer appointed by it, on charges preferred by the board or its chairman, and after notice of the hearing and a copy of the charges has been delivered to the officer and full opportunity has been given him in defense. Gager *v.* Chippewa County, 47 Mich. 167.

In *Illinois*, a removal by a board of county commissioners from office, simply on the report of a committee appointed to investigate the charges, is valid as against a collateral attack, it being within the discretion of the board as to the mode of procedure by which to procure the evidence of the facts, and not subject to review by the courts. People *v.* Mays, 117 Ill. 257.

In *Texas*, a county commissioners' court may abolish the office of county superintendent of public instruction, such power being expressly conferred upon it by statute. Stanfield *v.* State, 83 Tex. 317. See also Poe *v.* State, 72 Tex. 625.

In *Louisiana*, the police jury has power to remove a treasurer appointed by it. Richard *v.* Rousseau, 35 La. Ann. 933.

Order of Removal — Recital of Statute. — Where, in accordance with authority conferred by statute, a county board, by resolution, removes an official from office, it is not necessary that the board should recite in its record the cause of the removal and the precise words of the statute. People *v.* Mays, 17 Ill. App. 361.

See generally the title Public Officers.

When Payment of Compensation Discretionary. — When the payment of fees or compensation is by statute made discretionary with the board of commissioners, their decision in respect thereto is final, and will not be disturbed by a higher tribunal. Arapahoe County *v.* Graham, 4 Colo. 202; Vigo County *v.* Davis, 136 Ind. 503.

Allowance to De Facto Officer. — A board of county supervisors is justified in paying the salary of a *de facto* officer where the board has no notice of an adverse claim. Parker *v.* Dakota County, 4 Minn. 59.

1. Creating Vacancy Ultra Vires. — People *v.* Ward, 107 Cal. 236; Pueblo County *v.* Smith, 22 Colo. 534; Nooe *v.* Bradley, 3 Blackf. (Ind.) 158; Hedley *v.* Franklin County, 4 Blackf. (Ind.) 116; Knox County *v.* Johnson, 124 Ind. 145; State *v.* Sheldon, 10 Neb. 452.

In McNeill *v.* Green, 75 N. Car. 329, it was held, however, that it is not only the right but the duty of the commissioners to declare the office of the sheriff vacant and to make an appointment for the unexpired term whenever the incumbent is found to be in arrears in his statement of the public tax, or when he takes no notice whatever of the summons to appear before them on the day appointed and justify or renew his official bond.

and empowered by statute so to do.[1] But power to sell is not power to mortgage.[2]

Purchase. — Subject to statutory restriction the board may purchase land for the use of the county. This power is commonly exercised in acquiring lands for the public purposes of the county, and in cases of lands sold at tax sale and under execution on mortgages given to secure the county debts.[3]

1. Selling County Lands — Power Depends on Statute. — Martin *v.* Townsend, 32 Fla. 318.

In Platter *v.* Elkhart County, 103 Ind. 360, Elliott, J., says: "The board of county commissioners possess the usual powers of a public corporation over the property and institutions of a county, and it cannot be doubted that the logical sequence is that the board may sell property when in its sound judgment it is no longer required, for a county purpose."

In *Nebraska*, the public grounds of any county cannot be sold by the board of county commissioners, without first submitting the question to the electors. Douglas County *v.* Keller, 43 Neb. 635.

In *Virginia*, a board of county supervisors has implied power to sell the lands of the county when, in the exercise of its powers, such a course is deemed expedient. Culpeper *v.* Gorrell, 20 Gratt. (Va.) 484.

Sale of School Lands. — In *Texas*, the county commissioners, after fixing the price upon the school lands, should allow actual settlers the option of the purchase. A purchaser, other than an actual settler, takes title subject to the rights of such settler to buy on the terms fixed by the county commissioners in the sale. Perego *v.* White, 77 Tex. 196.

In *Washington*, under the statutes regulating the appraisal and sale of school lands by boards of county commissioners, the commissioners are not required to act in their ordinary capacity, but as appraising and selling agents of the state. Wilkes *v.* Hunt, 4 Wash. 100.

And where a board of county commissioners is required to make sales of school lands at public auction, and to provide payment for its services and necessary expenses, the board cannot include in the expense account the commission to professional auctioneers employed by it to cry the sales. Bickerton *v.* Grimes, 8 Wash. 451.

Delegating Power to Sell. — In Platter *v.* Elkhart County, 103 Ind. 360, it was held that a board of county commissioners might authorize a county auditor to sell property belonging to the board.

Under the statute of *Illinois*, a board of county commissioners may authorize any county officer or member of the board to execute and deliver all deeds necessary in selling real estate belonging to the county, and, in the absence of fraud or collusion, such deeds are binding on the county. McCord *v.* Pike, 121 Ill. 288, 2 Am. St. Rep. 85.

But a mere recital in a deed conveying county property, that the county clerk was authorized to execute it by a resolution passed by the board of county commissioners on a certain day, is not *per se* evidence of that fact. The resolution itself should be introduced. Ward *v.* Necedah Lumber Co., 70 Wis. 445.

A deed purporting to be "between the county commissioners of the county of Peoria and state of Illinois, of the first part, and James C. Armstrong of the second part," etc., signed and sealed by three individuals, and acknowledged before the county commissioners' clerk in open court, who certified under seal of the court that they were the "legal acting commissioners," was held to be the deed of the individuals in their official capacity, and as such admissible in evidence. Bestor *v.* Powell, 7 Ill. 119.

Cannot Accept Commission. — A county commissioner cannot demand or accept a commission or profit for selling land for the county, and this whether he performs his duties as commissioner with or without compensation. Dorsett *v.* Garrard, 85 Ga. 734.

Exchanging Lands. — County boards of supervisors may be empowered by statute to exchange lands and tax certificates of the county for stocks of railroad companies, for the purpose of aiding the construction of roads extending into their respective counties. Single *v.* Marathon County, 38 Wis. 363.

Giving Away Lands. — A county board of supervisors has no right to give away any land or money of the county, or to dispose of such property for a sum less than its known value or than is offered for the same. McCord *v.* Pike, 121 Ill. 288, 2 Am. St. Rep. 85.

Disposing of Lands Taken by Devise. — A county may take land by devise, and where the devise is made to the county by name, without limiting the uses of the property, it rests in the board of commissioners for the use of the county, and may be appropriated by them to any and all authorized county purposes. Carder *v.* Fayette County, 16 Ohio St. 355; Christy *v.* Ashtabula County, 41 Ohio St. 711.

2. Mortgage. — Vaughn *v.* Forsyth County, 118 N. Car. 636. See also the title AGENCY, vol. 1, p. 1010.

In *Missouri*, the county court has power to release a mortgage taken as security for school funds, upon receiving in its place a mortgage upon other lands, provided the change can be made without detriment to the fund. Lafayette County *v.* Hixon, 69 Mo. 581; Saline County *v.* Buie, 65 Mo. 63.

3. Power to Purchase Land. — Shelley *v.* Towle, 16 Neb. 194; State *v.* Cain, 18 Neb. 635; Concordia Parish *v.* Bertron, 46 La. Ann. 356.

In Vankirk *v.* Clark, 16 S. & R. (Pa.) 286, it was held that county commissioners had power to take and hold lands for the use of the county, when bought in to secure a debt of mortgage for that purpose.

When No Express Power Given. — On the question whether a board of county supervisors may acquire land in the absence of any express authority by statute, it is very forcibly said by Moncure, P., in Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484: "Having made

c. As to Erection and Management of County Buildings. — As a general rule, the care and management of all the property of a county is intrusted by statute to the board of county commissioners, and in all cases involving the location, erection, repair, removal, or furnishing of county buildings, such as court houses, jails, and public offices, the board exercises a discretion which cannot be controlled by any judicial tribunal, in the absence of fraud, corruption, or unfair dealing.[1]

these general observations in regard to the powers of the boards of supervisors, under the constitution and laws of the state, let us now proceed to the particular inquiry with which the question under consideration closes; that is, whether they have power to acquire land, and if so, in what mode, for the erection thereon of a court-house, clerk's office, and jail, and for other public purposes of the county. And, in the first place, have they power to acquire land for those purposes? No express power is given them to acquire land for any purpose. But power is expressly given them 'to build and keep in repair county buildings,' 'and in case there are no public buildings, to provide suitable rooms for county purposes,' and 'to represent the county and to have the care of the county property and the management of the business and concerns of the county, in all cases where no other provision shall be made.' How can they discharge these express powers and duties without the power to acquire land? Suppose a county is without a court-house, clerk's office, or jail, and without ground on which to build them; how are the board of supervisors to perform their express power and duty in such a case, 'to build and keep in repair county buildings,' without first acquiring the ground on which to erect these necessary buildings? The implied power to acquire the ground is as plainly given as the express power to erect the buildings. In the construction of the most naked powers, to which the strictest rules of construction are applied, there is no better settled rule than this, that every power necessary to the execution of an express power is plainly implied."

In Acquiring Private Property by Special Proceedings, such proceedings must be pursued in strict accordance with the statutory provisions. Damrell *v.* San Joaquin County, 40 Cal. 154.

Purchasing Land for County Building. — When authorized by statute, county commissioners may acquire land for building a county court-house, clerk's office, or jail, either by purchase or by proceeding to have it condemned. Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484; Sheidley *v.* Lynch, 95 Mo. 487.

In *Pennsylvania*, there must be the reports of two successive grand juries "that the necessities of the county require ground at the county seat for the purpose of the erection," before the board of county commissioners can act. Bennett *v.* Norton, 171 Pa. St. 221.

In *Missouri*, a county court, in purchasing a site for a court-house, may anticipate the annual revenue to be collected and bind the county to the extent but not in excess of it. Sheidley *v.* Lynch, 95 Mo. 487.

In *Ohio*, the provisions of the statutes requiring county commissioners to publish notice of their intention to purchase any lands or erect any building do not apply to proceedings for the purchase of lands for a children's home. State *v.* Darke County, 43 Ohio St. 311.

Powers Strictly Construed. — In Warren County Agricultural Joint-Stock Co. *v.* Barr, 55 Ind. 30, it was held that a statute authorizing the commissioners to buy land to be used for the purpose of agricultural fairs did not authorize them to make an appropriation to an agricultural society to assist it in paying off its debts.

Annexing Contiguous Territory to City. — The power to annex contiguous territory to a city may be conferred upon a board of county commissioners by statute. Stilz *v.* Indianapolis, 55 Ind. 515.

And no appeal lies from the decision of the board. Indianapolis *v.* Sturm, 39 Ind. 159.

1. Powers as to Public Buildings — *United States.* — Cook *v.* Hamilton County, 6 McLean (U. S.) 612.

California. — Los Angeles County *v.* Superior Ct., 93 Cal. 380; San Joaquin County *v.* Budd, 96 Cal. 47.

Illinois. — Dahnke *v.* People, 57 Ill. App. 619.

Indiana. — Platter *v.* Elkhart County, 103 Ind. 360; Franklin County *v.* Bunting, 111 Ind. 143; Crow *v.* Warren County, 118 Ind. 51; Kitchel *v.* Union County, 123 Ind. 540; English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215; Robling *v.* Pike County, 141 Ind. 522.

Kansas. — Brown County *v.* Barnett, 14 Kan. 627; Stafford County *v.* State, 40 Kan. 21.

Michigan. — Plummer *v.* Kennedy, 72 Mich. 295.

Mississippi. — Monet *v.* Jones, 10 Smed. & M. (Miss.) 243; Odineal *v.* Barry, 24 Miss. 9; Benton County *v.* Patrick, 54 Miss. 240; Rotenberry *v.* Yalobusha County, 67 Miss. 470.

New York. — Schenck *v.* New York, 67 N. Y. 44; People *v.* Stout, 23 Barb. (N. Y.) 349.

North Carolina. — Vaughn *v.* Forsyth County, 117 N. Car. 429.

Ohio. — Trumbull County *v.* Hutchins, 11 Ohio 368; *Ex p.* Black, 1 Ohio St. 30.

Pennsylvania. — Northampton County's Appeal, 57 Pa. St. 452; Butz *v.* Fayette County, 168 Pa. St. 464; Mahon *v.* Norton, 175 Pa. St. 279.

Texas. — Polly *v.* Hopkins, 74 Tex. 145; Cresswell Ranch, etc., Co. *v.* Roberts County. (Tex. Civ. App. 1894) 27 S. W. Rep. 737.

In Andrews *v.* Knox County, 70 Ill. 65, Breese, C. J., remarks: "Among the duties imposed by law upon the board of supervisors, and in imperative language, is, to build as often as may be necessary court-houses and jails, or cause the same to be repaired, in their respective counties, at the expense of such counties. About this they have no discretion — 'it shall be the duty.' The time when, the style, capacity, and cost of such erections, are wholly committed to them, with no responsi-

d. As to Bridges and Highways — **Bridges.** — It may be stated as a general rule that the time, place, and manner of constructing bridges are in

bility to any power save the people. The board, acting in good faith in the discharge of this duty, are amenable to no authority except that from which they derive their own powers. No fraud or unfair dealing is charged against this board in their attempt to discharge an imperative duty, but the whole case rests upon the allegation that the old jail, at the former county seat, five miles distant, is sufficient to keep prisoners. This is a question exclusively cognizable by the board."

Acceptance or Rejection of Bids. — A board of county commissioners has broad discretionary powers in accepting or rejecting bids for public works. Under statutes which require contracts for public works to be let to the lowest responsible bidder, it is the duty of the board to award the contract to one who complies with all the requirements of the statute, not merely one whose bid is less than his competitors. Boseker *v.* Wabash County, 88 Ind. 267; Mayo *v.* Hampden County, 141 Mass. 74; State *v.* Marion County, 39 Ohio St. 188. See also Robling *v.* Pike County, 141 Ind. 522.

Filing Plans Before Advertising for Proposals. — Under the statutes of *Indiana*, which require plans of public buildings to be filed before advertising for proposals, a board of county commissioners may make a change in a matter of detail, such as heating or lighting, without requiring plans and specifications of the proposed change to be filed, and without advertising for proposals for the same. Gibson County *v.* Cincinnati Steam Heating Co., 128 Ind. 240.

But the board cannot let the contract at any other time than that fixed in the advertisement of such letting. Benton County *v.* Templeton, 51 Ind. 266.

Submitting Question to Voters. — In *Kansas*, before the county commissioners of any county can appropriate any money for the purpose of erecting any permanent county building, it is necessary that such commissioners should first submit the question of appropriating such money or of erecting such building to the legal voters of the county; but for the purpose of making necessary repairs or alterations to an already existing county building, it is not necessary that the question be so submitted. State *v.* Harrison, 24 Kan. 268; State *v.* Marion County, 21 Kan. 419; Johnson *v.* Wilson County, 34 Kan. 670. See also, as to similar provisions in other jurisdictions, Pauly Jail Bldg., etc., Co. *v.* Kearney County, 68 Fed. Rep. 171; District Atty. *v.* Bristol County, 14 Gray (Mass.) 138; Thompson *v.* Mercer County, 40 Ill. 379.

But in *Iowa* a submission by the board of supervisors to the voters of the county of a question involving the expenditure of money in the purchase of a public building is of no effect unless accompanied by a proposition to levy a tax for the payment therefor, together with the adoption of such proposition by the board and the proposition of expenditure. Starr *v.* Des Moines County, 22 Iowa 491. *Compare* Rock *v.* Rinehart, 88 Iowa 37; Miller *v.* Merriam, 94 Iowa 126.

A commissioners' court may levy a tax for the erection or repair of a county court-house or jail, without providing for the issuance of bonds for that purpose. Cresswell Ranch, etc., Co. *v.* Roberts County, (Tex. Civ. App. 1894) 27 S. W. Rep. 737.

Under the laws of *Nebraska*, county commissioners have no authority to issue county bonds for the purpose of raising money to build a jail, although supported by an affirmative vote of the people. State *v.* Lincoln County, 18 Neb. 283.

A proposition submitted to county commissioners to be passed upon by the voters of their county, to see if such commissioners shall be authorized to construct new county buildings on a new site therefor at a certain cost, and be further authorized to hire money on the credit of the county for the purpose of such construction, is not objectionable as covering more than one subject, matter, or thing, as the elements of site, construction, cost, and credit are no more than parts of one and the same proposition. Hubbard *v.* Woodsum, 87 Me. 88.

See the title Elections.

County Poor Farms. — Under the statutes of *New Hampshire* a county convention, by a committee or otherwise, has no authority to act with the county commissioners in the purchase of furniture or other personal property for the use of the county poor farm, as such authority is conferred upon the county commissioners alone. Brown *v.* Reding, 50 N. H. 336. See further Salisbury *v.* Merrimack County, 59 N. H. 359.

Where a county, by its board of commissioners, had already purchased a farm and erected suitable and sufficient buildings for the use of the poor, it was held that the legislative discretion of the board to provide an asylum for the poor was exhausted, and that an appeal would lie from an order directing the purchase of another tract of land for that purpose. Hanna *v.* Putnam County, 29 Ind. 170.

It is not necessary for the board of county commissioners to pass an order formally discontinuing a county asylum for the poor prior to the sale of such asylum, for the purpose of locating it elsewhere. Platter *v.* Elkhart County, 103 Ind. 360.

See generally the title Poor and Poor Laws.

Insurance. — A board of county commissioners has power to enter into contracts for the insurance of county buildings against fire or lightning. Potts *v.* Bennett, 140 Ind. 71; Walker *v.* Linn County, 72 Mo. 650.

Making Repairs in Excess of County Revenue is in contravention of the constitution of *Missouri*, and the acts of the commissioners are therefore void. Book *v.* Earl, 87 Mo. 246.

Renting House for Sheriff While Jail Being Repaired. — Though county commissioners are not bound by law to provide a residence for the sheriff while the jail is rebuilding, yet if they lease a house for him the lessor is not bound to inquire into their authority in so doing, and he may recover the rent from the county if he is without knowledge of the illegal character of the act. Dauphin County *v.* Bridenhart, 16 Pa. St. 458.

the discretion of the board of county commissioners, unless limits are imposed on such discretion by statute; and, further, that such discretion is not divested until the bridges are constructed.[1]

In Texas commissioners' courts alone have power to contract for the erection of county buildings, and such a contract made for a county by a county judge alone, without their sanction, imposes no obligation on the county. Polly *v.* Hopkins, 74 Tex. 145.

Control Over Armories. — A board of supervisors has power to provide for a permanent location for an armory, People *v.* Earle, 47 How. Pr. (N. Y. C. Pl.) 370; and may lease a building for an armory, upon compliance with all the regulations of the Military Code, Ford *v.* New York, 63 N. Y. 640.

Care of Court-room. — It is the duty of the board of county commissioners to employ suitable persons to clean and keep in order the court-rooms, and to perform other acts of like necessity for the comfortable and convenient transaction of public business in the courts. Mayhew *v.* Hamilton County, 1 Disney (Ohio) 186. But the control of the county board over the court-rooms does not extend so far as to permit the board compulsorily to require the judges of the courts to change and remove their courts from one room to another at the pleasure of the board. Dahnke *v.* People, 57 Ill. App. 619.

Unauthorized Acts. — Where the board of supervisors of a county made a contract with a builder to build a court-house, for which he was to be paid eighty-five per cent. as the work progressed, on monthly estimates, upon the certificate of the superintendent of the building employed by the county, fifteen per cent. to be reserved until the completion of the work, the county was not bound by an arrangement made between the superintendent and the subcontractor, which was at variance with the terms of the original contract. Bouton *v.* McDonough County, 84 Ill. 384.

As a general rule, where a contract has been awarded according to law, work required by law to be done in performance of it is in legal effect done by order of the board of supervisors, who let the contract for it, and is a charge against the county, enforceable according to the terms of the contract. Times Pub. Co. *v.* Alameda County, 64 Cal. 469.

But a board of county commissioners may bind the county for work done and materials furnished beyond the terms of a written contract. Carroll County *v.* O'Connor, 137 Ind. 622.

Board Has Incidental Power to Finish an Uncompleted Building. — Where the contractor for the construction of a county building abandons his contract after a material portion of the work has been performed, a board of county commissioners has incidental power to take charge of the work and complete the building, and this, too, without adopting new plans and specifications or letting a new contract. Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234.

Employing Architect. — A board of county commissioners may employ an architect to prepare plans and specifications and make a draft of a contract, and can authorize him to make the contract himself subject to their approval; but the board cannot delegate its authority over the contract absolutely. Russell *v.* Cage, 66 Tex. 428.

And it seems that the county will be bound by a change in plan authorized by such architect. Gibson County *v.* Motherwell Iron, etc., Co., 123 Ind. 364.

1. Discretion of Commissioners as to Erection of Bridges. — Bingham *v.* Marion County, 55 Ind. 113; Kyle *v.* Kosciusko County, 94 Ind. 115; State *v.* Greene County, 119 Ind. 444; State *v.* Martin County, 125 Ind. 247; Beckwith *v.* English, 51 Ill. 147; Denison *v.* Watts, 97 Iowa 633; Lewis *v.* Chosen Freeholders, 56 N. J. L. 416.

In commenting on this discretion Brickell, C. J., in Commissioners' Ct. *v.* Moore, 53 Ala. 25, remarks: "So long as its action is not productive of private individual injury, it has a wide discretion and is guided only by its knowledge of public necessity and convenience. No other tribunal can intervene to revise or control its action. If its action is productive of private injury, or interferes with private property, it is then judicial, and the subject of revision by the tribunals clothed with revisory power over inferior tribunals."

As to the Erection and Maintenance of Bridges, see generally the title BRIDGES, vol. 4, p. 915.

Mandamus Will Not Lie to Enforce Erection. — Where county commissioners were authorized by special act of the legislature to build a bridge, and to raise the necessary funds for the purpose by successive yearly levies of taxes upon the people of the county,[1] and the commissioners, after levying and collecting a part of the taxes necessary, for reasons in their judgment sufficient, abandoned the purpose of building the bridge and declined to make further levies, it was held that mandamus would not lie at the suit of the taxpayers to compel the commissioners to build the bridge or to make further levies to raise the necessary funds therefor. State *v.* Henry County, 31 Ohio St. 211.

Impeding Navigation. — In the absence of statutory authority county commissioners have no power to erect bridges over creeks or arms of the sea which are navigable, so as to impede their use for the purposes of navigation. State *v.* Anthoine, 40 Me. 435. See also the title BRIDGES, vol. 4, pp. 925, 927.

Authority Not to be Delegated.—The statutory authority conferred upon boards of supervisors to regulate the bridging of navigable streams is a trust that must be executed by themselves; they cannot delegate it to others, especially to parties concerned in any details requiring the exercise of their judgment, such as the location or character of the bridge. Potts *v.* Henderson, 2 Ind. 327; Pleasant View Tp. *v.* Shawgo, 54 Kan. 742; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453; Kirkwood *v.* Newbury, 122 N. Y. 571.

However, a resolution of a board of county supervisors which provided that the county furnish and pay for plank for culverts and

Highways. — In the laying out, altering or discontinuing of any public road or highway, the boards of county commissioners are but creatures of statute, and as such are empowered to act only when, in the exercise of their judicial discretion, they have in due form adjudged that the necessities and convenience of the public require them so to do.[1] And where the mode of executing such

small bridges in the respective townships, each member of the board to determine by inspection of his district what plank was needed and to issue an order therefor when called upon by the road supervisors, was not void because of the power delegated to the individual members of the board. Denison *v.* Watts, 97 Iowa 633.

Receiving Donations. — A statute may confer the right upon commissioners to receive donations for the building of bridges, Bingham *v.* Marion County, 55 Ind. 113; and also to receive propositions for their construction, Ezell *v.* Justices, 3 Head (Tenn.) 583.

Ferries. — In some states boards of supervisors have jurisdiction over the subject-matter of granting or refusing ferry licenses. Such jurisdiction, however, is subject to legislative regulation as to the manner of its use, and must be exercised in conformity with the statute. Lamar *v.* Commissioners' Ct., 21 Ala. 772; Finch *v.* Tehama County, 29 Cal. 453; La Salle County *v.* Simmons, 10 Ill. 513; Jefferson County *v.* Arrighi, 54 Miss. 668; Blake *v.* McCarthy, 56 Miss. 654; Paxton *v.* Baum, 59 Miss. 531. See generally the title FERRIES.

Toll Bridges. — Boards of supervisors, when authorized by legislative enactment, have power to grant franchises for erecting toll bridges. Fall *v.* Sutter County, 21 Cal. 237. See the title BRIDGES, vol. 4, p. 927.

Fixing Toll Rates. — Where an act is passed authorizing the building of a toll-bridge across a river, and the collection of such tolls as the board of supervisors of the county shall fix, with a proviso that the legislature may modify or change the rates, the power of the board of supervisors in the premises is not exhausted when they once fix the tolls; but the board may change the same from time to time, subject to the supervisory control of the legislature. Stanislaus Bridge Co. *v.* Horsley, 46 Cal. 108. But the board has no right arbitrarily to refuse to fix toll rates. Volcano Cañon Road Co. *v.* Placer County, 88 Cal. 634.

Unreasonable and Plain Abuse of Discretion. — Where the board of chosen freeholders of a county, by resolution, granted to a street railway company the right to lay its tracks on the centre of a public bridge, and it clearly appeared that, owing to the narrowness of the bridge, no ordinary vehicle could pass on either side of the cars while crossing, the grant of such an exclusive use was, under the circumstances, held to be an unreasonable and plain abuse of the discretion vested in the board. Elmer *v.* Chosen Freeholders, 57 N. J. L. 366.

Action Presumably Lawful. — Under the statutes of *Michigan* the action of a board of supervisors in voting money for a county bridge is presumably lawful. Stockle *v.* Silsbee, 41 Mich. 615.

Repairing Bridges or Building Necessary Bridges Destroyed, so as to render them safe and convenient for the passage of property and to prevent injury to persons traveling upon the public highways of which they form an essential part, is a duty which devolves on the county authorities necessarily, and in regard to it they are not entitled to exercise discretion. Rex *v.* West Riding of Yorkshire, 5 Burr. 2594. See also the title BRIDGES, vol. 4, p. 936 *et seq.*

Consequential Damages. — Where the duty of repairing is discharged skilfully and honestly, and the improvements made are reasonable and necessary, the commissioners are exempt from liability for consequential damages. Tyson *v.* Baltimore County, 28 Md. 510; Walter *v.* Wicomico County, 35 Md. 385.

Appointment of Superintendent. — After making an order for the contract of a bridge, the appointment of a superintendent to take charge of the work is discretionary with the board of commissioners. State *v.* Martin County, 125 Ind. 247.

1. Roads and Highways. — Groton *v.* Hurlburt, 22 Conn. 178; Eyman *v.* People, 6 Ill. 4; Dudley *v.* Blountsville, etc., Turnpike Co., 39 Ind. 288; Oliphant *v.* Atchison County, 18 Kan. 386; Burns *v.* Annas, 60 Me. 288; State *v.* Price, 21 Md. 448; Howard *v.* Brown, 37 Neb. 902; Bourgeois *v.* Mills, 60 Tex. 76.

In *Michigan* highways and roads are by the constitution placed under the control of the board of county supervisors, not absolutely, but under legal restriction. Atty.-Gen. *v.* Bay County, 34 Mich. 47; Boyce *v.* Auditor-Gen., 90 Mich. 314. But see Delta Lumber Co. *v.* Wayne County, 71 Mich. 572. And so, also, in *South Carolina*. Walpole *v.* City Council, 32 S. Car. 547.

Constitutionality of Road Legislation. — In *New Jersey* the Act of May 28, 1886, p. 369, entitled "An Act to authorize the boards of chosen freeholders in the respective counties in this state to lay out, open, and improve a public road in each of the counties in this state," was held unconstitutional because one county was excepted from its operation. Bray *v.* Chosen Freeholders, 50 N. J. L. 82.

In *New York* the constitution prohibits the legislature from passing any private or local bill "laying out, opening, altering, working, or discontinuing roads or highways." But the further constitutional provision that the legislature may enact general laws conferring upon boards of supervisors "such further power of local legislation as from time to time it may deem expedient," preserves to the legislature the power to vest in boards of supervisors within their respective jurisdictions the same powers in respect to laying out, opening, and working highways, which the legislature could itself before directly exercise. People *v.* Queens County, 112 N. Y. 585.

When Exercise of Powers Not Discretionary. — Where a road extended into two counties, and the majority of the commissioners of both counties, at a legal meeting, adjudged it to be of public convenience and necessity to lay out the road, it was held to be their duty to pro-

statutory power is specifically prescribed, that mode must be substantially pursued.[1]

Judicial in Character. — Such proceedings are purely judicial in their character.[2]

Limitation on Discretion. — There is no limitation upon the exercise of such judicial discretion, except the fundamental one of compensation for damages to private property.[3]

Town Ways. — The power conferred upon the board of county commissioners to lay out a town way, and also to approve of and allow such way when laid out, is purely a statutory one, and may be exercised where the selectmen of the town unreasonably refuse to act and the board adjudges the way to be of common convenience and necessity to the inhabitants of the town.[4]

ceed and lay it out in conformity to the adjudication, there being no discretion whatever on their part. Sanger *v.* Kennebec County, 25 Me. 291.

Under the *Nebraska* statute, county commissioners must award a contract for the improvement of such county roads as may be of general necessity, to the lowest responsible bidder. People *v.* Buffalo County, 4 Neb. 150.

Powers Restricted. — A board of supervisors cannot grant a telegraph company a right of way along the "margin" of a highway. Such board can confer no right outside the limits of the highway itself. Clay *v.* Postal Tel. Cable Co., 70 Miss. 406.

A board of supervisors has no power to remove obstructions from a private way. Bailey *v.* Bazemore, 66 Ga. 537. See Lawrence Co. *v.* Mahoning County, 35 Ohio St. 2. Or to locate a new county road upon a petition for certain alterations in an old one. Livermore, Petitioner, 11 Me. 275. See also Hark *v.* Gladwell, 49 Wis. 172.

County commissioners may require road hands to open a new road. State *v.* Brown, 14 S. Car. 380.

Monuments at Angles of Highway. — Under the *Maine* statute, requiring county commissioners, in locating a highway, to "cause durable monuments to be erected at the angles thereof," the commissioners may adopt as monuments county or town lines, or natural objects, such as trees, rocks, or banks of rivers. Detroit *v.* Somerset County, 35 Me. 373.

Separating Highway and Railroad Grades at Crossing. — In ordering the separation at a crossing of the grades of a railroad and a highway, a board of county commissioners, under the statute, may change the highway to a place different from that of the existing crossing, if such change is not greater than is reasonably necessary in order to do away with the crossing at grade. Davis *v.* Hampshire County, 153 Mass. 218.

1. Mossman *v.* Forrest, 27 Ind. 233.

In Parsonsfield *v.* Lord, 23 Me. 511, it was held that, under the statute, the doings of the county commissioner in locating a road must be made and recorded at a term of their court held next after such proceedings have been had and announced, and that a record of such proceedings made at the termination of the term commencing previously was therefore void as not complying with the statute.

2. **Judicial Act.** — Willis *v.* Sproule, 13 Kan. 257. See also Commissioners' Ct. *v.* Hearne, 59 Ala. 371; Damrell *v.* San Joaquin County, 40 Cal. 154; Kimball *v.* Alameda County, 46 Cal. 19; Groton *v.* Hurlburt, 22 Conn. 178; State *v.* Tippecanoe County, 131 Ind. 90; Dayton Gravel Road Co. *v.* Tippecanoe County, 131 Ind. 584; Porter *v.* Stout, 73 Ind. 3; Wright *v.* Wells, 29 Ind. 354; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525; Woodman *v.* Somerset County, 25 Me. 300.

In Illinois, the constitution vests in county commissioners' courts a general supervision over the public roads of their respective counties, and proceedings before them in respect thereto are judicial. Savage *v.* County Com'rs, 10 Ill. App. 204. But see Nealy *v.* Brown, 6 Ill. 10.

Illustrations. — The acceptance or rejection, by county commissioners, of the report of the committee appointed by the commissioners pursuant to statute, and the agreement of the persons interested, to ascertain the amount of damages caused by the laying out of a highway, was held to be a judicial act. Kennebunk Toll Bridge, Petitioner, 11 Me. 263.

An order of the board of supervisors opening a road is a question essentially judicial. Seibert *v.* Linton, 5 W. Va. 57.

3. **Discretion of Commissioners.** — State *v.* Woody, 17 Ga. 612; Gemmill *v.* Arthur, 125 Ind. 258; Throckmorton *v.* State, 20 Neb. 647; Howard *v.* Brown, 37 Neb. 902; Rose *v.* Washington County, 42 Neb. 1; Bounds *v.* Kirven, 63 Tex. 159.

4. North Berwick *v.* York County, 25 Me. 69; Lisbon *v.* Merrill, 12 Me. 210; Belfast, Appellants, 53 Me. 431; Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394.

Highway Within Limits of Municipal Corporation. — County commissioners, when authorized by law, have power to lay out a highway within the limits of a municipal corporation. Harkness *v.* Waldo County, 26 Me. 355; Windham *v.* Cumberland County, 26 Me. 407; Hermon *v.* Penobscot County, 39 Me. 583; Smith *v.* Cumberland County, 42 Me. 395; Hanson, Appellant, 51 Me. 193; Lewis *v.* Laylin, 46 Ohio St. 663.

As to changing the limits or boundaries of a town, see Jacksonville *v.* L'Engle, 20 Fla. 344; State *v.* Forest County, 74 Wis. 610.

A county court has no right to establish, conjointly with a town, a county road which is to be partly within the boundaries of such town. State *v.* Heege, 39 Mo. App. 49.

Under the Statute in New York, in regard to opening, grading, construction and improvement of streets in the towns of the county, a county board of supervisors does not delegate its authority where, by a resolution providing for opening, grading, and construction of

e. As to County Printing. — The exclusive control over the county printing is usually vested in the board of county commissioners by statute, and in the absence of actual fraud or collusion its determination of the subject-matter is conclusive.[1]

f. As to Management of County Funds. — All power to fix, control, determine, or in any manner dispose of the funds of a county is usually vested in the board of county commissioners. Such board alone has the right to disburse the public moneys, and to decide in what cases and under what circumstances such funds shall be paid out, unless it be in those cases where fixed rights are conferred by statute.[2]

streets and the levying and collection of assessments therefor, it provides for commissioners to open the streets, and for grading commissioners. Roberts *v.* Kings County, 3 N. Y. App. Div. 366.

Presenting Petition. — In *Maine*, a petition to the county commissioners to revise the proceedings of a town, upon the alleged unreasonable refusal to discontinue a town way, should be presented by one having interest in the subject-matter, or in some way connected with such proceedings of the town, either in procuring the action of the town or being present and voting with the minority. So, where a petition or the proceedings thereunder failed to show that the petitioners were interested or in any way parties to the proceedings, it was held that the county commissioners had no jurisdiction. Brown *v.* Sagadahoc County, 68 Me. 537.

Where a record of the proceedings of a board of county supervisors in dividing a town and forming a new one from a portion thereof only described the dividing line, it was held that the uncertainty was cured by a reference in such record to the petition upon which it was founded, and from which petition it appeared that the new town was to lie south of the line of division, and by proof *aliunde* that a place named in the record for holding the first town meeting was south of that line. People *v.* Carpenter, 24 N. Y. 86.

Taking Schoolhouse Lot. — County commissioners may take a strip of land from a schoolhouse lot for a needed town way where the use of the lot for school purposes, though considerably impaired, will not be wholly prevented. Easthampton *v.* Hampshire County, 154 Mass. 424.

1. Printing. — Harper County *v.* State, 47 Kan. 283; Shelden *v.* Butler County, 48 Kan. 356; Shelby County *v.* Frego, 26 Ohio St. 488.

Mere Threats of a board of county commissioners to ignore or set aside a contract which it has awarded for the county printing, in the absence of any official order to ignore or set aside such printing, do not constitute grounds for an injunction. Some step must necessarily be taken by the county as a board toward setting aside a contract, before such a remedy can be resorted to. Seward County *v.* Stoufer, 47 Kan. 287.

An Order of the Board of County Commissioners in Accepting a Bid for County Printing does not constitute a contract with the bidder nor conclude the board from rescinding such an order and making another award. State *v.* Allen, 8 Wash. 168; Hundley *v.* Finney County, 2 Kan. App. 41.

Designating Official Newspaper. — In pursuance of the power over county printing, conferred upon a board of county commissioners, such board has power to designate the official newspaper of its own county. State *v.* Dixon County, 24 Neb. 106; Shelden *v.* Butler County, 48 Kan. 356. See the title Newspapers.

2. Management of County Funds. — Larimer County *v.* Lee, 3 Colo. App. 177. See also Locke *v.* Davison, 111 Ill. 19.

Under the statutes of *New Jersey*, a board of chosen freeholders has no right to make an extensive appropriation for one class of expenditure in order that with the surplus it may eke out deficiencies in others. An honest estimate of the probable expenditure in each class is required by the statute. Paterson *v.* Chosen Freeholders, etc., 56 N. J. L. 459.

Transfer from "General" to "Incidental" Fund. — A board of county commissioners has no authority, by its order, to transfer moneys from the "general" county fund to an "incidental" fund created by the board for the purpose of paying the necessary current expenses of the county. State *v.* Hopkins, 12 Wash. 602.

Under the statutes of *Nevada* it is made the official duty of the board of county commissioners to transfer the surplus money in the railroad and sinking fund to the school fund of the county. State *v.* Storey County, 17 Nev. 96.

Taking Note and Mortgage for a Fine imposed on a person convicted, with a view to release such person from imprisonment for nonpayment of the fine, is illegal, and the instruments so taken are void. Manitowoc County *v.* Sullivan, 51 Wis. 115.

Paying Money under Mistake. — The board of county commissioners is bound like an individual in its acts; so where it pays money under a mistake of law as to the liability of the county, such money cannot be recovered back by the board. Snelson *v.* State, 16 Ind. 29. *Compare* Washington County *v.* Parlier, 10 Ill. 232.

Issuing County Bonds. — The issuing of county bonds does not fall within the scope of the general powers of a board of county supervisors, relating to the management of the county funds. The power to issue such bonds must be expressly conferred upon the board by statute. Sutro *v.* Pettit, 74 Cal. 332. See generally the title Municipal Securities.

Mode of Payment Directed by Statute Cannot Be Changed. — Where the statute directs how a fund in the county treasury shall be paid out, the board of county commissioners has no

g. As to Taxes. — A board of county commissioners has no implied power to levy or collect taxes. Such power must be clearly and expressly given by the constitution or by statute, and if the constitution or the statute points out the particular course to be pursued no other course can lawfully be pursued.[1]

h. As to Official Bonds. — Where a board of county commissioners is required by statute to judge of the sufficiency of official bonds, under penalty of incurring a personal liability for taking bonds known or believed to be insufficient, the board in the approval or disapproval of such bonds acts judicially, and its decision on their sufficiency is discretionary.[2]

i. As to Control of Liquor Licenses. — A board of county commissioners derives its power to grant or revoke a license for the sale of intoxicating liquors in the county, from the statute only. Such board has a limited legal discretion, and the exercise of its judgment in the matter cannot be controlled by mandamus.[3]

power to change that mode. People *v.* Washoe County, 1 Nev. 460; Howe *v.* State, 53 Miss. 58; Laforge *v.* Magee, 6 Cal. 285; Richmond *v.* Davis, 103 Ind. 449; Kitchel *v.* Union County, 123 Ind. 540; Hoffman *v.* Gallatin County, 18 Mont. 324.

A board of county commissioners cannot by a submission to arbitration impose an obligation on the county to disburse a particular fund in a manner or to a purpose prohibited by statute. Jenifer *v.* Hamilton County, 2 Disney (Ohio) 189.

A Bequest of Bank Stock in trust to county commissioners "to remain in said bank while it exists," and afterwards to be safely invested by them, is valid. Rush County *v.* Dinwiddie, 139 Ind. 128.

Designating Bank. — In Medicine Lodge First Nat. Bank *v.* Peck, 43 Kan. 643, it was held that under the statute the board of county commissioners had no authority to designate the bank or banks for deposit of the public moneys for a definite period of time. To the same effect see McKinney *v.* Robinson, 84 Tex. 489; State *v.* Owen, 41 Neb. 651.

Cannot Make Profit. — A board of county commissioners cannot administer the affairs of a county so as to make profit where the law does not warrant it. Switzerland County *v.* Hildebrand, 1 Ind. 555, where it was held that the county commissioners could not sue a husband for the support of his wife in the county poorhouse, she being entitled to be kept therein.

Loaning School Fund. — A board of county supervisors may make such reasonable rules for the loaning of a school fund as seem proper, even providing that the funds shall only be loaned to residents of the county. Emmet County *v.* Skinner, 48 Iowa 244.

May Pay Bounty. — In *Kansas*, under the act to encourage the growth of hedges, etc., the board of county commissioners has sufficient authority to pay the bounty therein provided for for growing Osage orange hedges, and to pay the bounty out of the general county fund. Marion County *v.* Hoch, 24 Kan. 778.

Powers are Limited. — A board of county commissioners has extensive, although by no means unlimited, powers over county finances. Nixon *v.* State, 96 Ind. 111; Stowell *v.* Jackson County, 57 Mich. 31; Stevens *v.* St. Mary's Training School, 144 Ill. 336. See also Schwamble *v.* Sheriff, 22 Pa. St. 18.

1. Levying Taxes. — Perry County *v.* Selma, etc., R. Co., 58 Ala. 546; House *v.* Los Angeles County, 104 Cal. 73; People *v.* Lothrop, 3 Colo. 428; Hardin County *v.* McFarlan, 82 Ill. 138; People *v.* Ryan, 138 Ill. 263; Searing *v.* Heavysides, 106 Ill. 85; State *v.* Laughlin, 101 Ind. 29; Allegany County *v.* Union Min. Co., 61 Md. 545; Beck *v.* Allen, 58 Miss. 143; State *v.* Shortridge, 56 Mo. 126; State *v.* Hannibal, etc., R. Co., 87 Mo. 236; Cromartie *v.* Bladen, 87 N. Car. 134; Stiles *v.* Guthrie, 3 Okla. 26.

See generally the titles Taxation; Special Assessments.

2. Approving Bonds — *California.* — People *v.* Marin County, 10 Cal. 344; Miller *v.* Sacramento County, 25 Cal. 93; People *v.* Evans, 29 Cal. 429.

Colorado. — Arapahoe County *v.* Crotty, 9 Colo. 318.

Michigan. — McGregor *v.* Gladwin County, 37 Mich. 388.

Mississippi. — Shotwell *v.* Covington, 69 Miss. 735.

New Jersey. — Conger *v.* Chosen Freeholders, 55 N. J. L. 112.

North Carolina. — Harrington *v.* King, 117 N. Car. 117.

Texas. — Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

See generally the title Official Bonds.

In some states the approval of official bonds is held to be a ministerial, not a judicial, duty, though coupled with discretion. Oliver *v.* Martin, 36 Ark. 134; State *v.* Lafayette County Ct., 41 Mo. 221.

Approval of Bond — Knowledge of Member of Board Not Attributable to Board. — The knowledge of one member of a county board, at the time of the approval by it of the county treasurer's bond, of the conditional signing of the bond by the sureties, not shown to have been imparted to the board, is not knowledge of or notice to the board of such fact. Stoner *v.* Keith County, 48 Neb. 279.

3. License to Sell Intoxicating Liquors. — Jones *v.* Moore County, 106 N. Car. 436; Maxton *v.* Robeson County, 107 N. Car. 335; Muller *v.* Buncombe County, 89 N. Car. 172; Batters *v.* Dunning, 49 Conn. 479. See generally the title Intoxicating Liquors.

j. As to Audit and Allowance of Claims — **Acts Are Judicial.** — A board of county commissioners, in the audit, adjustment, allowance, or disallowance of a claim against a county, exercises judicial functions, and having exclusive jurisdiction, its judgment, in the absence of fraud, is conclusive both upon the board and the parties interested unless appealed from or reversed in the mode prescribed by law.[1]

1. Allowance and Disallowance of Claims — *California.* — El Dorado County *v.* Elstner, 18 Cal. 144; Tilden *v.* Sacramento County, 41 Cal. 68; Colusa County *v.* De Jarnett, 55 Cal. 373; McFarland *v.* McCowen, 98 Cal. 329; Placer County *v.* Campbell, (Cal. 1886) 11 Pac. Rep. 602.

Indiana. — Warren County *v.* Gregory, 42 Ind. 32; Hancock County *v.* Binford, 70 Ind. 208; Hancock County *v.* Bradley, 53 Ind. 422; State *v.* Benson, 70 Ind. 481; State *v.* Washington County, 101 Ind. 69; Jackson County *v.* Applewhite, 62 Ind. 464; Lagrange County *v.* Newman, 35 Ind. 10; Bunnell *v.* White County, 124 Ind. 1.

Kansas. — Leavenworth County *v.* Keller, 6 Kan. 510.

Michigan. — Peck *v.* Kent County, 47 Mich. 477.

Mississippi. — Carroll *v.* Board of Police, 28 Miss. 38; Klein *v.* Smith County, 54 Miss. 254; Arthur *v.* Adam, 49 Miss. 404.

Missouri. — State *v.* Macon County Ct., 68 Mo. 29.

Nebraska. — Brown *v.* Otoe County, 6 Neb. 111; State *v.* Buffalo County, 6 Neb. 454; Black *v.* Saunders County, 8 Neb. 440; Dixon County *v.* Barnes, 13 Neb. 294; Boone County *v.* Armstrong, 23 Neb. 764; State *v.* Churchill, 37 Neb. 702; Sioux County *v.* Jameson, 43 Neb. 265; State *v.* Merrell, 43 Neb. 575; Heald *v.* Polk County, 46 Neb. 28; State *v.* Vincent, 46 Neb. 408; Stenberg *v.* State, 48 Neb. 299; State *v.* Baushausen, 49 Neb. 558.

New York. — Martin *v.* Greene County, 29 N. Y. 645; People *v.* Livingston County, 26 Barb. (N. Y.) 118; Chase *v.* Saratoga County, 33 Barb. (N. Y.) 603; People *v.* Stocking, 50 Barb. (N. Y.) 573; Onondaga County *v.* Briggs, 2 Den. (N. Y.) 26; People *v.* Herkimer County, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 242; People *v.* Livingston County, 12 How. Pr. (N. Y. Supreme Ct.) 204; People *v.* Haws, 21 How. Pr. (N. Y. Supreme Ct.) 117; People *v.* New York County, 21 How. Pr. (N. Y. Supreme Ct.) 322; People *v.* Green, 47 How. Pr. (N. Y. Supreme Ct.) 382; People *v.* Fitzgerald, 54 How. Pr. (N. Y. Supreme Ct.) 1; People *v.* Ulster County, 32 Hun (N. Y.) 607; People *v.* Fulton County, 74 Hun (N. Y.) 251. *Compare* People, etc., *v.* Broome County, 65 N. Y. 225.

South Carolina. — Jennings *v.* Abbeville County, 24 S. Car. 543; Richland County *v.* Miller, 16 S. Car. 236.

Texas. — Callahan *v.* Salliway, 5 Tex. Civ. App. 239.

See *contra*, Commissioners' Ct. *v.* Moore, 53 Ala. 27; Cox *v.* Whitfield County, 65 Ga. 741; Ferry *v.* King County, 2 Wash. 337.

New York. — In People *v.* Montgomery County, 67 N. Y. 109, the court, speaking by Allen, J., says: "The acts of the supervisors which can in any aspect be regarded as judicial, and therefore final and conclusive until reversed, had respect solely to the amounts at which claims under the acts should be audited and allowed. Had they been left to determine, also, whether these claims were or were not county charges, their decision of that question might have been claimed to be judicial and in the nature of a judgment; but the functions of the supervisors, judicial in their character, being limited to ascertaining and determining the amount or amounts which, when ascertained and determined, the legislature had directed to be raised by tax and paid as other county charges are provided for and paid, a repeal of the acts making the claims a county charge does not reverse any judgment or judicial determination of the board of supervisors in respect to any matter referred to them. The cases in which it has been held that the action of boards of supervisors in the settlement of disputed claims, or the audit and allowance of county charges, have been regarded as in their nature judicial, have been those where the whole matter was within their jurisdiction." See also People *v.* Broome County, 65 N. Y. 222.

In North Carolina the allowance of a claim by a board of county commissioners is not conclusive, but only *prima facie* evidence of its correctness, and the order making the same may be modified or annulled. Abernathy *v.* Phifer, 84 N. Car. 711.

Accounts Not Legally Chargeable. — Where a board of supervisors attempts to audit and allow accounts not legally chargeable to its county, it is an act in excess of jurisdiction, done without the power to make it valid, and is null and void. Richmond County *v.* Ellis, 59 N. Y. 620; Commissioners' Ct. *v.* Moore, 53 Ala. 25; Foster *v.* Coleman, 10 Cal. 278; People *v.* El Dorado County, 11 Cal. 170; Linden *v.* Case, 46 Cal. 172; Mixer *v.* Manistee County, 26 Mich. 422; State *v.* Washoe County, 14 Nev. 66; Richmond County *v.* Ellis, 59 N. Y. 620; Chemung Canal Bank *v.* Chemung County, 5 Den. (N. Y.) 517; People *v.* Lawrence, 6 Hill (N. Y.) 244.

The fact that the board of commissioners of a county has no power under the general law to examine or allow any account against the county except such as is legally chargeable against it does not authorize the passage of a special law directing or allowing the payment of an account which could not be allowed under the general law. Williams *v.* Bidleman, 7 Nev. 68.

Where a board of supervisors made an order directing the payment of a claim not authorized by law, the court issued a mandamus compelling the board to vacate the same. People *v.* Westchester County, 11 Hun (N. Y.) 306.

The mere allowance of unreasonable or illegal claims by a board of county commissioners does not render the members liable to a forfeiture of office, unless in such allowance the board acted corruptly. State *v.* Scates, 43 Kan. 330.

Authority Depends on Statute. — The authority of county commissioners to audit claims against a county or to order the payment thereof by the proper county official depends entirely upon statute.[1]

Re-examination and Rejection. — As the former adjudication of a claim is conclusive upon the current and succeeding board, such action cannot be re-examined, reversed, vacated or set aside, by such boards.[2]

Warrants Issued Without Jurisdiction. — Warrants issued by a board of county commissioners for a purpose not within its jurisdiction are void, and do not bind the county. Walsh *v.* Rogers, 15 Neb. 309; Oakley *v.* Valley County, 40 Neb. 900.

No Funds in Treasury. — County commissioners have no authority to audit claims against the county unless there are funds in the treasury or sufficient taxes have been levied for the payment of the same. Com. *v.* Lancaster County, 6 Binn. (Pa.) 5; Com. *v.* Philadelphia County, 2 Whart. (Pa.) 286; State *v.* Colfax County, 10 Neb. 29; Lancaster County *v.* State, 13 Neb. 523; State *v.* Starling, 13 S. Car. 262. However, a contrary view has been taken in *New York*. People *v.* New York County, 22 How. Pr. (N. Y. Supreme Ct.) 71.

1. Matter of Tinsley, 90 N. Y. 231.

The Power Cannot Be Delegated. — Vincent *v.* Mecosta County, 52 Mich. 340. See also the title AGENCY, vol. 1, p. 974.

Arbitration. — As to the power of a board of supervisors to submit to arbitration the validity and reasonableness of a claim against the county, consult People *v.* Oneida County, 24 Hun (N. Y.) 413. See also the title ARBITRATION AND AWARD, vol. 2, p. 631.

Claims of County Against Township. — A board of county supervisors has no general power to establish claims in favor of a county against a township. People *v.* Wright, 19 Mich. 351.

Can Deal Only with County Matters. — The board of supervisors of a county, unless authorized by statute, has only to deal with county matters. It was accordingly held that a charge made by a janitor of an armory of a city was not a matter of which the supervisors could take cognizance. People *v.* Ulster County, 43 Hun (N. Y.) 385. Nor have they authority to direct that a judgment be collected from the taxable inhabitants of a school district, where the trustees of the district were sued and judgment obtained against them individually and not in their official capacity. People *v.* Snyder, 10 How. Pr. (N. Y. Supreme Ct.) 143.

Cannot Bind the County by Allowance of Illegal Claims. — A board of commissioners cannot bind the county by allowing and ordering a claim to be paid which is not legally chargeable to the county, or the allowance of which is prohibited by statute. It has not unlimited choice as to the objects to which the money of the public shall be applied. Huntington County *v.* Heaston, 144 Ind. 583, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 389.

Nevada — Jurisdiction Lost Where Claim Is Litigated. — Under the statute of Nevada, a board of county commissioners cannot proceed to consider claims to which objections have been filed as provided by statute, where proceedings have been instituted in a court of competent jurisdiction to determine the validity of such claims. State *v.* Gallagher, 22 Nev. 80.

Colorado — Appeal from Commissioners' Decision. —Under the Colorado statute which gives a right of appeal to the District Court from the action of the board of county commissioners disallowing a claim, an appeal can be taken only when the action of the board is final, and without the right of further consideration reserved. Gunnison County *v.* McCormick, 1 Colo. App. 319.

The Allowance of a Gross Sum on a bill instead of passing on the items is not a proper audit. People *v.* Fulton County, 74 Hun (N. Y.) 251; Atchison County *v.* Tomlinson, 9 Kan. 167.

But where a board of supervisors entered into a contract for the erection of a county jail, the work and labor to be paid for in instalments, on the certificate of the architect that a certain sum had been expended, an account setting out the sum total of the instalments without "all the items of the claim," as required by the code, and certified to by the architect, was held sufficient to authorize the board to allow it. Babcock *v.* Goodrich, 47 Cal. 488.

Waiving Statute of Limitations. —The power given to boards of supervisors to audit, settle, or compromise claims against their counties implies power to waive, by proper agreement, the defense of the statute of limitations as to claims not already barred. Woods *v.* Madison County, 136 N. Y. 403.

2. Re-examining and Reversing Allowance. — State *v.* Buffalo County, 6 Neb. 454; Boone County *v.* Armstrong, 23 Neb. 764; Stenberg *v.* State, 48 Neb. 299; Jefferson County *v.* Arrghi, 51 Miss. 667; Ryan *v.* Dakota County, 32 Minn. 138; People *v.* Herkimer County, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 242; People *v.* Cortland County, 24 How. Pr. (N. Y. Supreme Ct.) 119; People *v.* Albany County, 12 Johns. (N. Y.) 414; People *v.* Schenectady County, 35 Barb. (N. Y.) 408; Chenango County *v.* Birdsall, 4 Wend. (N. Y.) 453; State *v.* Kirby, 17 S. Car. 563; State *v.* Knight, 31 S. Car. 81. See also Garfield County *v.* Leonard, 3 Colo. App. 576.

In People *v.* Stocking, 50 Barb. (N. Y.) 573, it was held that the same board of supervisors might re-examine an account once passed, or even reduce the amount first allowed. See also People *v.* Broome County, 65 N. Y. 222.

Account Disputed. —A mandamus will not be granted against the commissioners of a county to pay an account which is disputed, until the amount due is sustained by an action against them in their corporate capacity. Com. *v.* Allegheny County, 16 S. & R. (Pa.) 317. Nor will a court of equity interfere in the absence of fraud or corruption on the part of the board. Harms *v.* Fitzgerald, 1 Ill. App. 325.

Excessive Claim for Printing — Recovery for Overpayment. — Where a board of county commissioners allows an excessive claim for printing a list of delinquent taxes, there being no mistake of fact, the list being before it, the

Rejection of Claim. — But the claim may be rejected *in toto* if sufficient reasons in the opinion of the board are not presented for its allowance.[1]

When Board Has No Discretion as to Amount of Allowance. — In settling the amount of the claim, if it is for any matter the price of which is fixed by law, or by contract with one having authority to contract on behalf of the county, the board of county commissioners has no discretion.[2]

amount overpaid cannot be recovered back. Warren County *v.* Gregory, 42 Ind. 32.

1. People *v.* Dutchess County, 9 Wend. (N. Y.) 508.

Where one having printed a book containing the proceedings of the board of supervisors of a county, under a contract with such board, presented his account for printing for audit, and the board took the claim into consideration and rejected it, it was held that the claim being one which by law must be presented to and passed upon by the board, and it having been presented, passed upon, and rejected, no action at law could be maintained for its recovery. Adams *v.* Oswego County, 66 Barb. (N. Y.) 368.

In California, if a claimant is dissatisfied with the rejection of his claim in part, he is required to " indicate to the supervisors his unwillingness to accept the amount which they had allowed and give them an opportunity to again consider his claim " for final action at the next regular succeeding session of the board. Arbios *v.* San Bernardino County, 110 Cal. 553.

Declining to Take Action Amounts to Disallowance. — Where a claim against a county was presented to the supervisors at the opening of their meeting in January, and they declined to take any action at that meeting in regard to it, and referred it to a committee with instructions to report thereon at their next annual meeting in November following, such a proceeding was held to be equivalent to a disallowance of the claim or a refusal or neglect to act upon it within a reasonable time, within the meaning of the statutes. Hyde *v.* Kenosha County, 43 Wis. 129; and the same ruling is made in People *v.* Richmond County, 20 N. Y. 252.

" **Be and Is Hereby Rejected.**" — A resolution of the board of county supervisors that a certain claim presented to it " be and is hereby rejected " shows that the claim was considered and disallowed. Ryan *v.* Dakota County, 32 Minn. 138.

A Report of a Committee advising there jection of an account against the county, presented to and adopted by a county board of supervisors, is a disallowance of the account within the meaning of the statute. Warner *v.* Outagamie County, 19 Wis. 611.

Rejecting Items in an Account. — Where a board of supervisors has once considered a claim and audited and allowed it at a certain amount, a mandamus cannot be issued to compel it to audit the claim anew and allow it at a greater amount; but where there are distinct and separate items in the account, the board cannot wholly reject or refuse to audit one or more of these items which is a legal charge. People *v.* Delaware County, 45 N. Y. 196.

Partial Allowance — Right to Appeal as to Remainder. — The statute of *Wisconsin* providing that any person whose claim has been allowed in part by the county board may receive the county orders issued for the part allowed without prejudice to his right to appeal as to the proper allowance, applies as well where a certain per cent. of the claim is disallowed as where some items are allowed and others disallowed. Bell *v.* Waupaca County, 62 Wis. 214.

Where the board of supervisors of a county allows only part of a claim, the acceptance of the amount allowed precludes the prosecution of a claim for the residue of the bill, whether the board passed on the account as a whole or upon its several items. Hancock County *v.* Binford, 70 Ind. 208; People *v.* Cayuga County, (Supreme Ct.) 17 N. Y. Supp. 314; Chase *v.* Saratoga County, 33 Barb. (N. Y.) 603; People *v.* Albany County, 12 Johns. (N. Y.) 414; People *v.* Queens County, 33 Hun (N. Y.) 305; Shepard *v.* Darke County, 8 Ohio St. 354.

Claim Unlawfully Refused. — Where one, having several claims against a county, receives a check from the county treasurer covering the audit by the board of supervisors of such claims, he is not precluded thereby from applying for a mandamus to compel the payment of one of the claims which has been unlawfully reduced by the board, although the amount to which the claim has been reduced is included in the check accepted by him. People *v.* Hamilton County, 56 Hun (N. Y.) 459.

Where No Ground for Rejection Is Given it will be presumed that the claim was properly rejected. Green *v.* Fresno County, 95 Cal. 329.

2. People *v.* Stout, 23 Barb. (N. Y.) 338; People *v.* Hamilton County, 56 Hun (N. Y.) 459; State *v.* Starling, 13 S. Car. 262.

Board Acts Ministerially. — Where fees are fixed by statute, the county board acts ministerially, and not judicially, in allowing and paying such fees, and the allowance of any amount in excess of that fixed by law is simply void. Kemerer *v.* State, 7 Neb. 130; State *v.* Roderick, 25 Neb. 629; San Joaquin County *v.* Jones, 18 Cal. 327; Hunter *v.* Ripley County, 48 Ind. 177.

Accepting Checks. — A board of county commissioners has no right in its settlement with the treasurer of the county to accept and count as money the checks of third parties. Missoula County *v.* McCormick, 4 Mont. 115.

Implied Contract as to Amount of Allowance. — Where a commissioners' court was authorized by law to fix the allowance of the county treasurer, within certain prescribed limits, and had for a long time invariably allowed the same percentage, a failure to make an order regulating the allowance in a particular case was held to raise an agreement by implication on the part of the county to continue to pay the same amount until it should notify the treasurer to the contrary. Bastrop County *v.* Hearn, 70 Tex. 563.

When Amount of Allowance Discretionary. — But if the amount is for any matter which does not come within any of the classes enumerated, the board of county commissioners, in settling or fixing amounts, is vested with a discretion, and acts in the light of such information as it may possess or obtain.[1]

Method of Hearing Claims. — It appears that, in the absence of statutory direction, there is no enforceable requirement as to the particular manner in which the duty of auditing claims must be performed. The board, however, must, in some way, give an opportunity to the claimant to be heard and to present his proofs.[2]

1. When Allowance Discretionary. — Garfield County *v.* Leonard, 3 Colo. App. 576; People *v.* Foster, 133 Ill. 496; People *v.* St. Lawrence County, 30 How. Pr. (N. Y. Supreme Ct.) 173; People *v.* Webb, (Supreme Ct.) 21 N. Y. Supp. 298; Chase *v.* Saratoga County, 33 Barb. (N. Y.) 603; People *v.* Cortland County, 58 Barb. (N. Y.) 139.

Says Potter, J., in Chase *v.* Saratoga County, 33 Barb. (N. Y.) 603: "These provisions, taken together, show clearly that in reference at least to charges for services for which no fixed or definite sum is prescribed as a compensation the board of supervisors have a discretion, and may allow such sum as they may deem to be just. Boards of supervisors, in auditing and allowing this class of accounts, act judicially, and no proceeding can be had against them, or against the county, for an erroneous determination in relation to their acts."

Where a sheriff was allowed to take an order on a board of county supervisors to show cause why they should not allow him certain fees for alleged services for which they refused to give him what he claimed, and upon the return it appeared that every item charged and not allowed was a charge for commitment or discharge from jail, and was made under the statute fixing sheriffs' fees in criminal cases, the court refused to grant a mandamus against the board, saying: "The supervisors have a considerable discretion in giving pay for services on which the law is silent. The statute gives them this discretion; and they, and not this court, must exercise it if a proper case in their judgment arises." Lee *v.* Ionia County, 68 Mich. 330.

Discretion Not to Be Exercised Arbitrarily. — In all cases where county commissioners are rightfully clothed with discretionary powers in the allowance of claims against the county, such discretion must be controlled by legal consideration and cannot be exercised arbitrarily. And whenever such power is exercised it is always subject to review by the courts. Davis *v.* Lewis County, 4 Mont. 292; Gremmill *v.* Arthur, 125 Ind. 258; Rothrock *v.* Carr, 55 Ind. 334. See also Linton *v.* Linn County, 7 Kan. 79.

The Allowance of Pay for the Relief of Families of Soldiers, etc., is discretionary with the board of commissioners. Sims *v.* Monroe County, 39 Ind. 40.

Power to Compromise. — The board of county commissioners is an inferior tribunal of special and limited jurisdiction. In all cases of settlement or compromise it must affirmatively appear that the action of the board is in conformity to some provision of the statute giving to it that power, else its order is without authority of law, and void. Finch *v.* Tehama County, 29 Cal. 455; White *v.* Conover, 5 Blackf. (Ind.) 463; Lowell *v.* Middlesex County, 3 Allen (Mass.) 550; State *v.* Ormsby County, 6 Nev. 95; State *v.* Washoe County, 6 Nev. 104; State *v.* Central Pac. R. Co., 9 Nev. 79. *Compare* St. Louis, etc., R. Co. *v.* Anthony, 73 Mo. 431.

The board of supervisors, having a supervisory control over the finances of the county, is invested with power to make a settlement touching such finances, and such settlement is binding on the county. Posey County *v.* Saunders, 17 Ind. 437, where the county was held bound by the settlement of the county treasurer's account by the commissioners.

But a settlement between the board of commissioners and a county officer does not conclude the state from maintaining an action to recover school funds unlawfully paid to such officer. Jackson County *v.* State, 106 Ind. 271. There must be a legal consideration to support the compromise. Jefferson County *v.* Lineberger, 3 Mont. 232, 35 Am. Rep. 462.

A county court has no power to enter into a contract with a citizen of the state, delegating to such citizen the power and authority to compromise the outstanding indebtedness of the county, and to deal with the holders of the bonds of such county as its agent in effecting the compromise. Coquard *v.* Chariton County, 14 Fed. Rep. 203.

2. In Mixer *v.* Manistee County, 26 Mich. 422, Campbell, J., said: "When claims are presented which have not yet been liquidated by any authority which concludes them [the supervisors], they are required, first, to allow the claimant an opportunity to be heard by such proofs as he may desire to offer to show that he has rendered the services, and that they were necessary or proper to be rendered; and, second, to allow him such compensation as he should receive therefor, whether fixed by law or contract, or dependent on their own determination, as the case may be. They are bound in all cases to act fairly, and to give every claimant a full opportunity of presenting and establishing his case, and they are bound to give its proper effect to all testimony laid before them, in the same manner in which courts and judicial bodies are expected to give effect to proofs in the course of justice; and they are also bound to come to a decision upon the merits of each claim, or distinctly record the fact that they reject it as not properly admissible, so as to enable the party to obtain a judicial decision whether they are bound to consider it." See also Endriss *v.* Chippewa County, 43 Mich. 319; People *v.* St. Lawrence County, 30 How. Pr. (N. Y. Supreme Ct.) 173; People *v.* Cortland County, (Supreme Ct.) 15 N. Y. Supp. 748.

Allowance for Voluntary Services. — It appears that, without statutory permission, county commissioners can make no allowance for services voluntarily rendered to the county, however beneficial such services may have been,[1] but such a power is sometimes granted by statute.[2]

VI. Rescission and Review of Official Acts — 1. Character of Official Acts Distinguished. — The acts of county supervisors or commissioners may be either ministerial or administrative, judicial or *quasi*-judicial.[3]

A Ministerial Act is defined to be one in whose performance no exercise of discretion is demanded.[4]

A Judicial Act, on the other hand, is one which requires the exercise of judgment or discretion.[5]

Acts Requiring Prior Exercise of Discretion May Be Ministerial. — But it is established that an "act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right

What Amounts to Proper Consideration of a Claim. — Where two bills were presented to a board of supervisors for audit, and a committee was appointed, the claimant having had reasonable notice of the proceedings and an opportunity with his counsel to examine and cross-examine witnesses, and at the end of the examination having stated that he had no other witnesses to examine, his counsel being allowed to discuss his case before the committee, it was held that the claim was properly considered. People *v.* Fulton County, 74 Hun (N. Y.) 251.

In *South Carolina* it has been held that the provision of the General Statutes as to boards of county commissioners requiring further evidence of the truth of claims presented against the county is permissive only, and where the proof presented with the claim does not satisfy the commissioners of its correctness, they are not compelled to demand further proof. Green *v.* Richland County, 27 S. Car. 9; Tinsley *v.* Union County, 40 S. Car. 276.

Defective Affidavit. — Where the affidavit of a claim, presented to the board of county commissioners for allowance, is defective but not void, and no objection is made to the verification while the claim is pending before the county commissioners, but they refuse to allow it for other reasons, no objection can afterward be made to the verification, when suit is brought on the claim in the District Court. Saline County *v.* Bondi, 23 Kan. 117.

In *Michigan*, the boards of supervisors have exclusive power, under the constitution, to adjust all claims against their respective counties. The provision also covers the claim of another county for the expenses of a criminal trial on change of venue. Barry County *v.* Manistee County, 33 Mich. 497.

But the original jurisdiction over claims against counties, which belonged to the courts at common law before the adoption of the constitution, was not taken away by the constitutional provision. Endriss *v.* Chippewa County, 43 Mich. 317.

A Member of the Board of County Commissioners Who Performs Services for the County, whether by order of the board or on his own motion, does so as an individual, and his claim for compensation must be presented in the same manner and take the same course as the claim of any other person. Rankin *v.* Jauman, (Idaho 1895) 39 Pac. Rep. 1111. But *compare* Hartson *v.* Dale, 9 Wash. 379.

Not Required to Hear Claims as a Court. — A board of county commissioners is not required to hear claims as a court, fixing a day for hearing, with witnesses. Tinsley *v.* Union County, 40 S. Car. 276. Nor is it necessary that the claim be brought before it like a formal suit at law. Gaston *v.* Marion County, 3 Ind. 497. See also Tippecanoe County *v.* Everett, 51 Ind. 543.

Requirement as to Verifying Claim. — The clause of the *Wisconsin* statute requiring accounts verified by affidavit to be filed therewith is a mere direction to the board of supervisors, and a compliance with it is not essential to give jurisdiction to the board. Parker *v.* Grant County, 1 Wis. 414.

Duty of Claimant. — It is the duty of the claimant to attend upon the session of the board of county commissioners and to offer his proof in support of his claim. Hickey *v.* Oakland County, 62 Mich. 94. See also Pfaff *v.* State, 94 Ind. 529; Orange County *v.* Hon, 87 Ind. 356; Homan *v.* Franklin County, (Iowa 1896) 68 N. W. Rep. 559.

Specifying Items. — In *Kansas*, the account, when presented to the commissioners, must be made out in absolute items and the nature of each item stated; and where the action is for services or labor, and not for specified fees, such as are allowed by law, the time actually and necessarily devoted to the performance of such service and labor should be specified. Atchison County *v.* Tomlinson, 9 Kan. 167.

Allowance of Unfounded Claim — Indictment. — Where a board of county commissioners audited accounts in favor of its members for mileage, and it was found as a fact that it did so under advice and without any corrupt or fraudulent motive, it was held that the members of the board were not indictable, either under the statute or at common law. State *v.* Norris, 111 N. Car. 652.

1. Huntington County *v.* Boyle, 9 Ind. 296.
2. Carroll County *v.* Richardson, 54 Ind. 153.
3. See *supra*, this title, *Definition*.
4. People *v.* Schenectady County, 35 Barb. (N. Y.) 408. See also Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468.
5. People *v.* Schenectady County, 35 Barb. (N. Y.) 408. See also Grider *v.* Tally, 77 Ala.

and duty" to act.[1] The character of the acts of boards when exercising several particular powers has been already examined.

2. Reconsidering and Rescinding of Official Action. — It has been stated as a general principle that a board of supervisors has no power to review, reverse, or vacate its own judicial action,[2] and there are several authorities holding, without particular reference to the character of the act as judicial or otherwise, that certain powers conferred on such boards are not continuous in their nature, but are exhausted by a single exercise, and cannot, therefore, be rescinded in the absence of fraud or imposition.[3] Some of these cases might well be rested on the broad ground that the rescission would impair the obli-

422, 54 Am. Rep. 65; Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468.

1. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468.

And see, as to the difficulty of laying down any general rule determining the distinction between judicial and ministerial acts, McCord *v.* High, 24 Iowa 336.

2. Cannot Reconsider Judicial Action. — People *v.* Schenectady County, 35 Barb. (N. Y.) 408.

The case of People *v.* Schenectady County, 35 Barb. (N. Y.) 408, is *criticised* in People *v.* Broome County, 65 N. Y. 222, where it is held that a board of county supervisors has power to rescind a resolution improperly allowing a claim against the county; the court, by Reynolds, C., saying: "In a very largely qualified sense it may be true that in such matters the action of the supervisors is *quasi*-judicial, but I think not in any such sense as renders an erroneous and improper audit or allowance incapable of correction by the body committing the error. Boards of supervisors are not judicial tribunals, any more than is the legislature of the state to be regarded in any of its actions a court of justice, although it may audit, allow, or reject claims against the state, and in any case repeal or reconsider its action when found to have been erroneous. The board of supervisors are mere local legislative bodies, in many respects, of limited power; but where they have jurisdiction they may act for their county precisely as the legislature may act for the state. If they act without jurisdiction their acts are void, the same as is the action of the legislature when in violation of any provision of the constitution. If having jurisdiction, if by fraud or falsehood or any misconception of a fact a wrong thing is done, there is no reason in law or morals or in public policy why they may not, on discovering the error, at once correct it. There is no substantial reason for hampering such a body, in its power to correct its own errors and to do right, by applying to it the technical rules which pertain to justices' courts, and other inferior judicial tribunals, supposed to proceed according to the course of the common law, and whose mere errors can only be corrected by a direct proceeding in review."

For other cases as to the supervisor's power to review the allowance of claims, see *supra*, this title, *Powers — As to Audit and Allowance of Claims.*

Cannot Change an Order Once Made. — As a general rule a board of county commissioners has no power to change or revoke an order after the close of the term at which it has been made; as such an order is a judicial act. People *v.* Ulster County, 32 Hun (N. Y.) 607; Case County *v.* Logansport, etc., Gravel Road Co., 88 Ind. 199; Weir *v.* State, 96 Ind. 311; Clarke County *v.* State, 61 Ind. 75; Doctor *v.* Hartman, 74 Ind. 221. But see Bixler *v.* Sacramento County, 59 Cal. 698.

In Woods *v.* Henry, 55 Mo. 560, it was held that an order incorporating a town was rather a legislative than a judicial act, and might be corrected at a subsequent term.

Concurrent Jurisdiction. — Where a board of county commissioners has concurrent jurisdiction of a matter with another board, the principles which govern courts of co-ordinate jurisdiction in refusing to take cognizance of the matter which has been taken jurisdiction of by another court apply. McCrea *v.* Chahoon, 54 Hun (N. Y.) 577; People *v.* Demarest, 16 Hun (N. Y.) 123; Taylor *v.* Fort Wayne, 47 Ind. 274.

3. Powers Exhausted by Exercise. — Where the commissioners of the county, acting under statutory powers, have accepted a conveyance of land for county purposes, taken possession of the land, and authorized the county auditor to draw a warrant in favor of the grantor for the purchase price, the commissioners have no power, in the absence of fraud, imposition, or failure of consideration, to rescind their order and direct that the warrant shall not issue. State *v.* Darke County, 43 Ohio St. 311. In this case, the court, by Owen, J., said: "The order of the commissioners directing the auditor to draw his warrant on the treasurer in favor of the relator was the only means by which they could fully perform and execute the contract on their part. By this act their power over the subject of the contract was expended and the rights of the relator fixed. To recall or rescind their action in this behalf would be a substantial and serious interference with a most important contract right of the relator. A statute of Indiana authorized the county commissioners to purchase a 'tract of land' for an asylum for the poor. The board provided one tract, and then undertook to purchase another. It was held that 'when the board have acted and provided a farm for the occupancy of the poor of the county, their legislative power on that subject is exhausted.' Hanna *v.* Putnam County, 29 Ind. 170. See, in support of the same general principle, Nelson *v.* Milford, 7 Pick. (Mass.) 18; Hall *v.* Holden, 116 Mass. 172, New Orleans *v.* Church of St. Louis, 11 La. Ann. 244; Northampton County's Appeal, 57 Pa. St. 452; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175; Indianapolis *v.* Indianapolis Gas Light, etc., Co., 66 Ind. 396; State *v.* Board of

gation of contracts or divest vested rights.[1] A resolution of a board may be rescinded, however, before it has been accepted or acted upon by the party interested in its subject-matter,[2] and contracts induced by fraud may be rescinded.[3]

3. Review of Official Acts by Courts. — The distinction between judicial and ministerial acts [4] is of importance in determining the power of courts to reconsider or review the determination of boards of supervisors or commissioners.

Where Act Involved Discretion. — If the act involves an exercise of discretion on the part of the board, the determination is final [5] in the absence of abuse, oppression, or fraud, or excess of jurisdiction.[6]

Judicial Action Cannot Be Attacked Collaterally. — The judgments of a board of supervisors or commissioners, like those of any court of competent jurisdiction, cannot be attacked collaterally, but are conclusive upon all parties in interest in an action at law until reversed.[7]

Review by Certiorari and Other Extraordinary Processes. — The principles upon which the remedies of certiorari, injunction, mandamus, prohibition, and quo warranto are available to review the acts of these boards, are treated in other connections in this work.[8]

Education, 35 Ohio St. 368; State *v.* Hastings, 15 Wis. 75."

Where, under an agreement with the commissioners, work has been done for the county which has been accepted and paid for, the commissioners can maintain no action, in the absence of fraud or mistake, to recover back the money thus paid. Hamilton County *v.* Noyes, 35 Ohio St. 201.

1. See, for instance, State *v.* Darke County, 43 Ohio St. 311.

2. A resolution may be rescinded before it is accepted by the claimant. Tilden *v.* Sacramento County, 41 Cal. 68.

3. The board of county supervisors may rescind a contract, the execution of which was induced by fraud. Hall *v.* Los Angeles County, 74 Cal. 502.

4. See *supra*, this section, *Character of Official Acts Distinguished.*

5. Where a board of supervisors allows or disallows a claim, it acts as a *quasi*-judicial body, and the action constitutes an adjudication of the claim which is conclusive. Colusa County *v.* De Jarnett, 55 Cal. 373; McFarland *v.* McCowen, 98 Cal. 329; Peck *v.* Kent County, 47 Mich. 477. See also *supra*, this title, *Powers, passim.*

6. McFarland *v.* McCowen, 98 Cal. 331.

It is only when its interference is necessary to prevent abuse, injustice, or oppression, the violation of a trust or the consummation of fraud, that a court of equity has power to review the exercise of discretionary power vested by law in a public officer. Freedman, J., in Hill *v.* Thompson, 48 N. Y. Super. Ct. 481, *citing* People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536. See generally the title INJUNCTIONS.

7. **Judgments Conclusive Against Collateral Attack** — *Alabama.* — Lewis *v.* Gainesville, 7 Ala. 85.

California. — Waugh *v.* Chauncey, 13 Cal. 11; Falk *v.* Strother, 84 Cal. 544.

Indiana. — Loesnitz *v.* Seelinger, 127 Ind. 422; Donalson *v.* Lawson, 126 Ind. 169; Maxwell *v.* Fulton County, 119 Ind. 20; Knox County *v.* Montgomery, 106 Ind. 518; Jackson *v.* State, 104 Ind. 516; Stingley *v.* Nichols, 131 Ind. 214; Cicero *v.* Williamson, 91 Ind. 541; Ricketts *v.* Spraker, 77 Ind. 371; Featherston *v.* Small, 77 Ind. 143; Stoddard *v.* Johnson, 75 Ind. 20; Muncey *v.* Joest, 74 Ind. 409; Miller *v.* Porter, 71 Ind. 521; Lawrence County *v.* Hall, 70 Ind. 469; Suits *v.* Murdock, 63 Ind. 75; Clarke County *v.* State, 61 Ind. 75; Clay County *v.* Markle, 46 Ind. 96; Windman *v.* Vincennes, 58 Ind. 480; Wild *v.* Deig, 43 Ind. 455; Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329; Little *v.* Thompson, 24 Ind. 146.

Maine. — Plummer *v.* Waterville, 32 Me. 566.

Massachusetts. — Brewer *v.* Boston, etc., R. Co., 113 Mass. 52.

Minnesota. — Webster *v.* Washington County, 26 Minn. 220.

Mississippi. — Yalabusha County *v.* Carbery, 3 Smed. & M. (Miss.) 529; Ross *v.* Lane, 3 Smed. & M. (Miss.) 695.

New York. — Hubbard *v.* Sadler, 104 N. Y. 223.

See also the title JUDGMENTS; and *supra*, this title, *Meetings of the Board — Proceedings and Records.*

When a board of county commissioners is clothed by law with exclusive jurisdiction over roads and highways, its judgments and orders are final and conclusive upon the board, the parties in interest, and third parties, at least when assailed in a collateral proceeding. Humboldt County *v.* Dinsmore, 75 Cal. 604; Butte County *v.* Boydstun, (Cal. 1886) 11 Pac. Rep. 781; Million *v.* Carroll County, 89 Ind. 5; Heagy *v.* Black, 90 Ind. 535; Rassier *v.* Grimmer, 130 Ind. 219; Badger *v.* Merry, 139 Ind. 631; Lake Shore, etc., R. Co. *v.* Smith, 131 Ind. 512; Thomas *v.* Churchill, 84 Me. 446; Smith *v.* Boston, 1 Gray (Mass.) 72; Stewart *v.* Board of Police, 25 Miss. 479; St. Louis, etc., R. Co. *v.* St. Louis, 92 Mo. 160; Howard *v.* Brown, 37 Neb. 902.

8. See the titles PUBLIC OFFICERS; INJUNCTION; MANDAMUS; PROHIBITION; QUO WARRANTO.

Indiana — When Appeal Lies. — Where the duty of the commissioners involves judicial action an appeal lies from it, unless the right

COUNTY COURT. (See the title COUNTY-SEAT, *post*; COURTS, *post*; and the references there given.) — A county court is ordinarily a court confined in jurisdiction to one county.[1]

COUNTY ORDERS AND WARRANTS. See the title MUNICIPAL SECURITIES.

COUNTY ROAD. (See the title HIGHWAYS.) — See note 2.

COUNTY SEAL. — See the titles PUBLIC OFFICERS; SEALS.

of appeal is denied expressly or by necessary implication from the statute creating the duty; but when the duty does not involve judicial action, but is ministerial or administrative, although involving discretion, no appeal lies, unless it is expressly authorized by statute. Vigo County *v.* Davis, 136 Ind. 505; Henry County *v.* Gillies, 138 Ind. 667; Platter *v.* Elkhart County, 103 Ind. 360.

Matters of Discretion. — In matters involving no question of legal right, but resting simply in the discretion of the board, no appeal lies from an action of the board. Sims *v.* Monroe County, 39 Ind. 40; Carroll County *v.* Richardson, 54 Ind. 153. See also Nichols *v.* Howe, 7 Ind. 506.

In O'Boyle *v.* Shannon, 80 Ind. 159, it is said: "This discretionary power of county commissioners over the property of their respective counties has been held to be analogous to the legislative power possessed by many municipal bodies, and is distinguishable from the judicial or *quasi*-judicial powers conferred upon such commissioners. Hanna *v.* Putnam County, 29 Ind. 170. It follows, therefore, that the order of sale from which an appeal was prayed in this case was not a 'decision' within the meaning of the statute authorizing appeals from the decisions of county commissioners in a large class of cases. 1 Rev. Stat. 1876, p. 357, § 31. Consequently the court below did not err in dismissing the appeal in this case."

When Execution of Ministerial Act Enjoined. — But the execution of a ministerial act of the board, if in excess of the power conferred upon it, may be prevented by injunction. Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416; Henry County *v.* Gillies, 138 Ind. 668, where the court said: "The making of this contract by the board was not a judicial act, but simply an administrative one in which the board had discretion to enter into the contract or refuse to do so. No appeal will lie from such an act of the board. But if the statute prescribed the mode of exercising this administrative power, and the board failed to comply with the requirements of the statute, then the act of the board was void, and it may be so declared, and injunction will lie to prevent the board from carrying out the terms of the void contract."

1. State *v.* Atherton, 19 Nev. 342. In that case the court said: "The name 'district courts' seems to have been selected because it was deemed to be a name of higher grade and greater dignity than *county courts*; but these courts, with the power and jurisdiction as given by the constitution, might appropriately have been called *county courts*, and the judge or judges thereof might have been elected to preside over such courts in one or more or all the counties, notwithstanding the fact that the term *county courts* is ordinarily given to courts confined to each county. The courts might have been called courts of common pleas, general courts, courts of appeal, or any other name which pleased the fancy of the members of the convention. It is the jurisdiction conferred upon the court that gives it its power and authority, and not its name. The name 'supreme court,' for instance, indicates that it is a court of the highest authority in the state, and so it is in this state; yet in New York this name is given to courts possessing similar jurisdiction to that given to the district courts in this state, and the name 'court of appeals' is given to the highest court. In Texas, the name 'court of appeals' is given to a court having appellate jurisdiction in criminal cases, and the name 'supreme court' applied to the court having appellate jurisdiction in civil cases. Instead of 'judicial districts,' the framers of the constitution might have used the words 'judicial courts,' 'judicial circuits,' or 'general courts, one, two, three,' etc. The word 'district' does not always mean a part or portion of a country, state, or territory. 'Judicial districts are districts created for judicial purposes, for defining jurisdiction of courts, and distributing judicial business.' (Abb. Law Dict.) 'By successive extensions of meaning, this word has gradually lost its original and peculiar signification, and is now constantly used, in ordinary language, to denote *any* extent of territory for *any* purpose.' (Burr. Law Dict.) 'The circuit or territory within which a person may be compelled to appear.' (Rap. & L. Law Dict.) There is no such positive or implied meaning in the use of the words 'district courts,' 'judicial districts,' or 'district,' as would authorize us, in the absence of any express clause limiting the power given to the legislature, to declare that the several counties in this state could not, by a legislative act, be included in one judicial district."

County Court. — "*Court* of *county*" and *county court* are convertible terms. Palmer *v.* Cradock, Sneed (Ky.) 183.

2. County Road Distinguished from State Road. — In State *v.* Wood County, 17 Ohio 186, it is said that a state road is a road running into two or more *counties*, and is distinguished by this from a *county road*, which lies wholly within one *county*.

COUNTY-SEAT.

By Joseph Walker Magrath.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: CONSTITUTIONAL LAW, vol. 6, p. 882; *COUNTIES, ante; COUNTY COMMISSIONERS, ante; DEDICATION; ELECTIONS.*

I. Definition and Nature. — A county-seat may be defined as the seat of government of a county;[1] the town or municipality in which the county and other courts are held,[2] and where the county officers have their offices, and

1. Seat of Government. — Cent. Dict., p. 1308; Williams *v.* Reutzel, 60 Ark. 155.

In *In re* Allison, 13 Colo. 525, 16 Am. St. Rep. 224, the court, *per* Helm, C. J., said: "The county-seat, accurately speaking, is something separate and apart from the place where it is located, for both the constitution and statute provide for its removal from one place to another. And the term, as in common parlance applied to a particular town or city, simply designates the town or city where the county-seat is for the time being established."

2. Seat of Justice. — Cent. Dict., p. 1308.

In Williams *v.* Reutzel 60 Ark. 155, the court, *per* Battle, J., said: "In every county

the county business is transacted.[1]

Not Necessarily Coextensive with Town Where Located. — When a city or town is selected as the county-seat, the boundaries of such city or town, as they then exist, become the boundaries of the county-seat, and the subsequent inclusion of more territory in such city or town does not enlarge the county-seat.[2]

II. LOCATION — 1. Power to Locate. — The power to locate a county-seat, in the first instance, belongs to the legislature,[3] and it is not necessary that there should be any vote of the electors of the county upon the question.[4]

of this state there is, and must be, a county-seat. At it the County Court is required to erect a good and sufficient court house and jail. The county, circuit, and other courts held for the county must sit there. There is no other place designated by law for that purpose. The name 'county-seat' indicates the object of its creation."

The "seat of justice," within the meaning of the constitution, is what is commonly called "the county-seat." It is the place where the court house and the jail and the county offices are located; the place where the chancery and circuit records are kept. The seat of justice is located with reference to the convenience of the citizens of the county. Ellis *v.* State, 92 Tenn. 85.

1. Place Where County Business Is Transacted. — State *v.* Hughes, 104 Mo. 459; Williams *v.* Reutzel, 60 Ark. 155.

The county-seat has always been the place designated for doing county business; the place at which the public buildings were to be erected; the place where the probate and county courts were to be held and the offices of the county clerk, county treasurer, and register of deeds were to be located; and where the board of supervisors were to hold their several sessions. Whallon *v.* Circuit Judge, 51 Mich. 503.

County-seat Does Not Mean County Buildings, or Land Whereon They Are Situated. — Under a statute in reference to the relocation of a county-seat which provided that the removal should be "at least three miles," a county seat is not the lot or lots upon which the county building or buildings stand, nor is it such buildings themselves; but it is the town or municipality in which such buildings are located. Moffit *v.* State, 40 Ind. 217.

The provision of the *Pennsylvania* Constitution forbidding the lines of a new county to pass within ten miles of the county-seat of any county proposed to be divided refers to the county town, and not to the court house. *In re* County Seat, 4 Pa. Dist. Rep. 319, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 402.

A statute requiring the "place" at which it is desired to relocate a county-seat to be named in the petition for a vote on the question and the order of the County Court directing such vote, means that the city or town at which the relocation is desired is to be named therein, not that the particular spot where the county buildings are to be erected should be designated. And this is true no matter how much extent of land is covered by the boundaries of such city or town, or how sparse the population may be in portions thereof. Doolittle *v.* County Ct., 28 W. Va. 158.

2. Not Necessarily Coextensive with Town Where Located. — State *v.* Atchison County, 44 Kan. 186; State *v.* Smith, 46 Mo. 60.

At an election for the location of a county-seat, M. was chosen. M. was unincorporated, but was mentioned and described as M. in a certain town plat, and contained a definite quantity of land. Subsequently an adjoining tract of land was added to "the town of M.," and the whole was incorporated as a city of the third class. Some time afterwards the board of county commissioners ordered all the county officers to remove their offices, records, books, etc., to the addition. It was held that this order was unauthorized, and that the county offices could not be removed beyond the limits of M. as it existed at the time the county-seat was located there. State *v.* Harwi, 36 Kan. 588.

In Missouri the Constitution provides that "all additions to a town which is a county-seat shall be included, considered, and regarded as part of the county-seat." Constitution of Missouri, art. 9, § 2.

3. Power Resides in Legislature. — Smith *v.* Adams, 130 U. S. 167; Mode *v.* Beasley, 143 Ind. 306, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 402, 403.

The original designation of a county-seat pertains to the power to organize a county. After it is once established through the agency of the legislature, the general provisions for removal apply, and the people may decide for themselves. Rice *v.* Shay, 43 Mich. 380.

In the absence of constitutional restrictions, the legislature of the state has full power to provide the manner in which county-seats shall be located. Luce *v.* Fensler, 85 Iowa 596.

Not a Regulation of County Business. — A special act of the legislature locating the county-site of a county is not within the prohibition of the *Florida* Constitution that the legislature shall not pass special or local laws regulating county, township, or municipal business, as the location of a county-site is not a regulation of such business. State *v.* Padgett, 19 Fla. 518. See also Mode *v.* Beasley, 143 Ind. 306; Jackson County *v.* State, (Ind. 1897) 46 N. E. Rep. 908.

Right to Locate County-seat Not Included in Police Power.— The Constitution of *Mississippi*, giving to the boards of police jurisdiction in all "matters of county police," did not thereby give them power to locate the seats of justice in the several counties, but such power remained in the legislature. Monet *v.* Jones, 10 Smed. & M. (Miss.) 237. See the title POLICE POWER.

4. Popular Vote Not Necessary. — Jewell *v.* Weed, 18 Minn. 272.

Division of County. — Where a new county

But the legislature may leave the selection of a location to the county commissioners,[1] or to commissioners appointed by itself,[2] or to the electors of the county, at an election held for the purpose of making a choice,[3] without being guilty of an unauthorized delegation of legislative power.[4]

2. Where County-seat May Be Located — *a.* MUST BE WITHIN COUNTY. — A place without the limits of a county cannot be the county-seat; and the legislature, if it selects such a place, exceeds its authority.[5]

b. CHOICE NOT LIMITED TO EXISTING MUNICIPALITIES. — In the selection of a county-seat the choice is not limited to existing cities and towns,[6] nor is it necessary that the place selected should be platted, or should have

has been formed out of territory belonging to an old county, and contains within its limits the county-seat of the old county, the designation of another county-seat for the old county is an establishment rather than a removal, and therefore the question of the location at such place need not, under the *Wisconsin* Constitution, be submitted to the voters of the old county. The constitutional provision that no county-seat shall be removed without the consent of the electors of the county, voting on the question, is not infringed by such establishment. State *v.* Larrabee, 1 Wis. 200.

1. Location by County Commissioners. — Under the provisions of the *Florida* Constitution "that in the formation of new counties, the county-seat may be temporarily established by law," the legislature may delegate to the board of county commissioners for a new county the power to locate the temporary county-seat. Lake County *v.* State, 24 Fla. 263.

In *Wisconsin*, where the act creating a new county does not provide for a county-seat, the county board is authorized, under Sanb. & B. Anno. Stat., § 654, to designate a county-seat at its first regular meeting after the organization of the county. Cathcart *v.* Comstock, 56 Wis. 590.

2. Location by Special Commissioners. — When a county is organized, the legislature may prescribe the location of the county-seat approximately, and then leave it to commissioners of its own selection to fix upon the exact spot. Rice *v.* Shav, 43 Mich. 380.

Failure of Commissioners to Comply Strictly with Directions. — Where an act of the legislature appointed commissioners to locate a county-seat, and authorized them to procure a lot of land containing not less than fifty nor more than two hundred acres, for that purpose, and the commissioners, being unable to obtain more than forty acres, obtained that amount, and located the county-seat thereon, it was held that no private right was infringed by an act of the legislature confirming such location. Ruggles *v.* Washington County, 3 Mo. 496.

3. Location by Electors of County. — Smith *v.* Adams, 130 U. S. 167; Doan *v.* Logan County, 2 Idaho 781.

When County Judge May Order Election. — In *Texas* a county judge, upon petition, has power to order an election to remove a county-seat; and when a county has been organized, and no county-seat located, he has the power, without petition, to order an election to locate one. Where a place has been used and recognized as the county-seat for a long time, by the people and by the officers whose duty it was, in the first instance, to determine whether the county-seat had been located, a county judge cannot, simply because he does not find the required evidence of such location, assume that no location has been made, and order an election. Caruthers *v.* State, 67 Tex. 132.

Ratification of Irregular Election. — The legislature may ratify an irregular election for the location of a county-seat, where such election has shown the will of a majority of the electors. State *v.* Harper County, 34 Kan. 302.

4. Not a Delegation of Legislative Power. — Territory *v.* Mohave County, (Arizona 1887) 12 Pac. Rep. 730; McWhirter *v.* Brainard, 5 Oregon 426; Lake County *v.* State, 24 Fla. 263.

In Territory *v.* Mohave County, (Arizona 1887) 12 Pac. Rep. 730, the court, *per* Barnes, J., said: "The location of a county-seat should be determined by the people of a county. Their interests and convenience should alone be consulted. So, in most of the states, laws have been enacted by which a vote of the people should determine the question. No case has been cited that decides such laws to be invalid. They have been acquiesced in by courts and the lawmakers too long now to question their validity. The case of Calaveras County *v.* Brockway, 30 Cal. 326, treats such a law as valid. So do the cases of State *v.* Stearns, 11 Neb. 104; Boren *v.* Smith, 47 Ill. 482."

In McWhirter *v.* Brainard, 5 Oregon 426, an act of the legislature for the location of a county-seat provided that five places might be voted for, and that the place which received a majority of the votes cast should be the county-seat, with provision for a second election in case no place received such majority. It was claimed that this was an unauthorized delegation of the legislative power to the electors of the county. But it was held that there was no such delegation, the court, *per* Shattuck, J., saying: "The power of location is exercised by the legislative assembly, but it takes effect in a particular mode, or not at all, by a vote of the electors interested." See the titles CONSTITUTIONAL LAW, vol. 6, p. 882; STATUTES.

5. Must Be Within County. — Reddy *v.* Tinkum, 60 Cal. 458. See also State *v.* Larrabee, 1 Wis. 200; Atty.-Gen. *v.* Fitzpatrick, 2 Wis. 542.

6. Not Limited to Existing Towns. — Conley *v.* Fleming, 14 Kan. 381.

Site for New Town May Be Chosen. — In the selection of a county-seat, the electors may choose a site for a new town, and locate the county-seat thereon. Conley *v.* Fleming, 14 Kan. 381.

fixed and definite boundaries. The selection, if in other respects legal, is good and operative if it designates a place which is well known, and if there is but one such place in the county.[1]

c. NO PARTICULAR PLACE WITHIN SETTLEMENT CHOSEN NEED BE NAMED. — Even though a large settlement is chosen for the county-seat, it is not necessary that any particular place within such settlement be designated.[2]

3. Temporary Location — *a.* NOT AN ESTABLISHMENT. — The selection by the legislature of a temporary county-seat, in order to get the business of a new county started, is in no sense the establishment of a county-seat, for that imports a selection intended to be permanent.[3] It follows that the selection of a permanent county-seat in place of a temporary one is not a removal, and such change is not subject to constitutional restrictions upon removals.[4]

1. Designation Sufficient if Place Is Well Known. — Fall River County *v.* Powell, 5 S. Dak. 49. In this case "Hot Springs" had been chosen as the county-seat. There was a settlement well known as Hot Springs, but which had no stated or definite topographical boundaries, though its general locality was well understood in all parts of the county. Before the organization of the county the owners of certain land comprising part of the locality known as Hot Springs had platted such land and caused the plat to be recorded as a plat of the town of Hot Springs. Under these circumstances it was held that whether the county-seat as selected was the general locality known as Hot Springs, or the territory platted and recorded as Hot Springs, was a question of fact to be determined from the evidence, and that the Hot Springs selected as the county-seat was not necessarily and only the territory covered by the recorded plat.

In State *v.* Atchison County, 44 Kan. 186, the court, *per* Valentine, J., said: "It is not necessary, however, in any case, that a county-seat should be located within or upon territory occupied by an incorporated city, or within the territory of a city at all, or within the territory of any town, or village, or township, or school district, or road district, or any corporation or organization of any kind. County-seats do not necessarily have any relation to or connection with any such things. A county-seat may be located upon vacant and unoccupied land, and by any name that will sufficiently designate it or by which it may be known. Conley *v.* Fleming, 14 Kan. 386. It might be located upon John Smith's farm and be designated by that name, provided there was any such place and only one such place in the county, and provided a sufficient portion thereof could be obtained for public buildings and other public necessities."

2. No Definite Place Within Settlement Chosen Need Be Named. — At an election for the location of a county-seat of a county, a majority of the votes cast were for F., which was a township of large dimensions, and no definite place was named within it. The court said that there was no difficulty in holding that a vote for F. meant the settlement of that name, and that the law does not require the county-seat to be located on a particular village lot or square. Atty.-Gen. *v.* Iron County, 64 Mich. 607.

3. Not an Establishment. — Atty.-Gen. *v.* Iron County, 64 Mich. 607.

4. Change from Temporary County-seat Not a Removal.— Doan *v.* Logan County, 2 Idaho 781.

Where the legislature, in organizing a new county, designated a temporary county-seat, and provided that at the next general state election the qualified voters should cast their votes for such place as they should designate, and the place receiving the highest number of votes should be the permanent county-seat, it was held that such act was not in contravention of a clause of the state constitution providing that 'no county-seat, once established, shall be removed until the place to which it is proposed to be removed shall be designated by two-thirds of the board of supervisors of the county, and a majority of the electors voting thereon shall have voted in favor of the proposed location in such manner as shall be prescribed by law." Atty.-Gen. *v.* Iron County, 64 Mich. 607.

The provision of the Constitution of *Idaho* that "no county-seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal," applies only to the removal of a county-seat once permanently fixed. And an act creating a county, which located a temporary county-seat and provided that at the regular election in a certain year the question of location of the county-seat should be submitted to the voters of the county, and that the place receiving the highest number of votes for the county-seat should be the permanent county-seat, was not abrogated by such constitutional provision. Doan *v.* Logan County, 2 Idaho 781.

An act of the legislature establishing a new county provided that the board of county commissioners should select a temporary county-seat and provide for the holding of an election to select a permanent county-seat. It was held that the selection of such permanent county-seat was not a removal of a county-seat once established, and that the act did not conflict with the constitutional provision that "the legislature shall have no power to remove the county-seat of any county, but shall provide by general law for such removal;" as the proviso to the constitutional clause, "that in the formation of new counties the county-seat may be temporarily established by law," qualified the limitation upon the legislative power, and reserved to the legislature the power, when forming a new county, to establish a

b. HOLDS UNTIL PERMANENT LOCATION IS MADE. — A place which is designated as the temporary county-seat remains the county-seat until a permanent location is made according to law.[1]

c. LOCATION FOR FIXED TIME ONLY. —Where a county-seat is located at a certain place for a fixed time only, it is the duty of the legislature, at the expiration of such time, to provide by law for the location of a new county-seat.[2] If, however, no such provision is made, the county-seat does not revert, it is held, to any place where it has been previously located, but remains where last located until such provision shall be made.[3]

d. RETAINING TEMPORARY COUNTY-SEAT. — Where a place has been designated as the temporary county-seat, the legislature may authorize the county commissioners, if they find it is for the public interest, to retain such place as the county-seat for a specified time, and in such case may forbid any election for a location or relocation within that time.[4]

4. Permanent Location — *a.* THERE CAN BE BUT ONE PERMANENT LOCATION. — When the county-seat of a new county is permanently located by the electors of the county under an act providing for the organization of new counties, the force of the act, as applied to such county, is completely spent, and there can be no subsequent election for the location of a county-seat under its provisions.[5]

temporary county-seat, which should not be subject to such limitation, but should be the county-seat only until the permanent county-seat should be established in the manner provided by the special act organizing the county. Lake County *v.* State, 24 Fla. 263.

But see Matter of La Fayette County, 2 Chand. (Wis.) 212, 2 Pin. (Wis.) 523. In this case an act of the legislature provided that the people should vote for the locating of the county-seat of a certain county, and gave them unlimited authority in selecting the place. It was also provided that if no place should receive a majority of all the votes at the first election held under the act, the electors should continue to vote on the question at every subsequent election, until a county-seat should be selected. It was further provided that until a county-seat should be selected, "the county-seat shall be and remain at S." Before any place was chosen under this act, the constitution of the state went into operation, and one section of such constitution provided that "no county-seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county, voting on the question, shall have voted in favor of its removal to such point." It was held that the county-seat would remain at S. until removed in the manner prescribed in the constitution. See also State *v.* Washington County, 2 Chand. (Wis.) 247, 2 Pin. (Wis.) 552.

1. Holds Until Permanent Location Is Made. — State *v.* Harper County, 34 Kan. 302; State *v.* Mills, 39 Kan. 76.

In State *v.* Harper County, 34 Kan. 302, the court, *per* Valentine, J., said: "This act in terms made Anthony only temporarily the county-seat; but it was temporary only in the sense and upon the contingency that the electors of Harper county should, at the next general election, to be held in 1879, relocate their county-seat at some other point. If, in the course of things, no election should be held as provided for in that act, then the county-seat would remain located at Anthony about as permanently as county-seats are usually located; for no county-seat is so permanently located that it cannot be removed by a majority of the electors of the county, if they choose to remove it, and do so in a legal and proper manner."

2. Legislature Should Provide for Permanent Location. — State *v.* Washington County, 2 Chand. (Wis.) 247, 2 Pin. (Wis.) 552.

3. Does Not Revert to Former Location. — State *v.* Washington County, 2 Chand. (Wis.) 247, 2 Pin. (Wis.) 552.

4. Temporary County-seat May Be Retained for Specified Time. — State *v.* Sanders, 42 Kan. 228.

An act making such a provision does not contravene a constitutional provision that no county-seat shall be changed without the consent of a majority of the electors of the county. State *v.* Sanders, 42 Kan. 228.

5. There Can Be But One Permanent Location. — State *v.* Harper County, 34 Kan. 302.

The principle stated in the text applies even though the election for location may not have been entirely regular, where it has been ratified by the legislature. State *v.* Harper County, 34 Kan. 302.

In 1871 an election was held in H. county under the provisions of an act of the legislature, for the location of a county-seat and the election of county offices. A majority of the votes cast were in favor of A. as the county-seat. The returns of the election were duly certified to and filed by the secretary of state, but the county officers failed to qualify. In 1872 the acting governor of the state issued his proclamation calling an election for county officers and the location of a county-seat. At this election county officers were elected, who subsequently qualified. There being no choice as to the location of the county-seat, two other successive elections were held, resulting in an apparent majority for M., but the final vote was not canvassed by the county clerk, and the result of said election was not officially declared. The county offices were not held, nor were the records kept, at any one

b. NUMBER OF VOTES NECESSARY TO LOCATE. — It has been held that under a legislative provision that, at a general election, the question of the location of the county-seat should be submitted to the voters of the county, and the place receiving "a majority of all the votes cast" should be the county-seat, the place receiving a majority of the votes cast on the question of location became the county-seat; and that a majority of the whole number of votes cast at the election for county officers or on any other question was not required.[1]

In Texas a county-seat may be located within five miles of the geographical centre of the county by a majority of the votes cast on the question of location, but to locate it in any other part of the county requires a two-thirds vote.[2]

c. THE ELECTION — (1) *Registration — Petition.* — **In Kansas** the law providing for the registration of voters at county-seat elections has no reference to county-seat elections in the organization of new counties, for its provisions are inconsistent with the law providing for such organization.[3]

In South Dakota no petition of the electors of an organized county in which the county-seat has not been located by a majority vote is necessary to authorize the board of county commissioners to submit the question of location; the constitution makes it the duty of the board to submit the question at a general election.[4]

(2) *Time of Holding Election.* — Under a statute providing that the election for the location of a county-seat must be held within a certain time after the presentation of a petition therefor, the time during which the county commissioners are restrained by an order of court from acting on the petition should be excluded from the computation.[5]

Election at Improper Time. — An election for the permanent location of a county-seat will not be declared void because not held at the proper time, where such failure was due to the neglect of the county commissioners, and the result of holding such election void would be to retain the temporary county-seat selected by the commissioners, and forever to deprive the people

place until the year 1875. From that time on the county offices and records were all kept, and the district courts were all held, at A. In 1881 the board of county commissioners, without the presentation of a petition therefor, called an election for the location of a county-seat. It was held that they had no authority or jurisdiction to call such election. Laws *v.* Vincent, 16 Neb. 208.

1. Votes Necessary to a Choice. — State *v.* Grace, 20 Oregon 154.

For a full discussion of cases where similar questions have arisen in reference to the removal of county-seats, see *infra*, this title, *Removal*.

2. Texas Rule. — State *v.* Alcorn, 78 Tex. 38.7

Void Location. — Where the result of an election has been declared to be the selection of a place more than five miles from the centre of the county as the county-seat, by a simple majority vote, the election is void. State *v.* Alcorn, 78 Tex. 387.

Validating Act. — To prevent the confusion which otherwise would have resulted from the above decision, the Act of March 10, 1891 (Laws 1891, p. 30), was passed, validating all previous elections where the county-seats of newly organized counties had been located more than five miles from the centre of the county by a mere majority vote. See Ewing *v.* Duncan, 81 Tex. 230.

3. Registration Not Necessary — Kansas. — State *v.* Hamilton County, 35 Kan. 640, 15 Am. & Eng. Corp. Cas. 43.

4. No Petition Necessary — South Dakota. — State *v.* Lien, (S. Dak. 1896) 68 N. W. Rep. 748. In this case it was held that c. 64, § 1, of the South Dakota Laws of 1890, providing that: "It is hereby made the duty of the board of county commissioners of any county in this state, in which the county-seat has not been located by a majority vote, on a petition being presented to them, * * * signed by a majority of the qualified electors of said county, * * * to submit the question of location of county-seat to the qualified electors of said county at the next general election," etc., was inoperative so far as it related to the presentment of a petition for the board of county commissioners in cases where county-seats had not been located by a majority vote, because it was in conflict with the provision of art. 9, § 2, of the Constitution, which provides that, "in counties already organized, where the county-seat has not been located by a majority vote, it shall be the duty of the county board to submit the location of the county-seat to the electors of said county at a general election."

5. Order of Court Restraining Action on Petition Extends Time for Election. — State *v.* Sherman County, 39 Kan. 293.

of the county of the power to remove the same.[1]

(3) *The Canvass.* —A canvass made without the presence of or notice to all the canvassing board, and attended by circumstances which show a fraudulent intent to declare a certain place elected, regardless of the true result, is void.[2]

All Votes Must Be Canvassed. — Special commissioners appointed by the governor, on the organization of a county, have no power, in canvassing the vote at an election called by them for the location of a county-seat, to throw out votes cast for a certain place; their duties are purely ministerial, and they must canvass the entire number of votes cast.[3]

Designation on Ballots of Different Places in Same Locality. – It has been held that where the voters designate on their ballots different places which are substantially in the same locality, the ballots should be counted for the general spot covered by the descriptions.[4]

Canvassers Cannot Dissolve Meeting Without Completing Canvass. — Canvassers appointed to ascertain the result of an election for the location of a county-seat have no right to dissolve their meeting until they have completed their canvass. They cannot defeat the popular will, as expressed by the election, by refusing or neglecting to perform the duties imposed upon them by law.[5]

True Result Declared by the Courts. — Where, in an election contest, a place declared by the canvassing board to have been defeated is clearly shown to

1. **Election at Improper Time.** — In Coleman *v.* People, 7 Colo. App. 243, the act creating a county provided that the county-seat should be temporarily located by the county commissioners, and that a permanent location should be selected by the voters of the county at the next general election. The question was voted upon at such election, but no decision was reached. The county commissioners did not submit the question at a special election one month thereafter, as required by Rev. Statutes 1868, c. 20, § 43, but the question was submitted at the succeeding general election, and H. was selected as the county-seat. It was held that the failure to hold the special election did not invalidate the selection so made. The court, *per* Bissell, J., said: "If we should hold otherwise, it would leave the board of county commissioners complete power to defeat the wish of the people. If the board, for pecuniary or other reasons, desired the county-seat to remain where they had temporarily located it, a simple neglect to call a special election would accomplish their object. Of course, this depends on the result of the first general election. If the county-seat be not then permanently established, to concede the appellee's contention would be to vest the power of location absolutely in the board. No special election being called, the matter could never be considered at a general election thereafter. No succeeding board could submit the question, and there is no known way by which the voters could enforce their will. The county-seat not having been permanently located, there could be no vote as to a change, either in one or four years, and an inefficient, incompetent, or corrupt county government would thus be left in full control of the question. No such result should be permitted, and as this is possible, we have a right to infer a want of intention on the part of the legislature to bring it about."

2. **Irregular and Fraudulent Canvass.** — Under the provisions of the act relating to the organization of new counties, an election was held for township and county officers, and also for the permanent location of the county-seat of a certain county, and certified returns from each precinct were made to the board of county commissioners. On the Saturday following the election the county commissioners examined the returns made to them, and canvassed and declared the result as regarded township and county officers. One of the commissioners made a motion that the board proceed to canvass the votes to determine the permanent location of the county-seat; another moved that the motion so made be laid on the table. This was carried, and no announcement of the result of the vote for the county-seat was made. The board adjourned till Monday, but no hour was fixed for the adjourned meeting, as the majority of the board did not want the friends of the place they intended to declare defeated in the contest for county-seat to be present. On Monday, at three o'clock in the morning, by moonlight, and without the official poll books, ballots, or tally sheets, two of the members of the board of county commissioners and the county clerk met upon the town site of the temporary county-seat, and without notice to or the presence of the third member of the board, pretended to make a canvass of the votes cast for the county-seat, and declared one of the places voted for to be the permanent county-seat of the county. It was held that the alleged canvass of the returns of the election for the county-seat, and the declaration of the result, were not only irregular but wholly invalid. State *v.* Harwood, 36 Kan. 236.

3. **Commissioners Must Canvass All Votes Cast.** — State *v.* Stearns, 11 Neb. 104.

4. Coleman *v.* People, 7 Colo. App. 243.

5. **Canvassers Must Complete Canvass.** — Atty.-Gen. *v.* Iron County, 64 Mich. 607

have been legally chosen as the county-seat, it will be so declared by the courts.[1]

5. Conditional Location. — The location of a county-seat may be made subject to a condition that certain property be conveyed to the county, and if such condition be not complied with, a new selection may be made.[2] But an absolute location at a certain place is not avoided by the failure of such place to comply with a direction, in the act of the legislature making the location, that it shall furnish county buildings.[3]

III. Removal — 1. Power to Remove — *a.* Primarily Vested in Legislature. — The power to remove, like the power to locate, a county-seat belongs primarily to the legislature; and, in the absence of constitutional restrictions, it may direct a removal whenever and to whatever place it may see fit.[4]

1. True Result Declared. — The case of State *v.* Malo, 42 Kan. 120, was a contest of an election for the location of a county-seat, the result of which election had been declared by the canvassing board to be the selection of C. as the county-seat. It was shown, however, that gross frauds had been perpetrated by the election officers in two of the townships. It was also shown by the evidence that if all the votes cast at the election were counted, the town of I. would have a majority; that if only the votes cast by the legal voters were counted, I. would still have a majority; that if only the votes cast by such of the legal voters as were not influenced by bribes or any other corrupt or illegal means were counted, I. would still have a majority. It was held that I. should be declared to be the county-seat.

2. Conditional Location. — Herbert *v.* Sanderson, 1 Winst. L. (60 N. Car.) 282. In this case commissioners were appointed by an Act of Assembly to "select and determine a site for the permanent seat of justice" of a county, and were directed, when they had selected the same, to give notice thereof to other commissioners appointed by the same act, for the purpose of acquiring title to the site selected. The commissioners for location made a selection conditional upon certain land being conveyed to the county; and such condition was not complied with. It was held that the commissioners were authorized to make a new selection.

3. Location Not Invalidated by Failure to Furnish Buildings, etc., as Directed. — In 1846 the legislature of *Mississippi* passed a statute, the first section of which provided "that the seat of justice for the county of Hancock be and the same is made permanent, and located in the town of Gainesville." The second section provided that the town of Gainesville should erect, at its own expense, suitable county buildings, part of the cost of which was, by a subsequent section, to be repaid by the county. The seventh section provided that if the public buildings were not completed by a certain time, the county offices should be removed to the town of Gainesville, to such buildings as the citizens should provide for their accommodation, until the completion of the public buildings directed to be erected by the town. It was held that the provisions as to the erection of public buildings, etc., were not conditions controlling the location, but that the county-seat was absolutely located at Gainesville, whether or not the buildings were furnished. Monet *v.* Jones, 10 Smed. & M. (Miss.) 237.

4. Legislature Has Power to Remove in Absence of Constitutional Restrictions. — Bagot *v.* Antrim County, 43 Mich. 577; Blood *v.* Mercelliott, 53 Pa. St. 391; Alley *v.* Denson, 8 Tex. 297.

The location or removal of a county-seat is a matter of general public concern, and neither the county authorities nor the voters would be entitled to a voice in it if such right were not conferred by the constitution. Bagot *v.* Antrim County, 43 Mich. 577.

In *Ex p.* Hill, 40 Ala. 121, the legislature had passed an act providing for an election to be held in order to locate the county-seat of Dallas county. By such act only two places, Cahaba and Selma, were permitted to be in nomination. At the election the majority of the votes were cast in favor of Selma. A writ of prohibition was applied for to restrain the removal of the county records from Cahaba to Selma, alleging that the act providing for the location of the county-seat was unconstitutional because it was passed without any consultation with the people of the county, and in the absence of an opportunity on the part of the people to petition the legislature, and that in the preliminary election for the seat of justice only two places were permitted to be in nomination. It was held that these facts did not render the law unconstitutional. The court, *per* Walker, C. J., said: "The validity of a statute can never depend upon the antecedent consultation of the people by the legislature, nor upon the affording to them an opportunity to express their sentiments through petitions. The removal of the court-house of a county, and its permanent location, is indisputably a permissible exercise of legislative authority. This authority it may exercise without consulting the people of the county, through the ballot or otherwise; and if it chooses to select two places and leave the choice between them to popular vote, it is the manifestation of a deference to public opinion which is not demanded by the constitution."

Act Providing for Removal Not Regulation of County Business. — An act providing for the removal of a county-seat is not within the constitutional prohibition against local legislation regulating county business, because the term "business," as used in the constitution, does not apply to acts granting relief in particular

How Power May Be Exercised. — The legislature may exercise the power to remove a county-seat in any way it sees fit; either directly, by designating a place to which a removal shall be made, or indirectly, by making the removal depend upon the result of a popular vote on the question,[1] or upon any other contingency, and appointing an agent or agents to determine and announce the result.[2]

b. NECESSITY FOR CONSENT OF ELECTORS — CONSTITUTIONAL PROVISIONS. — The power of the legislature over the removal of county-seats is, however, at the present time, so circumscribed by constitutional limitations in the various states that, as a general rule, no county-seat can be removed without the consent of the electors of the county.[3]

and extraordinary cases. It means the conduct of the usual affairs of the county, and the conduct of such affairs as commonly engage the attention of county officers. It does not mean performance of an act which can be done only in a particular case and by authority of a special law. Mode *v.* Beasley, 143 Ind. 306; Jackson County *v.* State, (Ind. 1897) 46 N. E. Rep. 908. See also State *v.* Padgett, 19 Fla. 518.

County Officers Have No Authority to Remove — Canada. — The municipal council of a county cannot indirectly change the shire town by erecting the county court-house and jail at a place other than the shire town established by law. Such change cannot be made without action by the legislature authorizing the same. Lunenberg *v.* Atty.-Gen., 20 Can. Sup. Ct. Rep. 596.

1. Question of Removal May Be Submitted to Electors. — Barnes *v.* Pike County, 51 Miss. 305.

In *Ex p.* Hill, 40 Ala. 121, the court, *per* Walker, C. J., said: "If the question of the power of the legislature to make the removal of the court-house to Selma dependent upon the condition of its approval by a popular vote were *res integra*, there would be room for much argument; but that question is settled, and is not now open for debate. * * * There are many laws for the establishment of the seats of justice of the different counties in which the act, instead of fixing the location, has prescribed a mode for its accomplishment by commissioners, or by popular vote, or by the selection of two or more places and a popular election between them; and such laws have never been deemed unconstitutional. The acquiescence in the validity of such laws, by the people, the bar, and the bench of the state, running back to the organization of the state government, would be entitled to great consideration, and settle the question if it were doubtful."

Not a Delegation of Legislative Power. — The legislature may, without any unauthorized delegation of legislative power, provide for an election to determine to which of two places a county-seat shall be removed. This being a matter of merely local concern, the legislature has a right to submit it to the determination of the people directly interested therein. Hamilton *v.* Carroll, 82 Md. 326. See also Bradshaw *v.* Lankford, 73 Md. 428, 25 Am. St. Rep. 602. See generally the titles CONSTITUTIONAL LAW, vol. 6, p. 882; STATUTES.

Or it may provide for an election to determine whether a county-seat shall be removed, and if so, for the selection of the place, leaving the electors free to choose any place in the county. Upham *v.* Sutter County, 8 Cal. 378.

2. Removal May Be Made Dependent upon Any Contingency. — The legislature has the power to cause the place to which a county-seat shall be removed to be determined by one contingency as well as another — by the locality of the numerical population, of the property, of the tillable lands or good water, as well as by the votes of the qualified electors. Walker *v.* Tarrant County, 20 Tex. 16.

3. Electors Must Consent to Removal — Constitutions. — Edwards *v.* Police Jury, 39 La. Ann. 855; Mobley *v.* Police Jury, 41 La. Ann. 821; *Ex p.* Towles, 48 Tex. 413; Krieschel *v.* Snohomish County, 12 Wash. 428.

How Consent May Be Given. — Under a constitutional provision that "no county-seat shall be changed without the consent of a majority of the electors of the county," a vote of the majority is not necessary, nor even the formality of an election. The consent of the majority of the electors, in whatever form expressed, whether in an election, or by petition, or otherwise, is sufficient. State *v.* Burton, 47 Kan. 44, *citing* County-seat of Linn County, 15 Kan. 530.

After Consent to Removal Legislature May Designate New County-seat. — The constitutional prohibition against changing a county-seat without the consent of a majority of the electors of the county does not restrict the power of the legislature, after such consent has been given, either to make the selection of the new county-seat itself, or to provide for the manner of its selection by the voters. And the consent of the electors to a change is given when at an election on the question a majority of the votes are cast in favor of places other than the existing county-seat, although no one place has received a majority of the votes cast. County-seat of Osage County, 16 Kan. 296.

The Tennessee Act of 1881, c. 98, provided that the County Court might order an election to be held to ascertain if the people desired the county-seat removed; that if two-thirds of the qualified voters of the county concurred in the removal of a county-seat, then another election should be held to ascertain the place where the new county-seat should be located; and that at such election the place receiving the majority of votes should be the location of the county-seat. It was held that this was in conflict with the provision of the constitution that the seat of justice of the county should not "be removed without the concurrence of

Requirement that Voters Consent to Removal Cannot Be Evaded. — The legislature cannot, by extending the corporate limits of the old county-seat so as to include a town to which a removal is desired, evade a constitutional provision that the seat of justice of a county shall not be removed without the concurrence of a certain proportion of the qualified voters thereof.[1]

Question Must Be Fairly Submitted. — The legislature, in submitting to the electors of a county the question of removal of the county-seat, must give all the electors of the county an opportunity to vote on the question,[2] and must

two-thirds of the qualified voters of the county." Combs *v.* Stumple, 11 Lea (Tenn.) 26.

Proposition for Removal Must Emanate from Legislature — Louisiana. — In Louisiana the power to remove a parish-seat is not only not denied the legislature by any constitutional limitation or prohibition, but is expressly conferred by article 250 of the constitution, which is to the effect that any law passed, contemplating such purpose, shall not go into effect until after submission to and approval by the qualified electors of the parish. This is so truly the case that it is left entirely discretionary with the legislature to initiate the question, or to refrain altogether from agitating it. The electors of the parish have no constitutional right to operate the removal. All they can claim is a law authorizing the removal, subject to their approval; but this right is subordinate to the will of the legislature to move or not in the premises. Edwards *v.* Police Jury, 39 La. Ann. 855. See the subdivision following.

Minnesota. — Under art. 11, § 1, of the Minnesota Constitution, which provided that "all laws * * * for removing county-seats shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby, * * * and be adopted by a majority of such electors," a change of a county-seat could be effected only by an act of the legislature providing for the change, and the approval of such act by the people of the county. An act providing for the ordering of an election upon the question, by the county commissioners, upon the petition of a majority of the voters of the county, was held to be unconstitutional, as in conflict with the above provision. Roos *v.* State, 6 Minn. 428.

The constitutional provision referred to in this case is now abrogated, and the procedure for changing a county-seat in Minnesota is now similar to that which was here declared unconstitutional. See Minn. Gen. Stat. of 1894, §§ 647–656.

Law Requiring Petition Merely Directory. — An act of the legislature which declares that a county-seat shall not be changed unless upon petition of a majority of the citizens of the county praying for such removal is merely directory and advisory, and a subsequent legislature has full power to direct an election upon the question of such a change without any such petition. Turley *v.* Logan County, 17 Ill. 151.

Designation of Point of Removal. — Under the *Illinois* Constitution, an act providing for an election upon the question of the removal of a county-seat should designate the point to which it is proposed to remove the county-seat, and "to the point of the incorporated town of Wheaton, in said county," is a sufficient designation. People *v.* Wiant, 48 Ill. 263.

In Louisiana it is not necessary that the act providing for the removal of a parish-seat should designate a particular point to which such removal may be made. It may leave the exercise of the power of selecting such point to the people of the parish. Mobley *v.* Police Jury, 41 La. Ann. 821.

Oregon. — An act of the legislature providing for an election on the question of removing a county-seat need not prescribe the particular site of the county buildings in case the county-seat be removed, but such selection may well be left to commissioners appointed for the purpose. Simpson *v.* Bailey, 3 Oregon 515.

Special Law Submitting Question of Removal. — In *Maryland* a special law is necessary to submit the question of the removal of a county-seat to the voters of the county, as no general law providing for the removal or location of county-seats has ever been passed, and, therefore, the constitutional provision that "the general assembly shall pass no special law for any case for which provision has been made by a general law" does not apply. Hamilton *v.* Carroll, 82 Md. 326.

Assent of Taxpayers. — Where the removal of a county-seat would increase the rate of taxation beyond the constitutional limit, and the act providing for such removal declared that the sense of the property taxpayers must be taken at the election for the ratification of the act, and that in the event of there being a majority of votes against the increase of taxation the act was to be of no effect, a removal could not be had without the assent of a majority of the property taxpayers. And in ascertaining the sense of the property taxpayers, it was necessary, in order to give the act effect, that the majority should actually vote therefor; an abstention from voting should be construed as a vote against the increase of taxation, not as a vote in favor thereof. Edwards *v.* Police Jury, 39 La. Ann. 855. See *infra*, this section, *Vote Necessary to Authorize Removal*.

1. **Requirement that Voters Consent Cannot Be Evaded.** — Stuart *v.* Bair, 8 Baxt. (Tenn.) 141.

2. **All Electors Must Have Opportunity to Vote on Question.** — A law providing for the removal of county-seats is unconstitutional if, under its provisions, a portion of the inhabitants of the county cannot lawfully vote on the question of such removal. Thus where a law provided for submitting the question to the electors at the township meetings, and there were, in the county, cities which had no township meetings, and whose charter elections were held on a different day from that on which the township meetings were required by law to be held, the law was held to be unconstitutional in not providing for a vote of the electors of

leave their choice entirely free and untrammeled; the imposition of the forfeiture of any existing rights in case the result be against removal will render the act providing for such submission of the question void.[1]

c. RIGHT OF COUNTY OFFICERS OR PEOPLE TO INSTITUTE PROCEEDINGS TO REMOVE — In many of the states it is not necessary even that the proposition for the removal of a county-seat should emanate from the legislature, but such proposition may come from county officers,[2] or from the people themselves, by the presentation of a petition for a removal, or for an election on the question of removal; such a petition, signed by a specified number of electors, being, in some of the states, an indispensable prerequisite to any action of the county officers in reference to a removal.[3]

d. LIMITATION OF POWER. — When the power of removing the county-seat is vested in the voters of the county, the only limitation upon such power is the provision, in some of the states, that after the county-seat has once been removed, the question of removal cannot again be considered for a specified time.[4]

such cities. Atty.-Gen. *v.* St. Clair County, 11 Mich. 63.

1. Consent Must Be Free. — State *v.* Perry County, 5 Ohio St. 497. In this case an act of the legislature, in relation to the removal of a county-seat, which provided that if a majority of the electors voted against removal all obligations which had been given to the commissioners of the county to secure the payment of a sufficient sum of money to erect suitable county buildings at the then county-seat should be delivered up to be canceled, and a tax should be levied sufficient to erect the necessary buildings, which should cost in the aggregate not less than sixteen thousand dollars, was held void.

2. Legislature May Authorize County Commissioners to Act Without Petition. — It is only the statute which makes a petition necessary for the removal of the county-seat, not the general principles of law, as this is not an ordinary adversary proceeding where the parties are asserting rights against each other. The legislature may authorize the county commissioners to proceed to relocate a county-seat without any petition whatever authorizing them to ascertain the popular will. Mode *v.* Beasley, 143 Ind. 306; County-seat of Linn County, 15 Kan. 500. Or, requiring a petition, it may specify the kind of petition, the number of signers, etc. County-seat of Linn County, 15 Kan. 500.

County Supervisors May Institute Proceedings for Removal. — Under the constitution and laws of *Michigan* no act of the legislature is necessary to give the board of county supervisors authority to act in reference to the removal of a county-seat. The proposal for such removal may originate with the board of supervisors, and all of the proceedings necessary for such removal may be conducted by them on their own authority. Bagot *v.* Antrim County, 43 Mich. 577.

Vote of Supervisors Necessary to Submit Question. — Under the *Michigan* statutes, a vote of two-thirds of all the members of the board of supervisors, whether elected or appointed, is necessary to designate a place to which the proposed removal is to be made. The provision in How. Stat., § 489, that such place shall be designated by the board of supervisors, by a vote of two-thirds of all the members "elect," was not designed to deprive townships which should be represented by appointed officers of a voice in the proceedings, but was intended to preclude action by two-thirds of a quorum, or of a board whose members had been lessened by vacancies. Peck *v.* Berrien County, 102 Mich. 346. See also Harrington *v.* Wands, 23 Mich. 385.

Resolution to Submit Question, if Unlawfully Passed, Cannot Be Validated. — An act of the legislature validating a resolution of the board of county supervisors for the submission to the electors of the county of the question of removing the county-seat, which resolution has not been lawfully passed by the board, is in violation of art. 3, § 18, of the New York Constitution, providing that "the legislature shall not pass a private or local bill * * * locating or changing county-seats." Williams *v.* Boynton, 147 N. Y. 426, *affirming* 71 Hun (N. Y.) 309.

3. Necessity for Petition. — Lanier *v.* Padgett, 18 Fla. 842; State *v.* Butler County, 31 Kan. 460; Crews *v.* Coffman, 36 Neb. 824; La Londe *v.* Barron County, 80 Wis. 380; State *v.* Polk County, 88 Wis. 355.

Power of Legislature to Require Petition. — In State *v.* Butler County, 31 Kan. 460, the court, *per* Horton, C. J., said: "It is clearly within the power of the legislature to require more than a majority of the electors to petition before an election shall be called for the relocation of a county-seat, and to define who are to be considered legal petitioners." See also *infra*, this section, *Petition for Removal.*

4. Limitation of Power of Removal. — *In re* Allison, 13 Colo. 525, 16 Am. St. Rep. 224; Coleman *v.* People, 7 Colo. App. 243. See also *infra*, this section, *When Question of Removal May Be Considered.*

In Coleman *v.* People, 7 Colo. App. 243, the court, *per* Bissell, J., said: "The power to permanently locate a county-seat is lodged nowhere but with the voters of the county. This is the whole tenor of the legislation on the subject, and the principle has been fully recognized and declared by our Supreme Court in *In re* Allison, 13 Colo. 525, 16 Am. St. Rep. 224. The learned Chief Justice Helm, in expressing the opinion of the court, states sub-

Location Declared Permanent May Be Changed. — The fact that the location of the county-seat at a certain place has been declared to be "permanent" does not take away the right to make a removal from such place.[1]

2. Imposition of Conditions — *a.* POWER TO IMPOSE. — The legislature, in providing for the removal of a county-seat to a certain place, may impose upon such place, or its citizens, as a condition precedent to the removal, an obligation to furnish land, buildings, or money to relieve the county of expense in making such removal and establishing the seat of justice in the new place.[2]

Imposition of Conditions on County. — Or it may impose on the county such terms as are deemed equitable; and where the removal has been made under the act, all its conditions and provisions are obligatory on the county.[3]

stantially what must be evident to those who even casually read the statutes. The whole subject is remitted to the control of the voters, subject only to the limitation that the question may not be considered oftener than once in four years. Aside from this limitation the legal voters of the county have perfect control over the subject, and may, by pursuing the statutory provisions, locate, remove, or change the seat of government whenever in their judgment any change should be made."

1. Location Declared Permanent May Be Changed. — Newton *v.* Mahoning County, 100 U. S. 548, *affirming* 26 Ohio St. 618; Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208; Twiford *v.* Alamakee County, 4 Greene (Iowa) 60; Fowler *v.* Brown, 5 Tex. 407; Welch *v.* County Ct., 29 W. Va. 63.

In *Michigan* the board of county supervisors may of their own motion institute proceedings for removal of the county-seat, although when the county was organized, the legislature permanently established the county-seat, without the intervention of the supervisors or electors, and has not afterwards submitted any proposition for removal, nor expressly authorized any other body to originate one. Bagot *v.* Antrim County, 43 Mich. 577.

County-seat Established by Special Legislation. — Notwithstanding that the county-seat of Pottawatomie county was established by virtue of an election ordered by a special act of the territorial legislature (Laws of 1861, c. 9, p. 11), and another special act declaring the result of said election (Laws of 1862, c. 65, p. 449), the county is within the scope of and subject to the provisions of the general county-seat location law. (Comp. Laws 1879, c. 26, p. 313.) Benton *v.* Nason, 26 Kan. 658.

2. Power to Impose Conditions. — An act of the legislature changing the shire town of a county from one place to another may properly provide that it shall be of no effect unless the town to which the seat of justice is to be removed shall, within a certain time, and without expense to the county, "provide suitable room and other accommodations for said court and officers, to the acceptance of a majority of said county commissioners, and shall execute and deliver to them a good and sufficient lease or other instrument, to secure the use thereof to said county, for the purpose aforesaid, during said five years, if the same shall be occupied so long, for the purposes specified in this act, and shall also convey or secure the conveyance in like manner of a suitable site for county buildings" in such town. This is not an unconstitutional delegation of the power of legislation to such town or its citizens, at whose option the act is to be void. Walton *v.* Greenwood, 60 Me. 356.

An act providing for an election upon the question as to whether the county-seat shall be moved to a certain city, and further providing that if a majority of the votes cast shall be in favor of such removal such city shall become the permanent county-seat, but also providing that the county offices shall not be removed thereto nor the courts be held thereat until such city shall place at the control of the board of supervisors a certain sum to aid in the erection of public buildings in such city, is valid. State *v.* Portage County, 24 Wis. 49.

Power of County Supervisors. — In People *v.* St. Clair, 15 Mich. 85, the board of supervisors had passed a resolution providing for the removal, subject to the vote of the electors, of the county-seat from C. to H., subject to a proviso that suitable guarantees should be given for the erection of the necessary buildings for county purposes, free of cost to the county, and that such guarantees should be given within ninety days from the date of the resolution. The court, *per* Christiancy, J., said: "A guarantee for the erection of the necessary buildings, without cost to the county, was a very proper subject of consideration in determining upon the expediency or propriety of the removal. * * * Whether it would have been competent to have submitted the question to the vote of the electors in this conditional form we are not called upon to decide, as there is no pretense that it was thus submitted."

3. Conditions Imposed on County. — In Blackwell *v.* Board of Justices, 2 Blackf. (Ind.) 143, an act to relocate a county-seat provided that land should be procured for the new county-seat and laid off in lots corresponding to those in the present county-seat, and that any lot owner in the old county-seat might have the privilege of exchanging his lot for the corresponding lot in the new town. The change being made, it was held that it was incumbent upon the county to furnish corresponding lots to such lot owners in the old town as wished to make the exchange. The court, *per* Holman, J., said: "The county of Lawrence, by accepting this act of assembly, so far as it establishes the town of Bedford as its seat of justice, has, by its proper agents, agreed by implication to perform all the conditions con-

b. COMPLIANCE WITH CONDITIONS. — Conditions precedent to the removal of a county-seat must, of course, be complied with before any removal can be lawfully made.[1]

A Substantial Compliance with the conditions is all that is necessary,[2] especially

sequent upon that event. Those conditions have therefore become as obligatory upon the county as if they were the express stipulations of its constituted authorities. They form a valid contract on a valuable consideration."

1. Conditions Must Be Complied With. — The Act of Feb. 24, 1869, 3 Indiana Stat. 171, provided that whenever fifty-five per cent. of the legal voters of a county should, by written petition, request the board of their county to relocate the county-seat, and should procure the conveyance to such board by deed, conveying good title, of two lots of ground of certain areas for sites for the court house and jail, and should deposit with the board a certain amount of money to pay an architect, and commissioners to assess damages, such board should proceed to have new buildings erected and the county-seat removed, etc. It was held that "the statute does not require that it shall be stated in the petition that the requisite number have signed it. It must contain the requisite number. The deed must be executed, conveying good title to the two sites for a court house and jail, and the two hundred and fifty dollars must be paid before the order for relocation can be made or the new county buildings erected. The board cannot decide upon the petition or the number of legal voters petitioning until it is presented, or upon the title to the land described in the deed until the conveyance to the board has been executed and delivered or offered, or whether the petitioners have deposited the sum of money required until it has been paid or offered to the board. When, however, these things have been done, the board must ascertain and determine those questions. If the petition contains the names of fifty-five per cent. of the legal voters of the county, and if the deed offered conveys a good title to the sites designated in the petition for the court house and jail, and the requisite sums of money have been deposited with the board, then the board must proceed to have the new county buildings erected and the county-seat removed, and not before." Clay County *v.* Markle, 46 Ind. 96.

Judgment of County Commissioners as to Compliance. — Where the act providing for the removal of a county-seat to a certain town required, as a condition of such removal, that suitable temporary accommodations should be furnished for the county offices, etc., and security given for the conveyance of a site for the county buildings, "to the acceptance of a majority" of the county commissioners, the judgment of such majority, in the absence of proof of fraudulent connivance, must be deemed final and conclusive as to the conditions having been complied with, and is not subject to revision by any tribunal whatever. Walton *v.* Greenwood, 60 Me. 356.

Contributors of Money Required to Be Raised Cannot Designate Use. — The act providing for an election upon the question of removing a county-seat to a certain place provided that the citizens of that place should raise a certain amount of money and deposit it in bank, to be used by the board of supervisors for the expenses of removal, and for the erection of county buildings. The money was raised and deposited "to be used as a fund for the purpose of erecting the necessary county buildings." It was held that the citizens had neither the right nor the power to designate the purpose to which the fund should be applied, and that by contributing the money and offering to deposit it with the banking firm named by the supervisors, they manifested the purpose for which the fund was raised — that is, to constitute a fund to be used according to the provisions of the act. Calaveras County *v.* Brockway, 30 Cal. 325.

Where New Location Conditional, but Removal from Old County-seat Absolute. — The *Arkansas* Act of April 25, 1873, appointed certain commissioners and provided that upon receiving a good and sufficient bond from either the corporation of Russellville or another corporation named that it would "by the first of January, 1874, donate to the county of Pope a court house and grounds, or money and material sufficient to erect as good a court house as the one now had at Dover, in said county, the choice being left to the commissioners, and furnish temporary county buildings until January 1, 1874, [the commissioners] shall order the county officers to transfer their offices to said buildings, together with their records and office fixtures. Thenceforth Dover shall cease to be the county-seat of Pope county, and the place designated by said commissioners shall be the county-seat of said county; provided, that until said county-seat is located, Russellville shall be the temporary county-seat." It was also provided that the commissioners should locate the permanent county-seat within three months from the passage of the act. None of the commissioners ever qualified or acted as such. They did not remove the county-seat from Dover, nor locate the same at any other place; and neither of the corporations named in the act, to which the county-seat might be removed, ever executed the required bond, nor donated the court house, nor grounds for the same, nor money to purchase or erect the buildings, nor temporary buildings for county purposes. It was held that nevertheless the effect of the act was to remove the county-seat from Dover to Russellville, and that the latter place was the county-seat. McNair *v.* Williams, 28 Ark. 200.

2. Substantial Compliance. — A condition, attached by the legislature, to the removal of the county-seat to a certain town, that such town or the inhabitants thereof shall "convey or secure the conveyance * * * of a suitable site for county buildings" in such town, is complied with when the county commissioners have accepted a bond executed in behalf of the town to convey a suitable site within the required time, as the legislative intention is not, in such case, to make the selection of a site for the public buildings before the time set for

where outside circumstances render a literal compliance impossible.[1]

c. SPECIAL TAXATION FOR NEW COUNTY BUILDINGS. — The legislature, in providing for the removal of a county-seat, may levy a special tax on property in the township whereto the removal is to be made, for the purpose of raising funds for the new county buildings made necessary by such removal.[2]

3. When Question of Removal May Be Considered — *a.* RECONSIDERATION OF QUESTION PROHIBITED FOR SPECIFIED TIME. — As has been seen, there is sometimes a limitation on the power of removing county-seats, that when the power has once been exercised, and a removal made, the question of removal cannot be again considered for a specified time.[3]

In Arkansas and California this limitation is strictly construed, and an election which has resulted in a decision against removal does not prevent the question being again considered at any time thereafter.[4]

In Nebraska, however, it is held that where an election results in favor of the existing county-seat, there is a relocation within the meaning of the statute forbidding another election for five years after a relocation.[5]

In Florida an invalid election on the question does not bring into operation the statute forbidding another election for ten years.[6]

b. EFFECT OF PENDENCY OF PROCEEDINGS TO REMOVE. — **In Minnesota** the pendency of a petition for removal to one place is an absolute bar to any proceedings for removal to another place.[7]

In Michigan the removal of a county-seat to a certain place is not invalidated by the fact that proceedings for such removal were instituted while a movement was in progress for a change to another place, and were pushed to a popular vote after the electors had decided in favor of the latter place, but before the change thereto was in fact carried out.[8]

4. Petition for Removal — *a.* NOTICE OF INTENTION TO CIRCULATE. — Under the *Minnesota* law, it is a condition precedent to the right of the county board to act upon a petition for the removal of a county-seat, that notice of intention to circulate such petition shall have been given.[9]

such removal a prerequisite to the act taking effect. Walton *v.* Greenwood, 60 Me. 356.

1. Literal Compliance Impossible. — The law directing an election to determine whether a county-seat should be removed to a certain place named in the act provided that before the election the citizens of that place should raise a certain sum of money to pay the expenses of the removal and to go towards erecting county buildings, and that such money should be deposited with a banking firm to be designated by the board of county supervisors. The money was raised and tendered to the banking firm designated by such board, but that firm refused to accept it, and it was deposited with another banking firm. It was held that this was a substantial compliance with the provisions of the act, and was sufficient. Calaveras County *v.* Brockway, 30 Cal. 325.

2. Special Taxation. — Jackson County *v.* State, (Ind. 1897) 46 N. E. Rep. 908.

3. Second Removal Prohibited for Specified Time. — See *supra*, this section, *Limitation of Power*.

Repeal of Prohibitory Act. — Where an act providing for the removal of county-seats is expressly repealed by another act for the same purpose, a provision in the repealed act that there shall not be a second removal for ten years after the county-seat has been once removed becomes inoperative. And, under the repealing act, a second removal may be had within ten years, even though such act contains a provision that whenever a county-seat has been changed "in pursuance of this act," it shall not be lawful to change the county-seat again for ten years. Varner *v.* Simmons, 33 Ark. 212.

4. Election Resulting in Decision Against Removal. — Cochran *v.* Edwards, 38 Ark. 136; Atherton *v.* San Mateo County, 48 Cal. 157.

5. Solomon *v.* Fleming, 34 Neb. 40.

6. Invalid Election. — McKinney *v.* Bradford County, 26 Fla. 267.

7. Streissguth *v.* Geib, (Minn. 1897) 69 N. W. Rep. 1097.

8. Harrington *v.* Wands, 23 Mich. 385.

9. Notice of Intention to Circulate Petition. — State *v.* Scott County, 42 Minn. 284.

How Given. — The notice should "be given by the publication thereof in one or more newspapers of such county, if there be such newspapers, and by posting the same in three of the most public places at the county-seat in such county for two weeks next preceding the circulation of such petition." Gen. Stat. Minn. 1894, § 647.

A Condition Precedent. — Although it is declared in section 9 of the county-seat removal act (Gen. Stat. Minn. 1894, § 655) that no failure or refusal of the publisher of any newspaper to publish the prescribed notices shall affect the sufficiency of the notice or invalidate the proceedings, it is apparent that the statute contemplates, as conditions precedent

b. FORM AND CONTENTS — (1) *Need Not Aver All Facts Necessary to Authorize Removal.* — A petition for the relocation of a county-seat need not contain any statement other than those required by the statute under the provisions of which the relocation is sought. Where the existence of certain facts is requisite to the application of the statute providing for relocation to the county in which the relocation is sought, but the statute does not require a statement of such facts to be contained in the petition, it is not necessary that they should be alleged.[1]

(2) *Must Show That a Change Is Desired.* — **In Florida** the petition must show that a change of the location of the county-seat is desired. If it merely asks that an election be held to locate the county-seat, it is insufficient.[2]

But in Texas the point to which a removal is desired need not be designated.[3]

(3) *Date of Petition.* — **In West Virginia** a petition is not fatally defective because it is not dated.[4]

(4) *Residences of Petitioners — Dates of Signatures.* — **In Nebraska** a petition for removal of a county-seat must show the section, township, and range on which or the town or city in which each petitioner resides, together with his age and time of residence in the county. The omission of any of these particulars is sufficient to cause his rejection as a petitioner.[5]

But in Indiana a statutory requirement that the petition shall show the date of each signature has been held merely directory.[6]

c. NUMBER OF SIGNATURES. — The number of signatures required to make a petition for removal of a county-seat effective is generally a certain percentage or fraction of the whole number of electors in the county;[7] and for

to the action of the county board upon the petition, that the prescribed notices shall be posted, and shall also be published in the newspapers, unless that is prevented by the neglect or refusal of the publishers. State *v.* Scott County, 42 Minn. 284.

1. Need Not Aver All Facts Necessary to Authorize Removal — Indiana. — Mode *v.* Beasley, 143 Ind. 306.

A petition for relocation of a county-seat need not state that it is signed by the necessary number of legal voters. Clay County *v.* Markle, 46 Ind. 96; Mode *v.* Beasley, 143 Ind. 306.

Where the act providing for the relocation of county-seats, after providing what facts must be shown in the petition in order to invoke the action of the board of county commissioners in ordering an election, contained a provision forbidding relocation under that act of any county-seat where a sum exceeding twenty thousand dollars had been expended in the erection or repair of the court house or jail within a certain time, it was not necessary in order to invoke the action of the board that the petition should aver that such sum had not been expended, but the burden was on the board, if it refused to act, to show that more than such sum had been expended. Jackson County *v.* State, (Ind. 1897) 46 N. E. Rep. 908.

2. Must Show that a Change Is Desired. — Lanier *v.* Padgett, 18 Fla. 842; McKinney *v.* Bradford County, 26 Fla. 267.

3. Need Not Designate Point to Which Removal Is Desired. — Whitaker *v.* Dillard, 81 Tex. 359.

4. Date. — Doolittle *v.* County Ct., 28 W. Va. 158.

5. Residence, etc., of Petitioners. — Ayres *v.* Moan, 34 Neb. 210; Crews *v.* Coffman, 36 Neb. 824.

6. Date of Signature. — Mode *v.* Beasley, 143 Ind. 306.

7. Number of Petitioners Necessary to Authorize Submission of Question. — In *Florida* the county commissioners have no authority to order an election for the relocation of a county-site under Laws of 1872, c. 1890 (McClellan's Digest 321), unless a petition is presented to them, signed by one-third of the registered voters of the county, praying for a change of the location of the county-site, as required by the first section of the act. Lanier *v.* Padgett, 18 Fla. 842.

In *Indiana* the petition must be signed by fifty-five per cent. of the legal voters of the county. Horner's Anno. Stat., § 4235 *b*; Mode *v.* Beasley, 143 Ind. 306.

In *Iowa* the petition must contain the signatures of at least one-half of all the legal voters of the county as shown by the last preceding census, and must also have a greater number of signers than the remonstrance against the relocation. Therefore, if the remonstrance contains more signatures than the petition there can be no election upon the question of relocation, though the number of signers to the petition exceed a majority of legal voters of the county as shown by the last preceding census. Loomis *v.* Bailey, 45 Iowa 400.

It is sufficient if the persons who signed the petition were legal voters of the county at the time of signing. It need not be shown that they were legal voters when the affidavit to the petition of the person who secured the signatures that they are all genuine was made. Stone *v.* Miller, 60 Iowa 243.

In *Kansas*, under the provisions of Laws of 1883, c. 91 (Gen. Stat. 1897, c. 26, § 2), in all cases where the county-seat of any county has been located by a vote of the electors of such county, and buildings have been erected at such county-seat for such county purposes, the cost of which has been at least ten thou-

the purpose of testing the sufficiency of a petition, various methods of computing the whole number of electors are prescribed in the several states.[1]

sand dollars, or when such county-seat has been eight years or more continuously at any one place by a vote of the electors of the county, the board of county commissioners is to order an election for the relocation of such county-seat only upon a petition of two-thirds of the legal electors of the county. State *v.* Butler County, 31 Kan. 460.

In *Minnesota* the provision of the second clause of the County-seat Removal Act of 1889 (Gen. Stat. 1894, § 647), requiring that if the number of legal voters who signed the petition for the removal of a county-seat "equals or exceeds a majority of the whole number of votes cast in such county at the last general election," the auditor shall call a special meeting of the county commissioners to consider such petition, must be read in connection with the first clause, which requires that such a petition must be signed by " not less than sixty per cent. of the whole number voting " at the last general election. Therefore, in that clause " a majority " means not a mere majority, but the majority required by the first clause, to wit, sixty per cent. Slingerland *v.* Norton, 59 Minn. 351.

In *Nebraska*, to entitle a county board to call an election for the removal of a county-seat, a petition must be presented to it signed by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election. Ayres *v.* Moan, 34 Neb. 210; Crews *v.* Coffman, 36 Neb. 824.

The petition must contain, at the time it is acted upon by the county commissioners, the names of a number of resident electors equal to three-fifths of the number of votes cast at the preceding general election. It is not sufficient that such petition may have originally contained such number, where some of the names have been withdrawn. State *v.* Nemaha County, 10 Neb. 32.

The term " resident electors " is used to distinguish actual residents of the county from such persons as are temporarily therein, although such persons may be electors. Ayres *v.* Moan, 34 Neb. 210.

In *West Virginia* the laws are complied with if, upon the filing of a petition for an election on the question of relocating the county-seat, it is shown that such petition is signed by one-fifth of all the legal voters of the county, estimated by allowing one vote for every six persons as shown by the last preceding census, though no proof is offered to show either when the petition was signed by any of the signers, or that any of them were voters at the time it was signed. Doolittle *v.* County Ct., 28 W. Va. 158.

In *Wisconsin* the signatures of two-fifths of the electors who voted at the last general election are essential to the jurisdiction of the board of supervisors to consider a petition for an election on the question of the relocation of a county-seat. La Londe *v.* Barron County, 80 Wis. 380; State *v.* Polk County, 88 Wis. 355.

The board of supervisors may properly postpone its action on the petition for a reasonable time in order to ascertain whether this requirement has been complied with. La Londe *v.* Barron County, 80 Wis. 380.

Who Are Legal Signers. — A law requiring that the petition must be signed by a certain proportion of the legal electors, and that " the number of legal electors shall be ascertained from the last assessment rolls," merely fixes the number of legal electors who must sign the petition, and does not require that it shall contain such proportion of the identical names on the roll. State *v.* Stock, 38 Kan. 154.

1. How Number of Electors Is Computed — *Indiana.* — It is provided by Horner's Anno. Stat., § 4235 *c*, " that the number of all legal ballots cast at the general election in said county at which a congressman was voted for next preceding the presentation of such petition to the board of commissioners, with ten per centum added thereto, shall be considered the whole number of votes of such county." In view of this provision it was held that a request for an instruction that the number of names on the poll book of the precinct election officers was to be taken as the true number of legal voters in the county was properly refused. Mode *v.* Beasley, 143 Ind. 306.

Kansas. — Under section 4 of the chapter on county-seats, in the Kansas Statutes (Gen. Stat. 1889, par. 1899), which provides that for the purpose of ascertaining whether a petition for an election to relocate a county-seat contains three-fifths of the names of the electors in a county, " the county commissioners shall be governed by the last assessment rolls of the several township and city assessors of the county," the assessment rolls of both real and personal property should be considered, not merely the personal property assessment roll. State *v.* Rawlins County, 44 Kan. 528. In this case the court, *per* Simpson, C., *distinguished* the cases of County-seat of Linn County, 15 Kan. 500, and State *v.* Phillips County, 26 Kan. 419, in the following language: " To commence with the earlier case [County-seat of Linn County, 15 Kan. 500], it may be said that the statute under consideration in that case is not the present section 4 of the County-seat Act; it was a section in the General Statutes of 1868, which reads as follows: ' For the purposes of this act the number of the legal electors of the county shall be ascertained from the last assessment rolls of the several township assessors in the county.' At the time of the passage of this act the only assessment roll prepared by township assessors was that of personal property. The real estate assessment was made by the county assessor, and continued to be so made by the county assessor until March, 1869. The court, construing this section in the light of the existing statutes providing for the assessment of property, held that it meant the personal property lists only. Brewer, J., says: ' The only assessment roll prepared by township assessors required or authorized at the time of the passage of this county-seat act was that of personal property, on which the assessor was required

Taxpayers. — It is not necessary, however, that all who petition should be voters, or that the number of petitioners have any relation to the number of voters. The legislature may require that the petition be signed by persons paying a certain proportion of the real estate taxes of the county. And in such case the term " persons " includes corporations, and is not used in the sense of qualified voters.[1]

d. WITHDRAWAL OF NAMES. — A person who has signed a petition asking for the removal of the county-seat has an absolute right to withdraw his name and have it struck off such petition at any time before it is finally acted upon by the board of county commissioners.[2]

e. NAMES IMPROPERLY ON PETITION. — Where a petition is objected to on the ground that some of the names thereon are those of persons not entitled to sign, or are improperly placed thereon, the board of county commissioners should set a reasonable time for the hearing of such charges,[3] and

to place a list of persons, companies, or corporations in whose name the personal property was listed. Gen. Stat. 1040, § 61.' This construction was followed in the case of The State *v.* Phillips County, 26 Kan. 419. But in neither of these cases was it urged or claimed that the section included the real estate assessment lists. There is a single expression in the last case only that warrants the claim that is made for that case being an authority to govern us in this case; but we reiterate the statement that neither in brief, argument, or opinion in the latter case was the question of real estate assessment lists thought of or mentioned."

In *Minnesota*, for the purpose of ascertaining whether a petition for the removal of a county-seat is signed by sixty per cent. " of the whole number voting in such county at the last general election," as required by section 1 of the County-seat Removal Law of 1889 (Gen. Stat. 1894, § 647), the poll lists, as distinguished from the official count, are the criterion, for they alone show the whole number voting at the election. And women voting at the election should not be included in the computation, for they are voters only for the purpose of electing school officers, and hence are electors only in a limited or qualified sense; and they have no right to vote on the question of the removal of a county-seat. Slingerland *v.* Norton, 59 Minn. 351.

1. Taxpayers. — Crafford *v.* Warwick County, 87 Va. 110.

2. Right of Petitioners to Withdraw Names. — State *v.* Eggleston, 34 Kan. 714; Eggleston *v.* State, 37 Kan. 426; Slingerland *v.* Norton, 59 Minn. 351; State *v.* Geib, 66 Minn. 266; State *v.* Nemaha County, 10 Neb. 32; State *v.* Crabtree, 35 Neb. 106; La Londe *v.* Barron County, 80 Wis. 380; State *v.* Polk County, 88 Wis. 355.

To Whom Demand for Withdrawal Should Be Made. — Under the *Minnesota* laws, a petition for removal of a county-seat is presented to the county auditor, who thereupon calls a meeting of the county commissioners to act upon the same, if upon its face the petition contains the necessary number of signatures, and is otherwise sufficient. A demand for the withdrawal of names from the petition should be made to the county commissioners when they meet to consider the petition. It cannot be made of the auditor, for the petition, when once presented to him, cannot be arrested on its way to the county commissioners by subsequent withdrawals, even though the names withdrawn would reduce the number of signatures to less than that required by statute. Slingerland *v.* Norton, 59 Minn. 351; State *v.* Geib, 66 Minn. 266.

How Demand May Be Made. — The presentation to the board of county commissioners of a petition for the removal of a county-seat, while such board is in session as a board of canvassers, is not sufficient to authorize them to take any action thereon. But a request of some of the signers of such petition, contained therein, that their names be taken off a prior petition for relocation at a different place, which the board is then considering, is sufficiently brought to the knowledge of the board to make it its duty to strike such names off the petition under consideration. Eggleston *v.* State, 37 Kan. 426. In this case the court, *per* Clogston, C., said: "The knowledge it [the board] then received that such a petition was filed with the clerk of the board, and that it contained a request to have certain names thereon taken off from all other petitions asking for an election for a relocation of the county-seat, could not be disregarded, whether it reached the board while acting in one capacity or another. It was a fact that the board knew, and when it met it was no excuse for it to say that a knowledge of this petition, and what it contained, came to it while acting as a board of canvassers. A desire to ascertain the true will and wish of the people of that county on the question then before it was its first duty; its preference for a county-seat afterward."

Recall of Withdrawal. — Where an elector's withdrawal of his name from a petition for the removal of a county-seat was presented to the board of county commissioners by his attorney in fact, and before any action thereon was had a recall of the withdrawal and a revocation of the power of attorney were presented to the board, it had no authority to remove such elector's name from the petition. State *v.* Geib, 66 Minn. 266.

3. Objections Must Be Heard. — Crews *v.* Coffman, 36 Neb. 824.

Variance from Names on Poll List. — In considering a petition for an election for the relocation of a county-seat, the board of supervisors should consider evidence showing that signatures on the petition, which vary slightly

if they are sustained, the names shown to be improperly on the petition should be struck off.[1]

Petition Not Invalidated. — But the mere presence of such names does not invalidate the petition; and if, after striking them off, there still remain the required number of good signatures to such petition, an election should be ordered as prayed for.[2]

5. Remonstrance. — The statutes of several states provide for a remonstrance against the removal of a county-seat,[3] and in *Iowa* no election may be ordered unless the voters petitioning for the relocation exceed those who sign the remonstrance thereto, and in no case shall the vote be ordered unless the petitioners equal one-half of the legal voters as shown by the last preceding census.[4] But, as a general rule, the only effect of the remonstrance is to preclude the counting as petitioners of those persons who, after signing the petition, have signed the remonstrance,[5] and in *Minnesota* it has been doubted whether it has even that effect.[6]

6. Proceedings on Petition — *a.* NOTICE — **Not an Absolute Necessity.** — A law providing for the removal of a county-seat upon the presentation of a proper petition is not invalid because it does not provide for notice of the proceedings. The proceeding is not an ordinary adversary one, and no person's rights of life, liberty, or property are to be affected thereby; hence no one can complain that he was not notified and allowed his day in court.[7]

Statutes Usually Provide for Notice. — It is usual, however, for the statutes to make provision for notice. Thus, in *Iowa*, sixty days' notice of the presentation of a petition for removal of a county-seat should be given.[8]

from the names on the poll list, in such particulars as the difference of one initial, the signing of the full name instead of an initial, or the insertion of an initial, are in fact the signatures of the persons whose names appear upon the poll lists of the last general election, two-fifths of the voters at which election must sign the petition. State *v.* Polk County, 88 Wis. 355.

1. Striking Off Names. — State *v.* Eggleston, 34 Kan. 714; Ayres *v.* Moan, 34 Neb. 210.

2. Petition Not Invalidated by Names Improperly Thereon. — McKinney *v.* Bradford County, 26 Fla. 267; Mode *v.* Beasley, 143 Ind. 306; State *v.* Crabtree, 35 Neb. 106.

3. Remonstrance Must Be Filed. — A remonstrance against a petition for relocation of a county-seat should be filed with the board of county commissioners, in order to be used as evidence in contesting the relocation. Mode *v.* Beasley, 143 Ind. 306.

4. More Signers of Remonstrance than of Petition. — Loomis *v.* Bailey, 45 Iowa 400.

Determination of Sufficiency a Judicial Act. — The determination of the sufficiency of a remonstrance against the relocation of a county-seat and the number of names signed thereto is a judicial act of the board of supervisors of the county, and may therefore be reviewed by certiorari. Herrick *v.* Carpenter, 54 Iowa 340.

5. Petitioners Who Afterwards Sign Remonstrance Not Counted on Petition. — Jamison *v.* Louisa County, 47 Iowa 388; Duffees *v.* Sherman, 48 Iowa 287.

Remonstrance of No Effect Unless Signed by Petitioners. — The *Indiana* statute of March 9, 1889, provided that a petition for the relocation of a county-seat might be defended against by showing that any of the petitioners "have since signed a remonstrance against the same." An instruction that a name upon the remonstrance had no effect unless such remonstrator had previously signed the petition was held correct. Mode *v.* Beasley, 143 Ind. 306.

6. Effect of Remonstrance — Minnesota Statute. — In Currie *v.* Paulson, 43 Minn. 411, the court, *per* Mitchell, J., said: "We might remark, however, that it is more than doubtful as to whether it appears from the findings that there was any proof before the county board that any of those who signed the petition had withdrawn, or attempted to withdraw, their signatures by signing a remonstrance against the proposed change. The only thing on that question was the so-called 'remonstrance' itself; and, while the act refers to remonstrances, and assumes to impose certain restrictions upon their presentation, yet we fail to discover that they amount to anything, or have any office to perform. They are not made evidence of anything; and as the county board has no discretion in the matter of the removal of the county-seat, it is difficult to see what effect a remonstrance can have, one way or the other."

7. No Absolute Necessity for Notice. — Mode *v.* Beasley, 143 Ind. 306.

8. What Is Sufficient Notice. — Under a statute providing that sixty days' notice of the presentation of a petition for the relocation of a county-seat shall be given by three insertions in a weekly newspaper, it is sufficient if the first insertion be sixty days before such presentation. Bennett *v.* Hetherington, 41 Iowa 142.

Failure to Give Notice. — In Dishon *v.* Smith, 10 Iowa 212, it was held that the provisions of chapter 46, *Iowa* Laws of 1855, prescribing the time and manner of giving notices of the presentation of a petition for the holding of an election for the removal of a county-seat, were directory merely, and an election was not void

Notice of County Commissioners' Meeting to Consider Petition. — In *Minnesota* it is a condition precedent to the action of the board of county commissioners on a petition for removal of a county-seat that two weeks' notice be given of the meeting of the board to consider the same.[1]

b. When and to Whom Petition Should Be Presented. — As a general rule, the statutes provide that the petition shall be presented to the board of county commissioners or supervisors at a regular meeting.[2]

c. Right to Examine Petition. — Persons interested in the matter have a right to examine the original petition for removal of a county-seat before the election is called, and should have a reasonable time for that purpose.[3]

d. Powers of County Commissioners. — A proceeding before the board of county commissioners for the relocation of a county-seat is special in its character, and that tribunal is clothed with no powers other than those conferred by the statute creating it. As a general rule, those powers are as follows: (1) To receive petitions and remonstrances;[4] (2) to determine the genuineness of signatures, and whether the signers be legal voters;[5] (3) to count those persons who both petition and remonstrate as remonstrants only;[6] (4) to determine whether the number requisite to authorize the submission of the question to the electors of the county petition therefor;[7] (5) to order

on account of the want of such notice where the people were duly notified.

1. Necessity for Notice of Meeting of County Commissioners. — Under this statute it is for the board to ascertain, by proper proofs, that the law in respect to the notices has been complied with before it becomes the duty of the board to proceed to a hearing and determination upon the matters presented in the petition. State *v.* Scott County, 42 Minn. 284.

Determination of Sufficiency of Notice. — The action of the board of county commissioners on the question of the sufficiency of the notice is not judicial, and does not involve the exercise of judicial discretion. The matter is to be determined upon inspection of the proof of publication, and if the proper notice was in fact given, and the proper proof thereof made, it is the duty of the board to proceed and take action upon the petition. State *v.* Scott County, 43 Minn. 322.

Full Two Weeks' Notice Necessary. — Under the Minnesota County-seat Removal Act of 1889 (Gen. Stat. 1894, § 647), requiring that notice of a meeting of the county commissioners to act upon a petition for the change of a county-seat must be published in all the newspapers published in the county, once in each week for two consecutive weeks immediately preceding the time fixed for such special meeting, there must be at least two weeks' notice of the meeting. Thus, where notice of a meeting to be held on the 27th of May was published on the 15th and 22d of May, this was held not a sufficient publication under the statute. State *v.* Scott County, 43 Minn. 322.

2. Must Be Presented at Regular Meeting. — Ellis *v.* Harrison County, 40 Iowa 301. In this case it was held that under the statute the board could not entertain the petition at an adjourned session.

Presentation to Board While in Session as Board of Canvassers. — In *Kansas* the presentation of a petition for the removal of a county-seat to the board of county commissioners while they are in session as a board of canvassers is not sufficient to authorize them to take any action thereon. Eggleston *v.* State, 37 Kan. 426.

In Minnesota the petition is presented to the county auditor, who calls a special meeting of the county commissioners to act upon it. Gen. Stat. Minn. 1894, § 647.

3. Petition May Be Examined. — Crews *v.* Coffman, 36 Neb. 824. In this case it was further held that it is not sufficient that a certified copy be furnished, as interested persons have a right to see the purported signatures of the petitioners.

4. Reception of Petitions and Remonstrances. — Loomis *v.* Bailey, 45 Iowa 400.

5. Passing upon Genuineness of Signatures. — Loomis *v.* Bailey, 45 Iowa 400; Ellis *v.* Karl, 7 Neb. 381.

What Proofs May Be Considered. — Under a statute requiring that the petition and remonstrance shall be verified by affidavits accompanying them when filed, which shall be sufficient to satisfy the board "that the signers are all legal voters of the county, and that the signatures on the petition are all genuine," the supervisors have no authority to consider other proof upon the subject than such affidavits. Herrick *v.* Carpenter, 54 Iowa 340.

6. Signers of Both Petition and Remonstrance Counted Only as Remonstrants. — Loomis *v.* Bailey, 45 Iowa 400. See also *supra*, this section, *Remonstrance*.

7. Determination Whether Sufficient Number of Petitioners. — Loomis *v.* Bailey, 45 Iowa 400.

Where the Personal Property Assessment Roll Was the Criterion from which it was to be determined whether a sufficient proportion of the voters had signed the petition, the board of county commissioners had a right to add to the list the names of persons whose property statements were found on file in the county clerk's office, but which were omitted by the township assessors when they made out the list. State *v.* Phillips County, 26 Kan. 419.

Jurisdiction Exclusive. — Under sections 281–287, Code of *Iowa*, the board of supervisors of a county is constituted a special tribunal to

an election if the petition be signed by the proper number of voters, or to refuse to do so if the petitioners be not the number required by law.[1]

c. WHERE MORE THAN ONE PETITION — (1) *In General.* — As a general rule, an election on the question of removing a county-seat is properly ordered where two or more petitions asking for such election are presented, and contain, in the aggregate, the required number of signatures, though no one petition alone contains a sufficient number of names.[2] And it has been held to be immaterial that the petitions ask for removal to different places; for the questions whether the county-seat shall be removed, and, if so, to what place, are distinct and separate, though they are submitted at the same election.[3]

(2) *Transferring Signatures.* — Two cases have arisen where several petitions identical in language were circulated and signed, and the signatures from all but one were cut off and pasted on that one, which was then pre-

determine whether a petition for the relocation of a county-seat is signed by the requisite number of legal voters to authorize the submission of the question of such relocation to a vote of the people. This jurisdiction is exclusive, and in the absence of fraud on the part of the board a court of equity cannot interfere to prevent the action of the board, on the allegation that the petition contains the names of the persons who are not voters. Luce *v.* Fensler, 85 Iowa 596.

Names Illegally Struck Off Petition — Mandamus. — Where a board of commissioners illegally strikes the names of electors from a petition for the relocation of a county-seat, so that the number remaining is reduced below that required to authorize the election, it may be compelled by mandamus to restore such names to the petition. State *v.* Geib, 66 Minn. 266.

1. Ordering Election. — Loomis *v.* Bailey, 45 Iowa 400.

In *Washington* the only power county commissioners have with respect to the removal of a county-seat is the power to submit the question to a vote of the people, on the presentation of a sufficient petition therefor, and to ascertain, declare, and publish the result of the election. Krieschel *v.* Snohomish County, 12 Wash. 428.

A Ministerial Duty. — Under the Code of *West Virginia* it is an absolute ministerial duty imposed upon the County Court, when the petition for the relocation of a county seat in proper form, and signed by the requisite number of voters, is presented, to permit it to be filed and to order the election prayed for. Doolittle *v.* County Ct., 28 W. Va. 158.

Order Need Not Specify Place to be Voted for. — In *Texas* the statute does not require that the order directing an election on the question of removing a county-seat should state the point to which a removal is desired. "The order must fix the time when and places where the election must be held, but it can place no restriction on the right of any voter to vote for any place he may prefer." Whitaker *v.* Dillard, 81 Tex. 359.

Election Ordered by County Court. — Prior to the election of the board of county commissioners, which, under the *Illinois* Constitution of 1870, was to succeed the County Court in counties not under township organization, such court, composed of a county judge and two associates, was the proper tribunal to order an election on the question of removing a county-seat, under the Act of 1872 (Sess. Laws 1871–72, p. 309), authorizing the "County Court" to order such election. Shaw *v.* Hill, 67 Ill. 455.

2. Several Petitions Considered as One. — Butler *v.* Mills, 61 Ark. 477; McKinney *v.* Bradford County, 26 Fla. 267; Benton *v.* Nason, 26 Kan. 658.

A second petition for the submission to a vote of the electors of a county of the question of the removal of the county-seat, presented while a first petition for the same object is under consideration by the board of county supervisors, should be considered, and both petitions should be acted upon together as one. State *v.* Polk County, 88 Wis. 355.

But in Iowa and Nebraska it is held that after the petition is presented a supplementary or re-petition is unauthorized and cannot be considered. Jamison *v.* Louisa County, 47 Iowa 388; Ayres *v.* Moan, 34 Neb. 210.

In Loomis *v.* Bailey, 45 Iowa 400, the court, *per* Beck, J., said: "The supervisors are required by the statute to act upon the petition and remonstrance, after the qualification of the signers as voters and the genuineness of their signatures have been determined. They have no power to inquire into the circumstances under which signers thereto affixed their names, or whether, after they had done so, their views, wishes, or wants had changed. They were not, therefore, authorized in this case to consider the application of those persons who signed the paper called the re-petition to have their names stricken from the remonstrance, and to be regarded as petitioners for the relocation of the county-seat."

3. Immaterial that Petitions Ask Removal to Different Places. — Butler *v.* Mills, 61 Ark. 477.

But in Washington, when a petition for the removal of a county-seat to a certain place has been presented, signed by the requisite number of electors, and it has been ordered that the question be submitted to the electors at the next general election, the county commissioners cannot, at the same election, submit the names of other places as candidates for removal, the petitions for removal to which places, subsequently presented, do not contain the requisite number of names. Rickey *v.* Williams, 8 Wash. 479.

sented. In the *California* case it was held that the names so pasted on should be disregarded.[1] But in the *Florida* case it was held that, no fraud being shown, the irregularity did not invalidate an election ordered on such petition.[2]

f. OPPOSITION TO PETITION. — Any defense against the relocation of a county-seat must be made, and any question concerning the sufficiency of the petition must be raised, while the petition is pending before the board of county commissioners.[3] No such question can be raised after an election on the question of removal has been ordered and held.[4]

g. CONCLUSIVENESS OF DECISION OF COUNTY COMMISSIONERS. — The authorities hold that the decision of the board of county commissioners as to the sufficiency of a petition for removal of a county-seat is conclusive until set aside in some method provided by law for a direct review,[5] and cannot

1. Names Transferred Should Be Disregarded. — Fox *v.* San Mateo County, 49 Cal. 563. In this case the court, *per* Wallace, C. J., said: "To say that, though the signers did not affix their names to the petition presented, they did affix them to another and similar petition, not presented to the board, is no answer; nor does it satisfy either the terms of the statute or its obvious policy, which was to shut the door against frauds which would inevitably occur if the practice of detaching signatures from one petition and attaching them to another were permitted." Crockett, J., concurring, said: "Whether they signed another paper with a similar heading will rest entirely in parol, and can only be ascertained by oral proofs. If such proof will suffice as to a portion of the petitioners, it will be equally effective as to all. We might then have the case of a petition never in fact signed by any one; and the omission could be supplied only by oral proof that the petitioners had signed other similar petitions. If a practice of this kind was tolerated it would open the door to numerous frauds, and would result in substituting oral proof for that which the statute requires to be in writing. For these reasons, I think the one hundred and eleven names which were pasted to the petition should be disregarded; and without them there was not the requisite number."

2. Irregularity Immaterial. — Douglass *v.* Baker County, 23 Fla. 419.

3. Objections Should Be Raised While Petition Is Pending. — Clarke County *v.* State, 61 Ind. 75; Ellis *v.* Karl, 7 Neb. 381.

4. Objection Cannot Be Raised After Election. — After a county-seat removal election has been ordered and held, and a sufficient vote has been cast in favor of some one place to work a relocation of the county-seat, the question whether the petition presented to the board of county commissioners, praying that such election be held, was signed by a sufficient number of voters, is not open to judicial investigation. State *v.* Langlie, 5 N. Dak. 594.

Equity Will Not Interfere to prevent a removal, conformably with the result of a county-seat election, because of defects in the petition therefor, if no objection was made before the county commissioners while the petition was pending, and the person complaining was not prevented from so doing. Ellis *v.* Karl, 7 Neb. 381.

Fraud Complete Before Order of Removal. — In *Indiana*, where the county commissioners are authorized to direct the removal of a county-seat upon the presentation of a sufficient petition, without any election, a removal in pursuance of a final order of the board cannot be enjoined on the ground of fraud, where the only acts of fraud charged were complete before the final order was made, and there was no objection raised before the board. Markle *v.* Clay County, 55 Ind. 185. In this case the court, *per* Biddle, J., said: "The allegations of fraud in the complaint are that the vendor had no title in the grounds conveyed to the board for the purposes of a court house and jail; that the board refused to investigate the title to the lands, and were deceived therein; that the board refused to count the signatures to the petition upon which the proceedings were founded; that there were not the requisite number of signatures; that many of them were fictitious; that many of the signers were not citizens of the county; that the board, being ignorant of such facts, relied upon the false representations of the petitioners, and acted on their representations. Other various charges of fraud are made, but the facts alleged all existed before the final order of the board relocating the court house and jail was made, all of which were open to contest, and some of which were contested, before the board, during the proceedings, and before the final order was made. Assuming that the fraud is sufficiently charged, and that the Circuit Court had jurisdiction and power to enjoin proceedings under an order of the board, for fraud, it could be done only for fraud practiced on the board in procuring the order, and which was not consummated until the final order was made. It could not be done for fraud practiced in the petition, nor in the land titles, nor for anything which existed before and could be contested in the proceedings while they were *in fieri*, and before the final judgment thereon."

5. Decision Conclusive. — Baker *v.* Louisa County, 40 Iowa 226; Bennett *v.* Hetherington, 41 Iowa 142.

Such decision, even if erroneous, is not void, but is conclusive until set aside by certiorari. Bennett *v.* Hetherington, 41 Iowa 142.

Where the board of county commissioners, in accordance with the provisions of Laws 1889, c. 174, inquire into and determine what, if any, signatures to a petition for the removal of a county-seat should be deducted therefrom, and file their certificates thereof, and, accord-

be collaterally attacked.[1]

7. Vote Necessary to Authorize Removal — *a.* POWER OF LEGISLATURE TO DESIGNATE. — The removal of a county-seat being a subject over which the legislature has plenary control, it can, in the absence of constitutional restrictions, authorize a change upon any vote of the people, great or small, or without any vote.[2]

Constitutional Limitation. — A constitutional provision that a county-seat shall not be removed without the affirmative vote of a certain proportion of the electors of the county fixes only the lowest limit on which the removal may be made, and does not restrict the power of the legislature to require a larger vote than is there fixed.[3]

The Legislature May Fix a Criterion for determining the number of voters in a county, in order to ascertain whether the proposition for removal has received the required number of votes,[4] but the criterion must be such that it

ing to such certificate, there still remains on the petition a sufficient number of names to authorize the ordering of an election, it becomes the duty of the county auditor to make such order; and the election held in pursuance thereof will not be void because of any error or mistake of the board in determining, upon the evidence before them, what signatures were improperly on the petition. The determination of the board in that regard, at least in the absence of fraud, is conclusive. Currie *v.* Paulson, 43 Minn. 411. In this case, the court, *per* Mitchell, J., said: "It is the vote of the electors at the election, and not the signatures to the petition, which determines the location of the county-seat. The main if not sole purpose of requiring the petition in favor of a change before ordering an election is to save the public from the expense, loss of time, and excitement incident to such an election, unless there is a reasonable probability that the required majority of electors will vote for the change. To go back of the action of the county board and reverse their determination as to these facts after the election is passed and the change carried by the popular vote, would certainly subserve no good purpose."

Commissioners Cannot Set Aside Their Order. — In Clarke County *v.* State, 61 Ind. 75, it was held that a board of county commissioners has no authority to set aside its orders, made at a previous term, in relation to the removal of a county-seat.

1. Cannot Be Collaterally Attacked. — Baker *v.* Louisa County, 40 Iowa 226; State *v.* Nemaha County, 10 Neb. 32; State *v.* Nelson, 21 Neb. 572.

Doctrine Denied in Kansas. — The finding of a county board upon the sufficiency of the petition is not so conclusive as to be beyond attack by a proceeding for an injunction to restrain the holding of the election, such proceeding being commenced before the election is held. State *v.* Eggleston, 34 Kan. 714.

2. Plenary Power of Legislature Over Removal. — Alexander *v.* People, 7 Colo. 155.

3. Legislature May Require Larger Vote than Constitution Requires. — The *Colorado* Act of Feb. 11, 1881, which provides that "not less than two-thirds of all the legal votes cast shall be necessary to effect the removal of the county-seat of any county in this state," is not in conflict with the provision of the constitution that "no county-seat shall be removed unless a majority of the qualified electors of the county, voting on the proposition at a general election, vote therefor." Alexander *v.* People, 7 Colo. 155.

The provision of the *Arkansas* Constitution that "no county-seat shall be established or changed without the consent of a majority of the qualified voters of the county to be affected by such change," only fixes the minimum number of votes by which a county-seat may be removed; and an act which fixes the number of persons liable to pay a poll tax as the criterion for ascertaining the number of qualified voters, and makes the vote of a majority of the persons liable to pay such tax, as ascertained upon the assessor's books, necessary to authorize a removal, is not in contravention of the constitution. Vance *v.* Austell, 45 Ark. 400; Saunders *v.* Erwin, 49 Ark. 376.

Constitutional Provision that Plurality of Votes Constitutes Choice. — The provision of art. xvi., § 16, of the *Florida* Constitution, that "a plurality of votes given at an election by the people shall constitute a choice when not otherwise provided by this Constitution," does not apply to elections for the purpose of locating county-sites, the only elections mentioned in the constitution being elections of officers by the people and by the legislature, and elections respecting changes in the fundamental law. Therefore the Act of Jan. 28, 1869, declaring that in elections for locating county-sites "the place receiving a majority of the number of registered votes shall be the county-site," is not unconstitutional. State *v.* Padgett, 19 Fla. 518.

The corresponding provision of the Constitution of 1885 (art. xvi., § 8), is expressly restricted in its operation to elections of officers.

4. Legislature May Prescribe Criterion. — The legislature, in submitting to the people of the county the question as to whether the county-seat shall be removed, is authorized to designate the assessor's books as the test of the number of voters, and to provide that the removal shall be made upon the affirmative vote of the majority of those whose names appear upon the assessor's book. Hall *v.* Marshall, 80 Ky. 552.

Determination from Assessment Rolls. — Where a vote of a majority of the persons liable to pay a poll tax is necessary to authorize the removal of a county-seat, the assessment list as returned by the assessor is conclusive as to

can never operate to effect a removal by a less vote than the constitution requires.[1]

b. CONSTRUCTION OF PROVISIONS AS TO VOTE REQUIRED. — The provisions in the different states as to the number of votes required to remove a county-seat vary widely,[2] as do also the judicial interpretations of such provisions. The preponderance of authority is, however, in favor of the following general rule: Where the law requires the consent, concurrence, or vote of a certain proportion of the electors, a removal is authorized when such proportion of votes cast at the election on the question is in favor of removal, and there is no necessity for an inquiry as to the whole number of electors in the county;[3] and when the question is submitted at a general election, or

the number of such persons, and names subsequently interpolated should be disregarded in determining the question whether the necessary number of votes has been cast for removal. Vance *v.* Austell, 45 Ark. 400.

The fourth section of the *Kansas* Act relating to the removal of county-seats (c. 26, Gen. Stat. 247), which provides that "for the purpose of this act, the number of legal electors in the county shall be ascertained from the last assessment rolls of the several township assessors in the county," has no reference to the registration list of adults directed to be prepared by the county assessor, by c. 86 of the General Statutes. Therefore such list cannot be considered in determining whether a majority of the electors have voted in favor of the change. County-seat of Linn County, 15 Kan. 500.

1. Cannot Effect Removal by Less Vote than Constitution Requires. — Section 6, c. 103, of the *Tennessee* Act of 1873 provided that "the county-seat shall not be removed to any place unless a vote is cast for the removal to said place equal to two-thirds of the votes cast in the next preceding governor's election." It was held that this was in conflict with the provision of the constitution that the seat of justice of a county should not "be removed without the concurrence of two-thirds of the qualified voters of the county." Bouldin *v.* Lockhart, 3 Baxt. (Tenn.) 262, Lockhart, 1 Lea (Tenn.) 195.

2. Vote Required to Remove — *Colorado.* — In Vinette *v.* Chaffee County, 1 Denver L. J. 6, it was held that the removal of the county offices and records of Chaffee county from Granite to Buena Vista was illegal, as, at the time, a vote of two-thirds of the qualified electors was necessary to authorize such removal, and Buena Vista had received only a bare majority of the votes cast.

Minnesota. — Fifty-five per cent. of the votes cast at a special election held on the question is necessary to effect a removal. Gen. Stat. 1894, §§ 647-656. See Smith *v.* Renville County, 64 Minn. 16.

Nebraska. — Three-fifths of the votes cast at a special election held on the question are necessary to effect a removal. Comp. Stat. 1897, c. 17, art. 3, § 1. See State *v.* Roper, 47 Neb. 417.

South Dakota. — The Constitution of South Dakota, art. 9, § 3, provides that "whenever a majority of the legal voters of any organized county shall petition the county board to change the location of the county-seat which has once been located by a majority vote, specifying the place to which it is to be changed, said county board shall submit the same to the people of said county at the next general election, and if the proposition to change the county-seat be ratified by two-thirds of the votes cast at said election, then the county-seat shall be changed, otherwise not." This provision superseded an act of the territorial legislature providing that the county-seat of a certain county might "be changed in the manner now or that may hereafter be prescribed by law, except that at the first submission of said question a majority of all the votes cast shall determine such location." Remington *v.* Higgins, 6 S. Dak. 313.

Texas. — The Texas statutes with regard to the number of votes necessary to remove a county-seat have relation to the position of the place selected, the object being to have the county-seats located as near the geographical centres of the counties as possible. Thus a county-seat situated within five miles of the geographical centre cannot be removed to any point, whether within such radius or without it, save on a vote of two-thirds of all the electors voting on the question; a county-seat without such radius cannot be removed to another place without such radius save on a two-thirds vote; but the county-seat may be removed from a place without such radius to a place within such radius by a mere majority vote. Therefore a removal to a place more than five miles from the geographical centre upon less than a two-thirds vote is illegal. Caruthers *v.* State, 67 Tex. 132.

3. Consent Given by Required Proportion of Votes Cast — *Arkansas.* — Vance *v.* Austell, 45 Ark. 400.

Florida. — State *v.* Padgett, 19 Fla. 518.

Illinois. — People *v.* Warfield, 20 Ill. 159.

Kansas. — County-seat of Linn County, 15 Kan. 500.

Minnesota. — Taylor *v.* Taylor, 10 Minn. 107; Everett *v.* Smith, 22 Minn. 53. The present Minnesota law requires fifty-five per cent. of the votes cast at a special election called on the question. Gen. Stat. 1894, § 647 *et seq.*

Texas. — Alley *v.* Denson, 8 Tex. 297. The present Texas law requires the vote of a certain proportion of the electors "voting at such election." Rev. Stat. 1895, art. 811.

Contrary Doctrine — Actual Affirmative Votes Necessary. — The provision of the Constitution of *Tennessee* that a county-seat shall not "be removed without the concurrence of two-thirds of the qualified voters of the county" requires the affirmative vote of two-thirds of the quali-

together with some other question, the specified proportion of the whole number of votes cast at the election must be in favor of removal; such proportion of the number of votes cast on the question of removal merely is insufficient.[1]

8. The Election — *a.* How Question of Removal Submitted — General or Special Election. — Whether the question of removing a county-seat should be submitted at a general election, or at a special election called for the purpose, is purely a matter of constitutional and statutory regulation in the several states.[2]

b. Holding More than One Election — Restriction of Choice. — In the absence of constitutional restrictions limiting the choice of a new county-seat to the place or places named in the act providing for, or order directing, an election on the question of removal, the electors have a perfect right to vote for any place in the county which they may prefer, and this right cannot lawfully be restricted.[3] Therefore it sometimes happens that an election results in a decision in favor of removal, but no new county-seat is chosen. In such case a second election is held, in which the choice is usually restricted to the two places which have received the highest number of votes at the first election.[4]

fied voters of the county to authorize such a removal. It is not sufficient that two-thirds of the votes cast at the election are in favor thereof. Bouldin *v.* Lockhart, 3 Baxt. (Tenn.) 262, 1 Lea (Tenn.) 195; Braden *v.* Stumph, 16 Lea (Tenn.) 581.

To the same effect was State *v.* Sutterfield, 54 Mo. 391, decided under a similar provision of the constitution then (1873) in force.

The provision of the *Missouri* Constitution of 1875 (art. 9, § 2) on the subject is as follows: "No county-seat shall be removed unless two-thirds of the qualified voters of the county, voting on the proposition at a general election, vote therefor," etc.

In Patterson *v.* Temple, 27 Ark. 202, the court, speaking of an act which provided that a certain county-seat might be removed if it appeared at an election on the question that "a majority of the qualified electors of said county are in favor of the removal," said, *per* Bennett, J.: "At the election now under consideration, it was not required that a single vote be cast against the removal of the county-seat at Greenwood, but there must have been a majority of all the qualified voters of the county who voted in favor of the removal. Those who were opposed to the removal could have stayed at home, or if voting, could have voted against, and either would have the same effect."

1. Required Proportion of Votes Cast on Question of Removal Insufficient. — People *v.* Wiant, 48 Ill. 263; Hogg *v.* Baker, (Ky. 1895) 31 S. W. Rep. 726; Bayard *v.* Klinge, 16 Minn. 249.

This question cannot arise under the present *Minnesota* law, as the question of removal is now submitted by itself at a special election. Gen. Stat. 1894, § 647 *et seq.*

The North Dakota Statute made it necessary that some one place should have "two-thirds of the votes polled" to work a change of the county-seat to such place. It was held that this meant two-thirds of the votes polled on that particular question, and not two-thirds of the highest number of votes polled on some other question at the same election. State *v.* Langlie, 5 N. Dak. 594.

A similar decision was rendered in State *v.* Grace, 20 Oregon 154, in a case of an election for location. See *supra*, this title, *Location*.

2. Special Election. — Under art. 250 of the *Louisiana* Constitution all laws removing parish-seats must, before taking effect, be submitted to the electors of the parish at a special election held for that purpose, and be adopted by a majority vote cast at such election. Therefore an act removing a parish-seat must order a special election for the purpose of ratification or rejection of the act by the electors of the parish. Mobley *v.* Police Jury, 41 La. Ann. 821.

The amendment of the *Minnesota* Constitution adopted in 1881 (art. 4, §§ 33–34), requiring that the legislature should provide by general law for the changing of county-seats, gave the legislature full control over the subject, and abrogated the previously existing provision (art. 11, § 1) requiring the question to be submitted at a general election. Nichols *v.* Walter, 37 Minn. 264; Todd *v.* Rustad, 43 Minn. 500.

Under the existing Minnesota statute the question of the removal of a county-seat is submitted at a special election called by the county auditor for the purpose. Gen. Stat. 1894, § 649.

3. Any Place in County May Be Voted for. — State *v.* Baker County, 22 Fla. 29; Douglass *v.* Baker County, 23 Fla. 419; Whitaker *v.* Dillard, 81 Tex. 359.

Where a petition was presented "asking for an election to be ordered as the law directs for removal of the county-site," and the order for election was based thereon, it was held that the only reasonable construction was that the order was for an election at which the electors might vote for any place in the county as the county-site, including the existing location of it. Douglass *v.* Baker County, 23 Fla. 419.

4. Restriction in Second Election. — Blackshear *v.* Turner, 53 Ark. 533; County-seat of Osage County, 16 Kan. 296.

Old County-seat Cannot Be Candidate at Second Election — Arkansas. — In an election as to the removal of a county-seat there are two dis-

c. TIME OF HOLDING ELECTION. — As there cannot be a valid election without a law authorizing the same, a county-seat election is ineffective if held before the law providing therefor has gone into effect.[1]

Within Certain Time After Presentation of Petition. — A provision that a county-seat election must be held within a certain time after the presentation of a petition therefor is mandatory, and the action of county commissioners in calling an election to be held after such time is void.[2]

Second Election. — But where two elections are necessary to determine the question, such time limitation does not apply to the second election.[3]

Direction to Submit Question at Specified Election. — A statute providing that the question of removal of a county-seat, upon petition therefor, shall be submitted at the next "April election" thereafter, refers to the time of taking the vote, and does not necessarily connect it with any other election by name, though there be at the time another election known as the "April election."[4]

tinct questions: first, as to whether the county-seat shall be removed; second, as to the place to which it shall be removed. And the first question may be finally settled by the election, though the second question requires a second election for its determination. Thus where, in such an election, a majority of the votes were for removal to some place, but there were more votes against removal than for removal to any particular place, it was held that the question of removal was finally determined, and that a second election to determine the new county-seat should be between the two places in favor of removal to which the highest number of votes had been cast, and not between the old county-seat and the place which had received the highest number of such votes. Blackshear *v.* Turner, 53 Ark. 533.

Under the Kansas Statutes (Gen. Stat. 1897, c. 26, § 10), the second election is held between "the two places having received the highest number of votes" at the first election. In the cases of Stoddart *v.* Vanlaningham, 14 Kan. 18, and Light *v.* State, 14 Kan. 489, the old county-seat was a candidate at the second election, and no question was raised as to the propriety of allowing it to be voted for.

The doctrine of the *Arkansas* case above cited is certainly the best considered view of the subject, for if the second election should result in a decision in favor of the former county-seat, as is possible under the *Kansas* procedure, the will of the majority of the voters, as expressed in the former election, that the county-seat should be removed, would be defeated.

Votes for Place Not a Candidate Rejected. — A county-seat election having resulted in favor of removal, but no place having been chosen, a second election was ordered between L. and O. At such election L. received one thousand one hundred and thirty-one votes; O., one thousand and forty-nine; and S., a place not in nomination, two hundred and ninety-eight. The commissioners rejected all votes for S. and declared L. selected, although it really had not received a majority of the votes cast at the election. It was held that such a course was proper. County-seat of Osage County, 16 Kan. 296.

1. Election Held Before Law Authorizing Same Has Taken Effect. — The *Illinois* Constitution of 1848 provided that "no county-seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county shall have voted in favor of its removal to such point." It was held that under this provision there could be no valid election without such a law, and that an election on the question of removal held after such a law had been passed, but before it had gone into effect, was not such an election as was required by the constitution. Iroquois County *v.* Keady, 34 Ill. 293.

When Act Providing for Election Takes Effect. — An act of the *Ohio* legislature provided for the removal of a county-seat if the act should be adopted by a majority of the electors of the county voting at the next general election. It also provided the manner of voting, etc. It was objected to the act that there was no law authorizing the election. It was held that the proper construction of the act was that the portion authorizing the election, etc., took effect immediately upon its passage, while only the part referring to the removal of the county-seat remained in abeyance until accepted by the electors; and that therefore there was no force in the objection. Noble *v.* Baker, 5 Ohio St. 524. To the same effect see State *v.* Perry County, 5 Ohio St. 497. See generally the title STATUTES.

2. Time Limitation Mandatory. — Gossard *v.* Vaught, 10 Kan. 162; State *v.* Washoe County, 6 Nev. 104. See the title STATUTES.

3. Time Limitation Does Not Apply to Second Election. — Conley *v.* Fleming, 14 Kan. 381.

4. Designation of Certain Election Refers Merely to Time of Taking Vote. — Cole *v.* Jackson County, 11 Iowa 552; Mather *v.* Converse, 12 Iowa 352.

Therefore where the "April election," as defined by law, meant the election held the first Monday in April to fill certain offices, and a subsequent law provided that such officers should be elected in October, thereby abolishing the "April election" as defined by law, it was held that an election to choose a county-seat could nevertheless be legally held on the first Monday in April, as the county-seat election was a special one, and no reference thereto had been made in the statute abolishing the "April election." Cole *v.* Jackson County, 11 Iowa 552.

d. NOTICE — (1) *Necessity for.* — In *Michigan*, where the statute made the time and occasion of the election imperative, requiring it to be held at "the next general state election," it was held that such direction could not be made nugatory by any failure to give notice of the same, as every one is bound to take notice of what the statute requires.[1]

(2) *Time of Giving Notice.* — Where thirty days' notice of the election is required, it is sufficient if the first publication of the notice is more than thirty days before such election,[2] even though such first publication be not a formal one.[3]

Less than Required Notice Given. — A county-seat election will not be declared void at the suit of a person who participated therein, because notice was not given for the full time required by law, especially where it is not shown that a different result would probably have been obtained if the full statutory notice had been given.[4]

(3) *Form of Notice.* — It has been held that the notice of a county-seat election is sufficient if it actually informs the electors of the question to be voted on, and that in such case an election is not invalidated by any defect in the form of the notice.[5]

In Michigan it is essential to the validity of an election that the place to which a removal is proposed should be designated in the notice.[6]

1. Election Not Void Because Held Without Notice. — Atty.-Gen. *v.* Iron County, 64 Mich. 607.

It is not essential to the validity of an election for the location of a county-site, or to a canvass of the returns thereof, that the record of the proceedings of the county commissioners at the time of canvassing the returns should show that evidence of due notice of the election having been given was produced before, or asked for by, the commissioners. Douglass *v.* Baker County, 23 Fla. 419.

Second Election. — Under the *Kansas* statutes it is not necessary to the validity of a second election to determine to what place a county-seat shall be removed, that notice of such second election should have been given. Light *v.* State, 14 Kan. 489. But see Jones *v.* State, 1 Kan. 273.

2. What Is Sufficient Notice. — Scott *v.* Paulen, 15 Kan. 162. In this case the notice required was to be given by publication in a weekly newspaper. The first publication was more than thirty days prior to the election, and it was repeated in each successive issue up to the time of the election. This was held sufficient.

3. Informal Publication. — State *v.* Sherman County, 39 Kan. 293. In this case the statute under which the election was held required that the county commissioners should cause thirty days' notice of the election "to be given, by publication in one or more newspapers published in the county, or by posting printed or written notices at the several voting places in the county." The first notice of the election was published as part of the commissioners' proceedings, more than thirty days before the election, but formal notices were not published until less than thirty days before such election. The electors of the county were, however, actually informed of the time, place, and purpose of the election, and generally voted thereat, so that the town which was declared elected received a majority of all the votes in the county. It was held that the election was valid.

4. Less than Required Notice. — Ellis *v.* Karl, 7 Neb. 381.

5. Sufficiency of Notice. — The *North Dakota* statute relating to elections for relocation of county-seats provided that if an election was ordered it should be the duty of the board of county commissioners, in the notices for the next general election, to notify the voters of the county to designate upon their ballots at such election the place of their choice. The notice actually given was that an election would be held for the purpose, among others, of voting "upon the question of relocating the county seat of Traill county." At the election one thousand eight hundred and eighty-two votes were cast on this question, and the highest number of ballots cast at such election was one thousand nine hundred and sixty. It was held that the notice was sufficient, and that, even if insufficient, the election was not void, it appearing that the voters were not misled by the defect in it. State *v.* Langlie, 5 N. Dak. 594.

Notice Held Fatally Defective. — In People *v.* Hamilton County, 3 Neb. 244, it was held that where the law provided that in the notice the electors should be directed "to designate on their ballots the place of their choice for the county-seat," and the notice merely authorized the electors to vote "for removal of county-seat; against removal of county-seat;" such notice was insufficient, and the election held in pursuance thereof void.

Supervisors Need Not Prescribe Form. — It is no objection to the validity of an election on the question of removing a county-seat, that the board of supervisors did not prescribe for its clerk the form and contents of the notice of such election, but left the giving of notice entirely to the clerk, where notice was in fact given in due form, the election was held, and the supervisors acquiesced in what had been done by canvassing the votes and declaring the result. Atty.-Gen. *v.* Lake County, 33 Mich. 289.

6. Designation of Place for Removal. — Pack *v.* Presque Isle County, 36 Mich. 377.

(4) *Manner of Publication.* — A requirement that notice of the election shall be given by posting certified copies of the order for such election is sufficiently complied with where one certified copy is made out, and printed copies of that are posted.[1]

e. Form of Submission — Conditions. — When the board of county supervisors have decided upon a conditional removal of the county-seat, the resolution as passed by them must be submitted to the electors of the county; an election held upon the question of removal submitted with no mention of the conditions is void.[2]

f. Qualifications of Voters. — The legislature cannot require any qualifications for a voter at an election on the question of removing a county-seat, other than those required by the constitution.[3]

g. Ballots — (1) *Generally.* — If a certain tract of land is popularly and generally known by a specific name, the use of that name on a ballot is a sufficient designation of the place voted for.[4]

A Reasonable Construction must be placed upon ballots,[5] and ballots which obviously mean the same place must be counted accordingly, though the designations vary.[6]

Designation of Site for County Buildings. — A ballot cast for a certain place is not vitiated by the fact that it designates a particular locality in that place as the site of the county buildings.[7]

Need Not Specify Site of County Buildings. — A notice is sufficient if it states that the question "of the removal of said county-seat to S. shall be and is hereby submitted to the electors" of the county. The fact that the county supervisors have already selected the piece of land upon which the county buildings shall be erected in case of removal need not appear in the notice. Peck *v.* Berrien County, 102 Mich. 346.

1. Posting Printed Copies of Order. — Chapter 39, § 15, of the Code of *West Virginia*, provides that when the county court has made an order for a vote to be taken on the question of the relocation of a county-seat, "the clerk of said court shall, upon the adjournment of the court, make out and certify as many copies of the order as there are voting places in the county, and deliver the same to the sheriff thereof, whose duty it shall be to post one of said copies, or cause it to be done, at each of said places of voting, at least forty days before the day of such election." This provision is substantially carried out where the clerk makes out a copy of the order and certifies to the same as a copy, and the sheriff then causes to be posted a printed copy of this certified copy of the order, at each of the voting places, for the required forty days. It is not necessary that each individual notice posted should be a written copy certified and signed by the clerk. Welch *v.* County Ct., 29 W. Va. 63.

2. Question Must Be Submitted as Considered by Supervisors. — People *v.* St. Clair, 15 Mich. 85. In this case the condition was that "suitable guarantees should be given for the erection of the necessary buildings for county purposes, free of cost to the county, and that said guarantees should be given within ninety days from the date of this resolution." The question submitted to the voters was as to an unconditional removal, and no reference was made to the giving of any guarantees. The election was held void.

3. Legislature Cannot Prescribe Special Qualifications for Voters. — In State *v.* Williams, 5 Wis. 308, it was held that an act requiring that persons offering to vote at a county-seat election must have resided in the town where they offered to vote at least thirty days before such election did not submit such question to the electors of the county, as the constitution prescribed no such qualifications for electors; and that the act was therefore invalid.

The principle stated in the text was recognized in State *v.* Lean, 9 Wis. 279, but it was held that the act under consideration in that case did not impose any additional qualifications, such act merely prescribing questions which might be submitted to a person offering to vote, in order to ascertain whether he was a duly qualified elector.

4. Name of Place Sufficient. — Conley *v.* Fleming, 14 Kan. 381.

Description of Place Voted for. — A ballot containing the name of the place voted for is not vitiated by the fact that it contains, in addition thereto, an imperfect, but not contradictory, description of the land. Conley *v.* Fleming, 14 Kan. 381.

5. Construction of Ballots. — Where, in an election for the removal of a county-seat, votes are cast for the "geographical centre" of the county, such votes must be construed to mean a desire to locate the county-seat at a place where the court-house and other buildings required by law can be erected, a place which would include the centre of the county, and would have such area as is necessary for all purposes for which county-seats are used and required by law to be established and maintained. Whitaker *v.* Dillard, 81 Tex. 359.

6. Different Designations of Same Place. — At an election for the removal of a county-seat, votes cast for the "geographical centre" and for the "centre of county" should be counted as for one and the same place. Whitaker *v.* Dillard, 81 Tex. 359.

7. Designation of Site for County Buildings. — In an election on the question of removing a county-seat of a certain county from the then county-seat to Grand Lake, certain votes were

(2) *Separate Ballots and Boxes.* — In *Michigan* the question of the removal of a county-seat is submitted at a general election, and it is held that the ballot on such question should be separate from the ballot containing the tickets for township officers, etc., and separate ballot-boxes should be used.[1] But it is not necessary that there should be separate ballots for and against the proposition of removal.[2]

h. RETURNS. — In *West Virginia*, where the question of relocation of a county-seat is submitted at a general election, it has been held that a requirement of the law that the commissioners of election at the several precincts shall make out a separate certificate of the vote on that question is mandatory, and that a failure of the commissioners to do so invalidates the election on that question.[3]

i. THE CANVASS — (1) *By Whom Made.* — The votes at an election for the removal of a county-seat are, as a general rule, canvassed by the county commissioners or corresponding officers.[4]

(2) *Powers of County Commissioners.* — It has been held that the powers of county commissioners, in canvassing the vote at a county-seat election, are judicial, not merely ministerial; and that they are authorized to go behind the returns and examine the ballots cast, for the purpose of determining the true result.[5]

(3) *Effect of Unintelligible Ballots.* — In *Minnesota* it is held that unintelligible ballots should be counted in making up the whole number of " votes

cast for the location at " Grand Lake *West Side*." It was held that such votes should not be rejected for that reason. The court, *per* Stone, J., said: " The question voted upon was the removal of the county-seat from Hot Sulphur Springs to Grand Lake, and the designation by the local voters at Grand Lake of a particular point at the lake as the preferred site ought not to be taken into account. Each individual voter might possibly have been interested in preferring a different spot as the exact site for the county buildings on the shore of the lake. It was a matter for the board of county commissioners to determine the exact site at the lake, if a majority of the legal voters of the county should vote in favor of the removal from the springs to the lake." People *v.* Grand County, 7 Colo. 190, *cited with approval* in Coleman *v.* People, 7 Colo. App. 243.

In an election for the relocation of a county-seat the choice was restricted to three places, of which F. was one. Votes cast for F. were entitled " F. ticket," and described accurately a subdivision of land within the limits of the town site of F. It was held that such ballots must be counted for F. State *v.* Dinsmore, 5 Neb. 145.

1. Separate Ballots and Boxes. — Atty.-Gen. *v.* Iron County, 64 Mich. 607; Peck *v.* Berrien County, 102 Mich. 346.

2. Separate Ballots For and Against Removal Not Necessary. — At an election on the question of the removal of a county-seat, a ballot having thereon the words " for the removal of the county-seat to S.," and underneath the words " yes " and " no," with instructions to voters how to indicate their wishes, is sufficient. Peck *v.* Berrien County, 102 Mich. 346.

3. Necessity for Separate Returns. — Welch *v.* County Ct., 29 W. Va. 63.

4. County Commissioners Should Canvass Vote. — Under the *Washington* Statutes (Gen. Stat., tit. 38, c. 3; Bollinger's Annotated Codes and Statutes, tit. 5, c. 2), it is the duty of the county commissioners, upon the presentation of a properly signed petition, to submit the question of the removal of a county-seat to the electors of a county at a general election to be held therein, and to receive and compare the ballots and ascertain therefrom the result. The board of county canvassers have no authority to canvass the returns of the vote on the question of removal. State *v.* Whitney, 12 Wash. 420.

Action by Quorum. — Although under the *Michigan* statutes a two-thirds vote of the board of supervisors is necessary to authorize a submission to the electors of the question whether a county-seat shall be removed, the concurrence of two-thirds of the supervisors is not necessary for canvassing the vote after such question has been submitted, and carrying into effect the decision of the electors if it be in favor of a removal. In such case the action of a quorum, controlled by a majority thereof, is sufficient. Harrington *v.* Wands, 23 Mich. 385.

Canvass by County Judge. — Under the *Texas* statutes (Rev. Stat. 1895, art. 814), an election on the question of removing a county-seat may be ordered either by the county judge or the county commissioners, and if such election is ordered by the county judge the returns are made to him, and he opens the same, counts the votes, and declares the result. Grimes *v.* Shaw, 2 Tex. Civ. App. 20.

5. Commissioners May Go Behind Returns. — Heffner *v.* Snohomish County, 16 Wash. 273; Double *v.* McQueen, 96 Mich. 39. See also State *v.* Police Jury, 43 La. Ann. 1009.

Requiring Additional Returns from Inspectors of Election. — In order to assist the board of county supervisors in canvassing the returns of an election, the inspectors of election may be compelled to reconvene and recanvass the votes cast in their township upon the question, and make a full return thereof. Double *v.* McQueen, 96 Mich. 39.

cast," of which a certain proportion must be for removal in order to carry the measure.[1] But in *Nebraska* such ballots are entirely disregarded.[2]

(4) *Conclusiveness of Canvass.* — The action of the canvassing officers in declaring the result of a county-seat election is final, and they cannot afterwards reconsider their action and declare a different result.[3]

Courts Cannot Review Canvass Lawfully Made. — If the canvass has been lawfully made, the courts have no authority to review the decision;[4] but the courts may restrain the illegal removal of a county-seat upon an order of a majority of the county commissioners, where they have, in the absence of the returns and poll books of the election held on the question, and without considering the returns from certain precincts, declared a certain place chosen; as in such case the legal number of votes cast upon the proposition is not ascertained by the board, as required by law.[5]

j. CONTEST OF ELECTION — (1) *Time of Contesting.* — After a second election has been held there can be no contest as to the validity of the first election, the canvass thereof, or the petition upon which it was ordered.[6]

1. Unintelligible Ballots Included in Count. — Smith *v.* Renville County, 64 Minn. 16.

2. Unintelligible Ballots Disregarded. — State *v.* Roper, 47 Neb. 417, *overruling* 46 Neb. 724.

3. Canvassing Officers Cannot Set Aside Their Declaration of Result. — Williams *v.* Reutzel, 60 Ark. 155; Atty.-Gen. *v.* Benzie County, 34 Mich. 211; Mee *v.* Benzie County, 41 Mich. 6.

Under the *Texas* statutes (Rev. Stat. 1895, art. 814), an election on the question of removing a county-seat may be ordered by the county judge or commissioners, and the returns of the election must be returned to the officer ordering the same, who then proceeds to open the returns, count the votes, and declare the result.

Where an election to fix a county-seat has been ordered by the county judge, returns have been made to him, and he has declared the result, his decision is final and cannot be collaterally inquired into. The county commissioners' action in subsequently canvassing the returns and issuing a certificate of election to a place other than that to which the county judge issued his certificate of election is without effect. Grimes *v.* Shaw, 2 Tex. Civ. App. 20.

Informal Statement of Vote Cast. — Where the police jury of a parish have made out an informal statement of the vote cast at an election on the question of removing the parish-seat, but no result has been declared or proclaimed by any order or vote of the police jury, the court will not compel a removal to the town which, according to such statement, appears to have a majority of the votes; even though the informal compilation has been published in the parish official journal, and the proclamation of the president of the police jury has also been published in such journal. Such publication does not render the action of the police jury final. Davis *v.* Police Jury, 42 La. Ann. 968.

The fact that the police jury, in finally ascertaining the result of the election, set aside and disregarded such informal statement is not evidence of fraud, and the police jury will not be compelled to take the informal statement as the true result of the election. State *v.* Police Jury, 43 La. Ann. 1009.

4. Courts Cannot Review Canvass. — Atty.-Gen. *v.* Lake County, 33 Mich. 289; Hipp *v.* Charlevoix County, 62 Mich. 456; Double *v.* McQueen, 96 Mich. 39; Pinkerton *v.* Staninger, 101 Mich. 273; Heffner *v.* Snohomish County, 16 Wash. 273.

Under Howell's *Michigan* Stat., § 491, the decision of the board of county supervisors, as a result of their canvass, that an election has resulted in favor of the removal of a county-seat, is conclusive for all purposes, and leaves no question open for contest afterwards. The removal cannot thereafter be defeated even by showing that the measure was carried by an omission to return all the votes cast against removal. Double *v.* McQueen, 96 Mich. 39. In this case the court, *per* Long, J., said: "It is evident from the language of this statute that the supervisors alone are to determine the final result of the vote."

5. Illegal Canvass. — Krieschel *v.* Snohomish County, 12 Wash. 428.

6. First Election Cannot Be Contested After Holding of Second Election. — Light *v.* State, 14 Kan. 489; County-seat of Linn County, 15 Kan. 500. In this case the court, *per* Brewer, J., said: "The law of 1871, while making may changes, made in this respect only a verbal change. It provided that 'the validity of the election * * * shall be tried and determined.' Laws 1871, p. 193, § 7. But the subsequent legislature, that of 1872, amended by adding this proviso: 'Provided, however, that in no case shall the validity of any election be inquired into beyond the one last had, and upon which the proceeding is based.' Laws 1872, p. 271, § 1. Now, by this proviso the legislature plainly intended some restriction on the limits of inquiry in such contests. Coming at the session after the decision of this court construing the statute, it is not unreasonable to suppose that it was made with reference thereto, and was intended to cut off some portion of the broad field of inquiry to which that decision opened. It meant to say that, when a contest was made, some things should be considered final, and not open to attack. It says that only the validity of the last election, the one upon which the proceeding is based, shall be inquired into. Now, the only case in which the law contemplates two elections is in the relocation of county-seats. Does it not plainly follow that when the two

(2) *Election Cannot Be Collaterally Attacked.* — In the absence of any jurisdictional question affecting the validity of the election, it can be contested only in a direct proceeding. Alleged irregularities do not lay the election open to collateral attack.[1]

k. LEGISLATIVE VALIDATION OF IRREGULAR ELECTION. — An act of the legislature legalizing a county-seat election which was not authorized when held, and declaring the place then chosen to be the county-seat, does not violate a constitutional provision that "no county-seat shall be changed without the consent of a majority of the electors of the county." [2]

9. Offer to County of Buildings or Property to Secure Removal. —It is well settled that it is not bribery, within the meaning of either the common or the statute law, to offer or donate to a county buildings, property, or any conveniences in order to secure the removal of the county-seat to a certain place. So long as the advantages offered are for the benefit of the county at large, and not of the individual voter or other person having the power of choosing, they are a proper subject for consideration in making a choice.[3]

elections have been held it means to forbid inquiry into the validity of the first; that the courts were bound to accept the prior election, and consequently the proceedings upon which it was based, as valid and regular, and could only inquire whether the last election was legally conducted, and the actual result of the voting legally ascertained and declared?"

1. Election Cannot Be Collaterally Attacked for Irregularities. — Remington *v.* Higgins, 6 S. Dak. 313.

The court will not, in a collateral proceeding fourteen years after an election for the location of a county-seat, inquire into alleged irregularities at such election, where no direct proceedings have been had to set it aside, and the place thus chosen has been in fact the county-seat for eight or nine years. State *v.* Piper, 17 Neb. 614.

2. Unauthorized Election May Be Validated. — State *v.* Burton, 47 Kan. 44. In this case the court said that, though the election might not have been authorized, it was admitted that an expression of the consent of the people was given upon the question of the location of the county-seat. It was not necessary that it should be called an election, for the consent might be expressed by petition, or in any other form; and the legislature based its action upon that consent in confirming the election and declaring the place chosen thereat to be the county-seat.

Texas Validating Act. — The Texas Act of 1891 (Laws 1891, p. 30) validated the location of county-seats in newly organized counties, when a place more than five miles from the geographical centre had been chosen by a mere majority vote, under a misapprehension of the law which required a two-thirds vote to choose such location. Ewing *v.* Duncan, 81 Tex. 230.

And it has been held that the validating effect of such act extends to a removal made under similar circumstances. Ball *v.* Presidio County, (Tex. Civ. App. 1894) 27 S. W. Rep. 702, *reversed* on another point in 88 Tex. 60.

3. Offer of Advantages to County Not Bribery —

Arkansas. — Neal *v.* Shinn, 49 Ark. 227.

Florida. — Douglass *v.* Baker County, 23 Fla. 419.

Iowa. — Dishon *v.* Smith, 10 Iowa 212; Hawes *v.* Miller, 56 Iowa 395.

Kansas. — State *v.* Elting, 29 Kan. 397.

Kentucky. — Hall *v.* Marshall, 80 Ky. 552.

Montana. — Wells *v.* Taylor, 5 Mont. 202.

Texas. — Beham *v.* Ghio, 75 Tex. 87; Roby *v.* Carter, 6 Tex. Civ. App. 295.

Washington. — Island County *v.* Babcock, (Wash. 1897) 50 Pac. Rep. 54.

See also the title BRIBERY, vol. 4, p. 907.

Consideration by County Supervisors of Advantages Offered Before Submitting Question of Removal. — There is nothing improper in a board of supervisors, who are considering the question of removing a court house, taking into consideration any local provisions that may be made to relieve the county of expense incident to the removal. If they pass an unconditional resolution for the removal, and the people vote upon and approve a like unconditional proposition, that is sufficient; and no inquiry can be gone into to determine what it was that influenced the minds of either supervisors or people in reaching the conclusion that they have agreed upon. Atty.-Gen. *v.* Lake County, 33 Mich. 289.

Conditional Subscriptions for County Buildings. — Under an act providing for an election upon the question of removing a county-seat to a certain place, and that if such election be decided in favor of removal it shall be the duty of the board of supervisors to erect or "procure" suitable buildings, etc., the board of supervisors has power to accept a contract of subscription from individuals, for the erection of such buildings, in case the election shall be decided in favor of removal. Thompson *v.* Mercer County, 40 Ill. 379.

An Act Authorizing a City to Raise Money for Building a Court House in such city is not unconstitutional on account of the possible influence which the raising of the money for such purpose may have on a future proposal to remove the county-seat. Callam *v.* Saginaw, 50 Mich. 7.

Case Explained and Reconciled. — The case of Ayres *v.* Moan, 34 Neb. 210, has been cited as being contrary to the doctrine set out in the text, but an examination of the case shows that such view is erroneous. A special election for the removal of the county-seat was opposed on the ground, *inter alia*, that there had been counted as petitioners for such election the names of two hundred persons "who

10. When Actual Removal Should Be Made. —In some of the states it is held that when the result of a county-seat election has been officially declared to be in favor of removal to a certain place, such place at once becomes the county-seat, by operation of law,[1] and it is the duty of the county officers immediately to remove their offices, books, papers, and records to the new county-seat.[2] But the legislature may provide that there shall be no removal until the necessary public buildings are erected at the new county-seat.[3]

In Washington it is the duty of the county commissioners to give notice of the result of the election, and in such notice declare the county-seat to be at the place selected, from and after a specified date, not more than ninety days

were induced to sign [the petition] by the payment of money to them, and by the promise that a court house would be built free of cost to said Dakota county, and the expense of said special election would be paid by private citizens and be without cost to Dakota county." The court, *per* Maxwell, C. J., said: "As to the charge of bribery to procure signatures, it is sufficient to say that it seems scarcely possible that bribery would be resorted to for the purpose of procuring signatures. If, however, the proof should show that it had been resorted to, it would be a fraud upon the people of the county. * * * In regard to the alleged bribery of voters, it may be well to say that our laws are designed to secure the free and voluntary expression of the electors at every election. To secure this, every form of bribery is frowned upon by the courts; and the fact that the election is for the relocation of a county-seat, instead of calling for a relaxation of the rule, renders it important that no corrupt means be sanctioned which would or might have a tendency to prevent the voluntary expression of a part or all of the electors."

It will be noticed that the allegation of bribery in this case was the giving of money to the persons alleged to have been bribed, as well as the offer to build a court house and relieve the county of the expense of the election. Therefore, from all that is shown in this case, it is not necessarily in conflict with the decisions that the mere offering of facilities for the public convenience if the county-seat be removed to a certain place is not bribery.

1. Place Chosen Becomes County-seat Immediately. — Wells *v.* Taylor, 5 Mont. 202; Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 43 Am. & Eng. Corp. Cas. 363; Minear *v.* Tucker County Ct., 39 W. Va. 627.

2. Officers Must Remove Immediately. — Du Page County *v.* Jenks, 65 Ill. 275; Cole *v.* Jackson County, 11 Iowa 552.

Removal Before New County Buildings Are Erected. — Where an election has resulted in a vote in favor of the removal of the county-seat to a certain town, an order of the County Court that the public offices and records of the county be removed to a certain place in such town, and the sessions of court be held in such place, until the permanent court house shall be built on land conveyed to the county for that purpose, is not void. Hudspeth *v.* State, 55 Ark. 323. In this case the court added: "How far the order of the County Court was premature and erroneous, if at all, we need not determine."

No Order for Removal Necessary. — Where the county officers, of their own motion, have removed to the new county-seat, they cannot be compelled by mandamus to return to the old county-seat to await an order for removal from the county commissioners, though the statute require the county commissioners to give such an order. The failure to make the required order cannot defeat the removal. Wells *v.* Taylor, 5 Mont. 202.

Removal in Violation of Injunction. — Where a county-seat election has been held, and the official certificate of canvass shows that the result was in favor of a certain place, such place becomes *prima facie* the county-seat and all public business transacted there is valid and binding until such place is declared by competent authority not the county-seat; and this is true although a contest of the election is pending, and business is transacted at such place in violation of an injunction restraining the county officers from removing their offices and records thereto. Du Page County *v.* Jenks, 65 Ill. 275.

3. Removal May Be Postponed Until Necessary Buildings Are Erected. — An act of the legislature provided that the county-seat of a certain county should be removed to a designated place, and that the section providing for the removal should take effect as soon as it was adopted by a majority of the electors of the county voting at the next general election after the passage thereof, "as hereinafter provided" A subsequent section provided that in case a majority of the electors voted for the removal, the public business of the county should continue to be transacted at the old county-seat until new buildings were erected at the proposed new seat of justice. It was objected to this act that it was repugnant to the constitutional provision that "all laws removing county-seats shall, before taking effect, be submitted to the electors of the county to be affected thereby * * * and be adopted by a majority of all the electors," etc., in that the provision for the temporary retaining of the old county-seat would not be submitted to such vote. It was held, that according to the construction of the act, both the provisions for removal and for temporarily retaining the old county-seat were submitted, and that the objection was not available; and also that the act was not invalid as effecting the removal at an indefinite time, upon a contingency uncertain and depending upon the discretion of the county commissioners. Peck *v.* Weddell, 17 Ohio St. 271, *followed* in Powers *v.* Reed, 19 Ohio St. 189. See also State *v.* Portage County, 24 Wis. 49.

after the election.[1]

11. Effect of Removal upon Private Rights — *a.* LOCATION OF COUNTY-SEAT NOT A CONTRACT. —The location of a county-seat at a certain place does not in any way constitute a contract that it shall always remain there,[2] even though such location has been declared to be "permanent" or "forever;"[3] and the fact that a consideration has been paid, by donations of property, to secure such location, does not change the rule.[4] Consequently, a removal cannot be opposed as an impairment of the obligation of a contract.[5]

b. REMOVAL DOES NOT GIVE CAUSE OF ACTION AGAINST COUNTY. — No person can have any property right in the location of a county-seat,[6] and therefore a private citizen has no standing in court to maintain a suit to pre-

1. Washington Rule. — Krieschel *v.* Snohomish County, 12 Wash. 428; Heffner *v.* Snohomish County, 16 Wash. 273.

Provision as to Notice Not Mandatory. — But the action of the county commissioners in giving the notice more than ninety days after the election is valid, as the direction of the statute in regard thereto (1 Hill's Anno. Stat., § 2462-3; 1 Ballinger's Anno. Codes and Stat., § 284-5) is not mandatory. Heffner *v.* Snohomish County, 16 Wash. 273.

2. Location Not a Contract. — Elwell *v.* Tucker, 1 Blackf. (Ind.) 285.

3. Location Declared Permanent. — Newton *v.* Mahoning County, 100 U. S. 548, *affirming* 26 Ohio St. 618; Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208; Twiford *v.* Alamakee County, 4 Greene (Iowa) 60.

In Newton *v.* Mahoning County, 100 U. S. 548, the court said that in such a case as the location of a county-seat there could be no contract and no irrepealable law, because it was a "governmental subject."

The fact that a county-seat was located by act of the legislature and that the site for the court-house building was fixed by agreement between the County Court and the owners of the land, who agreed that the county-seat should be permanently located at such place, is no obstacle to a relocation of the county-seat. Minear *v.* Tucker County Ct., 39 W. Va. 627.

4. Property Donated to Secure Location. — Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208; Twiford *v.* Alamakee County, 4 Greene (Iowa) 60; Gilmore *v.* Hayworth, 26 Tex. 89.

In Newton *v.* Mahoning County, 100 U. S. 548, *affirming* 26 Ohio St. 618, the legislature had passed an act providing for the removal of the county-seat of Mahoning county from Canfield, then the county-seat, to Youngstown. A bill was filed asking an injunction on the ground that the Act of Feb. 16, 1846, by which the county-seat was located at Canfield, had provided that upon certain conditions being complied with (which conditions had been complied with) the county-seat should be permanently located at Canfield. The court held that, even if the Act of 1846 constituted a contract, it had been fully carried out when the county-seat was established at Canfield with the intention of keeping it there, and that the legislature had power to provide for the removal of the county-seat.

Location Cannot Be Made the Subject of a Contract. — An act of the legislature appointing commissioners to relocate a county-seat, and giving them power to receive donations of land for a seat of justice and money to erect the necessary public buildings, does not authorize them to enter into a contract for the location of the county-seat, nor to make such location dependent on donations. Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208.

Certain land was conveyed to the commissioners of a county, the consideration being the erection of a court house upon such property; and the deed was absolute upon its face, but there was an agreement between the grantor and the commissioners that if for any reason a court house should not be built upon the ground, or it should be used for any other purpose than as a site for a court house, such ground would be reconveyed. Before the court house was completed, work upon it was stopped, the contract for its building was rescinded, and new commissioners were elected who relocated the county-seat in another town. The grantor brought an action for a cancellation of the deeds and a reinvestment of the title to the ground. It was held that the contract of reconveyance was void under an *Arkansas* act prohibiting county commissioners from receiving conveyances of land in fee simple with any reservation or condition. The court, *per* Fairchild, J., said: "Without the restrictive provision of the statute, the location of the county-seat could not be made to depend upon a contract with Rogers. The authority of the commissioners was to locate the county-seat with reference to the interests of the county alone, and not to make contracts fettering the free and legal action of the County Court or sacrificing the property of the county." Rogers *v.* Sebastian County, 21 Ark. 440.

5. Removal Not a Violation of a Contract. — Elwell *v.* Tucker, 1 Blackf. (Ind.) 285; Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208; Twiford *v.* Alamakee County, 4 Greene (Iowa) 60.

Contract to Purchase Land for Site of County Buildings. — The legislature has a constitutional right to pass an act changing the location of a seat of justice of a county, although a contract for the purchase of a particular site has already been made by the commissioners appointed by law for that purpose. State *v.* Jones, 1 Ired. L. (23 N. Car.) 414.

6. No Property Right in Location. — Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208; Luce *v.* Fensler, 85 Iowa 596; Walker *v.* Tarrant County, 20 Tex. 16, Harrell *v.* Lynch, 65 Tex. 146; Parmeter *v.* Bourne, 8 Wash. 45.

vent a removal by the proper authorities.[1]

Damages. — The legislature may provide for the payment to property owners in a town from which the county-seat has been removed, of damages caused by such removal, and authorize the assessment and collection of a tax therefor;[2] but in the absence of such provision any loss which private citizens may sustain by reason of a removal is *damnum absque injuria*.[3]

Payment of Damages Will Not Be Enjoined. — Nevertheless a court has refused to enjoin the payment of county warrants issued by the county commissioners in compromise of the claims of persons who had donated property to secure the location of the county-seat at a place from which it was afterwards removed.[4]

c. EFFECT UPON PROPERTY DONATED TO COUNTY. — As a general rule, property which has been donated to a county in consideration of the county-seat being located at a certain place does not revert to the donor when the county-seat is removed to another place,[5] nor is there any resulting trust in

1. **Private Citizen Cannot Maintain Suit to Prevent Removal.** — Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208; Worsham *v.* Richards, 46 Tex. 441.

Unlawful Removal. — The principle stated in the text is true even though the proposed removal be unlawful. Harrell *v.* Lynch, 65 Tex. 146.

Persons Who Have Donated Property Cannot Oppose Removal. — The removal of a county-seat cannot be resisted by persons who have donated property to the county on condition of the establishment of the county-seat at the place from which it is removed, although no compensation is provided for them in the act authorizing the removal. Alley *v.* Denson, 8 Tex. 297.

2. **Legislature May Authorize Payment of Damages.** — Wilkinson *v.* Cheatham, 43 Ga. 258.

Legislature May Disregard Previous Act Requiring Payment of Damages. — A statutory provision that "when the seat of justice of any county shall have been established for the term of four years, the same shall not thereafter be removed unless the County Court shall cause a sufficient tax to be assessed on all the taxable property within the county to pay the owners of lots at such seat of justice for their lots and improvements," is not a contract within the meaning of the United States Constitution. And an act of the legislature removing the county-seat without making any provision for such payment is not unconstitutional. Moses *v.* Kearney, 31 Ark. 261.

3. **Damnum Absque Injuria.** — Megret *v.* Vermilion Parish, 10 La. Ann. 670; Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208.

In Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208, the court, *per* McKinney, J., said: "The relocation of a seat of justice in a county, when demanded by the people of such county, with a view to the advancement of public interests and convenience, is a duty from which a legislature could not shrink. If, after the location of a seat of justice, and its continuance for many years, individual interests should become identified in its permanency, but these be opposed by the paramount interests and convenience of the public, and a relocation be made, what is the situation of such individual interests if deteriorated and affected in value by such relocation? Is the public bound to repair losses and afford indemnity? This question can only be answered in the negative. Such losses would be consequential upon the exercise of a public right. They are in the class of cases to which the maxim *damnum sine injuria* applies."

Persons Who Have Donated Property Cannot Claim Damages. — The removal of a county-seat does not give persons who have unconditionally donated property to the county in consideration of the county-seat being located at the place from which it is removed, any right to claim damages for the loss which they may sustain by reason of such removal. Adams *v.* Logan County, 11 Ill. 336.

4. **Payment of Damages Allowed Will Not Be Enjoined.** — Where the seat of justice was located at a particular place by authority of law, upon condition that citizens interested in the location would erect there, and donate to the county, a court house and public offices, and the citizens complied with the condition, it was held that when the county-seat was removed to another place there was clearly a moral obligation on the part of the county either to give up the property or make compensation; and the court, without passing upon the legal rights of the county under the circumstances, refused to enjoin the payment of county warrants which had been issued to the donors by the board of commissioners, in compromise of their claims. Lucas County *v.* Hunt, 5 Ohio St. 488, 67 Am. Dec. 303.

5. **Property Donated Does Not Revert.** — Sumner *v.* Darnell, 128 Ind. 38; Adams *v.* Logan County, 11 Ill. 336; Harris *v.* Shaw, 13 Ill. 456; Gilmore *v.* Hayworth, 26 Tex. 89.

In Harris *v.* Shaw, 13 Ill. 456, the court, *per* Trumbull, J., said: "It was no part of the contract * * * that the county-seat should forever remain as then located; on the contrary, he [the grantor] must have known, when he made the deed, that the legislature at that time possessed the power to change the location of county-seats at pleasure. He must therefore be considered in legal contemplation as having made the deed in view of the liability, at least, of a change of the county-seat at some future time."

Contrary Doctrine. — In Iowa, when a county-seat is removed from a certain place, land which has been deeded to the county for public buildings in consideration of the "permanent" location of the county-seat in such place, and in order to secure such location, should be conveyed back to the grantor.

favor of the donor.[1] But the legislature may direct a conveyance of such property back to the donor.[2]

IV. Effect of Inclusion in New County upon Established County-seat. — Where a new county, formed out of territory taken from an old county, includes within its limits the county-seat of the old county, such place ceases to be the county-seat of the old county,[3] but does not become the county-seat of the new county.[4]

V. De Facto County-seat. — A place at which the county business is transacted, and which is recognized as the county-seat, under color of having been properly selected and established as such, is the county-seat *de facto*,[5] and the question whether it is rightfully and legally the county-seat cannot be raised collaterally, but can only be inquired into and determined in a direct proceeding instituted for that purpose.[6]

COUPLED WITH AN INTEREST. — See the titles Agency, vol. 1, p. 1217; Powers.

Twiford *v.* Alamakee County, 4 Greene (Iowa) 60.

In Louisiana, if land be given to a parish on condition that the public buildings of the parish be erected thereon, such land reverts to the donor when the seat of justice of the parish is removed to another place; but the parish buildings which were erected thereon may be removed by the parish, unless the owner of the land pays the value of the materials of such buildings. Police Jury *v.* Reeves, 6 Martin N. S. (La.) 221.

In Megret *v.* Vermilion Parish, 10 La. Ann. 670, it was intimated that a person who had donated a court house and other property to a parish, upon the parish-seat being located on his land, such property having been accepted only provisionally, might have the right to claim the property back again when the parish-seat was removed to another place. But no such claim was made in the case, and the point was not decided.

Effect upon Property Dedicated. — When land is dedicated to a county for the location of the seat of justice, the title of the county is not beneficial, except so far as the purposes are county purposes, and the fee is merely ancillary to the trust for public uses as a seat of justice, and gives no proprietary right further. When the county-seat is legally removed from such land, and the county recognizes such removal and sells the buildings on such land to the person by whom it was dedicated, the county loses its last interest in land or buildings and ceases to have any proprietary rights under the dedication. If such land was conveyed by grant, it would remain county property until in some way transferred, unless the grant itself were limited. Kent County *v.* Grand Rapids, 61 Mich. 144.

1. No Resulting Trust. — Gilmore *v.* Hayworth, 26 Tex. 89.

2. Legislature May Direct Conveyance Back to Donor. — Harris *v.* Whiteside County, 105 Ill. 445.

3. Old County-seat Ceases to Be Such. — State *v.* Larrabee, 1 Wis. 200. See also Atty.-Gen. *v.* Fitzpatrick, 2 Wis. 542.

4. Does Not Become County-seat of New County. — Atty.-Gen. *v.* Fitzpatrick, 2 Wis. 542.

5. De Facto County-seat. — Watts *v.* State, 22 Tex. App. 572. See also Caruthers *v.* State, 67 Tex. 132.

Under the Louisiana Act 33 of 1888, elections were held for the removal of the parish-seat of Bossier parish. After the last election the police jury counted the votes and proclaimed the result of the election to be in favor of the town of Benton, and the president, in conformity with the law, declared the parish-seat removed to Benton, by formal proclamation. The police jury leased a building for a court house at Benton, and the records were removed thereto, and the county officers removed their offices to such town. The judge of the district, however, refused to hold court at Benton, and set up the pendency of a mandamus suit, the object of which was to ascertain judicially whether the police jury had performed its duty according to law. That suit had been decided in the lower court in favor of the town of Houghton, and a suspensive appeal had been taken to the Supreme Court, which appeal was then pending. It was held that under the facts of the case Benton was the *de facto* parish-seat of Bossier parish, and that it was the duty of the judge to hold the terms of court at such place; and that the court would not in the present action pass upon the *de jure* title of Benton to be the parish-seat. State *v.* Judge, 43 La. Ann. 125.

6. Question Cannot Be Raised Collaterally. — Robinson *v.* Moore, 25 Ill. 135; State *v.* Judge, 43 La. Ann. 125; Watts *v.* State, 22 Tex. App. 572.

COUPLING CARS (INJURIES BY).

By Allen P. Hallett.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles:* CONTRIBUTORY NEGLIGENCE, *ante*, p. 368; FELLOW-SERVANTS; MASTER AND SERVANT; NEGLIGENCE.

I. Introductory — Principles Governing the Subject. — The principles of law stated in this title form but a phase of the law of negligence as applied to the relationship of master and servant. The subject here developed is governed by no

distinctive principles, but the immense accumulation of cases arising out of injuries and accidents to employees received while coupling cars renders most desirable, if not necessary, a separate collection and analysis of these authorities. Such is the object of this article. A reference must be made to other titles for a treatment of the general principles applied here to particular classes of facts.[1]

II. Obligations of the, Master and Risks Assumed by the Servant — 1. In Respect to the Instrumentalities of the Business — *a.* Master Must Use Reasonable and Ordinary Care — (1) *To Provide Safe Machinery and Places of Employment* — (a) **Rolling Stock and Apparatus.** — A railroad company as master is bound to exercise reasonable and ordinary care to see that the locomotives and cars which its servants are called upon to couple are provided with reasonably safe and suitable coupling apparatus.[2]

1. See the titles Contributory Negligence, *ante*, p. 368; Master and Servant; Negligence.

2. **Master Must Use Ordinary Care to Provide Safe Machinery** — *Indiana.* — Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440, 5 Am. & Eng. R. Cas. 474; Umback *v.* Lake Shore, etc., R. Co., 83 Ind. 191, 8 Am. & Eng. R. Cas. 98; Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564.

Iowa. — Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Maine. — Guthrie *v.* Maine Cent. R. Co., 81 Me. 572.

Minnesota. — Le Clair *v.* First Div., etc., R. Co., 20 Minn. 9.

New York. — Donohue *v.* Brooklyn City R. Co., (Brooklyn City Ct.) 14 N. Y. Supp. 639.

Virginia. — Chesapeake, etc., R. Co. *v.* Lash, (Va. 1896) 24 S. E. Rep. 385.

Texas. — Texas-Mexican R. Co. *v.* King, (Tex. Civ. App. 1896) 37 S. W. Rep. 34; Houston, etc., R. Co. *v.* Myers, 55 Tex. 110, 8 Am. & Eng. R. Cas. 114.

In Atchison, etc., R. Co. *v.* Meyers, 24 U. S. App. 295, the rule was laid down that "the master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair." *Cited with approval* in Louisville, etc., R. Co. *v.* Johnson, 81 Fed. Rep. 679.

Liability of Master for Defects in Foreign Cars. — A railroad company as master is bound to the same degree of care in respect to the cars of other railroad companies which it receives and hauls over its road in the ordinary course of its business as it is in respect to its own cars. If a car is dangerous by reason of some defect, the company should refuse to receive it until the defect is remedied. Coffee *v.* New York, etc., R. Co., 155 Mass. 21; Bowers *v.* Connecticut River R. Co., 162 Mass. 312; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231; Gottlieb *v.* New York, etc., R. Co., 100 N. Y. 462.

A constitutional provision requiring railroad companies to receive and transport each other's cars without unnecessary delay or discrimination does not require a railroad company to receive and transport foreign cars obviously defective and dangerous to its employees. Illinois Cent. R. Co. *v.* Price, 72 Miss. 862.

Original Defects in Construction of Couplings. — In Toledo, etc., R. Co. *v.* Fredericks, 71 Ill. 294, the proof showed that there was a very radical defect in the manner of the construction of a coupling, in using which F. was injured; that its dangerous character was notorious among the operatives in the yards, and ought to have been, or could have been, known by the exercise of reasonable diligence by the officers of the company whose duty it was to build and repair machinery. F. was a new man, and could not have known of the dangerous character of this particular car. It was held that the company was liable.

In Gibson *v.* Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497, a careful and prudent brakeman, acting under orders, was injured while coupling. The jury found that he was using due care, and was ignorant of the defect in the apparatus. The coupling was dangerous originally, and the company was changing others of the same kind for a safer sort. It was held that the company was negligent and liable.

In Belair *v.* Chicago, etc., R. Co., 43 Iowa 662, the evidence showed that the draft iron was too short and was out of repair; that the company had actual knowledge of the fact, the servant having previously notified the company of the defect; that sufficient time elapsed after the notification and before the servant again handled the car to afford him ground to suppose the defect remedied. The jury found that he did so suppose. It was held that the company was liable. See also Lake Erie, etc., R. Co. *v.* Everett, 86 Ind. 229, 11 Am. & Eng. R. Cas. 221; Skellenger *v.* Chicago, etc., R. Co., 61 Iowa 714, 12 Am. & Eng. R. Cas. 206.

Broken Couplings. — In an action by a servant against a railroad company for injuries sustained by reason of the breaking of certain couplings, and the consequent falling of the cars upon the plaintiff's foot, it appeared that the defect in the couplings was known to the superintendent, and that it was not known to plaintiff, nor was it any part of plaintiff's duty to have such knowledge. It was held that the evidence was sufficient to entitle plaintiff to recover. Bowers *v.* Union Pac. R. Co., 4 Utah 215; Donahoe *v.* Old Colony R. Co., 153 Mass. 356.

In McKnight *v.* Chicago, etc., R. Co., 44 Minn. 141, the drawhead of an engine had been damaged by a piece breaking off of it, leaving a sharp, ragged edge which caught the sleeve of the plaintiff's coat and held it for an instant,

What Constitutes Ordinary Care — At Common Law. — In the absence of statute, ordinary care does not demand that a railroad company should seek and apply every new invention or adopt any special form of coupler;[1] nor is it negligence for it to receive from other companies and haul over its tracks cars having different styles of couplings from those in use on its own road.[2]

so that the buffers caught his hand and crushed it. The break was an old one, and notice to the company was presumed. It was held that the company was liable.

In Reed *v.* Burlington, etc., R. Co., 72 Iowa 166, 2 Am. St. Rep. 243, a brakeman was injured by reason of a hidden defect in the coupling. Previous to the making up of the train, a switchman discovered the defect and went to a shanty in the yard in which there was a telephone used for the purpose of communicating with the general office and shops, and called to some one (who answered his call) that the car was in bad order, and the person answering his call replied: "If she will hold together, send her off." It was held that this constituted notice to the company, and a verdict for the plaintiff was sustained.

Defective Brake-beam. — Where a car with a defective brake-beam was put in a train, and a brakeman, while attempting a coupling, had his foot caught and was run over and killed, and where on the trial it was shown that the company had knowledge of the defective condition of the car, but that it was unknown to the brakeman, the company was held negligent and liable. Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 9 Am. St. Rep. 883. See also Texas Pac. R. Co. *v.* White, 82 Tex. 543. In Wedgewood *v.* Chicago, etc., R. Co., 41 Wis. 478, 44 Wis. 44, where the company permitted a long bolt to project out from and beyond the brake-beam, and a servant, in coupling, tripped thereon, and was injured, the company was held liable.

Defective Switching Engine. — In Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, where a switching engine was out of repair by reason of a leaky throttle valve, which caused the engine to start suddenly, and where such defect was known to the company, but not to a brakeman injured thereby while attempting a coupling, the company was held to be negligent.

1. Improved Appliances — Master Not Bound to Adopt. — The duty of the company is to furnish good, well-constructed machinery, adapted to the purpose of its use, of good material and of the kind that is found to be reasonably safe when applied to use. But it is not required to seek and apply every new invention; nor to abandon the use of all its rolling stock and obtain new cars, tenders, and engines whenever some supposed improvement is made. Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518; Richmond, etc., R Co. *v.* Jones, 92 Ala. 218; Toledo, etc., R. Co. *v.* Asbury, 84 Ill. 429; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440, 5 Am. & Eng. R. Cas. 474; Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240; Bradley *v.* Nashville, etc., R. Co., 14 Lea (Tenn.) 374.

Neither is it bound to discard cars of an old style because the coupling of them with cars of a newer pattern is attended with increased danger. Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Pittsburgh, etc., R. Co. *v.* Henly, 48 Ohio St. 608; Simms *v.* South Carolina R. Co., 26 S. Car. 490.

An employer is not an insurer of the safety of his employees. When the employee undertakes hazardous duties he assumes the risk incident to their discharge from open and obvious causes, the dangerous character of which he has had opportunity to ascertain. An employer is not bound to furnish for his workmen the safest machinery, nor provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use. The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. Dooner *v.* Delaware, etc., Canal Co., 171 Pa. St. 581.

Where a company had its cars furnished with solid drawheads instead of open ones — the latter being the safer and most improved invention, but just coming into use — the company was not held liable for the use of drawheads of the older pattern. Nashville, etc., R. Co. *v.* Wheless, 10 Lea (Tenn.) 741, 43 Am. Rep. 317, 15 Am. & Eng. R. Cas. 315.

Use of Different Kinds of Cars Not Negligence. — A railroad company is not required to have all its cars or locomotives constructed after the same pattern. It may lawfully construct them after different models, and may use different appliances in operating its railroad. The law only requires that such cars, locomotives, and appliances shall be reasonably safe for the uses to which they are put. Hence, it is not *per se* negligence on the part of the defendants to use upon their railroads an engine the drawbar of which was too short to permit one of its cars to be safely coupled to or detached from such engine. Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408, 12 Am. & Eng. R. Cas. 214; Brooks *v.* Northern Pac. R. Co., 47 Fed. Rep. 687.

One construction of car or locomotive may render necessary a higher degree of care in coupling than another calls for, but there is no ground whatever for imputing to a railroad company legal negligence for that which was a necessity to its business and which all persons in its employ must be presumed to have known was a necessity. Kohn *v.* McNulta, 147 U. S. 238; Chicago, etc., R. Co. *v.* Montgomery, 15 Ill. App. 205; Baldwin *v.* Chicago, etc., R. Co., 50 Iowa 680; Fenlon *v.* Duluth, etc., R. Co., (Mich. 1896) 66 N. W. Rep. 51; Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; Hatter *v.* Illinois Cent. R. Co., 69 Miss. 642.

2. Use of Cars With Different Styles of Couplings. — Louisville, etc., R. Co. *v.* Boland, 96 Ala. 626; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122; Northern Pac. R. Co. *v.* Blake, 63 Fed. Rep. 45.

Where a brakeman was killed while attempting to couple a freight car belonging to the road by which he was employed and a car

Automatic Couplers — Statutes. — By United States statute it is now provided that "on and after the first day of January, 1898, it shall be unlawful for any" common carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." [1] Statutes requiring the use of automatic couplers upon all or certain kinds of cars have also been passed in some of the states.[2]

belonging to another road, by reason, as alleged, of a dissimilarity in the couplings of the two cars, it was held that the company was not liable. Kelly *v.* Abbott, 63 Wis. 307, 21 Am. & Eng. R. Cas. 633; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668; Thomas *v.* Missouri Pac. R. Co., 109 Mo. 187. *Compare* Southern Pac. Co. *v.* Burke, 60 Fed. Rep. 704; Martin *v.* California Cent. R. Co., 94 Cal. 326.

In Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365, the danger of double deadwoods was passed upon. A freight conductor attempted to couple a car which was moving to one which was stationary. One of the cars was equipped with a double deadwood. The pin in the drawbar of the standing car stuck. In the attempt to couple the cars the conductor's arm was crushed. It did not appear that the drawbar was ill-constructed, or that it had been so long out of order as to charge the company with negligence. It appeared that more care was needed in handling cars with double buffers than others, but such cars were in use on this and other roads, and they could safely be used if care was observed. It was held that the use of such cars by a company was not negligent; that the man ought to have known his danger; that, by remaining in the service, he assumed the risk, and could not recover for his injury. Kohn *v.* McNulta, 147 U. S. 238. *Compare* Kerns *v.* Chicago, etc., R. Co., 94 Iowa 121.

Use of Cars of Unequal Heights Not Negligence. — So the mere fact that one car is higher than another, so as to render it difficult to effect a coupling, does not constitute negligence of such a kind as to render the company liable. Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. Rep. 282; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629; Toledo, etc., R. Co. *v.* Asbury, 84 Ill. 429; Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Botsford *v.* Michigan Cent. R. Co., 33 Mich. 256; McLaren *v.* Williston, 48 Minn. 299; Hulett *v.* St. Louis, etc., R. Co., 67 Mo. 239; Dye *v.* Delaware, etc., R. Co., 130 N. Y. 671, 41 N. Y. St. Rep. 690; Edall *v.* New England R. Co., 18 N. Y. App. Div. 216. But see Le Clair *v.* First Div., etc., R. Co., 20 Minn. 9.

The drawheads of two cars which the plaintiff was attempting to couple were not perfectly matched, and in attempting to make the coupling he moved along with the cars and caught his foot in a frog, and was injured. The facts were held insufficient to show negligence in the company rendering it liable for the injury. Williams *v.* Central R. Co., 43 Iowa 396.

A brakeman upon a railroad train was crushed while coupling cars. The accident was caused by reason of the fact that the drawbar of one car was lower than that of the other car. Ordinarily there was no difference in the height of drawbars on defendant's cars, but the drawbar of the car in question was five or six inches lower than the usual height. This fact had been observed by defendant's inspector, and the car reported for repairs. On the trial the court directed a verdict for defendant, and this ruling was sustained on appeal. Brewer *v.* Flint, etc., R. Co., 56 Mich. 620.

But in Towns *v.* Vicksburg, etc., R. Co., 37 La. Ann. 630, 55 Am. Rep. 508, where a brakeman was killed while attempting to couple two cars of a construction train, by reason of the unequal height of the couplings, it was held that he was entitled to recover; that it was negligence for a company to construct and use its own cars of such unequal height as to render their buffers useless and thus to imperil the lives of its brakemen.

Crooked Links for Couplings of Unequal Height. — It is a question for the jury whether the failure of a railroad company to furnish crooked links for use where drawheads are of unequal height is a failure to provide reasonably safe appliances and constitutes negligence. Bennett *v.* Greenwich, etc., R. Co., 84 Hun (N. Y.) 216.

In Houston, etc., R. Co. *v.* Maddox, (Tex. 1885) 21 Am. & Eng. R. Cas. 625, the plaintiff, a brakeman on the train, was ordered to couple certain cars on the side track, to be attached to and carried on by the train. The injury occurred from an attempt to use the links which he found in the drawheads of said cars. Upon the question of negligence of the defendant or contributory negligence of plaintiff, the court was held to have correctly charged as follows: "The law imposes on the defendant the duty of furnishing to its employees machinery and appliances of all kinds, including links and pins, reasonably suitable and proper to enable such employees to perform the duties required of them, and also to use reasonable diligence to keep such machinery and appliances in such reasonably proper condition after they are furnished; and if plaintiff was injured by reason of a failure of defendant in this respect, he would be entitled to recover, unless you believe from the evidence that it was part of the plaintiff's duty as brakeman to examine the link before undertaking to use it."

Joint Employees. — An employee paid by one of the companies jointly maintaining a union freight yard can recover from his employer for injuries received while coupling the cars of one of the other companies. Gulf, etc., R. Co. *v.* Dorsey, 66 Tex. 148; Missouri Pac. R. Co. *v.* Jones, 75 Tex. 151, 16 Am. St. Rep. 879, 41 Am. & Eng. R. Cas. 363.

1. **Automatic Couplers.** — 27 U. S. Stat. at Large, p. 531.

2. See the statutes of *Illinois*, *Iowa*, *Massachusetts*, *Michigan*, *Nebraska*, and *New York*.

(b) **Tracks and Yards — Care of Tracks.** — A railroad company as master is likewise under obligation to keep its tracks in reasonable repair, and will be held liable for imperfections which ordinary diligence might have discovered in them.[1] But it is ordinarily under no obligation to ballast its tracks,[2] or to cover culverts under them [3] for the safety of its employees.

Yards. — However, in yards and in stations where much coupling is done, the company must exercise a higher degree of diligence commensurate with the increased risk to its employees, and is required to see that the various appliances used in the yards are properly constructed and kept in repair.[4] It

1. Obligations of Master in Respect to Tracks and Yards. — Missouri, etc., R. Co. *v.* Kirkland, 11 Tex. Civ. App. 528; Texas, etc., R. Co. *v.* McCoy, 90 Tex. 264.

It is the duty of a railroad company so to construct and maintain its tracks as to make them reasonably safe for its employees to perform their duties, and a person entering its service has a right to assume that this obligation has been discharged. Atchison, etc., R. Co. *v.* Swarts, (Kan. 1897) 48 Pac. Rep. 953.

Unsafe Track. — A brakeman, while standing on the rear of the tender of an engine to make a coupling with a freight car, was crushed by the drawbars passing each other. The failure of the drawbars to meet was caused by the track sinking under the weight of the engine. It was held that the company was liable. Texas, etc., R. Co. *v.* Guy, (Tex. Civ. App. 1893) 23 S. W. Rep. 633.

Hole in Track. — In Northern Pac. R. Co. *v.* Teeter, 63 Fed. Rep. 527, where a brakeman was injured by stepping into a hole concealed by snow and slush, it was held that the company owed the duty to its brakemen to keep the track where the coupling of cars had to be done in a reasonably safe condition for the performance of such work. It was the function of the jury to say, upon a consideration of all the evidence, whether the defendant had discharged this duty. See also Louisville, etc., R. Co. *v.* Johnson, 81 Fed. Rep. 679; Hannah *v.* Connecticut River R. Co., 154 Mass. 529. *Compare* Artis *v.* Buffalo, etc., R. Co., 3 N. Y. App. Div. 1.

Defective Rail. — In Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, where the plaintiff, a brakeman, while attempting a coupling, caught his foot in a sliver projecting from the outside of a worn rail in the track, and was run over and killed, a verdict for the plaintiff was not disturbed on appeal. Texas Pac. R. Co. *v.* Overheiser, 76 Tex. 437.

But in Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, where the complaint alleged that the plaintiff was injured by a sliver of a worn rail, which projected from the inside surface of the rail, the court held that an injury from such an extraordinary cause as a splinter, such as could remain projecting from the inside of a track along which the flanges of the wheels run, was not to have been anticipated by the defendant as likely to occur, and hence the failure to guard against it would not be negligence.

Defective Switch. — In Brooke *v.* Chicago, etc., R. Co., 81 Iowa 504, a brakeman was run over and killed while coupling cars. There was evidence that the accident was caused by the brakeman catching his foot between the rails of a split switch. The switch was not properly constructed, or the accident would not have occurred. It was held that the company was liable.

2. Unballasted Tracks. — In the absence of any agreement, a railroad company is not bound to furnish a better track than such as are in general use, and it is error to reject proof that a particular side track was constructed in the same manner and kept in the same condition as side tracks generally in this country. Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. App. 200.

A brakeman, while coupling a car on the side track at a station, was run over and killed. The plaintiff alleged that the railroad company was negligent in not having its track properly ballasted. It was held that there is no duty on the part of a railroad company to ballast its track for the safety of its employees. Philadelphia, etc., R. Co. *v.* Schertle, 97 Pa. St. 450, 2 Am. & Eng. R. Cas. 158. See also Finnell *v.* Delaware, etc., R. Co., 129 N. Y. 669, 42 N. Y. St. Rep. 354. But see Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 181.

In Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, 8 Am. & Eng. R. Cas. 128, it was held that a railroad company is not a guarantor or insurer of the perfection of its property; that the unballasted condition of a side track is such a defect as is open and obvious, and that an employee must be considered as contracting with reference thereto, and as assuming the risk of those dangers that are open to his observation. *Cited* and *approved* in Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, 37 Am. St. Rep. 336. See also Clark *v.* Missouri Pac. R. Co., 48 Kan. 654.

Storage Track. — A railroad is not guilty of negligence by a failure to ballast a storage track for cars. Pennsylvania Co. *v.* Hankey, 93 Ill. 580.

3. Culverts. — A railroad company is under no obligation to its employees to cover a culvert under its tracks where the same is not in a yard where employees will be ordinarily compelled to work while coupling cars. Little Rock, etc., R. Co. *v.* Townsend, 41 Ark. 382, 21 Am. & Eng. R. Cas. 619.

4. Culverts and Ditches in Yards. — It is the duty of a railway company to cover culverts in its yards and within a reasonable distance of switches, wherever it would naturally be anticipated that brakemen in the proper discharge of their duties would be apt to go in making couplings. Franklin *v.* Winona, etc., R. Co., 37 Minn. 409, 5 Am. St. Rep. 856. See also Illinois Cent. R. Co. *v.* Sanders, 166 Ill. 270; Baird *v.* Chicago, etc., R. Co., 61 Iowa 359, 8 Am. & Eng. R. Cas. 128; Brown *v.*

has also been held that the company must have the tracks in its freight yards properly ballasted.[1]

Atchison, etc., R. Co., 31 Kan. 1, 15 Am. & Eng. R. Cas. 271; Burdick *v.* Missouri Pac. R. Co., 123 Mo. 221, 45 Am. St. Rep. 528; Miller *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 92; Plank *v.* New York Cent., etc., R. Co., 60 N. Y. 607; Harr *v.* New York Cent., etc., R. Co., 114 N. Y. 623, 23 N. Y. St. Rep. 187.

It is sufficient to establish a *prima facie* case of negligence on the part of a railroad company to show that the brakeman was injured, while coupling cars at a station, by stepping into a ditch of the presence of which he had no knowledge. Hollenbeck *v.* Missouri Pac. R. Co., (Mo. 1896) 34 S. W. Rep. 494, (Mo. 1897) 38 S. W. Rep. 723.

The plaintiff, a brakeman, was injured while coupling cars at night in the defendants' yard at Denison, by falling into a ditch across the track. There was evidence that the ditch was dangerous and was afterwards replaced by a box. It was held that the defendant company was negligent, and there being conflicting evidence as to the plaintiff's knowledge of the existence of the ditch, a verdict for the plaintiff was affirmed. Houston, etc., R. Co. *v.* Pinto, 60 Tex. 516, 15 Am. & Eng. R. Cas. 286.

Uncovered Pit. — A pit between the rails of a track in the defendants' yard was covered with loose boards which had been taken up the day before the accident and carelessly replaced, leaving a hole in which the plaintiff's foot was caught while he was moving along with a train to make a coupling. It was held that the defendant company was negligent and liable. Filtert *v.* Delaware, etc., Canal Co., 56 N. Y. Super. Ct. 170.

Cattle Guard in Freight Yard. — In Fredenburg *v.* Northern Cent. R. Co., 114 N. Y. 582, 11 Am. St. Rep. 697, it was held negligence for a railroad company to have maintained a cattle guard in a freight yard where brakemen would be compelled to go to couple cars, and a new man who was unacquainted with the danger having been injured thereby, the company was held liable.

In Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, whether the company was negligent in maintaining a cattle guard in a freight yard was held to be a question for the jury.

Switch Stand. — A switchman, while running after a car to uncouple it from a train, ran into a switch stand and was injured. The stand was not lighted nor in use and the switch which it had operated had been spiked. The yard was a large one, and the plaintiff testified that he did not know of the existence of the switch stand. It was held that the question of the plaintiff's negligence in allowing the stand to remain in the yard was a question for the jury. Smith *v.* New York, etc., R. Co., 58 N. Y. Super. Ct. 284.

Defective Platform. — The plaintiff, a brakeman, while running along a platform beside a moving train, stepped on a loose board and was thrown under the train and injured. It was held to be negligence on the part of the railroad company to have permitted the platform to be in bad repair. Sweat *v.* Boston, etc., R. Co., 156 Mass. 284.

Inclined Sidewalk. — In an action brought by a yard switchman against the receivers of a railway company to recover damages for personal injuries sustained in their service while coupling cars, where it appeared that the injury was caused by the plaintiff slipping on an incline negligently constructed and maintained by the receivers, adjoining a new track, as part of a city sidewalk, it was held that the receivers were liable. Rouse *v.* Ledbetter, 56 Kan. 348.

Defective Platform Scales. — A railroad company will be liable in damages to a yardmaster for injuries received while coupling cars which resulted from the defective condition of a set of platform scales in its track, though the scales were the property of a coal company. Little Rock, etc., R. Co. *v.* Cagle, 53 Ark. 347. See also Gulf, etc., R. Co. *v.* Hockaday, (Tex. Civ. App. 1896) 37 S. W. Rep. 475.

Ice Formed from Leaking Water Tank. — In an action by a brakeman for injuries sustained by him while coupling cars at night, by slipping on ice which formed on water leaking from a tank, the spout of which was so short as to allow water to escape unnecessarily, it was held that the question of the company's negligence was for the jury. McFall *v.* Iowa Cent. R. Co., 96 Iowa 723.

Ashes and Snow. — A railroad company is liable for the negligence of a fireman in dumping ashes in a freight yard, and a brakeman injured by stumbling over a heap of ashes so placed can recover. Southerland *v.* Northern Pac. R. Co., 43 Fed. Rep. 646; Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32. But see Costello *v.* Philadelphia, etc., R. Co., 2 Pa. Dist. Rep. 453, and Welch *v.* New York Cent., etc., R. Co., (Supreme Ct.) 17 N. Y. Supp. 342, where the ashes were recently dumped and the company could not be fixed with knowledge.

A brakeman attempted to couple cars on a side track, but because of defect in the couplings, they failed to couple, and, fearing injury when the cars came together a second time, he stepped back, but slipped on a pile of snow and was injured. It was held that the company was negligent in having thrown up a pile of snow where brakemen would be required to go to couple cars, and was liable in damages. Cregg *v.* Chicago, etc., R. Co., 91 Mich. 624.

1. Duty to Ballast Tracks in Freight Yards. — In Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222, a night brakeman in the company's yard at Beaumont, while coupling cars, caught his foot between the ties of an unballasted track and was killed. It was held that the company was negligent in not having the track properly ballasted.

In St. Louis, etc., R. Co. *v.* Robbins, 57 Ark. 377, where a brakeman was killed by the unballasted condition of the track, the court, by Hemingway, J., said: "If the track had been in the same condition where the injury occurred as in other parts of the yard, we think that knowledge of it should be charged to the deceased; and if he were chargeable with such knowledge, plaintiff could not recover. * * * But as the injury occurred where the exposure

Blocking Frogs and Guard-rails. — But in the absence of statutory requirement, a railroad company would seem to be under no obligation to block the frogs and guard-rails in its tracks for the safety of employees,[1] though in some of the states statutes have been passed making this precaution obligatory.[2]

(2) *In the Matter of Inspection.* — These obligations of the master in respect to the instrumentalities of the business naturally entail the duty to provide for frequent inspections,[3] and a failure to make such inspection renders him

of the ties was greater than in other places, and where the risk was correspondingly increased, we cannot say that the deceased knew of the extra hazard to which he was there exposed, or that he assumed the risk arising from it." See also San Antonio, etc., R. Co. *v.* Parr, (Tex. Civ. App. 1894) 26 S. W. Rep. 861.

In Bonner *v.* Hickey, (Tex. Civ. App. 1893) 23 S. W. Rep. 85, the plaintiff, a brakeman, was injured while coupling cars in the defendant's yard at Houston. The evidence showed that the track where the accident occurred, known as the " cotton track," was poorly ballasted and overgrown with grass, and that the plaintiff, who was ignorant of its condition, was injured by stepping between the ties and falling. It was held that the defendant was negligent.

But in Williams *v.* St. Louis, etc., R. Co., 119 Mo. 316, where a repair track was overgrown with grass, and the plaintiff, a brakeman, had coupled cars there many times before without objection, he was held to have assumed the risk

Repairing Tracks. — It is not negligence for a railroad company to have its track in a rough and unballasted condition where the same is being repaired, and it is using reasonable diligence in putting it in condition. An unnecessary delay in so doing would amount to negligence. Cleveland, etc., R. Co. *v.* Sloan, 11 Ind. App. 401.

And see Vautrain *v.* St. Louis, etc., R. Co., 8 Mo. App. 538, where the section man left a hole in the track after making some repairs, and a brakeman was injured.

1. Failure to Block Frogs and Switches Not Negligence. — St. Louis, etc., R. Co. *v.* Davis, 54 Ark. 389, 26 Am. St. Rep. 48; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682; Missouri Pac. R. Co. *v.* Lewis, 24 Neb. 848; Ireland *v.* Gardner, (Supreme Ct.) 7 N. Y. Supp. 609; Spencer *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 196; McNeil *v.* New York, etc., R. Co., 71 Hun (N. Y.) 24; Appel *v.* Buffalo, etc., R. Co., 111 N. Y. 550; Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335. See also San Antonio, etc., R. Co. *v.* Gillum, (Tex. Civ. App. 1895) 30 S. W. Rep. 697.

In Southern Pac. Co. *v.* Seley, 152 U. S. 145, it was held error to have refused the following instruction: " The jury are instructed that if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

Whether Failure to Block Guard-rails Negligence. — In Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, it was held that whether a failure to block guard-rails was negligence on the part of the defendant was a question of fact for the jury to determine. Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364.

2. Statutory Requirements — Michigan. — In Michigan the statute provides that all railroad companies " are hereby required * * * to so adjust, fill, or block the frogs, switches, and guard-rails on their roads, in all yards, divisional and terminal stations, and where trains are made up, as to prevent the feet of employees or other persons from being caught therein." In Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, by the method used by the company, the car wheels, in a few days, would wear the blocking away and leave a space large enough to catch a man's heel. There were better methods in use elsewhere. It was held that this was not a compliance with the statute, and that the company was liable for an injury to a brakeman occasioned thereby.

Missouri. — In Duggan *v.* Wabash Western R. Co., 46 Mo. App. 268, it was held that since the enactment of sections 2627, 2628, the fact that the frogs in the track were not blocked was conclusive as to the negligence of the railroad company, and the only question to be determined was whether the death of the deceased was due to catching his foot in a frog, or not.

Wisconsin. — In Holum *v.* Chicago, etc., R. Co., 80 Wis. 299, it was held that the Act of 1889, which requires railroad companies to erect and maintain sufficient guards and blocks at the front and rear of every frog in their tracks, and inflicts a penalty for any violation or failure so to do, and also provides that such companies " shall, in addition, be liable to the person injured for all damages sustained thereby, whether the person so injured shall be a servant or agent of such corporation or not, and notwithstanding that such violation or failure shall arise or occur through the negligence of any other agent or servant thereof," does not render the company liable where the injury sustained was the result of contributory negligence on the part of the plaintiff. Where a brakeman was injured by giving a wrong signal to the engineer, the fact that his foot caught in an unblocked frog will not render the company liable.

Minnesota. — In Bohan *v.* St. Paul, etc., R. Co., 49 Minn. 488, where there was a disagreement in the testimony as to whether the injury to the plaintiff's foot was caused by insufficient blocking of a frog, as required by statute, or by being caught by the cow-catcher of an engine, it was held that the question was properly submitted to the jury.

3. Inspection of Cars and Apparatus. — It is the duty of a railroad company to guard its em-

liable for those defects which ordinary diligence would have discovered, although he was in fact ignorant of them.[1]

Duty to Inspect Foreign Cars. — The duty to inspect cars applies to cars which a railroad company receives from other roads, equally with those which it owns;[2] and the company cannot divest itself of this duty to its servants for their safety and protection, by a contract with other companies whose cars are used, that the latter shall keep them in repair.[3]

(3) *In the Employment of Servants* — (a) **For Their Own Protection — Employment of Minors.** — It is the duty of a railroad company to exercise reasonable and ordinary care in the employment of its servants. The coupling of cars being necessarily hazardous, persons, for their own protection, should not be employed at it, who, from want of age, have not sufficient discretion to comprehend and guard against the dangers of the employment. If a person thus unfitted to perform the duties be employed, the company is liable, though the injury result from his own carelessness.[4] But the employment of a minor in

ployees from injuries resulting from unsound, unsafe, and defective engines, cars, and appliances, by having the same frequently inspected by persons competent to perform that duty. Johnson *v.* Chesapeake, etc., R. Co., 36 W. Va. 73.

1. Seese *v.* Northern Pac. R. Co., 39 Fed. Rep. 487; Pittsburgh, etc., R. Co. *v.* Woodward, 9 Ind. App. 169; Bomar *v.* Louisiana North, etc., R. Co., 42 La. Ann. 983.

Failure to Discover Defect in Coupling Link. — Where an injury received by one who was coupling cars was due to the breaking of a defective link by which certain of the cars were coupled together, and an examination after the occurrence showed that the link had an old rusted flaw and was cracked and broken about one-third of the way in two, it was held that it was the duty of the railroad to have inspected and discovered the flaw in this link, and that the failure to do so constituted negligence; and furthermore, as it was not shown that the plaintiff had any knowledge of the defect in the link, it was held that the company was liable. Louisville, etc., R. Co. *v.* Howell, (Ind. 1896) 45 N. E. Rep. 584.

Duty to Inspect Blocked Frogs and Switches. — In Alcorn *v.* Chicago, etc., R. Co., (Mo. 1890) 14 S. W. Rep. 943, (Mo. 1891) 16 S. W. Rep. 229, 108 Mo. 81, a brakeman was injured by catching his foot in an unblocked frog. The railroad company had blocked the frogs and guard-rails in its yards, but the frog where the accident occurred, from some cause, had become unblocked. It was held that the company's negligence in not discovering and repairing the defect was a question for the jury. Meek *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 488.

2. Duty to Inspect Foreign Cars. — The company is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be discovered or disclosed by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must remedy such defects or refuse to take such cars. Texas, etc., R. Co. *v.* Archibald, 75 Fed. Rep. 802; Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564; Louisville, etc., R. Co. *v.* Williams, 95 Ky. 199; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 11 Am. & Eng. R. Cas. 193; Goodrich *v.* New York Cent., etc., R. Co., 116 N. Y. 398, 15 Am. St. Rep. 410; Gottlieb *v.* New York, etc., R. Co., 100 N. Y. 462, 24 Am. & Eng. R. Cas. 421; Jones *v.* New York, etc., R. Co., (R. I. 1897) 37 Atl. Rep. 1033.

A railroad company which undertakes to haul a foreign car, and has an opportunity to inspect it, is guilty of negligence if it fails to discover and repair dangerous defects in the coupling appliances. Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240.

The statutory requirement that every railroad shall impartially and diligently receive and forward the cars of other roads does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. Smith *v.* Potter, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; Louisville, etc., R Co. *v.* Williams, 95 Ky. 199.

3. Chicago, etc., R. Co. *v.* Avery, 109 Ill. 314, 17 Am. & Eng. R. Cas. 649.

4. Employment of Minors — When Negligence. — Pennsylvania Co. *v.* Long, 94 Ind. 250, 15 Am. & Eng. R. Cas. 345; St. Louis, etc., R. Co. *v.* Valirius, 56 Ind. 511; Goins *v.* Chicago, etc., R. Co., 47 Mo. App. 173.

The employment of a boy only fifteen years of age in the hazardous position of brakeman, if without the consent of his mother and only parent, and unless the boy has sufficient discretion to comprehend and guard against the dangers of the employment when fully explained to him, is a wrong done to the mother, and she may recover damages from the employer for injuries received by the boy, although they be occasioned by the fault of a fellow-servant. Hamilton *v.* Galveston, etc., R. Co., 54 Tex. 556, 4 Am. & Eng. R. Cas. 528.

In Gulf, etc., R. Co. *v.* Jones, 76 Tex. 350, the plaintiff, a lad of sixteen years, was permitted to engage in the hazardous employment of coupling cars, and was injured by reason of his youth and inexperience. It was held that the company was liable; that a minor will be presumed not to have sufficient capacity to understand the danger; and that the burden was upon the company to show that he possessed sufficient capacity or experience to justify his

this service is not negligence if he be possessed of sufficient discretion to qualify him to perform the duties safely.[1] Whether he has such discretion, is a question of fact for the jury.[2]

Inexperienced Employees. — For like reason, an employee whose duties do not require him to couple cars, and who has had no experience in so doing, should not be called upon to perform this service, and if he be killed or injured in the attempt, the company is liable.[3]

(b) **For the Protection of Fellow servants — Care in the Selection of Employees.** — For the protection of fellow-servants as well, the company must exercise ordinary care in selecting employees to see that they are reasonably competent to perform the duties assigned them.[4]

employment, and that a failure to do so justified a verdict for the plaintiff.

But in Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 190, 60 Am. Rep. 20, it was held that where a minor was nineteen years of age and had the appearance of one who had reached his majority, the company was not negligent *per se* in employing him in hazardous duties, and that in order for the father to recover for loss of his services the burden was upon the father to show that the company had knowledge of his son's minority.

1. When Not Negligence. — In Youll *v.* Sioux City, etc., R. Co., 66 Iowa 346, a minor seventeen years old, in sound physical condition and of average intelligence, was employed as a brakeman, and was injured after nine months' service, while performing ordinary duties. It was held that the mere fact that the plaintiff was a minor was not sufficient to authorize him to recover if he was competent and physically able to perform the duties he was employed to do. See also McGinnis *v.* Canada Southern Bridge Co., 49 Mich. 466.

In Viets *v.* Toledo, etc., R. Co., 55 Mich. 120, 18 Am. & Eng. R. Cas. 11, the evidence failing to establish negligence on the part of the defendant railroad company or its employees, and showing that the deceased, who was killed while coupling cars, was a youth of ordinary intelligence, and that he was fully aware of the dangerous business in which he was employed, and not entirely inexperienced, a judgment in favor of the defendant was affirmed.

2. Sufficient Discretion a Question of Fact. — Pennsylvania Co. *v.* Long, 94 Ind. 250, 15 Am. & Eng. R. Cas. 345; St. Louis, etc., R. Co. *v.* Valirius, 56 Ind. 511; Hamilton *v.* Galveston, etc., R. Co., 54 Tex. 556, 4 Am. & Eng. R. Cas. 528; Texas, etc., R. Co. *v.* Brick, 83 Tex. 598.

3. Unskilled Employees. — A "wiper" in a round-house, whose duties sometimes required him to couple engines to cars, was injured in an attempt to couple an engine equipped with a "goose-neck" to a freight car. To effect such a coupling was dangerous and required a high degree of care. The court said: "Surely it was negligence on the part of defendant to require or permit plaintiff to perform the dangerous service of coupling, when he was not apprised of its danger and the method of avoiding it." It was held that the company was liable. Grannis *v.* Chicago, etc., R. Co., 81 Iowa 444.

And where a common laborer, hired to load and unload cars, was ordered by the company's foreman at a depot to couple some cars, and in attempting to comply with this order was killed, it was held that the work was outside the scope of his employment, and that hence the company was to be held liable. Lalor *v.* Chicago, etc., R. Co., 52 Ill. 401, 4 Am. Rep. 616; Erickson *v.* Milwaukee, etc., R. Co., 83 Mich. 281. See also Jones *v.* Lake Shore, etc., R. Co., 49 Mich. 573.

But in Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 1 Am. St. Rep. 321, where the plaintiff, a machinist in the car-shops, was directed by the foreman to go and assist in moving some cars, and while attempting to make a coupling was injured, it was held that where an employee, at the time of receiving an injury, is in the performance of duties outside of his regular employment, he will nevertheless be held to have assumed the risks incident to those duties, and cannot recover if the injury is the result of a want of due care on his part. And see Osborne *v.* Knox, etc., R. Co., 68 Me. 49, 28 Am. Rep. 16.

In Eason *v.* Sabine, etc., R. Co., 65 Tex. 577, 57 Am. Rep. 606, where the servant of a shipper was asked by the defendant's conductor to couple a car to facilitate loading, and was injured by the negligence of the engineer, it was held that the defendant was liable.

4. For the Protection of Fellow-servants — Care in Selecting Employees. — It is the duty of a railroad company to exercise reasonable care in the selection of servants, and it will be liable for injuries to fellow-servants caused by its failure to exercise such care. Chesapeake, etc., R. Co. *v.* McMannon, (Ky. 1888) 8 S. W. Rep. 18.

A railroad company is liable for injuries sustained by a brakeman from the carelessness of an incompetent fellow-servant, where the incompetency of such servant was known or could have been known to the receiver of the railroad had he exercised ordinary prudence. International, etc., R. Co. *v.* Cook, (Tex. Civ. App. 1897) 41 S. W. Rep. 665.

A brakeman was injured by the negligence of a yard-master. Evidence was produced that the yard-master was incompetent by reason of lack of experience in the duties he was expected to perform. It was held that the company was liable. The court said: "Where one competent at the time of his employment becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency or of the habit must be brought home to the company, or the incompetency or habit must be so notorious as to charge the company with knowledge; but when the incompetency does not arise after

Subsequent Supervision. — And, furthermore, the company must exercise a proper supervision over them to see that they remain so; for if a servant becomes habitually and notoriously careless in the discharge of his duties, and a fellow-servant is injured thereby, the master is liable.[1]

(4) *In the Loading of Cars.* — It is the duty of a railroad company to exercise reasonable care to see that its cars are properly loaded, and to this end it should provide a proper system and competent servants.[2]

Projecting Loads. — The danger to car couplers from projecting loads is one of the incidents of the service, in respect to which they are supposed to contract, and they cannot hold the employer liable for injuries arising from this cause when such loading is necessitated by the demands of the business.[3] It is otherwise where such loading is the result of negligence.[4]

b. MASTER NOT AN INSURER — (1) *In General.* — The measure of duty which a master owes to his servants in respect to the instrumentalities of the business being, therefore, merely that of exercising reasonable and ordinary care, it follows as a necessary consequence that a railroad company is not an insurer of the perfection of its roadway, structures, or rolling stock,[5] or of the

the employment, but existed at the time, proof of notice to the company is not necessary." Lee *v.* Michigan Cent. R. Co., 87 Mich. 574.

1. Implied Knowledge of Servant's Habitual Carelessness. — In Houston, etc., R. Co. *v.* Patton, (Tex. 1888) 9 S. W. Rep. 175, the court said: "The master must not only exercise care in the selection of his servants, but he must also exercise due diligence in seeing that they continue competent and careful. If due care has been used in making the selection, and the servant has subsequently shown himself reckless, it must be proved that this fact was known to the master. But actual notice is not always requisite. It may be implied from such habitual carelessness as will authorize the inference that if proper supervision had been exercised, the fact would have been known." And where an engineer's carelessness was well known to the older brakemen and shopmen, notice to the company will be presumed. See also O'Hare *v.* Chicago, etc., R. Co., 95 Mo. 662.

2. Master's Duty in Respect to the Loading of Cars. — Byrnes *v.* New York, etc., R. Co., 113 N. Y. 251.

The duty of a railroad to exercise ordinary care to discover and remedy defects in cars that might prove dangerous to its employees applies, without any relaxation, to loaded cars received from other companies for transportation. Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128.

3. Projecting Loads. — The danger from projecting loads is nothing more than an ordinary risk, assumed by the brakeman, and for injuries growing out of such risk the railroad company is not liable. McIntosh *v.* Missouri Pac. R. Co., 58 Mo. App. 281; Wabash, etc., R. Co. *v.* Deardorff, 14 Ill. App. 401; Nash *v.* Chicago, etc., R. Co., 95 Wis. 327. See also Louisville, etc., R. Co. *v.* Brice, 84 Ky. 298, 28 Am. & Eng. R. Cas. 542.

In Brice *v.* Louisville, etc., R. Co., (Ky. 1888) 9 S. W. Rep. 288, a brakeman, while stooping to couple cars with projecting loads, stumbled, fell, and was killed. It was held that he knew the danger and assumed the risk.

It is not *per se* negligence for a railroad company to transport over its road a car with lumber or iron projecting over its ends, since the demands of its business often require it to carry timber or iron beams longer than its cars. Day *v.* Toledo, etc., R. Co., 42 Mich. 523, 2 Am. & Eng. R. Cas. 126; Northern Cent. R. Co. *v.* Husson, 101 Pa. St. 1, 12 Am. & Eng. R. Cas. 241; Jackson *v.* Missouri Pac. R. Co., 104 Mo. 448.

The acceptance by a railroad company of a flat car loaded with lumber which projects eighteen inches from the end of the car, does not entitle a brakeman, who is injured thereby in coupling such car to a box car, to an instruction that the company is, as a matter of law, guilty of negligence. Louisville, etc., R. Co. *v.* Gower, 85 Tenn. 465. And see Jacksonville, etc., R. Co. *v.* Galvin, 29 Fla. 636.

4. Projecting Loads — When the Result of Negligence. — Northern Pac. R. Co. *v.* Everett, 152 U. S. 107; Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222; Louisville, etc., R. Co. *v.* Robinson, (Ky. 1891) 16 S. W. Rep. 707; Irvine *v.* Flint, etc., R. Co., 89 Mich. 416; Corbin *v.* Winona, etc., R. Co., 64 Minn. 185; Houston, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1896) 34 S. W. Rep. 809; Texas, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1897) 39 S. W. Rep. 636; Ayers *v.* Richmond, etc., R. Co., 84 Va. 679.

The Loading of Long Rails on a Short Car, whereby a brakeman is injured in coupling, constitutes negligence. Redington *v.* New York, etc., R. Co., 84 Hun (N. Y.) 231.

5. Master Not an Insurer. — Atchison, etc., R. Co. *v.* Myers, 63 Fed. Rep. 793; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660; Porter *v.* Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454, 2 Am. & Eng. R. Cas. 44.

A railroad company is not bound at its peril to make use of only the best implements, the best machinery, and the best methods. If servants with full knowledge of the employer's way of conducting his business engage and co-operate with it, they voluntarily assume the risks. Texas, etc., R. Co. *v.* Rhodes, 71 Fed. Rep. 145; Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; Hulett *v.* St. Louis, etc., R. Co., 67 Mo.

competency of its servants,[1] and can only be held liable when its officers or agents fail to exercise that degree of diligence which reasonable and prudent men, guided by those considerations which ordinarily regulate the conduct of human affairs, would have used under the circumstances.[2]

Master Must Be Fixed with Knowledge of Defects. — So, when instrumentalities become defective from use, it not only devolves upon the person injured thereby, in an action for damages, to prove such defects, but he must also show either that the master had actual notice of them or that they were such as might have been discovered by the exercise of reasonable and ordinary diligence.[3]

(2) *Latent Defects.* — Thus a railroad company cannot be held responsible for a latent defect in a coupling apparatus, where the same was manufactured with care or purchased from a reliable manufacturer and the defect was such as could not be detected by careful inspection.[4]

240; Houston, etc., R. Co. *v.* Myers, 55 Tex. 110, 8 Am. & Eng. R. Cas. 114.

The plaintiff's intestate was injured in attempting to couple cars at a side track, adjacent to a platform used for loading stone. In making the coupling he got between the platform and cars, and his lantern, from some cause, got between him and the cars, and was so pressed against him as to inflict injuries from which he died. It was claimed that the defendant was negligent in constructing the platform so near the track. The court instructed the jury that if the track and platform were dangerous, and the company by reasonable care could have learned the fact, and the deceased was without knowledge, and could not by reasonable care have learned that it was dangerous, and by reason thereof received the injuries complained of, they should find the defendant guilty. It was held that the instruction was erroneous; that reasonable care when exercised by the company could only be expected to reach the same result that would follow from the same care on the part of the deceased; that if his care and diligence could not learn that the platform was dangerous, it was unreasonable to impute notice or negligence in not knowing it to the defendant. Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113, 15 Am. & Eng. R. Cas. 261.

1. Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121.

2. See the title NEGLIGENCE.

3. **Master Must Be Fixed with Knowledge of Defects.** — Illinois Cent. R. Co. *v.* Harris, 53 Ill. App. 592; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660; Johnson *v.* Chesapeake, etc., R. Co., 36 W. Va. 73. See also Haskins *v.* New York Cent., etc., R. Co., 79 Hun (N. Y.) 159.

If a car becomes defective by use in the service of the company, notice thereof is necessary to fix a liability; but if a defectively constructed car is used, notice is not necessary, and this rule applies to foreign cars furnished the servants of a railroad company to operate. Illinois Cent. R. Co. *v.* Harris, 53 Ill. App. 592.

A railroad company is not liable to an employee for injuries occurring through defects in its switch tracks in its yards, without proof of actual knowledge upon its part of such defects, or proof of the existence of the same for such a length of time as that knowledge thereof may be inferred. Atchison, etc., R. Co. *v.* Swarts, (Kan. 1897) 48 Pac. Rep. 953.

A brakeman who was standing upon the pilot of an engine was injured while making a coupling by the breaking of the push-bar, by reason of a defect in it which was discovered by the engineer before starting on the trip. It was held that whether the engineer occupied such a relation to the company that notice to him was notice to the company was a question of fact for the jury. McDonald *v.* Michigan Cent. R. Co., (Mich. 1895) 65 N. W. Rep. 597.

Servant's Carelessness — Master Must Be Fixed with Knowledge. — The master does not guarantee the competency or fitness of its employees, and in order for a servant to recover for an injury resulting from the negligence of a fellow-servant, it will not only be necessary for the plaintiff to show that such servant was incompetent or habitually careless, but that the company had knowledge of the same. Chesapeake, etc., R. Co. *v.* McMannon, (Ky. 1888) 8 S. W. Rep. 18.

Defect Prima Facie Evidence of Negligence — Ohio Statute. — By a provision of the second section of the Act of April 2, 1890 (87 Ohio Laws 149), it is provided that when certain "defects shall be made to appear in the trial of any action in the courts of this state, brought by such employee or his legal representatives, against any railroad corporation, for damages on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation." It was held that this act applies to all railway companies any part of whose line of railway extends into the state of Ohio, whether the injury complained of was received within or without the state. Pennsylvania Co. *v.* McCann, 54 Ohio St. 10.

4. **Latent Defects.** — Carpenter *v.* Mexican Nat. R. Co., 39 Fed. Rep. 315; Atchison, etc., R. Co. *v.* Myers, 63 Fed. Rep. 793; Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564; Grant *v.* Pennsylvania, etc., Canal, etc., Co., 133 N. Y. 657, 45 N. Y. St. Rep. 305; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260.

In Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505, 11 Am. & Eng. R. Cas. 188, a charge was held erroneous which instructed the jury that "defendant is bound to protect his servants from injury by reason of latent or unseen defects, so far as human care and foresight can accomplish the result," for the reason that this measure of duty is greater and more stringent than that required by law. Van Winkle *v.* Chicago, etc., R. Co., 93 Iowa 509.

(3) *Defects from Sudden Injury.* — Nor is it responsible for defects from sudden injury to cars or apparatus, of which it has neither actual nor constructive notice.[1]

c. RISKS ASSUMED BY THE SERVANT — (1) *Ordinary Dangers.* — It is an elementary principle of the law of master and servant, that an employee who undertakes the performance of hazardous duties assumes the ordinary risks incidental to their discharge.[2]

Illustrations of Ordinary Dangers. — So an employee who undertakes the duty of coupling cars assumes such risks as arise from the use by the railroad company of cars of different construction[3] or of unequal height,[4] or of different styles of coupling apparatus,[5] or from projecting loads,[6] and he cannot hold

1. Sudden Injury to Cars and Apparatus. — If the coupling of a freight car suddenly becomes out of repair, the railway company using the same will not be liable for an injury to an employee received in consequence thereof, unless its attention had been called to the defect, or the company, by the exercise of a reasonable degree of care, could have discovered the defect and had an opportunity to make the needed repairs. Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Fenderson *v.* Atlantic City R. Co., 56 N. J. L. 708.

Where a brakeman was injured while coupling cars, by reason of a bolt which had become loose and which projected from the end of the car, and where the evidence showed that the bolt had become loose while the car was on the road and since the last inspection, and without the knowledge of any one, the company was not held liable. Mensch *v.* Pennsylvania R. Co., 150 Pa. St. 598; Louisville, etc., R. Co. *v.* Law, (Ky. 1893) 21 S. W. Rep. 648.

2. Ordinary Perils Assumed by Employee — *Alabama.* — Mobile, etc., R. Co. *v.* George, 94 Ala. 199; Alabama G. S. R. Co. *v.* Richie, 99 Ala. 346.

Georgia. — Western, etc., R. Co. *v.* Bishop, 50 Ga. 465; Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374.

Illinois. — Chicago, etc., R. Co. *v.* Bragonier, 119 Ill. 51; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113, 15 Am. & Eng. R. Cas. 261.

Indiana. — Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 28 Am. & Eng. R. Cas. 308.

Kansas. — Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660; Clark *v.* Missouri Pac. R. Co., 48 Kan. 654.

Michigan. — Dysinger *v.* Cincinnati, etc., R. Co., 93 Mich. 646.

North Carolina. — Crutchfield *v.* Richmond, etc., R. Co., 78 N. Car. 300.

Texas. — Johnson *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 95.

Virginia. — Norfolk, etc., R. Co. *v.* McDonald, 88 Va. 352.

3. Coupling Cars of Different Construction — *United States.* — Brooks *v.* Northern Pac. R. Co., 47 Fed. Rep. 687; Atchison, etc., R. Co. *v.* Myers, 63 Fed. Rep. 793; Kohn *v.* McNulta, 147 U. S. 238.

Alabama. — Southern R. Co. *v.* Arnold, (Ala. 1897) 21 So. Rep. 954.

Illinois. — Chicago, etc., R. Co. *v.* Montgomery, 15 Ill. App. 205.

Iowa. — Baldwin *v.* Chicago, etc., R. Co., 50 Iowa 680; Van Winkle *v.* Chicago, etc., R. Co., 93 Iowa 509.

Michigan. — Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101.

Mississippi. — Hatter *v.* Illinois Cent. R. Co., 69 Miss. 642.

Nebraska. — Chicago, etc., R. Co. *v.* Curtis, (Neb. 1897) 71 N. W. Rep. 42.

New York. — Beaudin *v.* Central Vermont R. Co., (Supreme Ct.) 14 N. Y. Supp. 700.

Texas. — San Antonio, etc., Pass. R. Co. *v.* Adams, 11 Tex. Civ. App. 198.

Wisconsin. — Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408, 12 Am. & Eng. R. Cas. 214.

4. Coupling Cars of Different Heights. — Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. Rep. 282; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629; Williams *v.* Central R. Co., 43 Iowa 396; Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Botsford *v.* Michigan Cent. R. Co., 33 Mich. 256; Brewer *v.* Flint, etc., R. Co., 56 Mich. 620; McLaren *v.* Williston, 48 Minn. 299; Dye *v.* Delaware, etc., R. Co., 130 N. Y. 671; Edall *v.* New England R. Co., 18 N. Y. App. Div. 216.

In Hulett *v.* St. Louis, etc., R. Co., 67 Mo. 239, an experienced brakeman tried to couple cars of unequal height. The inequality was apparent, but, instead of using a crooked link as usual in such cases, he tried to couple with a straight one. The whole matter was under his control. He failed to make the coupling and was injured. It was held that the company was not negligent or liable.

In Toledo, etc., R. Co. *v.* Black, 88 Ill. 112, a man was injured while coupling cars whose drawbars were of different heights. One had double deadwoods, and one was loaded with iron which projected over the front of the car. It appeared that he frequently had to couple cars similarly loaded, and with similar coupling apparatus, and that it was more than usually dangerous to couple cars whose drawbars were of different heights. It was held that this was an ordinary peril of the employment, and one which he assumed.

5. Use of Different Styles of Couplings. — Northern Pac. R. Co. *v.* Blake, 63 Fed. Rep. 45; Louisville, etc., R. Co. *v.* Boland, 96 Ala. 626; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122; Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Thomas *v.* Missouri Pac. R. Co., 109 Mo. 187; Pittsburgh, etc., R. Co. *v.* Henly, 48 Ohio St. 608; Simms *v.* South Carolina R. Co., 26 S. Car. 490; Nashville, etc., R. Co. *v.* Wheless, 10 Lea (Tenn.) 741, 43 Am. Rep. 317, 15 Am. & Eng. R. Cas. 315; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668; Kelly *v.* Abbott, 63 Wis. 307, 21 Am. & Eng. R. Cas. 633.

6. Projecting Loads. — A brakeman who at-

the company liable if he is injured from these causes.

(2) *Knowledge of Defects and Unusual Appliances* — **Defective and Dangerous Couplings.** — In respect to defects and unusual appliances, the general rule is that although machinery furnished by a railroad company may be unsafe, or require an extraordinary degree of care in its use, and though the company would be liable to an employee who, ignorant of the danger, was injured thereby,[1] yet if an employee, knowing the character of the machinery, attempts to use it, he is bound to exercise care commensurate with the danger, and if he fails to do so and is injured his negligence will preclude a recovery against the company on account thereof.[2]

tempts to couple cars, from one of which he sees that a rail projects, assumes the risk and cannot recover for injuries sustained from such cause. Ely *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. Rep. 174, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), pp. 417, 420, 425.

Where a railroad company is in the habit of receiving, from other railroads, cars loaded with timbers which project over the ends of the cars so far as to make it dangerous for any one, except a careful, skilful, and prudent person, to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in broad daylight, although it may be raining at the time. Atchison, etc., R. Co. *v.* Plunkett, 25 Kan. 188, 2 Am. & Eng. R. Cas. 127, *cited* and *approved* in Atchison, etc., R. Co. *v.* Brown, 26 Kan. 443, 6 Am. & Eng. R. Cas. 228. To the same effect Mexican Cent. R. Co. *v.* Shean, (Tex. 1891) 18 S. W. Rep. 151.

An experienced brakeman was ordered by the conductor to attach a car loaded with lumber which projected forward, and compelled him to stoop in making the coupling, and in so doing he delayed a little and his fingers were caught in the coupling-link and hurt. It was held that he could not maintain an action against the railroad company, as he fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way. Day *v.* Toledo, etc., R. Co., 42 Mich. 523, 2 Am. & Eng. R. Cas. 126; Scott *v.* Oregon R., etc., Co., 14 Oregon 211, 28 Am. & Eng. R. Cas. 414; Brennan *v.* Michigan Cent. R. Co., 93 Mich. 156.

A., an employee of a railroad company, while engaged in coupling cars, from the top of which certain bridge-irons projected, was caught by the head between the ends of said bridge-irons and crushed to death. It was customary upon said railroad to load cars in said manner; and A. had knowledge both of this fact, and also that they were so loaded in this particular instance. The regulations of the company required its employees to stoop, in coupling, below the body of the cars. A. knew of this regulation, but had failed to comply with it. Had he done so, he could have effected the coupling with safety. In an action by A.'s widow and minor children against the railroad company to recover damages for his death, it was held that there was no evidence that the risk run by the decedent was extraordinary in its nature, and that therefore it was error to submit that question to the jury. It was held, further, that the risk was ordinarily incident to the decedent's employment, and that he had failed to take ordinary care in the premises, and that therefore the defendant company was entitled to judgment. Northern Cent. R. Co. *v.* Husson, 101 Pa. St. 1, 12 Am. & Eng. R. Cas. 241. See also Lothrop *v.* Fitchburg R. Co., 150 Mass. 423; Boyle *v.* New York, etc., R. Co., 151 Mass. 102.

1. See *supra*, this title, *Master Must Use Reasonable and Ordinary Care — To Provide Safe Machinery and Places of Employment.*

2. **Knowledge of Defects and Unusual Appliances — Statement of the Rule.** — Texas, etc., R. Co. *v.* Rhodes, 71 Fed. Rep. 145; Atchison, etc., R. Co. *v.* Meyers, 76 Fed. Rep. 443; Peirce *v.* Bane, 80 Fed. Rep. 988; Toledo, etc., R. Co. *v.* Asbury, 84 Ill. 429; Chicago, etc., R. Co. *v.* Munroe, 85 Ill. 25; Umback *v.* Lake Shore, etc., R. Co., 83 Ind. 191, 8 Am. & Eng. R. Cas. 98; Brewer *v.* Flint, etc., R. Co., 56 Mich. 620; Le Clair *v.* First Div., etc., R. Co., 20 Minn. 9; Porter *v.* Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454, 2 Am. & Eng. R. Cas. 44; Crutchfield *v.* Richmond, etc., R. Co., 78 N. Car. 300; Missouri, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1896) 35 S. W. Rep. 879. *Compare* Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108.

If the machinery, tools, or appliances furnished a servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances. Thompson *v.* Missouri Pac. R. Co., (Neb. 1897) 71 N. W. Rep. 61.

Where the defect or injurious contrivance is equally known to, or alike open to observation of, both employer and employee, both are upon common ground, and the employer is not liable for the resulting injury. Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 28 Am. & Eng. R. Cas. 308; Hatter *v.* Illinois Cent. R. Co., 69 Miss. 642; Brooks *v.* Northern Pac. R. Co., 47 Fed. Rep. 687.

Illustrations — Defective Car Couplings. — Where a brakeman, in coupling cars, noticed that the drawbar of one of them had dropped too low to effect the coupling, and in attempting to raise the drawbar with his knee, it slipped past, and his hand was caught and mashed, it was held that he assumed the risk and could not recover. Karrer *v.* Detroit, etc., R. Co., 76 Mich. 400.

In Houston, etc., R. Co. *v.* Barrager, (Tex. 1890) 14 S. W. Rep. 242, the evidence showed

Defects in Tracks and Yards. — The same rule applies to defects in tracks and yards. If the defect or injurious contrivance is open to observation and well known to the employee, he is held to assume the risk of danger therefrom.[1]

that the drawhead pulled out while the train was running, and that the spring dropped out and was lost. The brakeman replaced the drawhead without the spring, and was shortly afterwards injured while attempting to couple the car with another. It was held that he had knowledge of the defect and assumed the risk.

In Secord *v.* Chicago, etc., R. Co., (Mich. 1895) 65 N. W. Rep. 550, a brakeman had his hand mashed while attempting to couple two cars with drawbars of unequal height, owing to one of them being too small for the saddle. The brakeman noticed the defect, and tried to remedy it by putting a block under the drawbar upon the saddle. Nothwithstanding this he was injured while making the coupling. It was held that he had knowledge of the risk and could not recover.

In Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, it appeared that a brakeman, while attempting to couple a car and engine, was injured owing to defects in the coupling pin and in the drawbar. He knew of the defect in the coupling pin, but not of that in the drawbar. The railroad was without notice of either. It was held that the party had assumed all the risk of his employment, and was not entitled to damages.

Where an employee, engaged in coupling cars, was injured by reason of the alleged defective condition of the bumper or drawhead, which he had recently used, and whose condition it was a part of his duty to observe, it was held that he was negligent and could not recover. Norfolk, etc., R. Co. *v.* Emmert, 83 Va. 640. But see Ousley *v.* Central R., etc., Co., 86 Ga. 538.

Where the Brake-shoe of a Locomotive Was Broken and had to be removed, so that the brakes could not be used, a brakeman who knew of the defect, and who was injured while making a coupling about an hour afterwards, was held to have assumed the risk by continuing to work upon the engine with knowledge of the defect, and could not recover. Nelson *v.* Central R., etc., Co., 88 Ga. 225.

Coupling Cars Set Aside for Repairs. — Where cars are marked and set aside as damaged, the employee whose business it is to couple them has the strongest possible reason to exercise caution, and will be held to have assumed much more than ordinary risks. Rebelsky *v.* Chicago, etc., R. Co., 79 Iowa 55; Illinois Cent. R. Co. *v.* Bowles, 71 Miss. 1003; Barkdoll *v.* Pennsylvania R. Co., (Pa. 1888) 13 Atl. Rep. 82; Gulf, etc., R. Co. *v.* Mayo, (Tex. Civ. App. 1896) 37 S. W. Rep. 659. *Compare* Illinois Cent. R. Co. *v.* Orr, 59 Ill. App. 260.

In Watson *v.* Houston, etc., R. Co., 58 Tex. 434, 11 Am. & Eng. R. Cas. 213, it was held that where it is, by the custom and usage of a railroad company, part of the duty of a brakeman to couple defective or broken cars, so that they may be taken to the shops for repair, he will be held to have assumed the risks incident to that particular employment, and cannot recover in case of an injury sustained therein. See Yeaton *v.* Boston, etc., R. Corp., 135 Mass. 418, 15 Am. & Eng. R. Cas. 253; Fraker *v.* St. Paul, etc., R. Co., 32 Minn. 54, 15 Am. & Eng. R. Cas. 256; Arnold *v.* Delaware, etc., Canal Co., 125 N. Y. 15. See also Chicago, etc., R. Co. *v.* Ward, 61 Ill. 130.

Use of Road Engine to Shift Cars in Freight Yard. — Where a road engine was used in a freight yard, and an employee was injured while attempting a coupling, he could not recover on the ground that a regular switching engine would have been safer. He had made no complaint, and it was held he had assumed the risk. Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573.

Use of Cars of Peculiar Construction. — Where the cars were of peculiar construction and it was dangerous to attempt a coupling by going between them, and a brakeman who was familiar with their construction and who attempted to make a coupling in this way was injured, it was held that the company was not liable. Long *v.* Coronado R. Co., 96 Cal. 269.

The plaintiff's intestate was set to work upon a gravel train, the cars of which were provided with aprons at each end, consisting of a plank platform, being really an extension of the floor of the car, by means of which, when the cars were coupled, there was formed a continuous floor without any open space between the cars. The conductor of the train called the deceased's attention to the aprons and told him he must keep away from between them, and must stoop down under and use a stick to make a coupling. The following day the deceased undertook to make a coupling, and although there was no necessity for haste nor any unusual circumstances to distract his attention, was caught by the aprons while standing between the cars, and was crushed to death. It was held that the risk was obvious and that the deceased assumed it. Chicago, etc., R. Co. *v.* Wagner, (Ind. App. 1896) 45 N. E. Rep. 76.

Coupling Cars on Trestle. — The plaintiff, a brakeman, while working on a trestle, coupling coal cars as they were "kicked" across a track scale to be weighed, was knocked down by a car moving more rapidly than usual, and injured. He had worked there before and was aware of the danger. It was held to be one of the risks of his employment. Woods *v.* St. Paul, etc., R. Co., 39 Minn. 435.

1. Knowledge of Unballasted Tracks. — The unballasted condition of a railroad track is such a defect as is open and obvious, and an employee must be considered as contracting in reference thereto and as assuming the risk of danger therefrom. Pennsylvania Co. *v.* Hankey, 93 Ill. 580; Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. App. 200; Clark *v.* Missouri Pac. R. Co., 48 Kan. 654; Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, 8 Am. & Eng. R. Cas. 128; Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, 37 Am. St. Rep. 336; Finnell *v.* Delaware, etc., R Co., 129 N. Y. 669, 42 N. Y. St. Rep. 354; Philadelphia, etc., R. Co. *v.* Schertle, 97 Pa. St. 450, 2 Am. & Eng. R. Cas. 158.

Unblocked Frogs and Guard-rails. — In the ab-

Knowledge and Means of Knowledge Distinguished. — But here a distinction must be made between knowledge and means of knowledge. An employee is under no obligation to resort to means for the discovery of defects or unusual contrivances. He has a right to assume that the employer will not call upon him to couple defective cars,[1] or cars fitted with unusual and dangerous

sence of statutory requirement, an employee who enters the service of a railroad company knowing that the frogs in its track are unblocked assumes the risk of accident from that cause. St. Louis, etc., R. Co. *v.* Davis, 54 Ark. 389, 26 Am. St. Rep. 48; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682; Wood *v.* Locke, 147 Mass. 604; Missouri Pac. R. Co. *v.* Baxter, 42 Neb. 793; Ireland *v.* Gardner, (Supreme Ct.) 7 N. Y. Supp. 609; Spencer *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 196; McNeil *v.* New York, etc., R. Co., 71 Hun (N. Y.) 24; Appel *v.* Buffalo, etc., R. Co., 111 N. Y. 550; Haas *v.* Buffalo, etc., R. Co., 40 Hun (N. Y.) 145; Missouri, etc., R. Co. *v.* Thompson, 11 Tex. Civ. App. 658.

Culverts. — A car coupler while working in a freight yard stepped into a small drain and was run over and killed. He had known of the existence of the drain for two years. It was held that he had assumed the risk. DeForest *v.* Jewett, 88 N. Y. 264. See also Little Rock, etc., R. Co. *v.* Townsend, 41 Ark. 382, 21 Am. & Eng. R. Cas. 619.

Cattle-guards. — A cattle-guard is one of the appliances necessary in the construction of a railroad, in respect to which a brakeman must be considered to contract, and he cannot hold the master liable if he is injured by stepping into a cattle-guard while coupling cars in the daytime. Fuller *v.* Lake Shore, etc., R. Co., (Mich. 1896) 66 N. W. Rep. 593; Peoria, etc., R. Co. *v.* Puckett, 52 Ill. App. 222; Henderson *v.* Coons, 31 Ill. App. 75.

Insufficient Force.— In Skipp *v.* Eastern Counties R. Co., 9 Exch. 223, the plaintiff, who was a guard on the defendant's railroad, while making up a train of cars was knocked down and injured. There was evidence that the company's staff for the performance of this work was insufficient, but the plaintiff had been employed in this particular service for several months prior to the accident, and had not made any complaint to the company. It was held that the company was not liable. And see Richmond, etc., R. Co. *v.* Mitchell, 92 Ga. 77.

But in Joliet, etc., R. Co. *v.* Velie, (Ill. 1891) 26 N. E. Rep. 1086, where the conductor had made complaint to the superintendent and had been promised additional help in a few days, it was held to be a question for the jury whether, by remaining in the service of the road in reliance on this promise, the conductor had assumed the risk.

Knowledge of Incompetency or Carelessness of Fellow-servants. — Where an employee has knowledge of the incompetency or carelessness of a fellow-servant and continues to work with him without objection, he cannot be heard to complain for an injury occasioned by the negligence or incompetency of such fellow-servant. Chesapeake, etc., R. Co. *v.* McMannon, (Ky. 1888) 8 S. W. Rep. 18.

But a brakeman is not required at his peril to know what engineer is in charge of the engine doing the shifting, and his knowledge of the recklessness of a certain engineer will not defeat a recovery when there is evidence that he did not know that such engineer was in charge of the engine at the time he was required to make the coupling. O'Hare *v.* Chicago, etc., R. Co., 95 Mo. 662.

Knowledge of Inferior Quality of Oil. — Where a brakeman claimed that his injury was caused by the inferior quality of the oil furnished him for use in his lantern, and it was shown that he had been using the oil for over two months without complaint, it was held that he must be considered as having assumed the risk and could not recover. Huffman *v.* Michigan Cent. R. Co., (Mich. 1896) 67 N. W. Rep. 118.

1. Employee Only Assumes Risks from Defects of Which He Has Knowledge. — An employee is not under obligation to resort to means for the discovery of defects. He has a right to presume that his employer has done his duty and complied with the law; hence, it is only when he has knowledge of defects in machinery, which he continues to use without objection, that he is presumed to have waived the defects. It is his knowledge, and not his means of knowledge, that affects his right to recover. Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

A brakeman, in coupling cars, has the right to assume that they are in good and safe condition; and it is not contributory negligence for him to run in between two cars without stopping to examine and see whether the drawheads are properly adjusted or not. King *v.* Ohio, etc., R. Co., 14 Fed. Rep. 277, 8 Am. & Eng. R. Cas. 119; Louisville, etc., R. Co. *v.* Baker, 106 Ala. 624; Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 9 Am. St. Rep. 883; Pittsburgh, etc., R. Co. *v.* Woodward, 9 Ind. App. 169; Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Mahoney *v.* New York Cent., etc., R. Co., (Supreme Ct.) 15 N. Y. Supp. 501; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260; Galveston, etc., R. Co. *v.* Briggs, (Tex. Civ. App. 1895) 30 S. W. Rep. 933. But see Smith *v.* Potter, 46 Mich. 258.

A Rule of the Company Directing Brakemen to Look at Coupling Apparatus and see that it is all right before making a coupling, does not require a critical examination of it; and where a coupling apparatus had a defect in the spring which was not discoverable except by careful inspection, and a brakeman was injured thereby, it was held that he had a right to assume that the coupling was in good order, and could recover for his injury. Bennett *v.* Northern Pac. R. Co., 3 N. Dak. 91; Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534.

No Duty Imposed upon a Servant to Ascertain the Competency or Incompetency of His Fellow-servant. — He has a right to assume that his master has discharged his duty in employing and keeping in his service competent servants. International, etc., R. Co. *v.* Cook, (Tex. Civ. App. 1897) 41 S. W. Rep. 665.

appliances,[1] without warning him of their use; and it is only when he has actual knowledge of the danger, or when it is so obvious that the failure to see it constitutes negligence, that he may be said to have assumed the risk.[2] He cannot be held to have done so where the defect or unusual appliance is not so obvious as to have attracted the attention of an ordinarily observant man.[3]

Negligent Loading. — The plaintiff's intestate, a yardman in the defendant's employ, was ordered to couple to the train a car of lumber. The car had been improperly loaded, the lumber projecting too far forward; and in coupling the car at night and under imperative orders not admitting of delay, the plaintiff's intestate was caught between the projecting lumber and the tender of the locomotive and killed. It was held that the deceased had a right to presume that the car was properly loaded, and he was not guilty of contributory negligence in not closely examining the car as to its readiness for shipment. Haugh *v.* Chicago, etc., R. Co., 73 Iowa 66.

1. Unusual Construction. — An employee does not assume the risks from unusual appliances for coupling upon cars or engines; and his recovery for an injury from the use of a "gooseneck" on a freight engine will not be defeated by the fact that an examination of the engine would have disclosed the unusual and dangerous character of the appliance, where the employee had no reason to suppose such an appliance would be used. Hungerford *v.* Chicago, etc., R. Co., 41 Minn. 444; Galveston, etc., R. Co. *v.* Garrett, 73 Tex. 262, 15 Am. St. Rep. 781; Texas, etc., R. Co. *v.* Conroy, 83 Tex. 214.

In Crane *v.* Missouri Pac. R. Co., 87 Mo. 588, the plaintiff attempted to couple two cars, and was injured by the dangerous and unusual construction of the drawheads of one of them. He testified that he had no knowledge of the dangerous construction of this drawhead, and that it being a dark, misty night when the accident occurred, he did not observe his danger until too late to avoid the injury. A verdict for the plaintiff was affirmed.

2. Where Failure to Observe Defects Constitutes Negligence. — Where an experienced car coupler, who had worked about an engine a week, was injured by a defect in the drawhead, which made greater care in coupling it necessary, and which had existed all the time, it was held that the perilous nature of the employment requires that car-couplers should use every precaution to guard themselves from injury, and that the plaintiff's negligence in not observing so obvious a defect would defeat his recovery. Goulin *v.* Canada Southern Bridge Co., 64 Mich. 190.

A brakeman attempted to couple one car to another from which the extension block, bumpers, and drawhead were all gone, and was crushed. It was daylight and he could have easily seen the defects in the car, which were obvious. It was held that he assumed the risk and could not recover. Albert *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 152.

3. When Failure to Observe Defects Is Not Negligence. — A master is bound to furnish his servant reasonably safe appliances with which to perform his work, and the servant does not assume the risk of danger from the use of unsafe machinery unless the defects are so glaring that a reasonable prudent person would not attempt to use it. Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240.

The fact that a brakeman who was injured while coupling cars at night was familiar with a freight yard, will not charge him with knowledge that there was ice upon a certain track, where there was evidence that no ice had formed there until within a few days of the accident, and that the brakeman's duties had not called him to that part of the yard for some time. McFall *v.* Iowa Cent. R. Co., 96 Iowa 723.

A brakeman who has only been upon a run three weeks cannot be charged with notice of all the defects in the yards at the several stations through which his train passes and at which it is his duty to couple cars. Illinois Cent. R. Co. *v.* Sanders, 166 Ill. 270.

A yard switchman who is injured by a defect in a freight yard will not be charged with notice thereof by the fact that such defect was ordinarily in plain view and had existed for a long time, when it appears that the switchman's duties had usually been performed in another part of the yard, and he testifies that he did not know of the defect, and at the time that the accident occurred it was concealed by snow. Rouse *v.* Ledbetter, 56 Kan. 348.

The plaintiff was injured while in the employ of the defendant and while acting in the capacity of switchman in the defendant's yards. The engine used in moving the cars was operated without a fireman, the engineer performing the duties of fireman himself. The injury was caused by the failure of the engineer to observe the plaintiff's signal, the engineer at that moment being engaged in firing the engine. The fact that the engine was being operated without a fireman was known to the plaintiff, who continued to work without making any complaint. It was contended that he thereby assumed the risk of accident from this cause, but it was held that he did not assume the risk unless the want of a fireman caused the operation of the engine to be so obviously dangerous that a man of ordinary care and reasonable prudence would refuse to act as switchman. The plaintiff had the right to rely, at least to some extent, upon the judgment of the defendant's agents who deemed it safe for the engineer to perform the work of a fireman. Wright *v.* Southern Pac. Co., 14 Utah 383.

Failure to Observe Defects in Track at Night. — The fact that a brakeman stepped in between cars at night without stopping to examine the track by the light of his lantern will not charge him with contributory negligence as a matter of law, when the track had only that day been torn up by trackmen, without the knowledge of the brakeman, and he had no reason to suppose that the track was not in its ordinary condition. Cleveland, etc., R. Co. *v.* Sloan, 11 Ind. App. 401.

Knowledge or Obviousness a Question of Fact. — In all cases, whether the employee had knowledge or not, or whether the defect was so obvious as to charge him with negligence in not discovering it, is a question of fact for the jury.[1]

(3) *Servants Acting Beyond Scope of Employment.* — If a servant, whose duties do not require him to couple cars, volunteers to do so, he assumes the risk, and cannot recover if he is injured through his lack of experience.[2]

1. Knowledge of Defects and Dangers a Question of Fact. — Plank *v.* New York Cent., etc., R. Co., 60 N. Y. 607; Texas-Mexican R. Co. *v.* King, (Tex. Civ. App. 1896) 37 S. W. Rep. 34.

At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff while in its employ as a brakeman, by reason of the drawbar on a locomotive engine being too low for the work for which it was used, where there was a dispute as to the plaintiff's knowledge of the defect, it was held to be a question for the jury. Lawless *v.* Connecticut River R. Co., 136 Mass. 1, 18 Am. & Eng. R. Cas. 96.

In Russell *v.* Minneapolis, etc., R. Co., 32 Minn. 230, the plaintiff, who was a brakeman upon a railroad train, was injured while attempting to couple a baggage car equipped with a "Miller coupler," to the tender of an engine equipped with an ordinary coupler. The latter was not provided with wooden buffers to prevent the car and tender from colliding, as they sometimes do in such cases. In the present instance they did collide. The plaintiff had been for some time employed in the service of the company. It was held that whether or not the plaintiff had notice of the danger involved in making the coupling was a question for the jury. The court said: "Now, in this case, plaintiff undoubtedly knew the character of these two couplers. He knew that one was a Miller and the other a common one. He also knew that the former had a certain amount of lateral motion; also that there was no goose-neck or wooden buffers on the tender. But conceding this, and assuming that he must be held to the ordinary skill and experience of brakemen, it does not appear, certainly not conclusively, that he, by the exercise of ordinary observation, ought to have understood the risks to which he was exposed by using such couplers. He was not bound to be an experienced machinist or car builder. It does not appear that he knew, or by the exercise of ordinary observation ought to have known, that the lateral motion of the Miller coupler was sufficient to permit it to slip past the end of the drawhead on the tender. It does not appear that the use of these two kinds of couplers together in this way was usual or common, so that brakemen generally would or should understand fully the dangers incident to such a practice. Indeed, from the evidence it is to be presumed that prudent railroad companies do not ordinarily adopt any such practice. Plaintiff had been using them on this train for some time, and it does not appear that he had ever seen the two couplers slip past each other before, — a fact which distinguishes this case from Toledo, etc., R. Co. *v.* Asbury, 84 Ill. 429, cited by defendant. Neither does it appear that such a thing would be likely to occur except under peculiar circumstances; as, for example, where, as in this case, the coupling was being made on a curve. As remarked by the court below, the convexity of the drawhead on the tender being so slight, and the lateral motion of the Miller coupler being resisted by a spring, we cannot say that it was obvious or apparent that they would be likely to slip past each other if they came together as they ordinarily would on a straight track. The matter was properly for the jury."

Protection of Rules. — Where the rule of a railroad company provided that while a coupler was between the cars the train should not be put in motion, a coupler so engaged has the right to presume that it will not be moved, and that he could pass between the projecting beams of the cars, which he could have done if the train had not been moved; and if, while so passing out, under a signal given by another servant of the company, the engineer backed the train, and the employee was caught between the projecting beams and crushed to death, if he were a minor his father could recover for the loss of his services, and a recovery would not be prevented by the fact that the deceased might have passed under the beams in safety by stooping. Central R. Co. *v.* Harrison, 73 Ga. 744. Also see Rahman *v.* Minnesota, etc., R. Co., 43 Minn. 42.

2. The Conductor of a Freight Train, who was not bound to couple or uncouple cars except in case of emergency, undertook to perform this duty where no such emergency existed, and was hurt in so doing; it was held that he had voluntarily run a risk outside the scope of his employment, and that the company was not liable. Sears *v.* Central R., etc., Co., 53 Ga. 630, 61 Ga. 279. But see Hudson *v.* Charleston, etc., R. Co., 55 Fed. Rep. 248.

The Foreman of a Gang of Bridge Builders, who consented to do some switching, and who was injured in making a coupling, cannot recover for his want of experience, as he was a volunteer and assumed the risk. Cole *v.* Chicago, etc., R. Co., 71 Wis. 114, 5 Am. St. Rep. 201, 33 Am. & Eng. R. Cas. 274, *cited* and *approved* in Hogan *v.* Northern Pac. R. Co., 53 Fed. Rep. 519.

Where a Fireman Was Killed While Attempting to Couple Cars, it was held that in order to recover, it was necessary for the plaintiff to show that his intestate, in acting thus out of the scope of his employment, was doing so by the command of a superior; and that a failure to show this affirmatively would defeat a recovery. Shugart *v.* Norfolk, etc., R. Co., (Va. 1895) 22 S. E. Rep. 484.

Switchman Attempting to Couple Cars. — Where there was a hole in the planking between tracks, seven or eight inches long by three or four wide, and the plaintiff, who was a switchman, and had been directed not to couple cars, undertook to do so on a moving train, and his foot caught in the hole and he was

d. When Master Promises to Repair Defects. — A promise by a railroad company to repair defective machinery, if made for the purpose of inducing an employee to continue its use, renders the company liable for any injury which the employee may receive within a reasonable time from the use of such machinery.[1]

Imminent Danger. — But it has been held that this rule does not apply where the danger is so imminent that none but a person utterly reckless of his personal safety would continue in the service under the circumstances.[2]

2. Duty of Master to Give Warning and Instruction. — When inexperienced men are employed to couple cars,[3] or unusual and dangerous appliances are

injured; the hole being of such a character as not to have readily attracted notice; it was held that the servant assumed the risk of his employment, and the company was not liable, no negligence being imputable to the company or its employees in not discovering and repairing the hole. Gardner *v.* Michigan Cent. R. Co., 58 Mich. 584, 24 Am. & Eng. R. Cas. 435.

The Employee of a Lumber Dealer Attempted to Uncouple a Car from a Train on a side track and to push it into position to be loaded. He did not notify the trainmen of his intention, and while making the attempt, a movement of the train caught him between the bumpers and injured him. It was held that he was negligent and could not recover. Burns *v.* Boston, etc., R. Co., 101 Mass. 50.

Passenger Attempting to Couple Cars. — The conductor of a freight train has implied authority to employ a brakeman temporarily to supply the place of one incapacitated by sickness; and if a brakeman so employed is injured by the negligence of the company or its agents, the company is liable; but if the person injured is a passenger, and under no obligation to obey the conductor, the company will not be liable, even though the injured man was acting at the time under the direction of such conductor. He is to be considered as a mere volunteer and assumes the risk. Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518. And see Texas, etc., R. Co. *v.* Skinner, 4 Tex. Civ. App. 661.

1. Promises to Remedy Defects. — A switching engine used in the defendant's yard being laid up for repairs, a road engine having the usual pilot bars was put temporarily to do its work. The plaintiff's intestate, a brakeman, complained to the yardmaster of the danger of using this engine without foot-boards, and asked that he might put them on, but was dissuaded by the yardmaster's saying that the engine would not be used over one week. The brakeman was shortly afterwards killed by the use of this engine. It was held that the complaint and promise rendered the company liable. The court said: "If such assurance was made, and deceased was induced thereby to continue in the employment, then, as we have seen, the defendant assumed the risks incident to the performance of the work without running-boards until such boards should be furnished. The foregoing views of the law are so uniformly sustained by the authorities, that we do not deem it necessary to make citations." Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148.

The plaintiff, a switchman, standing on the step at the end of the tank, to uncouple some cars which were to be "kicked" onto a side track, by reason of a defect in the step, and because there was no railing to hold to, was thrown off by a jerk of the engine and injured. He had complained of these defects, and he with others had notified the yardmaster that they would quit if they were not remedied. They were persuaded to remain by a promise that the defects would be remedied. This was not done. It was held that if they were persuaded to remain by reason of this promise the company was rendered thereby liable. If the plaintiff remained in the service and worked on this engine with knowledge that the defects had not been remedied, after a reasonable time had elapsed in which to make them, he will be considered as having assumed the risk. What should be considered a reasonable time is a question for the jury, to be determined by a consideration of all the circumstances, such as the opportunity for making repairs and the frequency with which the engine was used. Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289. See also Indianapolis Union R. Co. *v.* Ott, 11 Ind. App. 564.

Promise by Unauthorized Person. — A complaint made by a switchman to the yard foreman of the incompetency of a fireman, and the foreman's promise to have another man in his place, will not bind the company, when the yard foreman was not the person to whom the complaint should have been made, and his promise to remove the incompetent fireman was without authority. Galveston, etc., R. Co. *v.* Eckols, 7 Tex. Civ. App. 429.

2. Indianapolis Union R. Co. *v.* Ott, 11 Ind. App. 564.

Burden of Proof. — Where a plaintiff who is injured by the use of defective appliances is shown to have knowledge of them, the burden is upon him to show that he protested against their use, and was induced to continue by the master's promise to repair. Ford *v.* Chicago, etc., R. Co., (Iowa 1897) 71 N. W. Rep. 332.

3. Duty to Warn and Instruct — Inexperienced Employees — It is not negligence for a railroad company to employ inexperienced men to act as brakemen, but it is the duty of the company to give them warning of the perils of the employment and such instruction in their duties as is commensurate with the dangers to be avoided. Bonner *v.* Moore, 3 Tex. Civ. App. 416; Houston, etc., R. Co. *v.* Strycharski, (Tex. Civ. App. 1896) 35 S. W. Rep. 851. See also Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509.

It is the duty of a railroad company to instruct an inexperienced switchman as to the proper mode of making couplings of foreign

used,[1] it is the duty of the employer to give such warning and instruction as the ignorance of the employee or the dangerous character of the appliance demands.

cars handled in transportation and supplied with coupling appliances essentially unlike its own, the use of which is more dangerous. Illinois Cent. R. Co. *v.* Price, 72 Miss. 862.

In Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, it was held that the employer may assume, unless he has knowledge to the contrary, that a person who seeks employment in a particular capacity is possessed of sufficient ability and experience and is of such an age as qualifies him to discharge the duties incident to the service applied for, and that he is competent to apprehend and avoid all the apparent and obvious hazards of the service. But where the employee is known to be inexperienced and ignorant of the dangers incident to the service, it is manifestly the duty of the employer to warn and instruct him concerning them, and a failure to do so constitutes negligence.

In Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, 33 Am. St. Rep. 908, it was held that a failure to instruct an inexperienced brakeman of the danger incident to coupling cars equipped with double deadwoods rendered the company liable for injuries sustained by the brakeman while so employed. See also Missouri Pac. R. Co. *v.* White, 76 Tex. 102, 18 Am. St. Rep. 33.

Minors. — The duty to give warning and instructions to inexperienced servants applies especially to minors. Texas, etc., R. Co. *v.* Brick, 83 Tex. 598; Missouri Pac. R. Co. *v.* King, 2 Tex. Civ. App. 122.

If a person, by reason of his youth and inexperience, does not know of or appreciate the danger incident to the service in which he is employed, and the employer has exposed him to the danger without warning him of it, the employer is liable. Davis *v.* St. Louis, etc., R. Co., 53 Ark. 117; St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458.

Warning in Respect to Dangers Which Are Obvious. — But the omission of a railroad company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double deadwoods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the danger of coupling cars of different construction, and was told not to take any chances. Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, 47 Am. Rep. 569, 12 Am. & Eng. R. Cas. 249.

Where the increased risk or hazard of coupling cars with a different coupling apparatus from those in ordinary use by a railroad company is open to the ordinary observation of any person using reasonable care and prudence, the failure of the railroad company to instruct or warn brakemen specially in regard to the increased risk of coupling such cars is not negligence on the part of the company; the danger being obvious and incident to the employment. Boland *v.* Louisville, etc., R. Co., 106 Ala. 641.

In Hughes *v.* Chicago, etc., R. Co., 79 Wis. 264, a brakeman was injured in coupling cars equipped with double deadwoods. The complaint charged that the brakeman was inexperienced, and that the company was negligent in not instructing him how to couple cars so equipped, and in not warning him of the danger. The evidence showed that the plaintiff was twenty-three years old, had worked two days in the defendant's yard, and had made two trips on trains, and five years before had worked fifteen days for another road as brakeman. It was held that the evidence did not justify the judge in determining, as a matter of law, that the plaintiff was so inexperienced as to be entitled to special instruction in regard to such cars; but that whether he had sufficient experience to understand the danger or not was a question for the jury.

Pretended Experience. — In Stanley *v.* Chicago, etc., R. Co., 101 Mich. 202, a brakeman, in order to get employment as such, pretended to have had experience, which he had not. He was ordered to uncouple a flat car from a train while in motion, and instead of lying down on the rear end of the car to pull the pin, as he should have done, he knelt down and was jerked off by a sudden start of the engine. It was held that he had no cause of action against the company.

1. Unusual or Dangerous Appliances. — Where any appliances of a new or unusual character are introduced, it would seem to be the duty of the company to give warning and instruction, especially so to new men who are not likely to be acquainted with the danger. In Hungerford *v.* Chicago, etc., R. Co., 41 Minn. 444, an inexperienced brakeman was injured in attempting to couple a passenger engine equipped with a goose-neck coupling to a freight car. The court said: "It seems to be admitted that had an engine of the customary pattern for the freight service been used, plaintiff would not have been injured, for he was attempting the task in the usual way; and it is also admitted that had he been instructed as to the proper manner of coupling under such circumstances," the injury could have been avoided. And see Galveston, etc., R. Co. *v.* Garrett, 73 Tex. 262, 15 Am. St. Rep. 781; Smith *v.* Buffalo, etc., R. Co., 72 Hun (N. Y.) 545; Missouri Pac. R. Co. *v.* Callbreath, 66 Tex. 526.

Warning That Cars Are Defective. — As between a railroad company pulling "a foreign car" and an employee, it is the duty of the former to exercise reasonable precaution to see that the car is in proper repair. If the company has been notified of the defective condition of the car so recently as not to have time to make the necessary repairs, it should place a sign on or near the car warning employees of the dangerous condition. Denver, etc., R. Co. *v.* Smock, 23 Colo. 456.

A railroad company, having had transient cars of other companies in its use or employment regularly inspected, condemned, and ordered to be sent to its shops for repairs, and having had them properly tagged so as to

3. Duty of Master to Make and Enforce Rules — **Duty to Make Rules.** — It is the duty of a railroad company to adopt and publish proper rules for the guidance and protection of employees engaged in coupling cars, and a failure to do so constitutes negligence.[1] But in making rules for the government of its employees a railroad company is only bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may be reasonably foreseen;[2] and it should not be left to the jury to determine whether a rule ought to have been adopted covering the specific subject or conditions existing in the case, where it was not shown that any other railroad company had adopted such a rule, and its practical operation was wholly a matter of speculation.[3]

Duty to Enforce Rules. — While the master is not an insurer of the observance of rules, he is obliged to use reasonable care to enforce them, and where a rule is habitually disregarded with his knowledge he is liable as though no rule had in the first instance been made.[4]

4. Liability of Master for Negligence of Servants. — A railroad company is liable for injuries to an employee caused by the negligence of another employee, when such employees do not stand in the relation of fellow-servants,[5] and when both are acting within the scope of their employment or authority.[6]

5. Agreements Between Master and Servant in Respect to Liability. — A railroad company cannot stipulate with its employees for immunity from liability for its own wrongful negligence. This liability, founded upon considerations of public policy, attaches to the relationship of master and servant by the rules of law, and any agreement which imposes upon an employee the duty to look after and be responsible at all events for his own safety contravenes this law and is consequently void.[7]

warn its employees of that fact, has not fully discharged its obligation of due care towards one engaged in the performance of night service as a car coupler, unless the tags are of such a size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact. Meyers *v.* Illinois Cent. R. Co., 49 La. Ann. 21.

The fact that a car is marked with chalk, "Out of order," will not charge a brakeman as a matter of law with knowledge of its defects, where the car was so marked not as a warning to brakemen but to inform the road from which it came that the car was out of order when received, and the brakeman was in fact ignorant of its condition. Chesapeake, etc., R. Co. *v.* Lash, (Va. 1896) 24 S. E. Rep. 385.

1. Duty to Make Proper Rules. — Gulf, etc., R. Co. *v.* Finley, 11 Tex. Civ. App. 64; Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121.

It is the duty of a railroad company not only to promulgate a code of rules for the government of its employees, but to enforce their observance. It is the duty of employees to inform themselves as to the printed and posted rules and regulations of the company, and to conform their conduct to them so far as they are reasonable. Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128.

2. Berrigan *v.* New York, etc., R. Co., 131 N. Y. 582, 42 N. Y. St. Rep. 858; Ely *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 323. See also Doing *v.* New York, etc., R. Co., 73 Hun (N. Y.) 270.

3. Larow *v.* New York, etc., R. Co., 61 Hun (N. Y.) 11; Berrigan *v.* New York, etc., R. Co., 131 N. Y. 582, 42 N. Y. St. Rep. 858.

4. Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121. And see *infra*, this title, *Contributory Negligence — Waiver of Rules by Non-enforcement.*

5. See *infra*, this title, *Fellow-servants.*

6. Employees Acting Beyond Scope of Authority. — If the engineer had no authority to order the deceased to uncouple cars, and it was no part of his duty to do so, the company could not be made liable for any injuries resulting to him from the unauthorized order or conduct of the engineer. Bradley *v.* Nashville, etc., R. Co., 14 Lea (Tenn.) 374.

In Rodman *v.* Michigan Cent. R. Co., 55 Mich. 57, 54 Am. Rep. 348, 17 Am. & Eng. R. Cas. 521, the engineer and fireman in charge of the locomotive of a railroad train having temporarily left their respective posts, the conductor, who it was alleged was incompetent for the purpose, undertook to take the place of the engineer, and ordered a brakeman to make a coupling; and while he was obeying this order, and in consequence of the unskilfulness of the conductor, the brakeman was injured. It was held by a divided court that the company was not liable.

7. Agreements with Servants in Respect to Liability. — Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514; Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218; Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630; Mason *v.* Richmond, etc., R. Co., 111 N. Car. 482; Lake Shore, etc., R. Co. *v.* Spangler, 44 Ohio St. 471. See also Roesner *v.* Hermann, 10 Biss. (U. S.) 486; Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 Am. St. Rep. 245; Memphis, etc., R. Co. *v.* Jones, 2 Head (Tenn.) 517. And see generally the titles MASTER AND SERVANT; NEGLIGENCE.

III. Contributory Negligence — 1. General Rule. — A servant who undertakes the performance of hazardous duties is as much bound to use ordinary care to protect himself from injury as the master is to protect him, and he cannot hold the master liable if the injury results directly from his own negligence.[1]

2. Proximate and Remote Causes. — When both master and servant are negligent, the injury will be deemed to have arisen from the proximate cause of

The liability of railroad companies for injuries caused to their servants by the carelessness of other employees who are placed in authority and control over them is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employees at the time, and as part of their contract of employment, that such liability shall not attach to it. Lake Shore, etc., R. Co. *v.* Spangler, 44 Ohio St. 471.

In Georgia. — In Western, etc., R. Co. *v.* Bishop, 50 Ga. 465, it was held that a contract between a brakeman and the railroad company, whereby the former agreed to accept all risks of employment and to release said company from liability arising out of injury to said brakeman by reason of "accidents or collisions, on the trains or road, or which may result from the negligence, carelessness, or misconduct of himself or another employee or person connected with said road or in the service of said company," will protect the employer from liability where the negligence which caused the damage does not come within that kind of negligence which is called in section 4291 of the Code criminal negligence, recklessness of human safety and human life.

The Ohio Statute of April 2, 1890 (Laws of Ohio, 1890, p. 145), forbids any railway company to enter into any contract with its employees by which such employee agrees to hold the company harmless on account of any injury received by reason of defective cars or machinery. It was held that this act applies to suits against a receiver of a railroad corporation operating its road. Peirce *v.* Van Dusen, 78 Fed. Rep. 693.

1. Contributory Negligence — Statement of the Rule. — A charge which instructs the jury that the plaintiff cannot recover unless it was impossible for him to have avoided the injury, is erroneous. The correct rule is that he cannot recover if by ordinary care he could have avoided the injury. Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644. See also St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458.

An employee who goes between cars for the purpose of making a coupling, without notifying either the foreman or the person in charge of the engine of his intention, is chargeable with negligence, and cannot recover if he is injured by a sudden movement of the train. Nihill *v.* New York, etc., R. Co., 167 Mass. 52.

Choosing Dangerous Mode of Performing Act. — Where an employee, in discharging the duty required of him, has the choice of two ways of performing it — one entirely safe, the other obviously and greatly dangerous — and adopts the dangerous way, and is injured, he is guilty of negligence which will bar a recovery by him in an action against the employer, based on the latter's negligence; and this although it was customary to perform the duty in the dangerous way. George *v.* Mobile, etc., R. Co., 109 Ala. 245.

The danger of getting between the deadwoods of cars in motion and liable to come together is so obvious, that an employee who takes such risk when there is ample room on either side, and when there is no necessity for such action, is guilty of such contributory negligence as to prevent his recovery of damages resulting from such negligence, and this independently of any rule of the employer. Alabama G. S. R. Co. *v.* Richie, 111 Ala. 297.

Question of Care Dependent on Circumstances — Sudden Emergencies. — In determining whether an employee has exercised or has failed to exercise due care in exposing himself to danger, it is always necessary to take into consideration the exigencies and circumstances under which he acted. Thus, where he acts under imperative orders requiring promptness, or upon a sudden emergency, the question of his due care will depend to some extent upon time for reflection and the necessity for immediate action. St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458.

A coal car became detached from a train and started down a steep grade at the foot of which was a passenger coach filled with the defendants' workmen. A locomotive was sent to overtake the car before it could collide with the coach, and the plaintiff stood upon the brake-beam of the tender in order to make the coupling when the engine should overtake the car. The coupling was made in safety, but the force of the impact between the engine and car caused the end gate of the coal car to fall out, crushing the plaintiff against the tender. It appeared in evidence that the plaintiff knew that the gate was defective; but it was held that though he acted rashly, there was apparently a great emergency in which the safety of life and property was involved, and that if his act was prompted by a sense of duty, the ordinary rule of contributory negligence would not apply; and a judgment in his favor was not disturbed. Evansville, etc., R. Co. *v.* Malott, 13 Ind. App. 289.

A brakeman who was in the act of coupling cars discovered that the drawbar was broken, and, fearing injury from the impact of the cars, attempted to get out from between them, but in his excitement had his hand caught between the deadwoods of the two cars and injured. It was held that under the excitement of the moment and the fear of injury the brakeman could not be expected to use the same judgment that he would have if the danger had been less imminent, and that under the circumstances the defective drawbar must be considered the proximate cause of the injury. Cincinnati, etc., R. Co. *v.* Bradshaw, 10 Ohio Cir. Ct. Rep. 645, 1 Ohio Cir. Dec. 117.

the accident. Thus, the master will not be held liable for defects if the injury resulted proximately from the servant's want of caution;[1] nor, on the other hand, will the servant's recklessness preclude a recovery if, notwithstanding it, the injury would not have occurred but for the carelessness of a superior servant.[2]

Proximate Cause a Question of Fact. — Whether the negligence of the master or of the servant was the proximate cause of the injury, is a question of fact for the jury.[3]

1. Proximate and Remote Causes. — Western, etc., R. Co. *v.* Esslinger, 95 Ga. 734; McDonald *v.* Michigan Cent. R. Co., (Mich. 1895) 65 N. W. Rep. 597.

Where a switchman was injured, while coupling cars, by stumbling and getting his hand caught between the bumpers, it was held that evidence as to the defective condition of the drawbar was immaterial, as his stumbling was the proximate cause of the injury. Cincinnati, etc., R. Co. *v.* Mealer, 50 Fed. Rep. 725.

In Nichols *v.* Chicago, etc., R. Co., 69 Iowa 154, the engine and train were moved backwards in obedience to a signal given by plaintiff. As the moving train approached the car to be coupled, he signaled the fireman, who was handling the engine, to stop, and went between the cars. The fireman failed to observe the signal, and though the plaintiff saw that the train was moving at an improper speed, he attempted to make the coupling. The court held that though the fireman might have been negligent, the plaintiff, in attempting to make the coupling, when he saw that his signal had not been obeyed, so far contributed to his own injury as to defeat a recovery.

Where a rule directing the use of a stick in coupling is made by the railroad company for the protection of its employees, but is not made compulsory or binding upon them, a brakeman cannot recover solely on the ground that no stick was furnished him, and that if such stick had been furnished he would not have been injured. Louisville, etc., R. Co. *v.* Bryant, (Ky. 1893) 22 S. W. Rep. 606.

2. When the Carelessness of a Superior Is the Proximate Cause. — Contributory negligence of the party injured will not prevent recovery if such negligence be known to the party causing the injury and could be avoided by the use of reasonable care. Romick *v.* Chicago, etc., R. Co., 62 Iowa 167, 15 Am. & Eng. R. Cas. 288; Brown *v.* Burlington, etc., R. Co., 92 Iowa 408; Neville *v.* Chicago, etc., R. Co., 79 Iowa 232; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648.

Where the engineer knows that the brakeman is not using a coupling stick, and carelessly and negligently jerks the train back and injures him, the contributory negligence of the brakeman will not defeat a recovery. Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68.

Though attempting to couple cars when the engine is running at a speed of fifteen miles an hour is apparently not only dangerous but reckless, yet if it be true in the experience of engineers and railroad men that it is safe provided the engine is properly managed, and if the failure in question resulted solely from the fault of the engineer in manipulating the engine, the high speed will be no obstacle to a recovery by the car coupler for a personal injury sustained by him in making the attempt. Rebb *v.* East Tennessee, etc., R. Co., 87 Ga. 631.

The act of an employee in going between the cars to uncouple them while they were moving at an improper and unusual rate of speed, after having signaled the engineer to slacken speed, is not necessarily contributory negligence; and the fact that the servant's foot was caught between the rails, so that he was fastened to the place, would not excuse the railroad company if its cars were negligently driven over him. Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 10 Am. & Eng. R. Cas. 658. See also Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 18 Am. & Eng. R. Cas. 95. And see Henry *v.* Sioux City, etc., R. Co., 75 Iowa 84, where the brakeman went between the cars, depending upon the conductor to check their speed at the proper time.

The Fact that the Plaintiff Was Injured While Disobeying a Rule of the defendant that a stick must be used in coupling cars, does not prevent him from recovering damages when it appears that the injury actually suffered would have been received even if the stick had been used in making the coupling. Reed *v.* Burlington, etc., R. Co., 72 Iowa 166, 2 Am. St. Rep. 243; Horan *v.* Chicago, etc., R. Co., 89 Iowa 328; White *v.* Louisville, etc., R. Co., 72 Miss. 12.

Ohio. — The Act of March 23, 1888 (85 Ohio Laws 105), requires all railway corporations operating railways in the state to block or fill frogs in their tracks for the safety of their employees, and imposes a punishment for a failure to do so. But a failure to comply with the provisions of this act does not prevent the company from interposing the defense that the employee was injured by his contributory negligence. Lake Erie, etc., R. Co. *v.* Craig, 73 Fed. Rep. 642.

3. Proximate Cause a Question of Fact. — Southern Pac. Co. *v.* Burke, 60 Fed. Rep. 704; Louisville, etc., R. Co. *v.* Johnson, 81 Fed. Rep. 679; Martin *v.* California Cent. R. Co., 94 Cal. 326; Van Gent *v.* Chicago, etc., R. Co., 80 Iowa 526; Kerns *v.* Chicago, etc., R. Co., 94 Iowa 121; Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 18 Am. & Eng. R. Cas. 91; Henry *v.* Sioux City, etc., R. Co., 66 Iowa 52, 21 Am. & Eng. R. Cas. 644; Graham *v.* Boston, etc., R. Co., 156 Mass. 4; Corbin *v.* Winona, etc., R. Co., 64 Minn. 185; Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 27 Am. St. Rep. 929. See also Gottlieb *v.* New York, etc., R. Co., 100 N. Y. 462, 24 Am. & Eng. R. Cas. 421.

The plaintiff, a brakeman, was injured while riding on the pilot of an engine and about to couple the engine to cars on a spur track. Upon the evidence it was held that the ques-

3. What Constitutes Negligence in Car Couplers — *a.* ACTS NEGLIGENT PER SE — (1) *Unnecessary Exposure to Danger.* — There are certain acts that may be committed by a person coupling cars which are so obviously attended with danger that the doing of them unnecessarily is negligence *per se.*

Illustrations. — Thus, going between cars to uncouple them while in motion,[1] or walking before a moving engine or car over an unballasted or obstructed track to adjust a coupling,[2] or essaying to couple cars when they are moving

tion whether the accident was caused by the running of the engine at a dangerous rate of speed up to within a few feet of the cars and its sudden reversal at that point, whereby the plaintiff was thrown forward and caught between the bumpers, or whether the plaintiff accidentally, and without fault of the engineer, lost his balance while reaching forward to make the coupling, was properly a question for the jury. Baltzer *v.* Chicago, etc., R. Co., 83 Wis. 459.

The evidence tended to show that the plaintiff's intestate, a brakeman, undertook to couple a freight car equipped with link-and-pin coupler to a coach equipped with a Miller hook; the coupling bars slipped by one another, leaving a space of about twelve inches between the ends of the cars; that there was on the freight cars a bolt projecting several inches from the end of the car and beyond the end of the nut. The intestate was killed by the collision. The only wounds due immediately to the collision were a bruise over the heart, the size of a silver dollar, and a smaller bruise on the back opposite the first. The bolt was so situated that as he stood between the cars it would strike him about where the wound was found. It was held that the case should have been submitted to the jury on the question of negligence in the construction of the car with reference to the bolt, and as to this being the proximate cause of his death, the car not being one with which he was familiar, and it not being shown that such a construction was common among the cars he habitually handled. Thompson *v.* Missouri Pac. R. Co., (Neb. 1897) 71 N. W. Rep. 61.

Where the Statute Requires Railroad Companies to Block the Frogs in Their Tracks, and a brakeman, in going between cars while in motion to uncouple them, catches his foot in an unblocked frog and is injured thereby, the negligence of the company and the contributory negligence of the brakeman are questions for the jury. Ashman *v.* Flint, etc., R. Co., 90 Mich. 567. And see Grand *v.* Michigan Cent. R. Co., 83 Mich. 564.

1. Uncoupling Cars While in Motion Constitutes Negligence. — Davis *v.* Western R. Co., 107 Ala. 626; Marsh *v.* South Carolina R. Co., 56 Ga. 274; Ohio, etc., R. Co. *v.* Bass, 36 Ill. App. 126; Peoria, etc., R. Co. *v.* Puckett, 52 Ill. App. 222; Ferguson *v.* Central Iowa R. Co., 58 Iowa 293, 5 Am. & Eng. R. Cas. 614; Muldowney *v.* Illinois Cent. R. Co., 39 Iowa 615; Towner *v.* Missouri Pac. R. Co., 52 Mo. App. 648; Bajus *v.* Syracuse, etc., R. Co., (Supreme Ct.) 5 N. Y. Supp. 804; Houston, etc., R. Co. *v.* Crawford, (Tex. Civ. App. 1895) 32 S. W. Rep. 155; Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335.

Where a switchman, in attempting to uncouple cars, found the pin caught in the drawhead, and walked between the moving cars, endeavoring to pull it out, until his foot was caught in the switch, the location of which he knew, and was run over and killed, it was held that he was guilty of contributory negligence. Crawford *v.* Houston, etc., R. Co., 89 Tex. 89.

Where a railway company has in use on its road freight cars without end ladders, steps, and handles, which are necessary in coupling and uncoupling while the cars are in motion, and a freight conductor is cognizant of this fact, it is clearly his duty, before attempting to pass from the side to the end of the car for the purpose of uncoupling it, to ascertain whether it is one of that kind; and if he finds it is, it is negligence on his part to attempt to make the uncoupling while the train is in motion. Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538, 18 Am. & Eng. R. Cas. 100.

A brakeman of some experience in the employ of a railroad company stepped between two box cars which were in motion, in order to couple them. While so doing, his foot slipped into an unblocked frog, and he was run over and killed. In an action to recover damages for his death, it was held that when the railroad company had showed that the deceased had actual knowledge of the alleged danger to which he was exposed, the burden of proof was upon the representatives of the deceased to show some excuse for his conduct in exposing himself to danger. In the absence of such excuse there could be no recovery, as the deceased had clearly been guilty of contributory negligence. Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 15 Am. & Eng. R. Cas. 265; Williams *v.* Central R. Co., 43 Iowa 396.

When Practice Is Sustained by Rule or Custom. — It cannot be ruled as a matter of law that a brakeman is guilty of contributory negligence in going between slowly moving cars to uncouple them, where a rule of the defendant company permits the practice when the cars are moving at a safe speed. Hollenbeck *v.* Missouri Pac. R. Co., (Mo. 1896) 34 S. W. Rep. 494, (Mo. 1897) 38 S. W. Rep. 723.

It was not negligence *per se* for the deceased to go between the cars while in slow motion for the purpose of uncoupling them, or to use a stone while walking along to loosen the coupling pin, where that had been a common custom in the switch yard, approved by the yardmaster, even though he might have signaled the engineer to stop the car and then have taken the pin out without danger; nor did he, by choosing the more dangerous mode, assume the risk of injury resulting, not from that cause, but from the negligence of the defendant in respect to the guard-rail. Curtis *v.* Chicago, etc., R. Co., 95 Wis. 460.

2. Walking Before Moving Engine or Car over Unballasted or Obstructed Track. — In Finnell

too fast,[1] or attempting to effect a coupling on a curved track from the inner side of the curve,[2] or using an unsuitable appliance in coupling when a suitable one could be had,[3] are all acts which, unless excused by peculiar circum-

v. Delaware, etc., R. Co., 129 N. Y. 669, 42 N. Y. St. Rep. 354, it was held that a brakeman, in walking before a moving switch engine over an unballasted track, while removing a coupling link and pin preparatory to making a coupling, was guilty of contributory negligence and could not recover for an injury so sustained.

A brakeman who walks backwards in front of a moving car in order to adjust a link in the drawhead is guilty of contributory negligence and cannot recover if he is injured by stumbling over a pile of cinders. Houston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1896) 38 S. W. Rep. 51.

A brakeman, while walking in front of a moving car, the coupling of which he was attempting to adjust, tripped on a grade stick between the ties and was run over and injured. It appeared in evidence that the track was covered with snow, and that the point where he was walking was obstructed by the rails leading into a switch. It further appeared that there was no occasion for his subjecting himself to the risk, as the car had only a moment before been stationary and he might then have adjusted the coupling. It was held that he was guilty of contributory negligence and could not recover, even admitting that the presence of the grade stick between the tracks constituted negligence in the company. Gleason *v.* Detroit, etc., R. Co., 73 Fed. Rep. 647.

A switchman who is injured while attempting, as he walks in front of an ordinary road locomotive, in motion, to uncouple a car from the locomotive — such act being shown to be very dangerous — when the engineer is subject to his orders and signals, and he has the right to have the engine stopped while uncoupling the car, is guilty of contributory negligence, though expressly ordered to perform the service in that way by a superior, to all whose reasonable and proper orders he is bound to conform; and the supposed exigencies of the employer's business, requiring that the work of switching should be done in that way, because more expeditious, will not excuse such contributory negligence. George *v.* Mobile, etc., R. Co., 109 Ala. 245.

But where a brakeman, in order to effect a coupling, walks in front of a moving car along a track which is planked and constructed for a walk in front of a depot platform, it cannot be said, as a matter of law, that he is guilty of negligence, but the question is one for a jury. Bird *v.* Long Island R. Co., 11 N. Y. App. Div. 134.

Stepping in Front of Moving Engine. — Where the foot-board on the front of an engine extends a foot beyond the rails on either side and may be gotten upon from the side of the engine, a switchman who steps to the centre of the track in front of the moving engine, in order to get on the foot-board, is guilty of contributory negligence and cannot recover for injuries sustained by being knocked down and run over. Ferguson *v.* Chicago, etc., R. Co., (Iowa 1897) 69 N. W. Rep. 1026.

1. Attempting to Couple Cars When They Are Moving Too Fast. — The plaintiff, a brakeman in the employ of a railroad company, and, although a minor, allowed by his father to find employment for himself, had his hand crushed by being caught between the dead-blocks while coupling cars. According to his own testimony, he thought the cars were coming too fast, and signaled to stop them; but although they did not stop, and he still thought that they were moving too fast, he stepped in between and attempted to make the coupling. He understood the construction of drawheads and dead-blocks, and knew that it was dangerous to get the hand between the dead-blocks. It was held that the plaintiff, in accepting the employment, assumed the risks incident to it, and that his injury resulted from such risks or his own negligence, and that the company was not responsible. Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512; Kennedy *v.* Lake Superior Terminal, etc., Co., 87 Wis. 28; Nichols *v.* Chicago, etc., R. Co., 69 Iowa 154. See also Lagage *v.* Chicago, etc., R. Co., 91 Wis. 507.

Where a brakeman sees that cars are moving at too great a speed and signals the engineer to slow up, but, without waiting to see that his signal is observed, steps in to make the coupling, he is guilty of contributory negligence and cannot recover for an injury sustained, especially when his act is in violation of a rule of the company of which he has notice. Western R. Co. *v.* Williamson, (Ala. 1897) 21 So. Rep. 827; Sanders *v.* McGhee, (Ala. 1897) 21 So. Rep. 1006.

2. Coupling on Inner Side of Curve. — The plaintiff's intestate was employed in coupling cars in defendant's depot yard, in Detroit, and while coupling certain cars standing on a sharp curve the drawheads of the cars failed to meet, and passed each other, allowing the cars to come so close together that he was crushed to death. The evidence showed that the deceased was standing on the inside of the drawbar while coupling, and that the outside was free from danger. It was held that the plaintiff was not entitled to recover, the deceased having wantonly assumed the risk of remaining upon the inside of the drawbar when he should have gone to the other side; and that having assumed the risks of the employment he was bound to look out for and avoid the dangers arising from the sharpness of the curve, to which, as an experienced brakeman, he must have known he was exposed. Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189; Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505, 11 Am. & Eng. R. Cas. 188.

In Foster *v.* Chicago, etc., R. Co., 84 Ill. 164, a switchman attempted to couple some cars on a curved track. Instead of making the attempt from the outside of the curve, he made it from the inside, and catching his foot in a guard-rail, was run over and injured. It was held that the guard-rail was an obvious danger, and that it was negligence for the plaintiff to have attempted the coupling from that side.

3. Using Unsuitable Appliances. — A servant who undertakes to couple cars by using the

stances,[1] will justify the court in holding the doer negligent.

(2) *Breach of Rules* — (a) **In General.** — It is the duty of an employee faithfully to obey all proper rules made for his guidance and protection, and he cannot be heard to complain that the breach of such rules contributes directly to his injury.[2]

Coupling by Hand. — A rule requiring the use of a coupling stick is a reasonable and proper requirement, and its breach constitutes negligence.[3]

Uncoupling Cars While in Motion. — Likewise, a rule forbidding brakemen to

end of a switch chain, instead of a coupling link, assumes the risk and cannot recover if his recklessness causes injury to himself. Houston, etc., R. Co. *v.* Myers, 55 Tex. 110, 8 Am. & Eng. R. Cas. 114.

And a brakeman who, discovering the inequality in the height of the drawbars of two cars to be coupled, attempts to use a straight link instead of a crooked one, assumes the risk of accident and cannot recover. Welch *v.* New York Cent., etc., R. Co., (Supreme Ct.) 17 N. Y. Supp. 342.

A switchman, while attempting to make a coupling, found a coupling pin on the drawhead of the moving car, and while trying to force it into its place, for which it was too large, walked along with the moving car, and was injured. He was an experienced brakeman and had knowledge that drawheads are of different construction and require coupling pins of different shapes and sizes, and it was held that in attempting to use one which was too large he was guilty of contributory negligence and could not recover. Missouri, etc., R. Co. *v.* Hauer, (Tex. Civ. App. 1895) 33 S. W. Rep. 1010.

1. Uncoupling Cars While in Motion — When Not Negligence. — A servant stepped between a tender and a car to uncouple them. The train was on a grade, and in order to loosen the pin it was necessary to ease up. While the train was slowly moving, he stepped with it. His foot caught in a hole in the plank roadbed, and he was run over. It was held that this was not necessarily negligent in the employee, because he was in discharge of his duty in so acting. If he used due skill and caution, he was not negligent. Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720; Porter *v.* Hannibal, etc. R. Co., 71 Mo. 66, 36 Am. Rep. 454, 2 Am. & Eng. R. Cas. 44; Preston *v.* Central R., etc., Co., 84 Ga. 588.

Where a brakeman cannot easily uncouple cars when the train is standing still, and, in endeavoring to uncouple them when the train is in motion, steps between the cars and there meets with an injury which is caused by want of repair in the roadbed, it cannot be ruled that he is careless as a matter of law, but the question is one for the jury. Gardner *v.* Michigan Cent. R. Co., 58 Mich. 584, 24 Am. & Eng. R. Cas. 435; Horan *v.* Chicago, etc., R. Co., 89 Iowa 328; Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567.

2. Breach of Rules Is Negligence. — A conductor who undertakes to uncouple cars, even though he does so voluntarily, subjects himself to all reasonable rules prescribed for those whose duty it is to do this work, and cannot recover if his violation of these rules was the proximate cause of the injury. Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545.

If an employee enters into or remains in the service of a railroad company, with a knowledge of its rules and regulations, he must be held as undertaking to acquiesce therein; and if he is afterwards injured by reason of his violation of such rules and regulations, he can not claim that their reasonableness is a question to be decided by a jury, in an action by him to recover damages for the injury thus occasioned. Wolsey *v.* Lake Shore, etc., R. Co., 33 Ohio St. 227.

3. Breach of Rules — Coupling by Hand. — Russell *v.* Richmond, etc., R. Co., 47 Fed. Rep. 204; Louisville, etc., R. Co. *v.* Ward, 61 Fed. Rep. 927; Pryor *v.* Louisville, etc., R. Co., 90 Ala. 32; Richmond, etc., R. Co. *v.* Thomason, 99 Ala. 471; Norfolk, etc., R. Co. *v.* Briggs, (Va. 1892) 14 S. E. Rep. 753; Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552.

In Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, the court said: "If the plaintiff, either from a knowledge of the rules or from observing the practice of couplers, had learned the rule or custom of the road not to use the hand, but a stick, in coupling, and in disregard of such rule or custom went on the track between the cars and attempted to couple with his hands, this would be contributory negligence and would deprive him of all right to recover in this action."

In Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, it was held that where the employer had published rules requiring employees to use a coupling stick in coupling cars, and had furnished such sticks for their use, a brakeman who was injured while coupling by hand was guilty of contributory negligence and could not recover unless he was able to show that, had a coupling stick been used, still the act of coupling could not have been safely performed, or that under the circumstances it was not practicable to use the appliance selected by the employer.

A brakeman upon a railway, who is under orders always to couple cars with a stick, and who has been in the employment of the company for a considerable time, and has always heard that such was the rule of the company (as it in fact was), cannot recover of the company for an injury to his hand sustained while endeavoring to make a coupling directly with his hand without the use of a stick. It makes no difference that other employees frequently or customarily disregarded the rule, unless the company, with knowledge of their practice, acquiesced in it in a way to sanction it or practically to abrogate the rule. Nothing less would relieve the plaintiff from abiding by his uniform orders. Sloan *v.* Georgia Pac. R.

enter between cars while in motion to uncouple them is a reasonable regulation and must be obeyed.[1]

(b) **Rules Not Properly Published.** — But an employee is not bound by a rule of the company which has not been properly published or brought to his attention.[2] Whether an employee has knowledge of a rule or not, is a question of

Co., 86 Ga. 15; Richmond, etc., R. Co. *v.* Hissong, 97 Ala. 187.

1. Uncoupling Cars While in Motion. — A brakeman who wilfully and unnecessarily violates a reasonable precautionary rule against entering between cars while in motion to uncouple them, which is known to him, or which he must be taken to have known, cannot recover for an injury of which such violation of the rule is the direct efficient cause. Lake Erie, etc., R. Co. *v.* Craig, 80 Fed. Rep. 488; Richmond, etc., R. Co. *v.* Free, 97 Ala. 231; St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467; Ford *v.* Chicago, etc., R. Co., 91 Iowa 179; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74; Missouri, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1896) 35 S. W. Rep. 879; Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206.

Where the agreement under which a brakeman was employed by a railroad company forbade the uncoupling of cars while in motion, and the brakeman, having gone between the cars while stationary, remained there after they had been wrongfully started, and in walking along to effect the uncoupling fell into a cattle guard and was injured, it was held that he was guilty of contributory negligence and could not recover. Sedgwick *v.* Illinois Cent. R. Co., 73 Iowa 158, 76 Iowa 340.

The plaintiff, a brakeman, sought in his action against the railroad company by which he was employed, to recover for an injury to his hand, received while trying to couple two freight cars, one of which was stationary, and behind which he stood while the other was moving towards him, he having ample opportunity to observe the fact that the coupling on the latter car was the "three-link coupling." There was evidence tending to show that the plaintiff was warned of this, and to be particular not to go between the cars. The plaintiff, however, denied having received these warnings. A rule of the company of which the plaintiff had knowledge forbade employees going between cars, when in motion, to uncouple them, "and all such imprudences;" while another rule, designed to lessen the danger of coupling, required that, when possible, a stick should be used. Both these rules the plaintiff disregarded. It was held that his contributory negligence precluded his recovery. Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 5 Am. St. Rep. 266, *cited* and *approved* in Norfolk, etc., R. Co. *v.* McDonald, 88 Va. 352.

Stepping in Front of Moving Engine. — A brakeman who, in violation of the rules of the company, steps in front of a moving engine to adjust a coupling, and is injured, is guilty of contributory negligence and cannot recover. Loranger *v.* Lake Shore, etc., R. Co., 104 Mich. 80; East Tennessee, etc., R. Co. *v.* Smith, 89 Tenn. 114.

For a Brakeman while Effecting a Coupling to Stand on the Running Board of a Switch Engine, is not a violation of the company's rule prohibiting brakemen from going between cars to make couplings, when the evidence is that such board was placed there to assist brakemen in the performance of their duties. Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218.

Signals. — Where a rule of the railroad company instructs brakemen to make sure that their signals are understood by the engineer before going between cars to make a coupling, a brakeman who gave a signal and immediately stepped between the cars and was injured by the engineer's mistaking the signal was held guilty of contributory negligence and could not recover. Deeds *v.* Chicago, etc., R. Co., 74 Iowa 154.

Examining Couplings. — A rule of the company required its brakemen to take sufficient time to examine the couplings of cars before going between them to couple them. A brakeman was injured by reason of the couplings being too short. It was held that this was an obvious defect which a compliance with the rule would have discovered, and that a failure to comply was contributory negligence and defeated a recovery. Bennett *v.* Northern Pac. R. Co., 2 N. Dak. 112.

But such a rule does not impose upon the employee the duty to make a critical examination of the coupling, and where the defect was in a spring, and was not discoverable except by careful inspection, the brakeman was not guilty of contributory negligence in not discovering it. Bennett *v.* Northern Pac. R. Co., 3 N. Dak. 91; Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534.

2. Rules Not Properly Published. — Louisville, etc., R. Co. *v.* Hawkins, 92 Ala. 241; Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534; Strong *v.* Iowa Cent. R. Co., 94 Iowa 380; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 11 Am. & Eng. R. Cas. 193.

To bind an employee by a rule, it must be shown to the satisfaction of the jury that the rule was within his knowledge, or that there was an opportunity given him to learn the rule It is not necessary that the railroad company should furnish him with a printed copy of the rule, or inform him where to apply for a copy; but if by oral tradition he have knowledge, derived from his co-employees, of the existence and terms of such rule, he is bound to conform his conduct thereto. Furnishing a copy of rules to an employee, or reading them, or having them read to him, is one means of promulgating them, and probably the most effective; but it is not the only means by which, being received, notice thereof will bind the employee. Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292.

The rule of a railroad company forbidding brakemen to go between the cars to make couplings, and requiring them to use a coupling stick, is not binding on a brakeman unless he has knowledge or notice thereof; and in an action by an administrator against a railroad

fact for the determination of the jury.[1]

(c) **Waiver of Rules by Nonenforcement.** — Neither can a railroad company plead the breach of a rule as a defense when it has allowed such rule to be habitually disregarded by its employees. When the disobedience is open and notorious, and has existed for a long time, the company will be chargeable with notice and the rule will be deemed to have been waived.[2]

(d) **When Circumstances Render Rules Impracticable.** — Nor is the employee bound by a rule when circumstances render it impracticable; and whether or not a compliance with the rule was practicable under the circumstances, is a question of fact for the jury.[3]

company to recover damages for the alleged negligent killing of an employee, where the defendant relies upon the violation of such a rule as constituting negligence which contributed to the injury complained of, the proof must show that the plaintiff's intestate had knowledge of such rule, since negligence cannot be imputed to the employee for the violation of such rule unless he knew of it. Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216.

1. Knowledge of Rules a Question of Fact. — Louisville, etc., R. Co. *v.* Perry, 87 Ala. 392; Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68; Seese *v.* Northern Pac. R. Co., 39 Fed. Rep. 487.

2. Waiver of Rules. — Fish *v.* Illinois Cent. R. Co., 96 Iowa 702; Spaulding *v.* Chicago, etc., R. Co., (Iowa 1896) 67 N. W. Rep. 227; Galveston, etc., R. Co. *v.* Slinkard, (Tex. Civ. App. 1897) 39 S. W. Rep. 961.

A brakeman will not be precluded from a recovery for an injury by reason of a violation of a rule prohibiting the uncoupling of cars while in motion, where it was the custom of the employees to uncouple cars while in motion, and the practice was open and notorious and had existed for a long time. The company will be chargeable with notice thereby and the rule will be deemed to have been waived. Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420.

For the purpose of showing that a rule has been waived by nonenforcement, it is competent to admit evidence that it was the custom generally on the defendant's road to uncouple cars while in motion and that the officers of the company knew of the custom and made no effort to enforce a rule against it. Spaulding *v.* Chicago, etc., R. Co., (Iowa 1896) 67 N. W. Rep. 227.

The employees of a railroad company may be justified in the nonobservance of its reasonable rules and regulations when they have been habitually disregarded and broken by the employees, with the knowledge and acquiescence and without the protest of the company. But mere disobedience of employees, without the knowledge or acquiescence of the company, will not justify any inference of an abandonment or waiver of its rules and regulations. Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128.

Waiver by Nonenforcement a Question of Fact. — Whether the rules of the company forbidding coupling cars while in motion or coupling by hand have been violated by employees with such knowledge of the company as to amount to a waiver of them, is a question for the jury. Northern Pac. R. Co. *v.* Nickels, 50 Fed. Rep. 718; Richmond, etc., R. Co. *v.* Bell, 92 Ga. 493; White *v.* Louisville, etc., R. Co., 72 Miss. 12; Hannigan *v.* Lehigh, etc., R. Co., 91 Hun (N. Y.) 300; Bonner *v.* Bean, 80 Tex. 152; Fish *v.* Illinois Cent. R. Co., 96 Iowa 702. See also Lake Erie, etc., R. Co. *v.* Craig, 73 Fed. Rep. 642.

Waiver of Rule by Conductor. — Where the rules of a company forbade brakemen to go between the cars to make couplings by hand, and prescribed that a stick should in all cases be used, and a brakeman acting under the orders of his conductor went between cars which had failed to couple and was injured by a defective bumper, it was held that the order acted as a waiver of the rule and that the company was liable. Mason *v.* Richmond, etc., R. Co., 111 N. Car. 482.

The plaintiff, a brakeman, had his hand mashed by a defective coupling. The defendant company introduced in evidence the signature of the plaintiff to a rule prohibiting coupling by hand. It was held that it was competent for the plaintiff to show that at the time he signed such rule the conductor had told him it was a mere matter of form and also that the stick was generally discarded and not used by brakemen. Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220.

But in Russell *v.* Richmond, etc., R. Co., 47 Fed. Rep. 204, it was questioned by the court whether a "conductor so far represents the company as to be authorized to rescind rules made by the corporation for his guidance and for that of the train hands." And this doctrine is approved in Richmond, etc., R. Co. *v.* Finley, 63 Fed. Rep. 228.

And, in Mason *v.* Richmond, etc., R. Co., 114 N. Car. 718, the fact that a conductor under whom a brakeman formerly served told him to go between the cars when they could not otherwise be coupled did not justify him in doing so several months later, when under the control of another conductor, who gave him no such order.

3. Impracticable Rule. — Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545; Renninger *v.* New York Cent., etc., R. Co., 11 N. Y. App. Div. 565.

Where an act of an employee is not necessarily negligent in itself, but only because prohibited by a rule of the employer, if the duty which the employee owes to the employer cannot be performed except in doing the act necessary to be done, in the mode prohibited by the rule, the employer is held to have waived the observance of the rule in respect to the performance of such duty imposed on the employee. Brown *v.* Louisville, etc., R. Co., 111 Ala. 275.

b. When Negligence Is a Question for the Jury. — It is often impossible for the court to decide as a matter of law that a certain act, when considered in the light of the circumstances which prompted it, was negligence *per se*, and in such a case the question is a proper one to be submitted for the determination of a jury.[1]

IV. Fellow-servants. — When an injury happens to an employee through the negligence of a fellow-servant, he is, of course, precluded from recovering wherever the "fellow-servant rule" prevails.[2] But as to who is and who is not a fellow-servant with a person engaged in coupling cars, the decisions are hopelessly in conflict. In the notes below are collected the decisions *pro* and *con* upon the various relations existing between car couplers and other employees of the master.[3]

1. When There Is Uncertainty as to the Existence of Either Negligence or Contributory Negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men might honestly draw different conclusions from them. Abbett *v.* Chicago, etc., R. Co., 30 Minn. 482; Leonard *v.* Minneapolis, etc., R. Co., 63 Minn. 489; Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240.

It cannot be said as a matter of law that an employee of a railroad company, who, after giving the proper signal for the train to stop, steps upon the track to make a coupling without waiting to see whether his signal will be obeyed or not, is guilty of contributory negligence in so doing; but the question is a proper one to be submitted to the jury with all the facts in the case. Bucklew *v.* Central Iowa R. Co., 64 Iowa 603.

It is not contributory negligence *per se* to stand facing the drawbar in coupling. This is a question for the jury. Belair *v.* Chicago, etc.. R. Co., 43 Iowa 662.

Where a Brakeman's Lantern Went Out Just Before He Attempted to Make a Coupling, and he had no time to relight it, and he was injured by a defect in a coupling which he could have discovered had he a light, his contributory negligence was held to be a question for the jury. McLarney *v.* Long Island R. Co., 11 Misc. Rep. (N. Y. Super. Ct.) 64.

Signaling from Wrong Side. — The usual position of an employee desiring to make a signal for the purpose of controlling the movements of a train, when not on a curve, is on the engineer's side; but when there was evidence that the train had just passed a curve on which a signal could not have been seen on the engineer's side, it was a question for the jury whether the plaintiff was negligent in signaling from the other side. Bucklew *v.* Central Iowa R. Co., 64 Iowa 603.

Coupling Car with Projecting Load. — The plaintiff's intestate was a brakeman on a freight train in which was a flat car loaded with poles which were negligently allowed to project over the end of the car. At a station he uncoupled the train from the car loaded with poles in safety, but some minutes later, when he entered from the other side of the train to couple it again to the car, his head was caught and crushed between one of the projecting poles and the car in front of it. The accident occurred about midnight, when it was raining and very dark, and as the car containing the poles was standing still, the deceased's attention would more particularly be drawn to the moving train as it was brought up to be coupled. Under the circumstances, it was held that it was for the jury to determine whether the deceased was guilty of contributory negligence. Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222.

Where the Question of Contributory Negligence Turns on the Credibility of Witnesses, the judgment of the trial court will not be disturbed. Richmond, etc., R. Co. *v.* Wright, 88 Ga. 19; Richmond, etc., R. Co. *v.* Williams, 88 Ga. 16; Van Gent *v.* Chicago, etc., R. Co., 80 Iowa 526.

Evidence of Custom as Affecting the Question of Negligence. — In an action by a brakeman for injuries received while attempting to couple cars by remaining between them after they had come together the first time and the couplings had missed, it is competent to admit in evidence, under the plea of contributory negligence, that there is a custom among brakemen to go out from between cars after they strike on failure to couple them. Andrews *v.* Chicago, etc., R. Co., (Wis. 1897) 71 N. W. Rep. 372.

2. See the title Fellow-servants.

3. Car Inspector and Car Coupler — *Held to Be Fellow-servants* — *Alabama.* — Smoot *v.* Mobile, etc., R. Co., 67 Ala. 13.

Arkansas. — St. Louis, etc., R. Co. *v.* Gaines, 46 Ark. 555; St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467.

Massachusetts. — Bowers *v.* Connecticut River R. Co., 162 Mass. 312.

Michigan. — Smith *v.* Potter, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; Dewey *v.* Detroit, etc., R. Co., 97 Mich. 329, 37 Am. St. Rep. 348.

Held Not to Be Fellow servants — *United States.* — Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642; Carpenter *v.* Mexican Nat. R. Co., 39 Fed. Rep. 315; Little Rock, etc., R. Co. *v.* Moseley, 56 Fed. Rep. 1009; Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. Rep. 196; King *v.* Ohio, etc., R. Co., 14 Fed. Rep. 277, 8 Am. & Eng. R. Cas. 119.

Indiana. — Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 197.

Minnesota. — Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 21 Am. & Eng. R. Cas. 545; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 11 Am. & Eng. R. Cas. 193.

New York. — Jennings *v.* New York, etc., R. Co., 12 Misc. Rep. (N. Y. C. Pl.) 408; Good-

V. Evidence — Expert Testimony — In Respect to Construction. — Knowledge of the advantages and disadvantages of various styles of couplings being a

rich *v.* New York Cent., etc., R. Co., 116 N. Y. 398, 15 Am. St. Rep. 410. *Contra*, Gibson *v.* Northern Cent. R. Co., 22 Hun (N. Y.) 289.

Texas. — International, etc., R. Co. *v.* Kernan, 78 Tex. 294, 22 Am. St. Rep. 52; Saint Louis, etc., R. Co. *v.* Putnam, 1 Tex. Civ. App. 142.

Utah. — Daniels *v.* Union Pac. R. Co., 6 Utah 357.

Virginia. — Richmond, etc., R. Co. *v.* George, 88 Va. 223.

West Virginia. — Johnson *v.* Chesapeake, etc., R. Co., 36 W. Va. 73.

Engineer and Car Coupler — *Held to Be Fellow-servants — Colorado.* — Summerhays *v.* Kansas Pac. R. Co., 2 Colo. 484.

Illinois. — Chicago, etc., R. Co. *v.* Touhy, 26 Ill. App. 99. See also Chicago, etc., R. Co. *v.* Keefe, 47 Ill. 108; St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Illinois Cent. R. Co. *v.* Keen, 72 Ill. 512.

Indiana. — Wilson *v.* Madison, etc., R. Co., 18 Ind. 226; Ohio, etc., R. Co. *v.* Dunn, 138 Ind. 18.

Missouri. — Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121; Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159.

New York. — Berrigan *v.* New York, etc., R. Co., 131 N. Y. 582, 42 N. Y. St. Rep. 858; Toms *v.* Buffalo Creek R. Co., 70 Hun (N. Y.) 84. See also Sherman *v.* Rochester, etc., R. Co., 17 N. Y. 153; Wright *v.* New York Cent. R. Co., 25 N. Y. 562; Moran *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 96.

North Carolina. — Webb *v.* Richmond, etc., R. Co., 97 N. Car. 387.

Ohio. — Pittsburgh, etc., R. Co. *v.* Ranney, 37 Ohio St. 665, 5 Am. & Eng. R. Cas. 533; Pittsburgh, etc., R. Co. *v.* Lewis, 33 Ohio St. 196.

South Carolina. — Boatwright *v.* Northeastern R. Co., 25 S. Car. 128; Evans *v.* Chamberlain, 40 S. Car. 104.

Tennessee. — East Tennessee, etc., R. Co. *v.* Smith, 89 Tenn. 114; Nashville, etc., R. Co. *v.* Wheless, 10 Lea (Tenn.) 748, 43 Am. Rep. 317, 15 Am. & Eng. R. Cas. 315; Bradley *v.* Nashville, etc., R. Co., 14 Lea (Tenn.) 374.

Texas. — Houston, etc., R. Co. *v.* Myers, 55 Tex. 110, 8 Am. & Eng. R. Cas. 114; Houston, etc., R. Co. *v.* Willie, 53 Tex. 318, 5 Am. & Eng. R. Cas. 541; Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573.

Virginia. — Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668.

In Nashville, etc., R. Co. *v.* Wheless, 10 Lea (Tenn.) 748, 43 Am. Rep. 317, 15 Am. & Eng. R. Cas. 315, it was held that the master is liable for injuries sustained by one servant through the negligence of another who is his immediate superior; that the relation of superior and inferior would exist between an engineer and a brakeman where the brakeman was in fact acting under the orders of the engineer, but not in their ordinary relations as members of the "crew" of a railroad train, and that in this relation they are fellow-servants.

Held Not to Be Fellow-servants — United States. — Central R. Co. *v.* Stoermer, 51 Fed. Rep. 518.

Alabama. — See Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216.

Georgia. — Central R., etc., Co. *v.* Lanier, 83 Ga. 587; Alabama G. S. R. Co. *v.* Fulghum, 94 Ga. 571. See also Georgia Pac. R. Co. *v.* Rigden, 85 Ga. 867; Barnett *v.* Northeastern R. Co., 87 Ga. 199.

Iowa. — Strong *v.* Iowa Cent. R. Co., 94 Iowa 380; Butler *v.* Chicago, etc., R. Co., 87 Iowa 206.

Kentucky. — Louisville, etc., R. Co. *v.* Hurst, (Ky. 1892) 20 S. W. Rep. 817; Rogers *v.* Louisville, etc., R. Co., (Ky. 1894) 25 S. W. Rep. 269.

Minnesota. — Stewart *v.* St. Paul, etc., R. Co., 43 Minn. 268.

Wisconsin. — Kruse *v.* Chicago, etc., R. Co., 82 Wis. 568; Baltzer *v.* Chicago, etc., R. Co., 89 Wis. 257.

Fireman and Car Coupler — *Held to Be Fellow-servants — United States.* — Hudson *v.* Charleston, etc., R. Co., 55 Fed. Rep. 248.

Michigan. — Loranger *v.* Lake Shore, etc., R. Co., 104 Mich. 80; Thompson *v.* Lake Shore, etc., R. Co., 84 Mich. 281.

Mississippi. — Illinois Cent. R. Co. *v.* Jones (Miss. 1894) 16 So. Rep. 300.

New York. — Marrinan *v.* New York Cent., etc., R. Co., 13 N. Y. App. Div. 439.

Tennessee. — East Tennessee, etc., R. Co. *v.* McKeney, (Tenn. 1886) 1 S. W. Rep. 500.

Utah. — Brown *v.* Southern Pac. Co., 7 Utah 288.

Held Not to Be Fellow-servants — Iowa. — Nicholaus *v.* Chicago, etc., R. Co., 90 Iowa 85.

Virginia. — Norfolk, etc., R. Co. *v.* Thomas, 90 Va. 205.

Conductor and Car Coupler — *Held to Be Fellow-servants. — United States.* — Northern Pac. R. Co. *v.* Hogan, 63 Fed. Rep. 102.

Indiana. — Wilson *v.* Madison, etc., R. Co., 18 Ind. 226.

Iowa. — Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357.

Kansas. — Dow *v.* Kansas Pac. R. Co., 8 Kan. 642.

Texas. — Robinson *v.* Houston, etc., R. Co., 46 Tex. 540; Campbell *v.* Cook, 86 Tex. 630.

Wisconsin. — Pease *v.* Chicago, etc., R. Co., 61 Wis. 163, 17 Am. & Eng. R. Cas. 527, decided prior to Employers' Liability Act, 1889.

See also Tibbs *v.* Alabama G. S. R. Co., 111 Ala. 449; Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216.

Held Not to Be Fellow-servants — Colorado. — Denver, etc., R. Co. *v.* Simpson, 16 Colo. 55, 25 Am. St. Rep. 242.

Georgia. — Spencer *v.* Brooks, 97 Ga. 681.

Kentucky. — Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675, 24 Am. & Eng. R. Cas. 443; Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327.

North Carolina. — Mason *v.* Richmond, etc., R. Co., 111 N. Car. 482; Shadd *v.* Georgia, etc., R. Co., 116 N. Car. 968; Purcell *v.* Southern R. Co., 119 N. Car. 728.

matter of skill and experience, and not of common understanding, the testimony of experts is admissible where the company's negligence in using any particular style is in issue.[1]

South Carolina. — Boatwright *v.* Northeastern R. Co., 25 S. Car. 128.

Virginia. — Ayers *v.* Richmond, etc., R. Co., 84 Va. 679; Johnson *v.* Richmond, etc., R. Co., 84 Va. 713; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108.

Brakemen on Same Train — *Held to Be Fellow-servants.* — Chicago, etc., R. Co. *v.* Rush, 84 Ill. 570; Young *v.* West Virginia, etc., R. Co., 42 W. Va. 112; Lagage *v.* Chicago, etc., R. Co., 91 Wis. 507.

Brakeman and Crew of Another Train. — A brakeman on one train is the fellow-servant of the employees in charge of and operating another train on the same railroad. McMaster *v.* Illinois Cent. R. Co., 65 Miss. 264, 7 Am. St. Rep. 653.

Switchman and Foreman of Construction Train. — The railroad company is responsible for the negligence of a foreman in signaling for the train to back without waiting for an order to do so from the switchman making the coupling. Louisville, etc., R. Co. *v.* Wallingford, (Ky. 1893) 22 S. W. Rep. 439.

Yardmaster and Car Coupler — *Held Not to Be Fellow-servants.* — A yardmaster in command of the car couplers in his yard occupies the position of vice-principal to such car couplers, and is not a fellow-servant. Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668; Taylor *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. Rep. 206.

Where a lad of sixteen years was killed while attempting to couple cars, there was a dispute as to whether he made the attempt by order of the yardmaster or not. It was held that if the evidence showed that he did so by order of the yardmaster the company was liable, but that if he made the attempt by his own volition he was a mere volunteer and could not recover. Hardy *v.* Minneapolis, etc., R. Co., 36 Fed. Rep. 657.

Where an inspector discovered a defect in a coupling and marked the car as in bad order, but a yardmaster or those connected with the assembling of trains negligently placed the car in a train and a brakeman was injured, it was held that the company was liable, as the yardmaster was not a fellow-servant of a brakeman. Rodney *v.* St. Louis Southwestern R. Co., 127 Mo. 676.

A yardmaster whose business it is to see that cars are properly loaded is not a fellow-servant of a brakeman injured by improper loading. Atchison, etc., R. Co. *v.* Seeley, 54 Kan. 21.

Upon the question whether a yardmaster is a fellow-servant with a switchman, it is proper to admit evidence of the duties of yardmasters in the employ of the defendant company, and of other railroad companies. Texas, etc., R. Co. *v.* Reed, (Tex. Civ. App. 1895) 32 S. W. Rep. 118.

Yardmaster and His Assistant Are Fellow-servants. — The plaintiff's intestate was employed in the yard of the defendant to assist the yardmaster. He was hired by the yardmaster and was under his control and supervision. While the intestate was engaged, by the direction of the yardmaster, in attaching a damaged car standing on a track in the yard to another car, the latter negligently signaled to an engineer whose train stood upon the track to back the train, which he did without signal or warning, and in consequence the intestate was crushed between the cars, receiving injuries resulting in his death. In an action to recover damages it was held that the yardmaster must be deemed a fellow-servant with the deceased as to all acts done within the range of the common employment. McCosker *v.* Long Island R. Co., 84 N. Y. 77.

Station Men and Car Coupler. — A servant whose business it is to load cars is a fellow-servant of a brakeman injured by improper loading. Indianapolis, etc., R. Co. *v.* Johnson, 102 Ind. 352.

And where a car is loaded by the shipper and it is the duty of the station master to inspect such loading, his negligence to do so is the negligence of a fellow-servant of a brakeman injured thereby. Byrnes *v.* New York, etc., R. Co., 113 N. Y. 251; Galveston, etc., R. Co. *v.* Farmer, 73 Tex. 85.

A station agent whose duty it is to see that cars are properly loaded is a fellow-servant of a brakeman who is killed while attempting to couple a car which is improperly loaded by reason of the negligence of the station agent. Byrnes *v.* New York, etc., R. Co., 113 N. Y. 251.

Foreman of Repair Shop and Car Coupler. — In Brabbitts *v.* Chicago, etc., R. Co., 38 Wis. 289, a railroad brakeman was injured in the course of his employment while coupling two sections of a railroad train; and there was evidence tending to show that the injury was caused by the use of a defective switching engine. The engineer whose duty it was had several times previously notified the foreman of one of the company's repair shops of the defective condition of the engine. The foreman had charge of all the men in the repair shop, and was the person to whom, by the rules of the company, such defects should be reported and whose duty it was to have them repaired. It was held that an instruction to the effect that notice to the foreman was notice to the company was correct; that the foreman's negligence was the negligence of the company and not that of a fellow-servant, and the company was liable for the injury caused thereby. To the same effect is Chicago, etc., R. Co. *v.* Rung, 104 Ill. 641.

Whether Fellow-servants Or Not, a Question of Fact. — Whether the person injured and the person by whose negligence the injury is alleged to have occurred are fellow-servants of the same master, is a question of fact to be found by the jury from all the evidence in a given case, and not a question of law for the determination of the court. Wabash, etc., R. Co. *v.* Deardorff, 14 Ill. App. 401; Kimel *v.* Chicago, etc., R. Co., 55 Ill. App. 244.

1. Expert Evidence in Respect to Couplings. — In Baldwin *v.* Chicago, etc., R. Co., 50 Iowa 680, it was held that where the negligence of the company in using double deadwoods on its

In Respect to Negligence of Brakeman. — But brakemen, baggage masters, conductors, and the like, are not competent to testify as experts in regard to what they consider the danger to a brakeman to be in coupling under certain circumstances. This is not a proper question for expert testimony, being a matter where the relations of facts and their probable results can be determined without special skill or study.[1] For like reasons, it is not a question for an expert whether a brakeman is negligent in standing a certain way while coupling cars.[2]

cars was in issue, the testimony of experts was competent as to the advantages and disadvantages of such appliances, and to the dangers to which brakemen are exposed in coupling cars so equipped. *Cited* and *approved* in Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18.

In McDonald *v.* Michigan Cent. R. Co., (Mich. 1895) 65 N. W. Rep. 597, it was held that a locomotive engineer was competent to testify to the ability of coupling apparatus to withstand shocks if free from defects. Hooker, J., delivering the opinion of the court, said: "We cannot say that the opinion of the engineer upon the ability of that cross-bar, if sound, to withstand the shock, was not admissible. If not, it would be difficult to suggest a method of proving such fact if those familiar with the machine, and who had used it, could not give the jury the benefit of their experience and knowledge, which, of necessity, would take the shape of an opinion."

When, by the rules of a railroad company, a brakeman is required to examine cars and report defects he may discover to the conductor, and he performs that duty, it does not lie with the company to dispute his qualification to testify as an expert concerning defects in a car so examined and reported by him Denver, etc., R. Co. *v.* Smock, 23 Colo. 456.

1. In Respect to Negligence of Brakemen. — Hamilton *v.* Des Moines Valley R. Co., 36 Iowa 31; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

In an action against a railroad company by a brakeman to recover damages for personal injuries alleged to have been sustained while attempting to couple cars, a witness cannot testify as to whether an inexperienced man, who never had been instructed, could, the first time he attempted it, have made the coupling of the cars the plaintiff was attempting to couple when injured; such testimony not being of a fact, but of a matter of deduction or inference to be drawn by the jury from all the facts and circumstances of the case. Boland *v.* Louisville, etc., R. Co., 106 Ala. 641.

2. Belair *v.* Chicago, etc., R. Co., 43 Iowa 662.

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